

**(2019) 06 GUJ CK 0001**

**In the Gujarat High Court**

**Case No : R/Misc. Civil Application No. 90 Of 2019**

Manbhupinder Singh Atwal S/O Barindra Singh Atwal

APPELLANT

Vs

Neeraj Kumarpal Shah

RESPONDENT

**Date of Decision : 21-06-2019**

**Acts Referred:**

Arbitration And Conciliation Act, 1996 — Section 9, 9(1)(ii), 9(2), 9(3), 11, 11(6), 15(3), 17, 29(A) (3), 37  
Code Of Criminal Procedure, 1973 — Section 340

**Citation : (2019) 06 GUJ CK 0001**

**Hon'ble Judges : N.V.Anjaria, J**

**Bench : Single Bench**

**Advocate : Shalin Mehta, G H Virk, Nd Nanavaty, Mn Marfatia, Himanshu C Desai, Mn Marfatia, P M Buch**

**Final Decision : Dismissed**

## **Judgement**

N.V.Anjaria, J

1. In terms of sub-section (3) of Section 9 of the Arbitration and Conciliation Act, 1996, whether the present application filed under Section 9(1)(ii) of

the Act is required to be entertained when the Arbitral Tribunal is already continued by the parties and the applicant has taken recourse to remedy

under Section 17 of the Act, so as to treat the said remedy under Section 17 of the Act to be not efficacious; whether in the facts of the case, such

circumstances exist which may not render the remedy provided under Section 17 efficacious â?" is the moot question for consideration.

2. By means of the present Miscellaneous Civil Application, the applicant has sought to invoke Section 9 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as 'the Arbitration Act'), to seek interim measures till the conclusion of the arbitration proceedings between the parties, which

are pending.

2.1 It is prayed to direct respondent Nos.1 and 2 to deposit Rs.21.18 crores by way of security before this Court. In the alternative, it is prayed for

opening of an escrow account under the supervision of the Court. The applicant has further prayed to direct respondent Nos.1 and 2 to file affidavit

disclosing their respective assets, bank accounts with cash balances, income-tax returns, the details of the bank locker, equity holding, mutual funds,

fixed deposits and such other details. applicant wants the original documents in respect of those details. What is prayed is also to require respondent

No.1 to refrain from interfering with the affairs of the partnership firm till the disputes are finally decided by the Arbitral Tribunal. A prayer is also

made to direct respondent No.2 to refrain from acting directly or indirectly in collusion with respondent No.1. applicant wants respondent No.1 to

return of all original documents pertaining to partnership firm. It is the prayer to direct respondent No.1 to furnish all certified copies of the documents,

agreements and transaction, deals and negotiations undertaken and executed by him on behalf of partnership firm between the period from 10th

February, 2015 to 26th February, 2016.

2.2 It is to be stated at the outset that the present applicant had earlier filed an Application No.119 of 2016 under Section 9 of the Act before the City

Civil Court for similar relief. The applicant appears to have in the meantime, initiated other proceedings under Section 11(6) of the Arbitration Act

before the Apex Court for appointment of Presiding Arbitrator, in which proceedings, the Supreme Court passed order dated 24th April, 2017 and held

the present arbitration to be an international commercial arbitration. In this view, the present Application is now filed before this Court under Section 9

of the Arbitration Act.

3. A Limited Liability Partnership was set up between the respondent Nos.1 and 2 pursuant to agreement dated 10th February, 2015. The present

applicant became a Partner of the Limited Liability Partnership (LLP) on 27th February, 2015 upon execution of the addenda agreement. applicant

and the respondents, thus are the Partners of the Limited Liability Partnership. It was stated by the applicant that at the time of execution of the

agreement, the valuation of the Firm was Rs.05.00 lakhs only wherein amount of Rs.02.25 lakhs was to be contributed by respondent No.1 and the

balance amount was to be contributed by respondent Nos.2 and 3. It is the case of the applicant that he brought substantial amount in the partnership firm.

3.1 The applicant who introduces himself as a retired army officer and a non-resident Indian based in country of Oman, stated that when in the month of December, 2014 he had come to India upon being invited by his business associates, the applicant came in contact with respondent No.1. It is the case of the applicant that respondent No.1 painted a rosy picture of him as the owner of business empire and that he had large stake in the business company Kinetrics. According to the applicant, he was unaware about the actual financial capacity and credibility of respondent No.1 and the Limited Liability Partnership Firm. It was stated that he joined as a Partner in the firm under agreement dated 10th February, 2015 read with addendum dated 27th February, 2015.

3.1.1 The business of the firm in which the parties became partners was of techno-marketing financial consultation for the clients of different fields. According to statement of the applicant, the firm was used to enter into any agreement on Turn-Key Projects involving technical, civil, financial, administrative, marketing, plant and merchandise etc. applicant stated that he was required to contribute Rs.45.00 crores in the firm which would be his 20% share holding and that the contribution of the applicant enhanced the value of the firm substantially. applicant stated that from March, 2015 he started remittance of his capital contribution in the firm. On 18th May, 2016 second addendum to the Limited Liability Partnership (LLP) agreement was signed.

3.1.2 The applicant alleged that between March, 2015 and October, 2015, respondent No.1 misappropriated and siphoned off money from the bank account of the firm without knowledge of the applicant and other partners through fund transfer and cash withdrawals from the account of the firm. Several commissions and omissions were alleged against respondent No.1 to be contrary to the agreement of LLP. It was also alleged by the applicant that respondent No.2 who was one of the founding partners started to connive with respondent No.1 and resorted to malicious conduct against the interests of the firm as well as of the applicant. It was alleged that only money which came to the firm was the sum of Rs.45.00 crores

contributed by the applicant, besides the initial contribution of Rs.05.00 lakhs made by the other Partners. In the memorandum of application

averments are made to allege as to how the funds were misused or siphoned off to the detriment of the financial interest of the firm. It was alleged

that respondent No.1 in collusion with respondent No.2 siphoned off large amount of Rs.21.18 crores. In this order, those allegations are not detailed

so as not to burden the narration.

