

(2015) 06 AP CK 0032
In the Andhra Pradesh High Court
Case No : C.M.A. No. 1206 of 2012

East India Udyog Limited

APPELLANT

Vs

Maytas Infra Limited and Others

RESPONDENT

Date of Decision : 12-06-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 14, 17, 2(3), 2(d), 2(e)
Civil Procedure Code, 1908 (CPC) — Order 18 Rule 5, Order 38 Rule 5, Order 38 Rule 6, Order 39 Rule 1, Order 39 Rule 2
Partnership Act, 1932 — Section 69(3)

Citation : AIR 2015 AP 118 : (2015) 5 ALD 446 : (2015) 4 ALT 797 : (2015) 6 ARBLR 1 : (2015) 4 CTC 593 : (2016) 1 RCR(Civil) 845

Hon'ble Judges : D.B. Bhosale, A.C.J; M.S. Ramachandra Rao, J; A. Ramalingeswara Rao, J

Bench : Full Bench

Advocate : M. Ravindernath Reddy and A. Srinarayana, for the Appellant; S. Niranjan Reddy, Advocates for the Respondent

Judgement

D.B. Bhosale, Acting C.J—The order of reference dated 28th January, 2013, which has occasioned the constitution of this Full Bench, has been passed by a Division Bench in the instant Civil Miscellaneous Appeal. The Division Bench in this case having disagreed with the view taken by another Division Bench of this Court in Bilasraika Sponge Iron Pvt. Ltd. Vs. Devi Trading Company, (2011) 5 ALD 327 (for short Bilasraika) formulated the following questions, which consequently require determination by this Full Bench:

"a) Whether the Court as defined under Section 2(e) of the Act, is entitled to dispose of the application filed under Section 9 of the Act before initiation of the arbitral proceedings under section 21 of the Act, ex-parte without giving notice to the respondents, if the facts and circumstances so warrant?

b) Whether the Court as defined under Section 2(e) of the Act, is entitled to grant any interim order pending disposal of the interim measure application under Section 9 of the Act?

c) Whether further application pending disposal of the interim measure under Section 9 of the Act, is maintainable?"

2. The Division Bench, in the instant appeal, also considered the judgment of this Court in Gulf Oil Corporation Ltd. Vs. Singareni Collieries Co. Ltd. and Another, (2008) 2 ALD 693 : (2008) 3 ALT 631 and having noticed the view taken therein observed that the learned Judges were unable to prima facie agree with the opinion of the Division Bench in Bilasraika with regard to the power of the Court to pass an ad-interim order/measure before disposal of interim measure application filed under Section 9 of The Arbitration and Conciliation Act, 1996 (for short the Act).

3. It would be advantageous to reproduce the relevant observations made by this Court in Bilasraika for understanding better the background against which the Division Bench in the instant Civil Miscellaneous Appeal framed the aforementioned questions and referred to Full Bench. The relevant paragraphs 16, 17 and 21 read thus:--

"16. Since the jurisdiction to order interim measures is conferred on the Court, in respect of any grievance of a party before or during arbitral proceedings, it is axiomatic that the Court has the power, authority and jurisdiction to order ad-interim measures as well and pending ordering of measures after hearing affected parties (arrayed as respondent to an application under Section 9). The appeal provided under Section 37 of the 1996 Act comprises within its locus an appeal against an order granting ad-interim measures, pending passing of final orders under Section 9 of the 1996 Act as well.

17. In the considered view of this Court since Section 9 of the 1996 Act incorporates a power in the Court to grant ad-interim measures, pending grant of measures after hearing the concerned parties as well and without the necessity of reliance on the provisions of Order XXXVIII Rule 5 CPC, the order of this Court dated 12.1.2011 could be considered proprio vigore an order under Section 9 of the 1996 Act granting ad-interim measures. Such an order could be appealed against under Section 37 of the 1996 Act.

