

# Dispute Resolution Hotline

October 13, 2020

## DELHI HIGH COURT PROVIDES ADDITIONAL PRE-REQUISITES FOR INTERIM RELIEF UNDER SECTION 9 OF THE A&C ACT

- Section 9 of the A&C Act calls for requirements in addition to the general principles for grant of interim reliefs under the CPC, such as emergent necessity and manifest intent to initiate arbitration
- Exercise of jurisdiction by courts under Section 9 is limited in light of Section 17 of the A&C Act
- Interim relief under Section 9 must be granted when the reliefs cannot await constitution of the arbitral tribunal

### INTRODUCTION

In a recent ruling in *Avantha Holdings Limited v. Vistra ITCL India Limited*,<sup>1</sup> the Delhi High Court (Court) held that in addition to the general principles for grant of interim reliefs under the code of Civil Procedure, 1908 (CPC), the petitioner is required to satisfy the courts on an emergent necessity that could not await constitution of an arbitral tribunal. The Court recognised the power of an arbitral tribunal to grant interim reliefs under Section 17 of the A&C Act, and held that the same could not be usurped by a court even at a pre-arbitration stage. The judgment sets out the additional criteria to be satisfied in addition to the general principles for interim injunctions in its bid to distinguish, and defer to, the jurisdiction of arbitral tribunals in appropriate cases seeking interim reliefs.

### FACTS

Avantha Holdings Limited (“Avantha / Petitioner”) borrowed INR1265 crores from KKR India Financial Services Pvt. Ltd. and KKR India Debt Opportunities Fund (collectively, “KKR”), M/s L & T Finance Ltd., L & T Fincorp Ltd and Family Credit Ltd. (collectively, “L & T”) and M/s BOI AXA Corporate Credit Spectrum Fund (“BOI”), against 12,650 debentures, each with face value of ₹10 lakhs. KKR, L&T and BOI are collectively referred to as “debenture holders”. Vistra ITCL India Limited (Vistra / Respondent”) was the debenture trustee under the Debenture Trust Deed dated January 5, 2017. The debentures were redeemable on July 6, 2019.

To secure the debenture, the Petitioner pledged (i) 13,53,92,496 equity shares held by it in Crompton Greaves Power and Industrial Solutions Ltd. (CGP); and (ii) 32,26,89,019 equity shares held by it in Ballarpur Industries Ltd. (BILT). A Memoranda of Pledge was executed on January 5, 2017 and June 27.

Of (i), KKR purchased 6,71,87,692 shares between July 2019 and September 2019 sold in the open market. In November 2019, L&T purchased 6,26,00,000 of the remaining pledged shares sold in the open market. Requisite disclosures were made by the Petitioner to SEBI. 56,04,804 shares of CGP remain available for sale. Of these, 50,96,248 shares remain which were invoked by the Respondent in March 2019 against the debentures held by L & T.

Under the Debenture Trust Deed, the Petitioner was required to maintain a security cover. Due to the Petitioner’s continuous default in maintaining the same, the Respondent issued several notices to the Petitioner. On June 30, 2020, the Respondent issued a notice to the Petitioner referring to the aforesaid notices and alleging other breaches by the Petitioner. It was also stated that the Petitioner had also defaulted in paying all outstanding amounts on the final redemption date of July 10, 2019. These constituted Events of Default under the Trust Deeds. The Respondent therefore called upon the Petitioner to pay the entire outstanding amounts to the debenture holders within a period of ten days, failing which the respondent reserved its right to invoke and sell the shares of BILT, pledged against the payment of the outstanding amounts by the Petitioner. The Petitioner was called upon to treat the notice as one under Section 176 of the Indian Contract Act, 1872<sup>2</sup>.

The Petitioner filed the a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (A&C Act) seeking interim measures of protection in “extraordinary circumstances”, pending initiation of arbitration proceedings in terms of the Debenture Trust Deeds and Memoranda of Pledge. Among other prayers, the Petitioner prayed that the Respondent be (a) called upon to forthwith transfer the Pledged CG Shares into the demat account of the Petitioner and to do all necessary and incidental acts in relation to the same; (b) directed and restrained from selling the shares of BILT held by the petitioner and/or acting in furtherance and/or in implementation of the notice dated June 30, 2020; and (c) directed/ restrained from taking any steps against the petitioner under the Debenture Trust Deeds and/or the Memoranda of Pledge.

### CONTENTIONS OF THE PARTIES

In its response to the June 30, 2020 notice, the petitioner had responded that it had been agreed between the Petitioner and KKR (who was acting on behalf of the Debenture Holders) that the pledged CGP shares, after being moved to the DEMAT account of the respondent, would continue to be held as collateral to enable the Petitioner to repay the Outstanding Amounts under the Debenture Trust Deeds. The Petitioner alleged that the sale of the CGP shares between July and September 2019 was in violation of the said agreement and understanding. The manner in

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which the debenture holders had acted reflected market manipulation, using the Petitioner as a scapegoat. In view thereof, it was submitted that the Debenture Trust Deeds and the Memoranda of Pledge stood vitiated and the Petitioner had no liability under the debenture trust deeds which accordingly stood rescinded. Petitioner also pointed out that it had complained to the SEBI which was enquiring into the matter.