3.1.3 Respondent No.1 came to be expelled as Partner from the firm by Resolution-cum-letter dated 24th October, 2016 by applicant and respondent

Nos.2 and 3 on the allegation that respondent No.1 had acted fraudulently and had embezzled the monies from the bank account of the partnership

firm. The expulsion of respondent No.1 came to be recorded in the Minutes of the Meeting of the partnership firm dated 25th October, 2016.

3.2 The events which took place thereafter were as under.

(i) Respondent No.1 filed Civil Miscellaneous Application No.111 of 2016 for measures of interim protection before the Commercial Court,

Ahmedabad under Section 9 of the Act on 08th November, 2016. The relief was claimed thereunder against the applicant as well as respondent Nos.2

and 3.

(ii) On 10th November, 2016 the applicant as well as respondent Nos.2 and 3 collectively invoked arbitration clause under the partnership agreement

and appointed Honourable Judge of the Supreme Court (Retired) as their nominee arbitrator seeking confirmation and/or asking to appoint a co-

arbitrator by the other side.

(iii) The applicant herein filed Civil Miscellaneous Application No.119 of 2016 under Section 9 of the Arbitration Act before the Commercial Court

being the City Civil Court, Ahmedabad, seeking directions against respondent No.1 for depositing the security in the court for the amount allegedly

embezzled by him etc. The said application was later withdrawn.

(iv) In course of hearing of aforementioned Civil Miscellaneous Application No.111 of 2016 which was filed by respondent No.1, respondent No.2

opted to take side of respondent No.1. Alleging approbation and reprobation by respondent No.2, applicant filed application under Section 340 of the

Code of Criminal Procedure, 1973 against respondent Nos.1 and 2 and also filed a criminal complaint, for which F.I.R. was registered on 21st

December, 2016.

(v) Application under Section 9 of the respondent No.1 being Civil Miscellaneous Application No.111 of 2016 came to be dismissed on 29th

December, 2016. Thereafter appeal preferred under Section 37 of the Act against the said order was rejected by this Court on 04th May, 2017.

Special Leave Petition came to be dismissed by the Apex Court.

3.3 Respondent Nos.1 and 2 had in response to the nomination of arbitrator by the applicant as above, had appointed a retired Chief Justice of the

Bombay High Court as their nominee arbitrator. This nominee arbitrator withdrew himself from arbitration proceedings on or around 16th January,

2017. applicant called upon on 17th January, 2017 respondent No.1 to appoint another co-arbitrator. On 16th February, 2017 respondent No.1

appointed a retired Judge of the Supreme Court as co-arbitrator. Arbitrator nominated by the applicant and arbitrator nominated by respondent No.1

failed to appoint the Presiding Arbitrator within the stipulated period of 30 days.

3.3.1 Therefore, the applicant filed application under Section 11 of the Act before the Supreme Court. The Supreme Court by order dated 24th July,

2017 in Arbitration Petition No.14 of 2017 appointed retired Judge of the Supreme Court as the Presiding Arbitrator. It was in the said order dated

24th July, 2017 that the arbitration was considered as international commercial arbitration by the Apex Court. Thus, the Arbitral Tribunal stood

constituted with three members as above. It began hearing of the arbitration proceedings holding its first meeting on 29th August, 2017.

3.3.2 On the same day of the first hearing, that is on 29th August, 2017, the applicant â?" claimant moved an application for interim protection before

the Arbitral Tribunal under Section 17 of the Act. Thereunder the applicant â?" claimant asked for various reliefs against respondent Nos.1 and 2.

These reliefs were similar to one prayed in the present application under Section 9. Thereafter following pleadings were filed before the Arbitral

Tribunal â?" (i) Application under Section 17 of the Act filed by the Claimant along with documents, (ii) Additional documents in support of the Section

17 application filed by the Claimant, (iii) Statement of Claim along with supporting documents filed by the Claimant, (iv) Application under Section 17

of the Act filed by the Respondent No.2, which the Respondent No.2 also sought to be treated as his reply to the Claimant's Section 17 application, (v)

Documents in support of the Respondent No. 2's Section 17 application filed by the Respondent No. 2, (vi) Reply to Claimant's Section 17 application

filed by the Respondent No. 1 along with certain documents and (vii) Reply to the Claimant's Statement of Claim filed by the Respondent No. 2.

3.3.3 Thus, application under Section 17 was filed by the applicant before the Arbitral Tribunal and respondent No.1 had also filed his Section 17

application separately. There were two applications under Section 17 by different parties before the Arbitral Tribunal and the replies therein were

filed.

3.3.4 applicant has stated that hearings in the arbitration took place on 29th August, 2017, 03rd October, 2017, 15th October, 2017, 22nd October, 2017

and 23rd October, 2017 and the arguments on the applicant's claimant's application under Section 17 were heard by the Arbitral Tribunal. The

tribunal had reserved pronouncement of the order in the said Section 17 application. At this stage, the Presiding Arbitrator who was appointed by the

Supreme Court by order dated 24th April, 2017, by e-mail communication dated 11th November, 2017 expressed his inability to continue in the

arbitration proceedings.

