

**PERCEPT D'MARK (INDIA) PVT. LTD. V. ZAHEER
KHAN & ANR.
(2006) 4 SCC 227**

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In this case note, the authors examine the scope and extent of the power to grant an interim injunction conferred on Indian courts under section 9 of the Arbitration and Conciliation Act, 1996. The note first looks at the historical position regarding grant of an interim injunction in arbitration disputes including the changes brought about by section 9 of the 1996 legislation. It then looks at the interpretation given to section 9 and principles laid down by the Hon'ble Supreme Court for granting interim injunction in this case. It also gives suggestions for further reforms.

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I. LEGISLATIVE BACKDROP

Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the 1996 Act') provides for the granting of interim relief "before, during or after arbitral proceedings, or at any time after the making of the arbitral award, but before it is

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enforced". Sub-section (ii) enumerates some of the specific forms of interim relief that can be granted to parties who have entered into a contract containing an arbitration clause. Section 9(ii)(d) deals with the granting of an interim injunction by the court.

Section 9 finds its origins in Article 26¹ of the UNCITRAL Arbitration Rules, 1976,² but it differs from this provision insofar as the latter is restricted in its elaboration of specific grounds under which interim relief can be claimed; whereas the former provides for a number of specific types of interim relief that the court may grant. The wide amplitude of section 9, as contemplated by the Legislature, can be gauged from the inclusion of a "just and convenient" interim measure in the section, which would solely depend on the discretion of the court.

While the 1996 Act is entirely founded on the UNCITRAL Model Law, 1985³ (hereinafter 'Model Law'), section 9 marks a significant departure from the analogous provision in the Model Law, Article 9,⁴ which merely establishes that any interim measure of protection granted by the court would not be incompatible with the arbitration agreement. This Article merely acknowledges the possibility that, if a party goes to the court seeking an interim measure, such an action might be construed as being tantamount to a waiver of the right to take recourse to arbitration by that party. Therefore, Article 9 clarifies that, even if a party approaches the court to seek interim relief, this does not preclude him from subsequently initiating arbitration proceedings.⁵

¹ Article 26, UNCITRAL Arbitration Rules, 1976 reads:

"Interim Measures of Protection:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

² O. P. MALHOTRA, *THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION* 379 (2006).

³ Preamble, Arbitration and Conciliation Act, 1996.

⁴ Article 9, UNCITRAL Model Law, 1985 reads:

"Arbitration Agreement and Interim Measures by Court – It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

⁵ A. REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 336 (2006). See also R. S. BACHAWAT, *LAW OF ARBITRATION AND CONCILIATION VOL. I* 337 (2005).

The basic objective underlying section 9 of the 1996 Act, as can be gauged from the corresponding provision in the Model Law, is to provide for urgently required interim relief where no arbitral tribunal has been constituted and any delay in the grant of interim relief would prejudice the party.⁶ At this juncture, it is important to distinguish section 9 from section 17, with the latter dealing with the grant of interim relief by an arbitral tribunal. Section 17 is clearly of no utility in such a situation as it cannot provide the party with the necessary relief sought.

It is submitted that section 9 constitutes a rare and justified exception to section 5 of the 1996 Act which mandates minimal judicial intervention in arbitration proceedings. The power of the court is not derogatory but complementary to the power of the arbitral tribunal to grant interim relief. Far from being antithetical to the objects of the 1996 Act, the provision, in fact, facilitates more effective interim relief.

The previous legislation consolidating the law on arbitration in India, the Arbitration Act, 1940 (hereinafter 'the 1940 Act'), laid down, under section 18, that the interim relief could not be granted prior to the filing of the arbitration award. There was no question of any interim measure prior to or during the pendency of arbitration proceedings under section 18. However, under section 41(b) read with paragraph 2 of the Second Schedule of the 1940 Act, interim relief could be applied for during the pendency of arbitral proceedings. The Supreme Court has categorically held that, under this provision, the commencement of arbitration proceedings was a condition precedent to the granting of interim relief.⁷

It is of note that while section 9 is modelled on section 41(b) read with paragraph 2 of the Second Schedule of the 1940 Act, it is in stark contrast with the same, since there is no longer any requirement of the arbitration proceedings having begun, in order to claim interim relief. Clearly, the Legislature intended to liberalize the scope of section 9 of the 1996 Act. The new section was interpreted

Further, Domke notes that American courts have arrived at a consensus that the power of the court to grant interim relief is not inconsistent with the foundational basis of arbitration law as contained in the Federal Arbitration Act. *See Domke on Commercial Arbitration* ¶35:2.