21. In the view we have taken; that the power to pass an order granting ad-interim measures before hearing the respondent in an application under Section 9 of the 1996 Act is also comprehended within the scope of the powers granted under Section 9, the order dated 12.1.2011 could be truly and fairly considered an order passed under Section 9 and it would not be necessary, in the facts and circumstances of this case, for the appellant to await the passing of an order under order XXXVIII Rule 6 CPC and to pursue remedies there against. This appeal is therefore maintainable as an appeal against an order passed under Section 9 of the 1996 Act. This issue is answered accordingly and in favour of the appellant.

(emphasis supplied)

4. In Gulf Oil (supra), the Division Bench while dealing with Section 9 of the Act held that it only provides for the interim arrangement, protection or any direction, which may warrant on the facts and circumstances and a party can invoke the said provision to seek any such relief as specified thereunder. It was further observed that such relief can be invoked even before or during the arbitral proceedings or at any time after the Award but before it is enforced and that the relief as provided for or the application, which needs to be filed under Section 9 of the Act, is only for an interim measure and not for any substantive relief.

4.1 It would be relevant to reproduce the relevant observations made by this Court in Gulf Oil (supra), which read thus:--

"12. In spite of such clear and categorical letter of the law under the aforesaid provision, it is brought to our notice that pending all such applications filed under Section 9 of the Act, seeking interim reliefs or measures or for any directions, once again further interim applications are being filed like the present one which is appealed against in this appeal, seeking further or varied interim reliefs by way of injunctions and directions which only amounts to duplication of the very enquiry and adds to the delays in disposal of main interim application and repetition of the exercise. Such action is not only permissible and contemplated under the law but goes far beyond the scope of provision and objects intended under Section 9 of the Act. Therefore, it has to be seen that the very application filed under Section 9 of the Act itself should be treated as an interim application alone and shall accordingly be disposed of on the same procedure or approach as normally followed. This Court is informed during the course of arguments that even the main applications filed under Section 9 of the said Act are being kept for quite long time for some or other reason including due to pendency of such further interlocutory applications and are being treated as a substantive application almost on par like a regular suit or other O.P., touching upon the main lis. However, having regard to the very nature of the proceedings as provided for and as stated above, necessarily wherever such applications are being filed by the parties, the Court should take up the main application itself and dispose of in the same manner as an interim application but not to entertain any interim applications. In this case, no doubt, the Court below has rejected the present interim application on the ground that it is in total variance with the main relief without taking up main applications. We refrain from expressing any opinion on merits either way. Instead of entertaining applications of this nature, which may give scope to the parties to go on filing one application after the other pending the main application under Section 9 of the Act, the endeavour should be to take up the main application under Section 9 of the Act and dispose of the same as expeditiously as possible after appearance of the respondent. Therefore, we hold that having regard to the nature of proceedings as contemplated under Section 9 of the Act, further interim application as has been filed and framed is neither maintainable nor can require to be considered by the Court. However, by taking into consideration the apprehensions expressed across the Bar in regard to long

pendency and delays in disposal of the applications filed under Section 9 of the Act, we hold that all such applications shall have an expeditious disposal as expeditiously as possible, immediately after the appearance of the respondent not later than three months from such appearance of the respondent. Such approach would more apt and objectively meets the ends of justice."

(emphasis supplied)

4.2 Thus, from perusal of both the judgments, difference of opinion is apparent. The reference order, therefore, having disagreed with the view taken in BILASRAIKA, referred the questions for determination to Full Bench.