3.3.5 As the co-arbitrators failed to decide on the appointment of Presiding Arbitrator, applicant approached the Supreme Court. By order dated 04th

December, 2017 the Apex Court appointed another retired Judge of the Supreme Court as new Presiding Arbitrator. It may be stated that against the

Presiding Arbitrator who came to be appointed by aforesaid order dated 04th December, 2017 by the Supreme Court, the applicant made allegations

at the subsequent stages by addressing letter dated 28th November, 2018, the details of which are referred to hereinafter. By order dated 10th

December, 2017, the re-constituted Arbitral Tribunal set out a time-table for rehearing of the application under Section 17 filed by the applicant.

3.3.6 Noticeably, on 02nd November, 2018 applicant's claimant's application under Section 17 of the Act was heard and order was reserved by

the Arbitral Tribunal. In the subsequent meetings which were scheduled on 17th, 18th and 19th December, cross-examination of claimant's

witness named one Shri Colonel R.K. Singh was mid-way. Soon thereafter on 28th November, 2018 the applicant's claimant addressed the

aforementioned letter making allegations against members of then constituted

tribunal, which led to withdrawal by co-arbitrator and the Presiding Arbitrator.

3.3.7 On 24th January, 2019 Shri Andre Yeap, the nominee arbitrator of the applicant addressed a letter to Shri Vinayak Pradhan requesting said

Mr.Pradhan on behalf of himself as well as the other co-arbitrator Honourable Mr.Justice G.T. Nanavati (Retd.) to act as Presiding Arbitrator. Said

Shri Vinayak Pradhan on the very day, that is on 24th January, 2019, accepted the appointment as Presiding Arbitrator.

3.3.8 It was on 25th January, 2019 that the present application came to be filed before this Court for interim measures of protection under Section 9 of the Act, which was registered on 28th January, 2019.

3.4 Figures on the record of the present application (Annexure-P54, Page 779), detailed letter dated 28th November, 2018 addressed by advocate of

the applicant " claimant to the three members of the Arbitral Tribunal. In this letter, insinuations and tacit, if not direct, allegations came to be made

against the Presiding Arbitrator " the Honourable Judge of the Supreme Court (Retd.) who was appointed by the Supreme Court on 04th

December, 2017. The contents of the said letter are mentioned in the succeeding paragraphs in details.

3.4.1 In the aforementioned letter dated 28th November, 2018, the applicant " claimant in the former part narrated the history of the arbitration and

the constitution of Arbitral Tribunal, that the Arbitral Tribunal was constituted on 24th July, 2017 as per the order passed by the Apex Court in

Arbitration Petition No.14 of 2017, wherein Honourable Judge of the Supreme Court (Retd.) was appointed as Presiding Arbitrator whereas the two

other Honourable Judges (Retd.) of the Supreme Court were the co-arbitrators. It was stated that respondent Nos.1 and 2 previously filed Civil

Miscellaneous Application No.119 of 2016 before the City Civil Court under Section 9 of the Arbitration Act, which was withdrawn and subsequently

application under Section 17 came to be filed by respondent Nos.1 and 2, that this application was heard extensively during the month of October,

2017 and Tribunal reserved its order on 25th October, 2017 in that application under Section 17 of the Act. It was stated that soon after the then

Presiding Arbitrator resigned from the Tribunal, that thereafter the Supreme Court appointed on 04th December, 2017 another Presiding Arbitrator

who was another Honourable Judge of the Supreme Court (Retd.), and that the new Presiding Arbitrator set down time-table for hearing of the

applicant's application under Section 17 of the Act. However, according to the applicant, long date was given.

3.4.2 It was next stated by the applicant that respondent No.1 wanted to secure Rs.17.00 crores procuring certain parcels of land in favour of the

firm, and that despite claimant's objections, the Tribunal permitted respondent No.1 to take necessary steps to procure land parcels in the name of the

firm and to secure such amount. It was suggested by the claimant in paragraph 15 of the said communication dated 28th November, 2018 that, "It

is also noteworthy that the Respondent Nos. 1 and 2 have used any and all means to delay adjudication of Claimant's Section 17 Application and main

arbitral proceedings as well". It was alleged that respondent Nos.1 and 2 sought time and further stated in paragraph 16 that, "However, this

Hon'ble Tribunal was not able to prevent the Respondent No. 1 from delaying and protracting the arbitration proceedings " " ...", and further that

"Hon'ble Tribunal did not give any directions to the Respondent No. 1 and just spent the said two months awaiting response of the Respondent

No.1". It was thereafter sought to be stated by the applicant that parcels of land which the respondent No.1 wanted to bring in for the firm was

much less in value than Rs.17.00 crores as suggested. The applicant in clever language suggested that even after detailed arguments addressed by the

parties, Tribunal took cognizance of frivolous and dilatory e-mail from respondent No.2. It was thereby sought to be suggested that the Arbitral

Tribunal was a participant in prolonging the proceedings.

3.4.3 After narrating the events and making indirect suggestion against functioning of the Tribunal and alleging that hearing of Section 17 applications

was being delayed, the applicant " claimant adverted to allegations about personal incapacity etc. of the Presiding Arbitrator. It was stated in

paragraph 24 of the letter by the applicant thus, "By this time, it became apparent to the Claimant that the Presiding Arbitrator was unfortunately

not keeping well and was unable to recollect arguments etc....". Since learned Presiding Arbitrator, due to ill-health, did not recollect the arguments

heard on claimant's Section 17 application, the matter was effectively re-heard on merits at length and the order was again reserved on 02nd

November, 2018.