⁶ R. BERNSTEIN ET. AL., *HANDBOOK OF ARBITRATION PRACTICE* 668 (1998). *See* D.A. Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide About to Turn?*, 30 *TEX. INT'L L.J.* 71.

⁷ *Sant Ram and Co. v. State of Rajasthan*, (1997) 1 S.C.C. 147. *See also* *Sundaram Finance Ltd. v. NEPC India Ltd.*, (1999) 2 S.C.C. 479.

It must be noted that there existed a divergence of opinion regarding the issue of whether commencement of arbitral proceedings was a precondition to the granting of interim relief. *See P.M. BAKSHI, PARUCK'S ARBITRATION ACT* 581 (1991).

in the landmark decision of *Sundaram Finance Ltd. v. NEPC India Ltd.*⁸ where the Supreme Court held that the wording of section 9 and its rationale lead to the conclusion that interim relief may be granted even prior to the initiation of arbitration proceedings. However, the Court attempted to put in place a check to ensure that a party does not successfully obtain interim relief and then deliberately omit to commence arbitration. It was mandated that the court ensure that the claimant party demonstrate a “manifest intention” to commence arbitration. It was also suggested that, in all such cases, the court grant a conditional order making the interim relief contingent on the arbitration beginning within a reasonable time. The extension of the power of the court to grant equitable relief under the 1996 Act will be highlighted by this comment, in the context of this decision.

II. FACTUAL BACKGROUND

The appellant, a company engaging in the business of, *inter alia*, model and celebrity endorsement, sports management and marketing, entered into a Promotion Agreement in the nature of a contract with respondent No. 1, Zaheer Khan, a successful Indian cricketer, on 1.11.2000. As per a condition laid down in clause 31(b) of the contract, respondent No. 1 was required to give an opportunity to the appellant to match any offer made to him by a third party. This was to be done before respondent No. 1 could enter into an agreement with that third party. In the event that the appellant’s offer did not match that of the third party, respondent No. 1 would be at liberty to enter into a contract with the third party. The contract also contained an arbitration clause as per which disputes relating to the agreement could be referred to arbitration.

The appellant sent a letter to respondent No.1 on 29.07.2003 containing the draft terms of the proposed extension of the Promotion Agreement. On 10.09.2003, respondent No. 1 replied to the same stating that he did not wish to renew or extend the Promotion Agreement and further stating that he did not wish to appoint any agent for the purpose of managing his media affairs. On 28.10.2003, one day before the expiry of the initial term of the Promotion Agreement, respondent No. 1 replied to another letter sent to him by the appellant, dated 27.10.2003, arguing that clause 31(b) of the contract was void under section 27 of the Indian Contract Act, 1872 for restraint of trade. Subsequently, after the expiry of the Promotion Agreement, respondent No. 1 entered into a contract with respondent No. 2, a company incorporated under the Companies Act, 1956, thereby replacing the appellant as the manager of his media affairs.

⁸ *Sundaram Finance Ltd. v. NEPC India Ltd.*, (1999) 2 S.C.C. 479.

On 04.12.2003, the appellant filed an Arbitration Petition before a single judge of the Bombay High Court under section 9 of the 1996 Act, praying, *inter alia*, for an interim order to restrain respondent No. 1 from entering into any agreement or continuing to act upon any agreement that he had entered into with the respondent No. 2, or any third party, without performing his obligations under clause 31(b) of the Promotion Agreement between the appellant and respondent No. 1. The Single Judge granted an injunction for the period pending the commencement and completion of the arbitration proceedings. Subsequently, both respondents appealed separately to a Division Bench of the Bombay High Court. On 19.12.2003, the Division Bench passed an order holding clause 31(b) of the contract between the appellant and the Respondent No. 1 to be void under section 27 of the Indian Contract Act, 1872. It allowed both the appeals and dismissed the arbitration petition. The appellant then filed two Special Leave Petitions before the Supreme Court. The apex court upheld the decision of the Division Bench on the nullity of clause 31(b) on the ground that it was in restraint of trade under section 27 of the Indian Contract Act, 1872 insofar as it operated after the expiry of the Promotion Agreement. On the issue of interim relief under section 9 of the 1996 Act, it was held that granting the injunction sought would be in contravention of the Specific Relief Act, 1963 and contrary to the balance of convenience which was favour of respondent No. 1.

