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SECTION 9 OF ARBITRATION AND CONCILIATION ACT, 1996 – A DETAILED ANALYSIS

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This article deals with the corresponding provisions in Arbitration Act 1940, Model Law, English legislation, and Act 1996, besides judicial intervention, interim measures, preservation, custody and sale of goods, securing the amount in dispute, Bank guarantee, detention and preservation of property, injunctions, Appointment of Receivers, and guidelines and connected matters.

In India, prior to enactment of Arbitration and Conciliation Act 1996, there exists an Act entitled 'Arbitration Act 1940' and Sections 18 and 41 of the said Act 1940 deals with power of Court to pass interim orders.

The Section 18 of Act 1940 reads as follows:

"*18. Power of Court to pass interim orders.*— (1) Notwithstanding anything contained in Section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or

that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show-cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just".

Section 41 of the Act 1940 reads as follows:

"*41. Procedure and powers of Court.*—Subject to the provisions of this Act and of rules made thereunder—

(a) the provisions of- the Code of Civil Procedure, 1908, (5 of 1908) shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of

the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court: Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters".

Section 18 of Act 1940 was analogous to Order XXXVIII Rule 5 of CIVIL PROCEDURE CODE 1908, while Section 41 made the provisions of CIVIL PROCEDURE CODE in respect of the arbitral proceedings under the Act.

Section 9 of Arbitration and Conciliation Act, 1996 is neither similar to Section 18 of Act 1940 nor Order XXXVIII Rule 5 of CIVIL PROCEDURE CODE, 1908.

Arbitration and Conciliation Act 1996 is based on the UNCITRAL Model Law of 1985.

Provisions in THE MODEL LAW:

Article 9 of UNCITRAL MODEL Law ON International Commercial

Arbitration 1985 reads as follows:

"*Article 9. Arbitration agreement and interim measures by Court:*—It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure".

Article 9 expresses the principle that any interim measures of protection that may be obtained from Courts under their procedural law are compatible with an arbitration agreement. That provision is ultimately addressed to the Courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any Court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a Court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement. Pursuant to Article 1(2), Article 9 is excepted from the general rule according to which the Model Law applies only if the place of arbitration is located in the territory of the enacting State. Therefore—and as several cases illustrate—, Article 9 also applies if the place of arbitration is either undetermined or located in a foreign jurisdiction. The rationale for Article 9 is that the granting of interim measures is sometimes essential to ensure the effectiveness of the Arbitral Tribunal's power to dispose of the merits of the case fully and in an effective manner. Also, the Arbitral Tribunal is sometimes unable to respond effectively to a party's need for interim measures of protection. Examples include situations where a measure is needed prior to the constitution of the Arbitral Tribunal, or where a measure needs to be granted against a third party over which the Arbitral Tribunal has no jurisdiction. As was held in several cases quoting from a leading decision of the English House of Lords, "the purpose of interim measures of protection […] is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute." The concept of an interim measure of protection is not defined in the 1985 version of the Model Law. The "range of measures covered by the provision is a wide one" and includes pre-award attachments, measures relating to the protection of trade secrets and proprietary information, measures relating to the protection of the subject-matter of the dispute and measures intended to secure evidence. The Model Law, as amended in 2006, includes in Article 17(2) a detailed and comprehensive definition of an interim measure, but that provision relates to

measures adopted by Arbitral Tribunals (and not to measures adopted by Courts)

Article 9 was modelled on Article 26(3) of UNCITRAL Arbitration Rules which reads as follows:

"*Interim Measures of Protection*

Article 26

1. At the request of either party, the Arbitral Tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The Arbitral Tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement'.

The above Rules were modified in the year 2010 and the revised Rule 26 reads as follows:

"*Interim measures*

Article 26

1. The Arbitral Tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the Arbitral Tribunal orders a party, for example and without limitation, to:

(a) maintain or restore the *status quo* pending determination of the dispute;

(b) take action that would prevent, or refrain from taking action that is likely to cause,

(i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2(a) to (c) shall satisfy the Arbitral Tribunal that:

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) there is a reasonable possibility that the requesting Party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Arbitral Tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under Paragraph 2(d), the requirements in Paragraphs 3(a) and (b) shall apply only to the extent the Arbitral Tribunal considers appropriate.

5. The Arbitral Tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the Arbitral Tribunal's own initiative.

6. The Arbitral Tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The Arbitral Tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the Arbitral Tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The Arbitral Tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement".