3.4.4 It was stated that the time limit of the arbitral award to be rendered by the Tribunal was 12 months, which expired on 05th December, 2018;

however, the Tribunal had failed to adjudicate the claimant's application under Section 17 of the Act. It was alleged that the Tribunal had been acting

in favour of respondent Nos.1 and 2, as stated in paragraph 27 of the letter thus, "The main arbitration proceedings have been delayed due to unfair

leniency by the Hon'ble Tribunal towards the Respondent Nos. 1 & 2 wherein several opportunities have been granted to the Respondent Nos. 1 and

2 to file their respective pleadings without there being any sufficient ground for such indulgence as also by entertaining repeated adjournment requests

at almost every pre-scheduled hearing." The applicant further made suggestive allegations against the Tribunal, the relevant sentence is reproduced

from paragraph 28 of the letter - "This long delay has been compounded by the situation that the Hon'ble Tribunal has been unable to enforce its

directions issued against Respondent Nos. 1 and 2 from time to time and adhere to the schedule fixed by the Tribunal itself only because of the

unnecessary leniency shown by the Hon'ble Tribunal to the Respondent Nos. 1 and 2, who are being treated with obvious preference and to their

advantage."

3.4.5 It was alleged that the Presiding Arbitrator gave long dates and was prolonging the hearing of the decision on application under Section 17 which

was made by the applicant. The Arbitral Tribunal was giving unequal treatment to respondent Nos.1 and 2 and had been acting to their advantage. On

the basis of such bare allegations, it was sought to be suggested by the applicant that due to such functioning of the Tribunal, his application under

Section 17 of the Act did not culminate. It was sought to be argued by the applicant that due to all such things, remedy under Section 17 of the Act

already availed by the applicant before the Arbitral Tribunal had become ineffectual.

3.4.6 It was thereafter stated by the applicant that the Tribunal had failed to dispense justice in fair manner. The applicant "claimant did not give his

consent for extension of time period for the Arbitral Tribunal as contemplated under Section 29(A)

(3) of the Act. In the backdrop and on the premise of the contents of the letter,

the insinuation and allegations, direct or indirect, applicant devoted paragraphs 32 to 36 in the letter under the head "Presiding Arbitrator's Inability to Act" and stated that the Presiding Arbitrator should consider himself to be withdrawn from the arbitration proceedings as Presiding Arbitrator in view of what is stated by the claimant.

3.5 The respondents would indeed emphatically and categorically submit that all the allegations on the conduct and capacity of the Arbitral Tribunal and in respect of the Presiding Arbitrator, were unsubstantiated, unsupported by any material and they were only paper-deep statements which were the insinuations and indirect or direct allegations made against the Presiding Arbitrator for the sake of making, who was a person with all time integrity, commitment and discipline.

3.6 While the aforesaid letter was addressed on 28th November, 2018, it attracted immediate reaction from one of the co-arbitrators, who was nominee of the applicant. The co-arbitrator by letter dated 29th November, 2018 tendered his resignation and withdrew from the Tribunal with immediate effect. It referred to contents of letter dated 28th November, 2018 to state that the allegations were against the whole Tribunal.

3.7 The conduct on part of the applicant in addressing the aforesaid letter dated 28th November, 2018 and his indulgence in making insinuations and allegations, direct and indirect, on the Arbitral Tribunal in general and against the Presiding Arbitrator in particular, led to a sharp reaction from learned Presiding Arbitrator "Honourable Judge of the Supreme Court (Retd.). The Presiding Arbitrator addressed letter dated 01st December, 2018 to deal with and deny all the direct and indirect insinuations and allegations made against him by the applicant in his aforesaid letter. The reply of the Presiding Arbitrator dated 01st December, 2018 is on record of this proceedings (Annexure-P56, Page 792).

3.7.1 The Presiding Arbitrator's reply communication dated 01st December, 2018 specifically denied all the wanton allegations sought to be levelled by the applicant. It was stated that the applicant might be in habit of making baseless statements and allegations to get the order in his favour. It was stated that, "Be sure that such baseless statements and allegations would not count much before the Tribunal consisting of three retired Judges of the Honourable supreme Court". All the allegations were denied. The repetition

of contents of the denial is not considered necessary. The Presiding Arbitrator ultimately showed his disinclination to continue and withdrew from the arbitration.

3.7.2 Followed thereafter another communication dated 03rd December, 2018 by the applicant addressed to the Presiding Arbitrator stating that

highlighted in their earlier letter dated 28th November, 2018 (i) the conduct of respondent Nos.1 and 2 and the unequal treatment being meted out to

respondent Nos.1 and 2 to their advantage in the arbitration proceedings and

(ii) the general health condition and concerns regarding the same, to further state that the Tribunal had ceased to exist and no further order be passed

by the Tribunal in absence of the Presiding Arbitrator who had resigned. It was stated that the applicant had taken steps for reconstitution of the

Arbitral Tribunal. The papers of the arbitral proceedings were collected back.

3.8 Thereafter ensued correspondence dated 04th December, 2018, 15th December, 2018 and 26th December, 2018 between the Presiding

Arbitrator's office who had resigned, and the applicant for return of the papers of the arbitral proceedings. The Presiding Arbitrator returned all

the arbitration papers to the applicant.

3.8.1 In communication dated 26th December, 2018 mentioned above which was by the applicant to the continuing co-arbitrator, it was sought to be

pointed out by the applicant that his nominee arbitrator had resigned from the proceedings on 28th November, 2018 and that the Presiding Arbitrator

had also withdrawn from the arbitral proceedings with effect from 01st December, 2018. The applicant stated in his letter about the said order to state

that "the purported proposed reasoned order" has no sanctity in the eyes of law and any attempt to give effect to such a proposed

reasoned order will only give credence to and substantiate the contents of the applicant-claimant's letter dated 28.11.2018.