III. LEGAL ISSUES

In this judgment, five broad issues came up for consideration before the Supreme Court. First, the Court considered the merits of the contention of Respondent No. 1 that the granting of an injunction to the appellant in this case would be violative of the Specific Relief Act, 1963. Further, since the balance of convenience in this case was in favour of respondent No. 1, granting of injunction would be inequitable. Second, it examined whether interim relief could be granted in an arbitration petition, wherein there has been inordinate delay in initiating the arbitration proceedings on the part of the party seeking the interim relief. Third, it was sought to be determined whether interim relief could be granted against a third party, who is not party to the arbitration agreement. Fourth, the issue of whether an arbitration petition under section 9 of the 1996 Act would be maintainable against respondent No. 2, who is not party to the arbitration agreement, was raised and finally, the Court dealt with the issue of whether clause 31(b) of the contract between the appellant and respondent No. 1 was in restraint of trade within the meaning contemplated by section 27 of the Indian Contract Act, 1872.⁹

⁹ On the issue of restraint of trade, the Court upheld the decision of the Division Bench of the Bombay High Court stating that clause 31(b) of the Promotion Agreement

A. Delay in Commencing Arbitration

The facts of the case reveal that the appellant filed an arbitration petition on 04.12.2003 seeking interim relief under section 9 of the 1996 Act for the arbitration to be initiated against respondent No. 1. However, even in 2006, it had made no attempt to commence arbitration proceedings. The Court rejected the argument of the appellant that it had acted expeditiously in filing an arbitration petition as soon as it learned of the contract between Respondents No. 1 and 2 and had then been following up on the matter through the continued proceedings before the Division Bench and this case in the Supreme Court. The Court also noted that since no injunction had been granted, the contract between the Respondents No. 1 and 2 had continued to subsist and would soon be completed. To grant an injunction two years into its operation would be inequitable, especially when the appellant could simply be compensated monetarily.

It is evident from the facts that, as alleged by the respondents, the appellant attempted to misuse section 9 of the 1996 Act by obtaining interim relief for an arbitration that they had no intention of commencing. The Supreme Court has held in *Sundaram Finance Ltd. v. NEPC India Ltd.*¹⁰ that, when a court grants interim relief before arbitration has commenced, it may do so only when there is manifest intention on the part of the applicant to refer the matter to arbitration. A court may also grant a conditional order for interim relief with terms ensuring that the applicant commences arbitration proceedings within a reasonable period of time. This will effectively prevent a party from obtaining the ultimate relief to be sought in arbitration in the guise of interim relief without ever initiating arbitration. The instant case exemplifies such undesirable abuse of section 9. However, it must be noted that, while the Court did acknowledge that there had been inordinate delay in commencing arbitration, this factor was used solely for the purpose of examining the issue of the balance of convenience, hence, completely ignoring its implications for section 9.

It is submitted that the Court disregarded leading precedent on the point by first, failing to acknowledge the ratio in *Sundaram Finance Ltd.* which requires a finding that there be manifest intention of the parties to commence arbitration before interim relief can be granted and, second, by sidelining the issue of delay in commencing arbitration, thereby diluting its importance.

was violative of § 27 of the Indian Contract Act, 1872 insofar as it continued to operate after the expiry of the Promotion Agreement. After a consideration of the leading cases on this point, it was concluded that the restrictive covenant would apply during the subsistence of the Promotion Agreement but would attract § 27 and be rendered void after the Promotion Agreement has come to an end.

¹⁰ *Supra* note 8.

The Court ought to have first ensured that the parties did possess the requisite intention to initiate arbitration before delving into issues that, in light of the patent delay on the part of the appellant, are, at best, incidental. Legally, the issues on the merits ought not to have been discussed at all. The judgment is clearly flawed as it is characterised by a misplaced sense of the relative priority to be assigned to the two primary issues of delay and the permissibility of an interim injunction.