5. The Division Bench, in the instant appeal, after considering the judgments in Bilasraika and in Gulf Oil and after referring to the judgment of the Supreme Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., AIR 1999 SC 565 : (1999) 1 ARBLR 305 : (1999) 3 CompLJ 205 : (1999) 1 JT 49 : (1999) 123 PLR 685 : (1999) 1 SCALE 40 : (1999) 2 SCC 479 : (1999) 1 SCR 89 : (1999) 1 UJ 613 : (1999) AIRSCW 225 : (1999) 1 Supreme 126 and so also to the Rules framed by this High Court being The Andhra Pradesh Arbitration Rules, 2000 (for short the Rules), in the concluding paragraph observed thus:--

"This court in GULF OIL case (referred supra) held that having regard to the nature of the proceedings as contemplated under Section 9 of the Act, further interim application is not maintainable and that application filed under Section 9 of the Act shall have to be disposed of expeditiously, which judgment was not cited or considered in the later judgment of this Court in BILASRAIKA case. As we are unable to prima facie agree with the opinion of the later judgment of this court in BILASRAIKA case with regard to the power of the Court to pass an ad-interim order/measure before disposal of interim measure application filed under Section 9 of the Act and in view of the important issues involved which will have a far reaching effect on various applications pending before the Civil Courts under Section 9 of the Act, we deem it appropriate that the matter be referred to a Full Bench for an authoritative judgment on the following issues."

(emphasis supplied)

5.1 The issues/questions framed by the Division Bench are already reproduced in the first paragraph of this Judgment.

6. The relevant facts, which are necessary for consideration of the questions referred to the Full Bench, are that the appellant filed a petition under Section 9 of the Act for the relief of injunction restraining the 2nd respondent from paying and the 1st respondent from receiving the amounts covered by three(3) performance bank guarantees dated 03.10.2007, 17.01.2008 and 12.12.2007 for Rs. 3,48,625/-, 15,78,950/- and Rs. 24,07,500/- respectively. The 1st respondent is a Company while the 2nd respondent is a Bank. The appellant is engaged in manufacture, supply and export of various types of power transformers with high quality and in conformity with the ISO-9001:2000

standard. Andhra Pradesh Northern Power Distribution Company Limited (for short APNPDCL) had awarded a contract to one M/s. Manchu Konda Prakashan and Company for electrification of various divisions situated in northern districts of Andhra Pradesh. The said work was taken up by the 1st respondent informally from M/s. Manchu Konda Prakashan and Company. The 1st respondent, which required transformers for the project at Bansawada division of Nizamabad District of north Andhra Pradesh, issued the purchase order dated 30-07-2007 to the appellant for supply of 1791 transformers. The total value of the order was Rs. 8,72,01,650/-. Out of 1791 transformers, 799 were to be of 16 KVA and 992 were to be of 25 KVA. The terms and conditions were stipulated in the purchase order. Pursuant to the understanding with the 1st respondent, the aforementioned bank guarantees were furnished in favour of the 1st respondent by the 2nd respondent agreeing to pay the value of bank guarantees on its invocation. Pursuant to the purchase order dated 30-07-2007, the appellant started making supplies of transformers and the last consignment was delivered in the month of March, 2008. According to the appellant, representatives of 1st respondent and APNPDCL inspected the transformers at the site and on their satisfaction the transformers were transmitted. Further, on receipt of material at site, the 1st respondent took steps for release of payments as agreed under the purchase order and cleared 90% of the amount payable. Further, according to the appellant, there was a delay of 3 to 4 months in making payments, for which the appellant did not make grievance immediately and accepted the delayed payments in good faith. Even after completion of six months, neither the payment was made nor any grievance about the quality of transformers was made by the 1st respondent or its customer-APNPDCL. The appellant contend that balance 10% of the amount was to be paid by demand draft but payment was not made. The 1st respondent claimed that balance amount payable was adjusted towards the taxes paid by them. This claim of the 1st respondent, according to the appellant, was absurd and not consistent with the agreement between the parties. The 1st respondent also raised issues as to quality of transformers when the appellant claimed the balance payment. According to the 1st respondent, inspite of repeated reminders, the appellant did not take steps to replace the defective transformers or to rectify the defects and in these circumstances, the 1st respondent claimed that they were left with no option but to invoke the performance of bank guarantees furnished by the appellant by cancelling the purchase order.

7. We are not going into further details since we do not propose to deal with the appeal on merits and we would like to confine ourselves only to address the questions referred to this Bench. We also would like to clear that while narrating the factual matrix, we shall not be understood to have expressed any opinion on merits of the case.