3.8.2 In the very letter dated 26th November, 2018, the applicant stated that for the purpose of reconstitution of the Arbitral Tribunal the requisite

steps were already taken as stated in letter dated 03rd December, 2018 and that the applicant "claimant had nominated one Mr. Andre Yeap, SC as

his nominee arbitrator in the present arbitral proceedings. It was stated that the respondents and their respective advocates were also sent a

communication in this regard.

3.8.3 It may be recollected here that the draft order was already issued by the team of two Arbitrators in respect of applicant's application under Section 17 of the Act.

4. Heard learned senior advocate Mr. Shalin Mehta with learned advocate Mr. Parth Contractor for the applicant, learned advocate Mr. G.H. Virk for respondent No.1, learned senior advocate Mr. Nirupam Nanavaty with learned advocate Mr. Himanshu Desai for respondent No.2, learned advocate Mr. M.N. Marfatia for respondent No.3 and learned advocate Mr. P.M. Buch for respondent No.4.

4.1 Learned senior advocate for the applicant, in order to press the prayers, extensively relied on the averments made in the application to submit that

the respondents had acted to the detriment of the firm and that the funds were wasted and siphoned off. It was submitted that the respondents brought

money in the firm to the extent of Rs.05.00 lakhs whereas applicant brought Rs.45.00 crores. Learned senior advocate referred to the bank accounts,

remittance notes, transfer notes, letter of the bank etc., seeking to emphasise that the applicant had brought in more than Rs.45.00 crores for the firm.

He then submitted that there were illegal transfers and withdrawals by the respondents in favour of their family members. applicant alleged that all

those acts amounted to tinkering with the funds of the firm. He sought to rely on the judgment in First Appeal No.668 of 2017 dated 04th May, 2017.

It was further sought to be alleged in the submission that circuitous transactions had taken place at the behest of respondent No.1.

4.1.1 Learned senior advocate next submitted that the Memorandum of Understandings in respect of lands were bogus and did not fulfill the basic

essentials of contract. He also submitted that though the parcels of lands were offered as security by respondent No.1 during hearing of Section 17

application before the Arbitral Tribunal, the lands offered was useless and could not stand as security and that it was not commensurate with the

amounts embezzled by the respondents. It was submitted that the land was not properly valued and respondent No.1 had not provided to the Arbitral

Tribunal the details about the land valuer.

4.1.2 Learned senior advocate for the applicant relied on judgments of Calcutta High Court in Bishnu Kumar Yadav v. M/s. M.L. Soni [2016 SCC

Online Cal 1420, more particularly paragraphs 6, 16 and 17 thereof] as well as in

SREI Equipment Finance Limited v. Ray Infra Services Private

Limited [2016 SCC Online Calcutta 6765] in which it was observed that the Court might entertain an application for interim relief after the constitution

of a Arbitral Tribunal if the Court finds that the circumstances exist which might not rendered the remedy provided under Section 17 of the Act to be

efficacious. A Kerala High Court decision in M. Ashram v. Kasim V.K. [2018 SCC Online Kerala 4913] was pressed into service, in which the

question addressed by that High Court was whether an application under Section 9(1)(ii) of the Act was maintainable seeking an interim measure for

protection after passing the award by the Tribunal. By pressing into service decision of the Delhi High Court in NGC Network India Private Limited v.

Orangefish Entertainment Private Limited being OMP No.326 of 2018 decided on 18th September, 2018 wherein it was held on the facts of that case

that delay and lack of knowledge about the constitution of the Arbitral Tribunal provided sufficient ground to the applicant to approach with application

under Section 9 and in the facts of that case, bar under Section 9(3) of the Act would not apply, it was submitted that the present application is

required to be entertained though application under Section 17 of the Act is filed before the Arbitral Tribunal.

4.2 On behalf of respondent No.1, affidavit-in-reply came to be filed in the present proceedings, it was highlighted that as on the date, the Arbitral

Tribunal comprising of the Presiding Arbitrator one Shri Vinayak Pradhan and co-arbitrators comprising of the Honourable Retired Judge of the

Supreme Court and one Mr.Andre Yeap was continued and was in existence.

It was contended that Section 9(3) envisages that application under Section 9 would not be entertained unless the Court is of the view that the remedy

under Section 17 was not efficacious. It was further pointed out by annexing the e-mail correspondence exchanged between the arbitrators, the

parties and their advocates between 24th January, 2019 to 25th February, 2019 that the Arbitral Tribunal was constituted and had gone in existence.

4.2.1 It was contended on behalf of respondent No.1 that in narrating the events and raising pleadings in the application, the applicant had placed a

convenient version of facts far from correct, which again suffered from vice of suggestio falsi and suppressio veri. It was submitted that the Tribunal

consisting of two Honourable Judges of the Supreme Court (Retd.) and

Honourable Supreme Court Judge (Retd.) as Presiding Arbitrator had to disband itself due to applicant's conduct, who realised that his false case was exposed in the proceedings of Section 17 application and that the relief prayed for therein was on the verge of rejection in view of the witnesses' depositions and cross-examination. It was the case of respondent No.1 that the allegations levelled by the applicant against the Presiding Arbitrator by addressing letter dated 28th November, 2018 were motivated and self-serving to a desired end.

4.2.2 Respondent No.1 quoted the denial of the Presiding Arbitrator contained in his letter dated 01st December, 2018 extracting as under, by pinpointing that the Presiding Arbitrator, who was an Honourable Judge of the Supreme Court (Retd.) and always-and-all-the-time-above board person was drawn into allegations levelled against him by the applicant who himself became unethical in making allegations to serve the self-interests, bringing to disrepute the whole dispute resolving process of arbitration. It appears that it might be your habit to make such baseless statements and allegations to get the order in your client's favour. Be sure that such baseless statements and allegations would not count much before the Tribunal consisting of three retired Judges of the Supreme Court. It is, therefore, quite possible that because of such behaviour, ex-Presiding Arbitrator, .... (Former Judge, Supreme Court of India) was required to withdraw his consent to continue as Presiding Arbitrator.