The provisions in English Legislation are Section 12 which reads as follows:

12 Conduct of proceedings, witnesses.—(1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrator or umpire all documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrator or umpire may require.

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the witnesses on the reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation.

(3) An arbitrator or umpire shall, unless a contrary intention is expressed in the arbitration agreement, have power to administer oaths to, or take the affirmations of, the parties to and witnesses on a reference under the agreement.

(4) Any party to a reference under an arbitration agreement may sue out a writ of *subpoena ad testificandum* or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action, and the High Court or a Judge thereof may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before an arbitrator or umpire of a witness wherever he may be within the United Kingdom.

(5) The High Court or a Judge thereof may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an arbitrator or umpire.

(6) The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of—

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) the giving of evidence by affidavit;

(d) examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction;

(e) the preservation, interim custody or

sale of any goods which are the subject-matter of the reference;

(f) securing the amount in dispute in the reference;

(g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, 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; and

(h) interim injunctions or the appointment of a Receiver;

as it has for the purpose of and in relation to an action or matter in the High Court:

Provided that nothing in this sub-section shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid"

Section 9 of the Arbitration and Conciliation Act 1996 as enacted after going through the above provisions, is as follows:

"*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 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 authorising 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".

The powers of the Court, under these provisions, are available only where the place of arbitration is in India. The opening words of this Section 9 *viz*., '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' indicate that an interim measure as contemplated by this provision can be granted by the Court only from the date of the arbitration agreement upto the date of enforcement of the award under Section 36 of the Act 1996. No interim relief can be granted *de hors* these time limits. These powers have been

conferred to meet situations where the interest of justice require that 'before or during the arbitral proceedings or at any time after making the arbitral award but before it is enforced in accordance with Section 36', it is expedient to order interim measures of protection in relation to goods or other property.

Judicial intervention:

Section 5 of Act 1996 says as: 'Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part'.

The purpose of this Section is to 'exclude any general or residual powers given to the Courts in a domestic system which are not listed in this Act.

However, there is an exception to this provision in the shape of Section 37 – Appealable orders, of Act 1996 which reads as:

'*Appeals*

37. Appealable orders.—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under Section 9:

(b) setting aside or refusing to set aside an arbitral award under Section 34.

(2) Appeal shall also lie to a Court from an order of the Arbitral Tribunal------

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or taken away any right to appeal to the Supreme Court'.

Thus, Section 37 gives powers to the aggrieved party to file appeal on any order passed by the Court in either granting or refusing to grant any measure under Section 9.

Article 9 of Model Law - Arbitration agreement and interim measures by Court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure.

Article 9 expresses the principle that any interim measures of protection that may be obtained from Courts under their procedural law are compatible with an arbitration agreement. That provision is ultimately addressed to the Courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any Court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a Court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

Article 9 only addresses the effect of an arbitration agreement by providing that it is not incompatible with such an agreement for a party to request or for a Court to grant an interim measure of protection. Therefore, and as is clear from the Article 9 does not in itself confer on Courts the power to issue interim measures of protection in support of international commercial arbitral proceedings.

The rules governing the power to grant interim measures, the types of measures

available, the conditions under which they may be granted, and the relationship between the Courts' power to issue such measures and that of the arbitrators are thus to be found elsewhere than in Article 9. The fact that none of these issues was addressed in the 1985 version of the Model Law entails that they were, at that time, intended to be governed by domestic law. The situation is slightly different under the Model Law, as amended in 2006:

The rationale for Article 9 is that the granting of interim measures is sometimes essential to ensure the effectiveness of the Arbitral Tribunal's power to dispose of the merits of the case fully and in an effective manner. Also, the Arbitral Tribunal is sometimes unable to respond effectively to a party's need for interim measures of protection. Examples include situations where a measure is needed prior to the constitution of the Arbitral Tribunal, or where a measure needs to be granted against a third party over which the Arbitral Tribunal has no jurisdiction. As was held in several cases quoting from a leading decision of the English House of Lords, "the purpose of interim measures of protection […] is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute."

The concept of an interim measure of protection is not defined in the 1985 version of the Model Law. The "range of measures covered by the provision is a wide one" and includes pre-award attachments, measures relating to the protection of trade secrets and proprietary information, measures relating to the protection of the subject-matter of the dispute and measures intended to secure evidence. The Model Law, as amended in 2006, includes in Article 17(2) a detailed and comprehensive definition of an interim measure, but that provision relates to measures adopted by Arbitral Tribunals (and not to measures adopted by Courts)

Adopted by UNCITRAL on 7 July 2006, the Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards.