8. Mr. M. Ravindernath Reddy, learned counsel for the appellant, and Mr. S. Niranjana Reddy, learned counsel for the respondents, at the outset, submitted that having regard to the facts and circumstances of the instant appeal and so

also the judgments of this Court in *Bilasraika* and *Gulf Oil* (supra), the first and second questions as framed in the reference order dated 28-01-2013 need to be reframed. We would not like to examine whether the questions/issues referred are correctly framed and we would like to proceed to address the questions, as they are, in the light of the observations made in the reference order dated 28-01-2013 and in the light of the law declared in *Bilasraika* and *Gulf Oil* (supra) of this Court. At this stage, we deem it appropriate to record that both the learned counsel for the parties submitted that application under Section 9 of the Act cannot be decided *ex parte* without giving notice to the respondents, but the Court, as defined under Section 2(3) of the Act, is entitled to grant an *ad-interim* order pending disposal of the interim measure application under this provision. In support of their contention, they relied upon the judgments of the Supreme Court, this High Court and the other High Courts and also invited our attention to the relevant provisions of the Act and also the Rules.

9. The provisions of the Act, which are relevant for our purpose, are Sections 2(e), 9, 17, 21 and Section 37. Section 2(e) defines Court. Since the definition of the word Court is not in dispute we refrain from reproducing the same. Section 9 of the Act, which gives power to the Court to pass interim orders, and the interpretation of which we are concerned with in the present case reads thus:

"9. Interim measures, etc. by Court :

A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court,-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely,-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient;

And the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

9.1 As this Section refers to arbitral proceedings, it is necessary to reproduce Section 21 of the Act, which relates to commencement of arbitral proceedings. Section 21 reads thus:--

"21. Commencement of arbitral proceedings:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

9.2 Section 17 of the Act confers jurisdiction on the Arbitral Tribunal as defined under Section 2(d) of the Act to pass interim orders. Section 17 of the Act reads thus:--

"17. Interim measures ordered by arbitral tribunal:

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

10. A glance at Section 9 would show that an application for interim order/measure can be filed before or during arbitral proceedings or at any time after the making of arbitral award, but before it is enforced in accordance with Section 36. The Arbitral proceedings, contemplated by Section 9 commences on the date on which a request for particular dispute is received by the respondent for its reference to arbitration, as provided for in Section 21 of the Act. In this context, we will have to understand what the expression before or during arbitral proceedings occurring in Section 9 of the Act would exactly mean. The first question referred for our consideration is whether the Court can dispose of the application filed under Section 9 of the Act before initiation of arbitral proceedings under Section 21 of the Act, ex parte, without giving notice to the respondents, if the facts and circumstances so warrant. In view thereof, the expression before or during arbitral proceedings occurring in Section 9 of the Act assumes importance.

10.1 Section 17 of the Act provides that the arbitral tribunal may, at the request of the party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. From a bare perusal of this provision, it is clear that the arbitral tribunal can pass interim order during pendency of the arbitration before the tribunal, while Section 9 empowers the Court to make an order in the nature of interim measure before or during arbitral proceedings or at any time after making of the

arbitral award but before it is enforced in accordance with Section 36 of the Act.

10.2 Section 37 deals with appealable orders. Under Section 37, for our purpose, the order granting or refusing to grant any measure under Section 9 of the Act is appealable to the Court authorized by law to hear the appeals from original decree of the Court passing the order.

11. Next, we would like to consider the relevant Rules. This High Court, in exercise of the powers conferred under Section 82 of the Act made the Rules called as Andhra Pradesh Arbitration Rules, 2000 (for short, the Rules). Rule 4 thereof, provides for the procedure for making applications under Sections 8, 9, 14, 27, 34, 39 and 43 of the Act. In the present appeal, we are concerned only with the application under Section 9 of the Act.