4.2.3 It was submitted by respondent No.1 that application under Section 17 filed by the applicant before the Arbitral Tribunal was already decided by reasoned order signed and passed by majority members of the Arbitral Tribunal. It was stated that it was decided below applicant's application dated 29th August, 2017 which was not produced and suppressed from this Court in the memorandum of the present application and the list of documents. It was contended that once the order on the application under Section 17 of the applicant was passed and the said proceedings were decided, it was a suppression going to the root of the matter and that the present application is therefore, an attempt to revive Section 17 application already decided as above. In paragraphs 8 onwards of the affidavit, respondent No.1 also dealt with merits to refute the case of the applicant.

4.3 Affidavit-in-reply came to be filed by respondent No.2 also raising a

submission that the majority members of the Arbitral Tribunal had passed a reasoned order on the application under Section 17 of the Act preferred by the applicant before the Arbitral Tribunal and that the said order has not been challenged by the applicant. It was submitted that the said order since signed by the majority members of the Tribunal, would hold field under the Arbitration and Conciliation Act, 1996, until and unless set aside by the appellate court. It was contended that the majority members had signed the order and thereafter the minority resigns, then also such order would hold the field and any other view would frustrate the entire exercise undertaken under Section 17 and the entire purpose would be defeated.

4.4 Learned senior counsels for respondents relied on the contentions in their respective affidavits-in-reply. They pinpointed the aspect that the proceedings of applicant's application under Section 17 of the Act had progressed before the Arbitral Tribunal and the order was drawn and that it was signed by the majority members of the Tribunal. In this regard, in order to submit that the order would bind, the provision of sub-section (3) of Section 15 was referred to, which provides that unless otherwise agreed by the parties, an order or ruling of the Arbitral Tribunal made prior to replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

4.4.1 It is clarified that the above issue or the aspect "whether the order claimed to have been passed" in Application under Section 17 of the Act which was claimed to have been signed by majority arbitrators, stands valid in eye of law or not etc. is not the subject-matter or within the compass of present controversy. Therefore, the Court has only recorded submissions made by the parties in that regard. The said issue is not gone into herein. Nor anything is expressed on merits, and recording of submissions shall not be construed as having gone into merits on that score or expression on merits.

5. While the part of the factual merits and rival submissions on that count are recorded in this order, they are neither elaborated nor are gone into in depth, as in the ultimate analysis of the facts and aspects of the case, and after hearing learned counsels for the parties, the court was of the view that for considering the grantability or otherwise of the prayers, the factual merits were not necessary to be adverted to. It was only to be seen, adjudged

and decided as to whether the test of Section 9(3) of the Act was satisfied in the facts of the case. The court has accordingly not gone into factual merits.

5.1 Now, therefore, the provisions of Section 9 and in particular Section 9(3) may be considered. The Section reads as under.

Section 9. - Interim measures, etc. By Court. - (1) 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 purpose of arbitral proceedings; or

(ii) for an interim measure or 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 authorising for any of the aforesaid purpose any person to enter upon any land or building in 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.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section

(1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court

may determine.

(3) Once the Arbitral Tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that

circumstances exist which may not render the remedy provided under section 17 efficacious.â??

5.1.1 Section 9 thus permits interim measures. A party to the arbitration may seek such interim protective measures either at the stage before the commencement of the arbitral proceedings or post-making of award before it is enforced. However, sub-section (3) is a provision in the nature of exception. There is a mandate not to entertain an application under sub-section (1) of Section 9 once the Arbitral Tribunal has been constituted. The words used are â??the court shall not entertainâ?. The necessary implication is that once the Arbitral Tribunal is constituted by the parties, application under Section 9 would not be entertainable by the Court since the remedy of similar kind under Section 17 of the Act is provided for by the legislature to be resorted to before the Arbitral Tribunal. A rider is also provided in sub-section (3) of Section 9 that if such remedy under Section 17 could be said to be becoming inefficacious, then only the Court may entertain an application under Section 9. In other circumstances, a party has to file an application under Section 17 before the constituted Arbitral Tribunal.

5.1.2 Sub-section (2) and sub-section (3) in Section 9 came to be subsequently introduced by Act No.3 of 2016 with effect from 20th October, 2015.

The object of insertion of both these sub-sections is to see that steps are not unnecessarily resorted to for interim measure under Section 9 or that

Section 9 measures are not unduly protracted by the party who may have obtained the order for interim measures under Section 9 but would while

away the time in commencing the actual arbitral proceedings to continue to enjoy the interim measures. Therefore, by resorting to sub-section (2) in

Section 9, it is provided that if before the commencement of arbitral proceedings a court has passed order of interim measure of protection under sub-

section (1), arbitration proceedings shall have to be commenced within a period of 90 days from the date of such order.

5.1.3 With similar objective, sub-section (3) of Section 9 which is under consideration in this controversy, was also inserted. It provides that no

application would be entertained by the court where arbitration proceedings have commenced. This sub-section (3) and the amendment in that regard

would indicate that the said provision is brought into the statute book so as to give primacy to Section 17 when the arbitration proceedings are pending

before the Arbitral Tribunal. The party is expected to resort to Section 17 for having an interim measure of protection when the arbitration

proceedings are underway. However, a provision is made to mention an exception that in such circumstances where remedy under Section 17 does

not become efficacious, then in such eventuality, application under Section 9 may be entertained by the Court.