B. Basis for an Interim Injunction

Before granting an injunction under section 9(ii), the Court must look into whether the specific form of relief sought is permissible. This is an enquiry wholly independent of the Arbitration and Conciliation Act, 1996. In the instant case, the Court looked into the legality of the injunction under sections 14 and 41(e) of the Specific Relief Act, 1963.¹¹ Additionally, the Court noted that precedent on the point had consistently refused to specifically enforce a contract for personal services¹² where the relationship between the parties was one of trust and confidence. The injunction would have the unjust effect of compelling respondent No. 1 to enter into a management contract with the appellant thereby specifically enforcing clause 32(g) of the Promotion Agreement. Furthermore, the appellant was practically claiming the whole relief that could be claimed at arbitration and the interim nature of the injunction was, therefore, rendered illusory. This amounted to pre-empting the decision of the arbitral tribunal.

The crux of the decision of the apex court appears to be based on the balance of convenience test.¹³ It was held that while the appellants could be compensated monetarily, respondent No. 1 would be irreparably injured by being forced into a personal services contract with the appellant despite the fact that he no longer reposed any trust or confidence in him. Given that the discretionary remedy under section 9 aims at bringing about an equitable result, the decision of the Supreme Court on this issue appears sound.

¹¹ In the instant case, the Court looked into the legality of the injunction sought in terms of § 14 of the Specific Relief Act, 1963. The Court accepted the contention of Respondent No. 1 who argued that granting the injunction would amount to the enforcement of a negative covenant under § 14.

¹² Pollock and Mulla note that even if a contract is not a contract of service, the equitable principle relating to personal service applies to contracts involving personal service. See POLLOCK AND MULLA, INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACTS VOL. II 2531 (2006).

¹³ Kerr expounds upon the circumstances in which the balance of convenience test: "a man who seeks the aid of the Court must be able to show a good *prima facie* legal title to the right which he asserts. If the right at law under the covenant is clear or fairly made out, and the breach of it is clear or fairly made out, and serious injury is likely to arise from the breach, it is the duty of the Court to interfere before the hearing to restrain the breach. But if the right at law under the covenant is not clear or is not

C. Interim Relief Against a Third Party

Although the Court noted the submissions of both counsels on the third issue mentioned above, it is not subsequently addressed in the course of rendering the decision. In regard to this issue, reference may be made to the treatises of RUSSELL¹⁴ and REDFERN¹⁵ which recognise the inevitability of sometimes having to grant interim relief as against a third party. It is submitted that a difference must be made between granting interim relief against a third party, on the one hand, and granting relief to a party to the arbitration agreement which would affect the rights of a third party, on the other. This must be qualified by stating that, while it is permissible to grant such relief where the third party is affected *incidentally* as a result of the relief being granted to the claimant, this cannot be extended to those cases in which the rights of the third parties are affected in a manner so drastic that the result is clearly inequitable. A third party could be gravely prejudiced by the loss of his rights. At the same time, the refusal to grant interim relief to the claimant may render the ultimate relief sought nugatory and the arbitration proceedings infructuous.¹⁶ Hence, section 9 should be construed in a manner such that a delicate balance is struck between the rights of the claimant and the rights of the affected third party by assessing the relative prejudice that would be caused to each.

D. Maintainability of an Arbitration Petition Against a Third Party

As regards the fourth issue it was argued that the cause of action in the arbitration petition, which was constituted by the contract between respondent No.1 and respondent No.2 (with the latter being a third party who was outside the scope of the arbitration agreement) could not fall within the arbitration clause and section 9 could not be invoked. This issue, too, is left unaddressed by the Court. It is submitted that this dispute clearly relates to an alleged breach of the

fairly made out, or the breach of it is doubtful and no serious injury can arise to the plaintiff, pending the trial of the right, the case resolves itself into a question of comparative injury, whether the defedenant will be more damnified by the injunction being granted or the plaintiff by its being withheld". J. M. PATERSON, *KERR ON INJUNCTIONS* 410-411 (1999). In the instant case, the appellant's right at law is not clearly or fairly made out, since there is serious doubt as to whether clause 31(b) of the Promotion Agreement can provide such a right in law, in light of § 27 of the Indian Contract Act, 1872. See also LORD HAILSHAM OF ST. MARYLEBONE, *HALSBURY'S LAWS OF ENGLAND* VOL. 24 476-477 (1999).