The Recommendation encourages States to apply Article II(2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendation encourages States to adopt the revised Article 7 of the UNCITRAL Model Law on International Commercial Arbitration. Both options of the revised Article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favourable law provision" contained in Article VII(1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

Judgments of Hon'ble Supreme Court with regard to judicial intervention:

Lord *Mustill* of House of Lords in the case of *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, 1993 (1) All ER 664, authoritatively stated the law:…. 'the purpose of interim measures of protection …..is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the

substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.'

The Supreme Court of India in the following various decisions indicated about judicial intervention in arbitration matters.

Administration of Justice and Police in Khasi and Janitia Hills Rules, 1937, Rule 36A. Arbitration Act, 1940, Sections 30 and 39. Award filed in Court. Objections rejected by Court. Appeal under Section 39. Dismissed. Revision to High Court under Rules. Division Bench held it maintainable in view of Rule 36A of Rules for the Administration of Justice and Police in Khasi and Janitia Hills, 1937. It is correct. Appeal dismissed. Direction to decide revision on merits as early as possible. [*Shyam Sunder Agarwal and Company v. Union of India*, (1996) 1 Scale 237 = [1996] 1 ALR 153 = [1996] 1 Supreme 375 = [1996] 2 SCJ 40 = [1996] 2 SCC 132 = AIR 1996 SC) 1321(SC)]

The existence of an agreement to refer the dispute to arbitration can be ascertained in the facts and circumstances of the case as it depends on the intention of the parties which is to be gathered from the relevant documents and surrounding circumstances. [*K.K. Modi v. K.N. Modi*, [1998] 1 Scale 391 = [1998] 2 RAJ 1 = [1998] 1 Supreme 484 = [1998] 1 JT 407 = [1998] 3 SCC 573 = AIR 1998 SC 1297(SC)]

A foreign award given after the commencement of the Arbitration and Conciliation Act, 1996 can be enforced only under the 1996 Act. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before coming into force of the new Act (The Arbitration and Conciliation Act, 1996); award given after 1996 Act came into force even in proceedings commenced before can be enforced under old Act and not under new Act. The phrase "in relation to Arbitral proceedings" occurring in Section 85(2) of the Arbitration and Conciliation Act, 1996 would cover not only proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for award becoming decree under Section 17 thereof and also appeal arising there under. *Thyssen Stahlunion Gmbh v. Steel Authority of India*, [1999] 6 Scale 441 = [1999] 3 RAJ 355 = [1999] 8 JT 66 = [1999] 10 Supreme 378 = [1999] 9 SCC 334 = AIR 1999 SC 3923 (SC)]

The fact that earlier application under Section 34 of Arbitration Act, 1940 was got dismissed as not pressed in the teeth of the repeal of the said Act cannot constitute any legal impediment for having recourse to and avail of the avenues thrown open to parties under Section 8 of the Arbitration and Conciliation Act, 1986. Similarly, plea of estoppel have no application in above situation. [*Kalpana Kothari: Parasnath Builders Private LTD. v. Sudha Yadav*, [2001] 3 RAJ 452 = [2001] 3 ALR 487 = [2001] 9 JT 337 = [2001] 8 Supreme 402 = [2001] 7 Scale 560 = [2002] 1 SCC 203 = AIR 2002 SC 404(SC)]

If the arbitral award is contrary to the substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34 of the Act. [*Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, [2003] 3 Supreme 449 = [2003] 2 RAJ 1 = [2003] 2 ALR 5 = [2003] 4 JT 171 = [2003] 4 Scale 92 = [2003] 5 SCC 705 = AIR 2003 SC 2629(SC)]

In absence of an agreement to the contrary, in terms of the provisions of Arbitration Act, 1940 an arbitrator can pass only an interim award or a final award and such awards are enforceable in law. [*M.D., Army Welfare Housing Organisation v. Sumangal*

Services Private Ltd., [2003] 8 Supreme 520 = [2003] 3 ALR 361 = [2003] 3 RAJ 447 = [2003] Supp2 JT 300 = [2003] 8 Scale 424 = [2004] 9 SCC 619 = AIR 2004 SC 1344(SC)]