5.1.4 The introduction of sub-section (3) to Section 9 in the Act had a purpose. In the Report No.246 of the Law Commission of India (August, 2014)

(Page No.44), it is highlighted that this amendment seeks to reduce the role of the court in relation to the grant of interim measures once the Arbitral

Tribunal has been constituted. The Law Commission stated that after or, once the Tribunal is ceased of the matter, it is most appropriate that the

Tribunal to hear all interim applications. Thus, Section 17 came to be amended to provide the Arbitral Tribunal the same powers as the court would

have under Section 9 of the Act.

5.2 It stands to reason that once the Arbitral Tribunal is constituted, the remedy of interim measures for protection would lie and would have to be

dealt with by the Tribunal with whom the arbitral dispute between the parties is pending and which is well aware of the compass and the canvass of

the controversy to be better equipped and poised to deal with the prayer for interim measures for protection which would raise issues touching the

pending dispute between the parties before the Tribunal.

5.3 The basic postulate is that it would be the constituted Arbitral Tribunal which shall here and taken up all interim applications. Once the arbitration

has commenced, measures of protection by invoking Section 9 cannot be availed of, for, remedy under Section 17 would be specifically available

before the Arbitral Tribunal. Once the arbitration proceedings have commenced, it is considered trite that the parties take up all matters relating to the

subject matter of dispute before the Arbitral Tribunal and does not go to the court on one pretext or other when the arbitration proceedings are

pending.

5.4 The idea is not only to reduce the burden on the courts, but to congregate the determination of the issues relating to subject matter of arbitration

dispute in the matter of interim protective measures, to be decided by the Arbitral Tribunal which is ceased of and which is in know of the compass of

the controversy between the arbitrating parties. For the Court, the discretion to entertain Section 9 application overriding the availability of provision of

Section 17 before the tribunal, could be said to be extremely confined, limited to the ground that Section 17 proceedings may render themselves not

efficacious. Having regard to the nature of provision of Section 9 vis-a-vis that of Section 17, it cannot be said that every case now and then or any

sundry reason, could be viewed as one wherein the remedy under Section 17 could be readily treated as not efficacious.

6. Viewing the facts of the case in the context of aforesaid requirement in sub-section (3) of Section 9 of the Act, it was a submission advanced by

learned senior counsel for the respondents that the Presiding Arbitrator who was Honourable Supreme Court Judge (Retd.), was always-and-all-the-

time-above board person and man of integrity, against whom allegations were raised by the applicant, perhaps deliberately, to divert the arbitral

proceedings which had progressed substantially. It was submitted that the applicant "claimant found that he was unlikely to succeed in his

application under Section 17 of the Act, therefore the applicant adopted different means and address letter dated 28th November, 2018 making

allegations against the Arbitral Tribunal.

6.1 From the facts highlighted in the preceding paragraphs, it clearly appeared that it was a conduct on part of the applicant in addressing letter dated

28th November, 2018 making allegations against the Arbitral Tribunal, resulted into prolongation of the proceedings of application under Section 17

already preferred by the applicant. The allegations made in the aforementioned letter against the members of the Arbitral Tribunal and in particular

Presiding Arbitrator, were not shown to be substantiated by any material. It appeared that they are made for the sake of making in absence of any

material whatsoever.

6.2 The conduct of the applicant could not be brushed aside as of non-bearing nature, when the applicant has justified the filing of the present

application notwithstanding the fact that his application under Section 17 is pending, to put-forth the case that the present application under Section 9 is

required to be entertained. While the entire approach of the party to raise allegations against the arbitrators was deplorable, the act of filing the present

application under Section 9 of the Act wholly lacked in its legal strength when it

could not be suggested by any circumstance, aspect or factor that the remedy of Section 17 already availed would be rendered inefficacious before the Arbitral Tribunal

already constituted. Inefficaciousness is ineffectiveness. In order to maintain an application under Section 9 of the Act when the Arbitral Tribunal is

constituted, what is required in terms of Section 9(3) is that the remedy under Section 17 stands inefficacious, to say ineffective.

6.3 A party who indulges into bare allegations against the arbitrators for alleged inaction and by making allegations of bias and levelling insinuations

without any proof or material, cannot complain at the same time that the proceedings stood protracted and the remedy of application under Section 17

has become inefficacious. Nor the act of making allegations per se against the members of the Arbitral Tribunal by any party to the arbitration could

be viewed as a circumstance rendering the remedy under Section 17 of the Act to be not efficacious. The applicant cannot take advantage of its own

conduct, so as to contend now that Section 9 may be permitted to be invoked even though the proceedings under Section 17 were pending before the

Arbitral Tribunal, which stands constituted.

6.4 It is an admitted position that now the new Arbitral Tribunal has been constituted by the parties to the arbitration. It consist of Vinayak Pradhan as

Presiding Arbitrator and two co-arbitrators, one of whom was earlier nominated Honourable Judge of the Supreme Court (Retd.) and one Mr.Andre

Yeap, who was nominated by the applicant. As the new members of the Arbitral Tribunal have already been chosen by the parties and the parties

have already thereby submitted to the jurisdiction of the new Arbitral Tribunal and that application under Section 17 of the applicant is already made

and pending, it is for the newly constituted Arbitral Tribunal to consider the said application to take to its logical end. It is expected even from the

parties to the arbitration that the proceedings are concluded before the newly constituted Arbitral Tribunal without whiling away the time and in

shortest possible span.