In response to the present petition, the Respondent contended that it invoked the pledged CGP shares due to the Petitioner's continuous default in maintaining the required security cover, as per the Debenture Trust Deeds. This constituted an "Event of Default" under the Debenture trust Deeds. The Respondent also contended that the Petitioner fraudulently conspired with KKR and others in a manner that involved (i) transfer of CGP shares to the Respondent's DEMAT account; (ii) artificial depression in the value; followed by (iii) purchase of shares by KKR and L & T from the open market at lower prices. Thus, the "transfer" of the pledged CGP shares to the DEMAT account of Respondent was not a simpliciter transfer accompanied by an "oral agreement" but was by way of invocation of the pledged shares.

## JUDGMENT

The Court dismissed the petition for interim reliefs. The analysis of the Court is set out below.

Firstly, the Court examined the nature and the intent behind interim reliefs that could be granted under Section 9 of the A&C Act. It held that the expression "interim measures, etc." was required to be interpreted as per the *ejusdem generis* (applied where the words preceding the word "etc." constituted a genus) , and the *noscitur a sociis* (applied more universally) rules of interpretation.<sup>3</sup> The Court recognised that the measures needed to be in the nature of interim measures "granted to serve the temporary purpose of protecting the plaintiff's interest so that the suit is not frustrated"<sup>4</sup>.

Secondly, the Court examined the nature of Section 9 in light of its interplay with Section 17 of the A&C Act. It recognised that even at a pre-arbitration stage, the Court could not usurp the jurisdiction which would vest with an arbitral tribunal after its constitution in light of Section 17 of the A&C Act. This was evident from the fact that reliefs under Section 9 were to be granted only when circumstances exist which did not render the remedy under Section 17 efficacious.

Thirdly, the Court enunciated the principles upon which interim reliefs were granted under Section 9 vis-a-vis principles that have judicially evolved to grant reliefs under Order 39 of the Civil Procedure Code, 1908 i.e. establishing the existence of a prima facie case, whether the balance of convenience lies in favour of the plaintiff/applicant seeking the relief, and the possibility of irreparable loss or prejudice if the interim relief was not granted.

Although the Court ultimately dismissed the application for interim relief on the ground that no prima facie case was established by the applicant, the Court made a distinction between the principles for grant of interim reliefs under the CPC and that under Section 9 of the A&C Act. It held that in light of Section 17 of the A&C Act, a Court seized with a petition under Section 9 also needed to assess if circumstances were such that interim reliefs could not await the constitution of the arbitral tribunal and subsequent application under Section 17 before the arbitral tribunal. Therefore, 'emergent necessity' of ordering interim measures is an additional sine qua non to be satisfied before granting relief under Section 9 of the A&C Act.

In line with the purpose of interim reliefs, the Court needs to assess if failure to order interim measures under Section 9 would frustrate or render the recourse to arbitration futile. The Court relied on several cases the case of<sup>5</sup> wherein it was held that under Section 9, the Court is only formulating interim measures to protect the right under adjudication before the Arbitral Tribunal from being frustrated. The jurisdiction under the "just and convenient" clause is quite wide in amplitude, but must be exercised with restraint. It did not allow the Court the discretion to exercise unrestrained powers and frustrate the very object of arbitration. Pursuant to Section 9(2) of the A&C Act, it was also essential to assess if the petitioner manifestly intended to initiate arbitral proceedings.

On the basis of the aforesaid principles, the Court ruled that none of the prayers in the petition warranted interim reliefs under Section 9. In terms of prayer (a), the Court held that invocation of the pledged CGP shares had taken place, the shares had been dematerialised, sold in the open market and purchased by KKR and L & T. In such circumstances, a petition under Section 9 could not justify setting the clock back to a stage anterior to the invocation of the pledge by the Respondent, which took place as far back as in March 2019.

In terms of prayer (b), the Court held that in its response to the Respondent's notice dated June 30, 2020 (alleging failure to maintain the required security cover, and to liquidate all outstanding amounts by the final redemption date), the Petitioner had not denied the allegations. Even in the petition, the Petitioner has remained silent on failure to maintain the required security cover, and repayment of outstanding amounts. The Court held that prima facie, the "Event of Default" had occurred under the Debenture Trust Deeds. Therefore, there was no occasion for the Court to interdict the invocation and sale, if any, of the pledged BILT shares. Any such direction would amount to a proscription on the exercise of rights by the Respondents under the Debenture Trust Deeds. This was not permissible and no interim relief could be under Section 9.