11.1 Rule 6 of the Rules, provides that in an application for interim measure filed under Section 9, before the commencement of the arbitral proceedings, the applicant should specifically refer to the steps, if any, already taken to seek arbitration and that the applicant is willing and prepared to take necessary steps for utmost expedition to seek reference to arbitration in terms of the arbitration agreement/clause. Thus, as stated in this Rule, it is clear that one can file application for interim order/measure under Section 9 even before the commencement of the arbitral proceedings subject to the applicant specifically referring in the application the steps, if any, already taken to seek arbitration or making statement in the application to the effect that the applicant is willing and prepared to take necessary steps with utmost expedition to seek reference to arbitration in terms of arbitration agreement/clause. If the application is not filed by the party in accordance with the provisions of this Rule in particular, the Court is empowered to reject the application after giving an opportunity to the applicant to rectify the defects and, if necessary, giving a hearing to the party as contemplated under Rule 7 of the Rules.

12. Having seen all the relevant provisions of the Act and the Rules, in the light of the questions that are referred, we would now like to proceed to consider the judgments of the Supreme Court relied upon by learned counsel for the parties in support of their contentions.

13. The arbitral proceedings, as we have seen, commence only when a request to refer the dispute to arbitration is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are before or during the arbitral proceedings. This clearly contemplates two stages when the Court can pass interim orders i.e., during arbitral proceedings or before the arbitral proceedings. The word before occurring in Section 9 will have to be interpreted to mean that the Court can pass interim orders before the commencement of arbitral proceedings. As observed by the Supreme Court in *Sundaram Finance* (supra) any other interpretation, insofar as the word before occurring in Section 9 is concerned, will have the effect of rendering the word before in Section 9 as redundant. This is clearly not permissible. In *Sundaram Finance* (supra) the

Supreme Court considered the question whether under Section 9 of the Act, the Court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an arbitrator is appointed. Paragraph 19 of this judgment is relevant for our purpose, which reads thus:--

"19. When a party applies under Section 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application under Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to Arbitral Tribunal. But a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under Section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act."

(emphasis supplied)

14. In *Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.*, AIR 2004 SC 1433 : (2004) 1 ARBLR 141 : (2004) 2 CompLJ 419 : (2004) 2 CTC 208 : (2004) 2 JT 352 : (2004) 137 PLR 526 : (2004) 1 SCALE 297 : (2004) 3 SCC 155 : (2004) 50 SCL 224 : (2004) 1 SCR 404 : (2004) AIRSCW 366 : (2004) 1 Supreme 754 the Supreme Court considered two questions; 1) effect of the bar created by Section 69(3) of the Partnership Act on maintainability of an application under Section 9 of the Act; and 2) in the event of the question of maintainability being decided for Group A, what interim arrangement, whether by way of appointment of receiver or otherwise, would meet the ends of justice? While dealing with these two questions, the Supreme Court in paragraph 18

observed thus:--

"18. Under the A&C Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre- and post- the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court. The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the proximately contemplated or manifestly intended arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made "before" i.e. in contemplation of arbitral proceedings. The court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so. The court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms."

(emphasis supplied)

15. An application under Section 9 under the scheme of the Act is not a suit. Though such application results in initiation of civil proceedings, the time or the stage for invoking the jurisdiction of Court under Section 9 can be before or during arbitral proceedings, or at any time after making of the arbitral award but before it is enforced in accordance with Section 36. Section 9 though permits application being filed in the Court before the commencement of the arbitral proceedings does not give any indication of how much before. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended as observed in *Sundaram Finance* (supra) and are positively going to commence within a reasonable time. What is a reasonable time, as observed in *Firm Ashok Traders* (supra), would depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof, but the distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. Thus, it is settled that an application for interim order/measure under Section 9 can be filed even before commencement of the arbitral proceedings and if any such application is filed the applicant has to make his intention clear to take recourse to the arbitral proceedings or the Court while

exercising jurisdiction under this provision can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencement of the arbitral proceedings. If the arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under this provision and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made before i.e., in contemplation of arbitral proceedings.