6.5 The members of the newly constituted Arbitral Tribunal were chosen by the parties themselves and the applicant was ad idem in the constitution

of the Arbitral Tribunal. Once the fresh Arbitral Tribunal is constituted and the parties are before it, there is no reason as to why the Tribunal could

not take up and immediately decide the application for interim measures under Section 17 of the Act. It could hardly be contended that before the newly constituted Tribunal, the remedy under Section 17 of the Act is not efficacious and effective so as to lend a justification to invoke and utilise the provisions of Section 9 of the Act before this Court.

No circumstance could be pointed out or found to be existing on the basis of which it could be said that remedy under Section 17 would render not efficacious.

6.6 As the Arbitral Tribunal is now constituted, the question of entertaining application under Section 9 by this Court does not arise as it is not possible in the facts of the case to conclude that proceedings under Section 17 before the new tribunal which are pending would become efficacious which

were never inefficacious at any earlier point of time, but for the conduct of the applicant himself. A lame excuse was sought to be put-forth on behalf

of the applicant that the Arbitral Tribunal has yet not given any definite date. It is always open to the parties including the applicant to approach the

Arbitral Tribunal to request to take up and decide the proceedings of Section 17 at the earliest. The proceedings before the new tribunal could be get

completed. Once the Tribunal is constituted and available and when the application under Section 17 is already moved and pending, the present

application by the applicant before this Court is not well conceived either on facts or in law.

6.7 In addition, what is noticeable is also the aspect that the present Civil Application was somehow opted to be filed by the applicant invoking Section

9 of the Act, at a time when the new Arbitral Tribunal was already constituted, the new Presiding Arbitrator was appointed and the new Tribunal was

fully set to deal with and decide the proceedings before it including the applicant's application under Section 17 of the Act

7. The proceedings under Section 9 are not appellate proceedings. Nor Section 9 of the Act can be converted or used as an appeal when the Arbitral

Tribunal is available to look into the merits for the similar prayers which is pending in this case, or in a given case could be made to the Tribunal, under

Section 17 of the Act.

8. The whole arbitral dispute is pending consideration before the Arbitral Tribunal. The interim measures prayed for by the applicant has a necessary

interaction to the aspects of main controversy. The issues relate to main controversy and the question of interim measures prayed for have to be

decided in that light and context. Therefore when the dispute is already before the Arbitral Tribunal, the proper and expedient remedy for interim

protective measures is, in all ordinary circumstances, under Section 17 of the Act. It is before the Arbitral Tribunal that the dispute between the

parties regarding interim protection could be better appreciated and adjudicated.

8.1 The Arbitral Tribunal who would be in know of the factual canvass of the dispute, would be able to precisely and effectively deal with the prayers

regarding interim measures. The remedy under Section 17 therefore, in that way, could be rather said to be an effective and efficacious remedy to be

properly taken recourse to when the Arbitral Tribunal is constituted. As far as the facts of the present case is concerned, it may be stated at the cost

of the repetition that in the present case such application under Section 17 is not only already made by the applicant, the same was subjected to a

progress before the Arbitral Tribunal to be now concluded to its logical end by the newly constituted Arbitral Tribunal.

9. In view of the above facts and the aspects emerging and for the foregoing reasons and discussion, the present application is not liable to be

entertained and requires to be rejected.

10. While parting, it is required to be observed that the process of arbitration has its own sanctity. The arbitral process is a process in law. It is a

statutory procedure. Provisions of the Arbitration and Conciliation Act, 1996 govern the process. The parties are bound, while choosing the dispute

resolution method of arbitration, by the envisages of law and the ethics of conduct. Any process of law including the arbitration process is not a

trading. Litigants are expected to observe the norms of decency. The facts of the instant case left a prima facie impression that the litigant party

finding himself to be on the backfoot in terms of favourable order and sensing that proceedings may not turn out to be in his favour, proceeded to

make allegations in black and white against the Presiding Arbitrator who was none other than a highly respectable Judge of the Supreme Court

(Retd.).

10.1 It has to be observed that members of the Arbitral Tribunal including the Presiding Arbitrators who withdrew from the Arbitral Tribunal and the

Presiding Arbitrator who walked out pursuant to allegations in letter dated 28th November, 2018, were all retired Honourable Judges of the Supreme Court (Retd.) and stalwarts in the legal field. Levelling allegations and repeating them in the legal pleadings have to be necessarily eschewed. Besides that the approach of the applicant on this count is to be denounced, the conduct of the applicant represents how litigating parties have in the recent times developed a rank commercial mind-set to pursue their commercial interests solely and self-servingly. Such litigants with pelf care little to accord respect to the members of the Honourable Judges, the members of the legal fraternity and legal luminaries chosen by themselves to be their arbitrators or representatives. The affairs of the arbitration have touched the state of nadir at the hands of those who care scant for ethics in litigating, where fairness to legal forums and faith in them are sine qua non.

10.2 The total sequence of events and the conduct of the applicant has contributed only to bring the dispute resolution remedy of arbitration under the Arbitration Act, to a disrepute. The delay whichever occurred is due to the conduct of the parties, to be deprecated. It defeated the very purpose of arbitration which is to bring about an early solution.

10.3 The facts and circumstances not only reveal the above sorry state of affairs, the present application came to be filed by the applicant invoking Section 9 of the Act when the new Arbitral Tribunal was already constituted. The members of the Tribunal and the Presiding Arbitrator were appointed by the parties and application under Section 17 of the Act of the applicant was also pending. In the cumulative circumstances obtained above, the present proceeding could be said to be hardly bona fide and partakes abuse of process of law.

11. Therefore, while dismissing the present application, cost is required to be ordered. The applicant shall pay token cost of Rs.10,000/- (Rupees Ten Thousand Only). This amount of cost shall be paid to the Gujarat High Court Legal Aid Committee within a period of one week and receipt shall be produced with the Registry. The present application stands dismissed with cost as above.