

Dispute Resolution Hotline

August 07, 2017

CAUTION: DISOBEYING ORDERS OF AN ARBITRAL TRIBUNAL MAY LAND YOU IN JAIL!

- Supreme Court clarifies that parties can be punished for contempt for any action/default in complying with Tribunal's order or during the conduct of the proceedings and not merely restricted to taking evidence

INTRODUCTION

The Supreme Court ("Court"), in *Alka Chandewar* ("Appellant") v *Shamshul Ishrar Khan* ("Respondent") recently held that under Section 27(5) of the Arbitration and Conciliation Act, 1996 ("Act") any non-compliance of an arbitral tribunal's order or conduct amounting to contempt during the course of the arbitration proceedings can be referred to the appropriate court to be tried under the Contempt of Courts Act, 1971.

FACTS

The Sole Arbitrator passed an interim order dated October 7, 2010 ("Order") under Section 17 of the Act directing the Respondent not to dispose any further flats without the leave of the Arbitral Tribunal. The Respondent allegedly was in breach of the said Order. The Arbitral Tribunal by an order dated May 5, 2014 referred the aforesaid contempt of the Order to the High Court to pass necessary orders under Section 27(5) of the Act. The High Court held that Section 27(5) of the Act does not empower an Arbitral Tribunal to make a representation to the Court for contempt of interim orders unless it relates to taking of evidence.

ISSUE

The Supreme Court in the present case dealt with the scope and ambit of Section 27 (5) of the Act, specifically whether non-compliance with any order/direction of an Arbitral Tribunal would fall within its scope.

ARGUMENTS

The Appellant argued that Sections 9 and 17 being alternative remedies available to the parties during the conduct of arbitration proceedings, if orders made under Section 17 were deemed unenforceable or unactionable then the same would be rendered otiose. They also argued that Section 27 of the Act does not leave any doubt as to the scope and ambit of the Court's power to punish for contempt of orders made by the Arbitral Tribunal.

The Respondent contented that the marginal note of Section 27 made it clear that Section 27(5) would only apply to assistance in taking evidence and not to any other contempt that may be committed. It was further highlighted that this lacuna in the law has now been filled pursuant to the 246th Law Commission Report, inserting Section 17(2) by the Amendment Act of 2015.

JUDGMENT

The Court held that:

- A literal interpretation of Section 27(5) would show that there are different categories of actions which can be referred to a court by a tribunal for contempt proceedings. One of those categories is the general and wide category of "*any other default*". Further, the Section is not confined to a person being guilty of contempt only when failing to attend in accordance with the process of taking evidence as the Section specifically states that persons guilty "*of any contempt to the Arbitral Tribunal during the conduct of the Arbitral proceedings*" shall be subject to contempt proceedings.
- It is well settled that a marginal note in a statute was used to understand the general drift of the section only when the plain meaning of the words of the statute were ambiguous. This was not the case in the present situation and therefore the marginal note in section 27 would not alter the purport of the section.
- Per the modern rule of interpretation of statutes, the object of providing a party with the right to approach an Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such a Tribunal are deemed toothless. It is to give teeth to such orders that an express provision has been made in Section 27(5) of the Act.
- The Court observed that the Supreme Court in *M/s Ambalal Sarabhai Enterprises vs. M/s Amrit Lal & Co. & Anr.*¹ had held that parties to arbitration proceedings had to choose between applying for interim relief before the Tribunal under Section 17 or before the Court under Section 9. Such an election would be meaningless if interim orders passed by the Arbitral Tribunal were held to be unactionable, as all parties would then go only to the Court, which would render Section 17 a dead letter.
- However, since an order passed by an arbitral tribunal was unenforceable therefore sub-section (2) to Section 17

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was added by the Amendment Act of 2015, so that the cumbersome procedure of an Arbitral Tribunal having to apply every time to the High Court for contempt of its orders would no longer be necessary. Such orders would now be deemed to be orders of the Court for all purposes and would be enforced under the Civil Procedure Code, 1908 in the same manner as if they were orders of the Court.

ANALYSIS

One of the major lacunas existing in the Act prior to the commencement of the Amendment Act of 2015 was the unenforceability of order/directions passed by a tribunal. Under section 17, the arbitral tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement. Prior to amendment, the section was quite open-textured in the scope of reliefs that could be provided; it permitted the tribunal to issue any interim measure of protection. However, courts and arbitral tribunals took the view that the scope of the interim measures that may be granted under Section 17 was more limited than that under Section 9. Despite the arbitral tribunal's power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted meant that there were doubts regarding efficacy of the arbitral process.² Therefore parties chose to approach the courts rather than continue with the arbitration proceedings. The Amendment Act has introduced much needed changes with respect to grant of interim reliefs by an arbitral tribunal and has brought clarity on the kind of reliefs that may be granted.

The Delhi High Court had attempted to find a suitable legislative basis for enforcing the orders of an arbitral tribunal under section 17 of the Act. In the judgment of *Sri Krishan v. Anand*,³ (followed in *Indiabulls Financial Services v. Jubilee Plots* and upheld by the Court in the present judgment)⁴ the Delhi High Court held that any person failing to comply with the order of the arbitral tribunal under section 17 would be deemed to be "*making any other default*" or "*guilty of any contempt to the arbitral tribunal during the conduct of the proceedings*" under section 27 (5) of Act, being the only mechanism for enforcing its orders.

The Supreme Court has through the present judgment confirmed the above position of law (in relation to arbitrations being conducted under the regime as applicable prior to 2015 amendment).

It is pertinent to note that under Section 12 of the Contempt of Courts Act, 1971, any person found guilty of contempt would be liable to be punished with imprisonment upto 6 months along with fine.⁵

— **Arjun Gupta, Payel Chatterjee & Moazzam Khan**
You can direct your queries or comments to the authors

¹ (2001) 8 SCC 397

² M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619, Sri Krishan v. Anand (2009) 3 Arb LR 447 (Del)

³ (2009) 3 Arb LR 447 (Del)

⁴ OMP Nos 452-453/2009 (Order dated 18.08.2009).

⁵ Section 12 - Punishment for contempt of court

(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both: Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation.—An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

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