16. The Supreme Court in *Arvind Constructions Co. Pvt. Ltd., V. Kalinga Mining Corporation* AIR (SC)-2007-0-2144, though did not consider the question that has fallen for reconsideration, while considering the provisions contained in Section 9 and while dealing with the argument that the power under this Section is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9, observed that the said argument cannot prima facie be accepted. The power under Section 9 is conferred on the District Court and for exercising the power no special procedure is prescribed by the Act in that behalf. It further clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. The relevant observations made by the Supreme Court in *Arvind Constructions* reads thus:-The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. The reliance placed on *Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.*, AIR 2004 SC 1433 : (2004) 1 ARBLR 141 : (2004) 2 CompLJ 419 : (2004) 2 CTC 208 : (2004) 2 JT 352 : (2004) 137 PLR 526 : (2004) 1 SCALE 297 : (2004) 3 SCC 155 : (2004) 50 SCL 224 : (2004) 1 SCR 404 : (2004) AIRSCW 366 : (2004) 1 Supreme 754 in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69(3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has

been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver. (emphasis supplied)

16.1 The Supreme Court in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.*, AIR 2007 SC 2563 : (2007) 3 ARBLR 65 : (2007) 3 CompLJ 316 : (2007) 4 CTC 340 : (2007) 9 JT 147 : (2007) 9 SCALE 126 : (2007) 7 SCC 125 : (2007) 8 SCR 213 : (2007) 2 UJ 889 : (2007) AIRSCW 6999 : (2007) AIRSCW 4558 : (2007) 5 Supreme 844 while dealing with Section 9 of the Act in paragraph 11 observed thus:--

"It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of just and convenient while speaking of passing any interim measure of protection. The concluding words of the section, and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

(emphasis supplied)

16.2 In *I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd.*, AIR 2002 SC 2308 : (2002) 2 ARBLR 246 : (2002) 4 CompLJ 186 : (2002) 1 JT 466 Supp : (2002) 4 SCALE 655 : (2002) 5 SCC 510 : (2002) 38 SCL 943 : (2002) 3 SCR 1122 : (2002) 2 UJ 1111 : (2002) AIRSCW 2438 : (2002) 4 Supreme 444 the Supreme Court while dealing with the question whether the revision petition under Section 115 of the Civil Procedure Code lies to the High Court as against

an order made by a civil court in an appeal preferred under Section 37 of the Act observed that it is true in the present Act application of the Code of Civil Procedure is not specifically provided for, but what is to be noted is: there is no express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court. We find no such specific exclusion of the Code in the Act. When there is no express exclusion, we cannot by inference hold that Code is not applicable.

16.3 The power to grant interim order/measure under Section 9 is conferred on a Civil Court. No special procedure is prescribed by the Act in that behalf. It is equally true that in the present Act, application of the Code of Civil Procedure is not specifically provided for, but there is no express prohibition against the application of the Code to a proceeding arising out of the Act before a Civil Court. In other words, there is no specific exclusion of the Code in the Act, and therefore, it cannot be stated, as observed by the Supreme Court in *Siemens Public Communications Network Limited* (supra) the Code is not applicable. The general rules, therefore, would stand attracted, for the Court, while considering the grant of interim order/measure at the threshold, while dealing with an application under Section 9 of the Act. The grant of interim order/measure are governed by well known Rules and in view thereof, the Supreme Court in *Adhunik Steels Limited* (supra) observed that it is difficult to imagine that the Legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that govern the grant of interim injunction. It is, thus, clear that when a party is given the right to approach the Civil Court under Section 9 of the Act, without providing a special procedure or special set of Rules in that behalf, ordinary rules followed by that Court would govern the exercise of power conferred by the Act including the power to grant an ex parte ad-interim order.

17. We would also like to refer to the judgments of different High Courts dealing with the provision contained in Section 9 of the Act.