¹⁴ Russell notes that interim relief against a third party will have to be sought from the Court and not the arbitral tribunal since the latter cannot exercise jurisdiction over a third party. See RUSSELL, *ARBITRATION* 186 (2003).

¹⁵ Redfern and Hunter note that one of the situations in which the court will have to be approached for interim relief is where a third party is involved. See A. REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 336 (2006).

¹⁶ M.J. MUSTILL AND S.C. BOYD, *COMMERCIAL ARBITRATION* 329 (1989).

contract subsisting between the appellant and Respondent No. 1 and is covered by the arbitration clause 32(g) which extends to any claims relating to the agreement.¹⁷ The mere existence of a third party cannot hinder the initiation of arbitration proceedings for the alleged breach.

IV. CONCLUSION

This comment began by observing that section 9 of the 1996 Act represents the broadening of the scope of interim relief *vis-à-vis* the 1940 Act. A party may now seek interim relief even prior to the commencement of arbitration proceedings. However, since such a liberalisation increases the potential of abuse of the provision, it is imperative that courts exercise tremendous caution in the interpretation of section 9, so as to check the possibility of misuse.

In the instant case, much as the decision on balance of convenience was sound, the first point of enquiry ought to have been whether there was an intention on the part of the appellant to commence arbitration within a reasonable period of time. Taking into account the facts of this case, the enquiry should have ceased at that point and the appellant's prayer for interim relief rejected. The Court put the cart before the horse by primarily addressing the question of whether an interim injunction for a contract of personal service could be granted for an arbitration that would never commence.

At the same time, a mere enquiry into the intention of a party to commence arbitration does not provide an effective weapon to guard against abuse. The intention of a party, especially at such an early stage, will be extremely difficult to gauge accurately and will involve a high level of subjectivity. It is submitted that the optimal solution is the inclusion of a proviso to section 9 of the 1996 Act mandating a conditional order whenever interim relief is granted *before* the commencement of arbitration proceedings. The terms of the order will stipulate a reasonable time within which arbitration must be initiated.

The Law Commission of India in its 176th Report, 2001, recommended certain procedural changes in section 9 which would remove the impediment

¹⁷ Clause 32(g) of the Promotion Agreement read:

"ARBITRATION - Any claims or controversies relating to this Agreement shall be resolved by arbitration held under the auspices and rules of the Indian Arbitration and Conciliation Act, 1996 by one arbitrator appointed in accordance with the arbitration rules. The place of arbitration shall be Mumbai. Any award of such arbitration shall be final, conclusive and legally binding, without any right of appeal and may be entered into judgment in any court of competent jurisdiction. This Agreement and all matters related hereto shall be governed by the laws of India."

highlighted above. It was suggested that appointment of arbitrators under section 11 within a period of thirty days of the order granting interim relief be a condition precedent to the continued validity of the interim measure so granted. In case of default in commencing arbitration proceedings, the order for interim relief would stand vacated.¹⁸

These provisions were not, however, subsequently incorporated into the Arbitration and Conciliation (Amendment) Act, 2001, as they ought to have been.

In conclusion, although, in the instant case, the Supreme Court missed an excellent opportunity to enunciate the law on granting interim relief prior to the commencement of arbitration, the decision serves as a useful pointer to the need for the legislative reform indicated above.

¹⁸ The following sub-sections were proposed to be inserted in § 9:

“(4) Where a party makes an application under sub-section (1) for the grant of interim measures before the commencement of arbitration, the court shall direct the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in section 11, within a period of thirty days from the date of the said order.

(5) The court may direct that if such steps are not taken within the period of thirty days specified under sub-section (4), the interim measure granted under sub-sections (2) and (3), shall stand vacated on the expiry of the said period:

Provided that the court may on sufficient cause being shown for the delay in taking such steps, extend the said period.

(6) Where an order granting an interim measure stands vacated under sub-section (5), the court may pass such further orders as to restitution as it may deem fit against the party in whose favour the interim measure is granted under this section.”