On the Petitioner's allegation of conspiracy and fall in CGP share prices owing to a misleading report by a law firm, the Court found that the same was speculative and presumptuous in nature. As such, no judicial notice could be taken of such allegations in the absence of solid and unimpeachable evidence. Irrespective, this issue was not related to the Petitioner's failure to comply with its obligations under the Debenture Trust Deed and the Respondent's consequent right to invoke the pledged shares and sell them in the stock market for realisation of the outstanding amounts.

In terms of prayer (c), the Court held that this equated with an absolute embargo on the Respondent's exercise of its rights under Debenture Trust Deeds and could not be granted in the absence of any denial to the alleged defaults by the Petitioner. The Court also held that this prayer was based on an assumption that the Debenture Trust Deeds and Memoranda of Pledge stand rescinded which had no merit.

## ANALYSIS

Interim reliefs are in the nature of urgent remedies, granted in exceptional circumstances. These are generally subject to satisfaction of the three judicially evolved principles for examining grant of reliefs under Order 39 of the

Civil Procedure Code, 1908, i.e. the existence of a prima facie case, whether the balance of convenience lies in favour of the plaintiff/applicant seeking the relief, and the irreparable harm or injury in the event relief is not granted.

In addition to the above, public interest has also evolved as an additional ground.<sup>6</sup>

However, the nature of interim reliefs relating to arbitration is distinguishable from those that come within the ambit of general interim reliefs under the CPC. Section 9 of the A&C Act makes no reference to the CPC, and Section 19 of the A&C Act provides that the arbitral tribunal shall not be bound by the CPC. The grant of interim reliefs under Section 9 will therefore need to be tested on its own purpose and intent in furtherance of arbitration.

Parties consenting to arbitration intend to exclude jurisdiction of courts, save for their limited supervisory role. The Indian A&C Act vests an arbitral tribunal with powers to grant reliefs under Section 17 of the A&C Act, literally identical to the reliefs and powers it vests in the Court under Section 9 of the A&C Act. In fact, to cater to emergencies arising prior to constitution of the tribunal, arbitral institutions have long incorporated emergency arbitrator provisions that need not await constitution of the tribunal, and save the applicant from resorting to court remedies. In light of this, the powers of a court to grant interim relief should be limited.

Additionally, the content of Section 9 only provides for an efficacy test, not a test of urgency (or emergent necessity as interpreted by the Court), unlike Section 44 of the English Arbitration Act, 1996 which specifically provides:

*"(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets. (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties."*

In light of absence of specific grounds for grant of reliefs under Section 9, Courts in India have either read in general principles applied while granting interim reliefs under the CPC,<sup>7</sup> or have held that CPC has no application to Section 9, and that a real, imminent danger of removal or disposal of the properties for such an extreme measure is to be proven.<sup>8</sup>

Irrespective of either approach, in a petition under Section 9 of the A&C Act it may be additionally necessary to demonstrate a manifest intention on the part of the applicant to initiate arbitration proceedings. It will also help to demonstrate a higher degree of urgency or an 'emergent necessity'. Circumstances will need to be demonstrated to satisfy the court that the petitioner cannot await constitution of an arbitral tribunal to prefer an application under Section 17, lest the subject matter of the arbitration might be lost. The grant of interim relief by Court will therefore be critical in such situations to preserve the subject matter of the arbitration. After all, an arbitration without existence of its subject matter is akin to a bird without wings.

– Kshama Loya Modani & Moazzam Khan

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<sup>1</sup> O.M.P.(I) (COMM.) 177/2020 & I.As. 5463-65/2020, I.As. 5664-67/2020

<sup>2</sup> "176. Pawnee's right where pawnor makes default. — If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. —

If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."

<sup>3</sup> According to Black's Law Dictionary, ejusdem generis means, "A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals - despite its seeming breadth - would probably be held to include only fourlegged, hoofed mammals typically found on farms, and thus would exclude chickens." Noscitur a sociis means, "A canon of construction holding that the meaning of an unclear word or phrase, esp. one on a list, should be determined by the words immediately surrounding it. Also termed associated-words canon".

<sup>4</sup> Relying on Bank of Maharashtra v. M.V. River Oghese, AIR 1990 Bom 107

<sup>5</sup> Firm Ashok Traders v. Gurmukh Das Saluja (2004) 3 SCC 155; Adhunik Steels Ltd v. Orissa Manganese and Minerals (P) Ltd. (1997) 5 SCC 134; V. Shekhar v. Akash Housing, AIR 2011 Mad 110.

<sup>6</sup> Ramniklal N. Bhutta v. State of Maharashtra (1997) 1 SCC 134; and Raunaq International Ltd. v. I.V.R. Construction Ltd. (1999) 1 SCC 492.

<sup>7</sup> ITI v. Siemens Public Communication (2002) 5 SCC 510; Leighton India Contractors Private Ltd. vs. DLF Ltd. O.M.P.(I) (COMM)109/2020 decided on May 13, 2020.

<sup>8</sup> M/s. KGS Constructions Limited v. Karishmaa MEP Services Pvt. Ltd., (2017) 4 CTC 51 (DB)

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