17.1 The Bombay High Court in *Mrs. Perin Hoshang Davierwalla and Anr. V. Mr. Kobad Dorabji Devierwalla and Ors* [2014(3) Bom CR 551] dealt with the appeal arising from the order passed by the trial court rejecting the appellants application under Section 9 of the Act seeking appointment of Court Receiver of the business and assets of the partnership firm of the appellants and respondents. In this appeal, the Bombay High Court while dealing with the contentions urged on behalf of the respondents that an order granting or refusing grant of ad interim relief pending disposal of an arbitration application under Section 9, is an order passed by the Court in exercise of its power under Order 39 Rule 1 of the Code of Civil Procedure. In paragraph 8, the Bombay High Court observed thus:--

"8. It is difficult to see how any order passed by the Court in an application to it under Section 9 of the Act is not an order passed under Section 9 by reason of the Court having exercised powers under Order 39 Rule 1. As explained in the

case of Arvind Constructions Co. (P) Ltd. (supra), whilst powers are conferred on the District Court under Section 9 of the Act for ordering an interim measure of protection, no special procedure is prescribed by the Act in that behalf. Whilst entertaining an application under Section 9 of the Act, the Court has the same power for making orders as it has for the purpose of and in relation to any proceeding before it. This is on the principle that when a power is conferred under a special statute and on an ordinary court of law without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. Thus, every order by the District Court under Section 9, whether ad-interim or interim, is passed by using powers of the Court which are ordinarily exercised whilst deciding an interlocutory application before it. These include powers under Order 39 or well recognised principles for exercise of such powers. The order passed by the court in an application made to it under Section 9 of the act by exercising such powers is very much an order passed under Section 9, and is appealable under Section 37 of the Act. Grant or refusal of an interim measure of protection by way of an ad-interim order under Section 9 of the Act is, thus, an appealable order under Section 37. There is nothing in law which requires the life of such an order to extend beyond the pendency of the proceeding under Section 9. The judgment of our court in Conros Steels Pvt. Ltd. (supra) has not decided the point as to whether or not an ad-interim order passed under Section 9 is appealable under Section 37. A casual reference to "final order" under Section 9 being appealable cannot be termed as laying down any such law."

17.2 The High Court of Sati Oil Udyog Ltd. and Another Vs. Avanti Projects and Infrastructure Ltd., (2010) 2 GLR 512 : (2010) 1 GLT 141 while dealing with the provisions contained in Section 9 of the Act and the preliminary objection with regard to maintainability of the appeal under consideration and after noticing that the trial court, for protection of the suit property, directed that the appellants should not create any third party interest over the suit property and maintain status quo until further orders, observed that there can be no doubt that the impugned directions amount to granting of injunction. It was further observed that whether such an order, because of the fact that it has been passed ex parte, would fall within the ambit of Section 9 and be regarded as an interim measure within the meaning of Section 9 and/or whether such directions, as have been given by the interim order, would be amenable to the appellate provisions aimed in Section 37(1)(a) of the Act, are questions required to determine. These questions were ultimately answered in the affirmative.

17.3 The Madhya Pradesh High Court in Jabalpur Cable Network Pvt. Ltd. Vs. E.S.P.N. Software India Pvt. Ltd. and Others, AIR 1999 MP 271 : (2001) ILR (MP) 846 observed that it cannot be disputed that under Section 9 of the Act the Court has power to grant interim injunction or to take such other interim measure of protection as may appear to the Court to be just and convenient.

17.4 The High Court of Rajasthan (Jaipur Bench) in Road Infrastructure

Development Company of Rajasthan Ltd. V. I.V.R.C.L. Ltd. [2014(4) RLW 3660 (Raj.)] observed that any order granting or refusing to grant any measure under Section 9 would be appealable. The words any measure are words of widest amplitude. The use of the term any measure would obviously include an interim order. Therefore, the words any measure would include an interim order passed by the Court while exercising its power under Section 9.

17.5 The High Court of Gujarat in *Aventis Pasteur S.A V. Cadila Pharmaceuticals Ltd.* [2003(2) ARBLR 259 (Gujarat)] after considering the provisions of Sections 9 and 37 of the Act held that the appeal filed against an ex parte ad interim injunction under Section 37 of the Act is maintainable.

17.6 The High Court of Karnataka in *Symphony Services Corp.(India) Pvt. Ltd. V. Sudip Bhattacharjee* [2008(3) ARBLR 295 (Kar)] has taken a view in relation to the maintainability of an appeal under Section 37 that an appeal is maintainable only against a final order passed under Section 9 of the Act. The relevant observations made in this judgment read thus:-13. In the case on hand, it is to be noticed that the original proceedings under Section 9 of the Act are still pending. It is no doubt true that an application is filed treating it as under Section 9 of the Act, but however, it is not an interim measure but is an interim measure, which would necessarily mean that it is only an application, which is filed, pending adjudication of the main petition under Section 9 of the Act. Hence, I am of the view that Section 37(1)(a) of the Act is not applicable and the impugned order cannot be termed as a final order under Section 9 of the Act, which would make it an appealable order. Hence, the petition is maintainable.

18. Having considered the judgments of the Supreme Court and the High Courts and after having perused the relevant provisions carefully, it appears to us that when an application is made under Section 9 of the Act to a Court, such application gives rise to a proceeding, which is original in nature. Such a proceeding is not dependent upon the pendency of any other proceedings such as any suit or appeal. As a matter of fact, Section 9 itself makes it clear that an application seeking interim measure, as provided therein, may be made even before any arbitral proceedings are commenced. In other words, even before commencement of arbitral proceedings, an application under Section 9 can be filed and such application, being original in nature, in our opinion, would stand on the same footing as the proceedings within the meaning of Section 141 of the Civil Procedure Code. As observed earlier that no special procedure is prescribed by the Act for dealing with an application for interim measure/order under Section 9 thereof and further when power is conferred under a special statute on a Civil court without laying down any special condition for exercise of that power, the general rules that governed the Court while considering the grant of interim measure/order at the threshold are attracted. Thus, when an application under Section 9 is made and during pendency of such application, an ex parte ad interim order becomes imperative, in the facts and circumstances of the case, it is open to the Court to pass an ad interim ex parte order based on well

recognized principles contemplated by the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure Code governing the grant of interim injunctions and/or other orders of interim protection or the appointment of a Receiver. The power to grant an ex parte interim order is derived by a Court under the principle that every Court has the power to pass an order, which it must pass so as to ensure that the application, made before it, does not become infructuous merely because of the fact that no specific provision has been made dispensing, in an emergent situation, the necessity to pass an ex parte order. In other words, the Court cannot be stated to be completely helpless in the matter of an ad-interim order/measure otherwise the entire purpose of the application under Section 9 of the Act would stand defeated, if ultimately the party approaching the Court under Section 9 succeeds in the Arbitration proceedings. It is difficult to conceive that the Legislature, so intended while providing the remedy to a party to approach the Court under section 9 of the Act. In short, when any power is expressly granted by a statute, there is impliedly included in the grant, even without special mention, every power and every control, the denial of which would render the grant itself ineffective.

19. Insofar as the question whether a Court can dispose of the application filed under Section 9 of the Act even before initiation of arbitral proceedings under Section 21 of the Act is concerned, requires no further discussion in view of the judgments of the Supreme Court in *Sundaram Finance* (supra) and in *Firm Ashok Traders* (supra), which we have already considered in the foregoing paragraphs. Thus, we answer the questions as framed in the order of reference as follows:--

"the Court as defined under Section 2(e) of the Act, is undoubtedly entitled to dispose of the application filed under Section 9 of the Act even before initiation of the arbitral proceedings under Section 21 of the Act. The Court, however, cannot dispose of such application ex parte without giving notice to the respondents, but Court can pass ex parte ad interim order pending the application filed under Section 9 of the Act."

20. Registry is directed to place the Civil Miscellaneous Appeal before the Court, which is assigned to hear such appeals, for deciding it on merits in the light of the opinion expressed by the Full Bench.