In an organisation like railways "party" referred to in Section 2(h) read with Section 34(3) Arbitration and Conciliation Act is to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before Arbitrator. [*Union of India v. Tecco Trichy Engineers and Contractors*, [2005] 3 Scale 259 = AIR 2005 SC 1832 = [2005] 4 SCC 239 = [2005] 1 ALR 409 = [2005] 1 RAJ 506 = [2005] 2 Supreme 622 = [2005] 3 JT 426(SC)]

If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the *lis*, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one. [*Transmission Corporation of A.P., Ltd. v. Lanco Kondapalli Power Pvt. Ltd.*, [2006] 1 ALR 1 = [2006] 10 JT 542 = [2006] 1 SCJ 435 = [2006] 1 Supreme 78 = [2006] 1 SCC 540(SC)]

An order passed by a Chief Justice or his nominee under Section 11(6) of Arbitration and Conciliation Act may be a judicial order but same does not take away effect of appellate jurisdiction to be exercised by Court under Section 37(2) of the Act. [*Pandey & Co. Builders Pvt. Ltd. v. State of Bihar*, AIR 2007 SC 465 = [2007] 2 Supreme 261 = [2007] 1 SCC 467(SC)]

Who can make the application to the Court under Section 9 of Act 1996:

Section 9 of Act 1996 can only be invoked by a party to the arbitration agreement by way of an application to the Court. The expression 'party' used in this section is to be understood as defined in Section 2(h) of the Act, 1996, (*i.e.*, "party" means a party to an arbitration agreement), this implies that no person who is not a 'party to the arbitration agreement' is competent to apply to the Court for an interim measure of protection.

The Supreme Court of India has defined who is a 'party' under Section 2(h) of Act 1996 as:

A party to an arbitration agreement can approach Court for interim relief even before arbitration proceedings commence and Court can pass interim orders. Notice to opposite party invoking arbitration clause is not a must to invoke Section 9; but the application under section must manifest intention of applicant to take recourse to arbitral proceedings. [*Sundaram Finance Ltd. v. NEPC India Ltd.*, [1999] 1 Scale 40 = [1999] 1 SCJ 289 = [1999] 1 JT 49 = [1999] 1 ALR 305 = [1999] 1 Supreme 126 = [1999] 1 RAJ 365 = [1999] 2 SCC 479 = AIR 1999 SC 565(SC)]

"party" referred to in Section 2(h) read with Section 34(3) Arbitration and Conciliation Act is to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before Arbitrator. [*Union of India v. Tecco Trichy Engineers and Contractors*, [2005] 3 Scale 259 = AIR 2005 SC 1832 = [2005] 4 SCC 239 = [2005] 1 ALR 409 = [2005] 1 RAJ 506 = [2005] 2 Supreme 622 = [2005] 3 JT 426(SC)]'

Application requirements:

This section has not given requirements of an application to be submitted by a 'party' to the Court. However, the Supreme Court recommended as : 21. There is another aspect which calls for our attention. Section 82 of the 1996 Act gives the High Court power to make rules consistent with the Act. We were informed that all the High Courts have not so far made rules. Whereas

the Section 84 gives the Central Government power to make rules to carry out the provisions of the Act, the High Court should also, wherever necessary, make rules. It would be helpful if such rules deal with the procedure to be followed by the Courts while exercising jurisdiction under Section 9 of the Act. The rules may provide for the manner in which the application should be filed, the documents which should accompany the same and the manner in which such applications will be dealt with by the Courts. The High Courts are, therefore, requested to frame appropriate rules as expeditiously as possible so as to facilitate quick and satisfactory disposal of arbitration cases. [*Sundaram Finance Ltd. v. NEPC India Ltd.*, [1999] 1 Scale 40 = [1999] 1 SCJ 289 = [1999] 1 JT 49 = [1999] 1 ALR 305 = [1999] 1 Supreme 126 = [1999] 1 RAJ 365 = [1999] 2 SCC 479 = AIR 1999 SC 565(SC)]

Court:

For the purpose of arbitration, the term 'Court' has been defined both in the old Act of 1940 and the new Act of 1996.

Arbitration Act 1940:

Section 2(c) of the Act defines Court as: "(c) 'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject- matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Causes Court";

Arbitration and Conciliation Act 1996:

Section 2(e) of Act 1996 defines the term 'Court' as: ":e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes."

The definition of the term 'Court' is both exclusive and inclusive as it particularly includes High Court in exercise of its ordinary original civil jurisdiction and excludes civil Courts of a grade inferior to such principal civil Court and Courts of Small Causes.

Even though the term 'Court' has been considered by the Supreme Court as:

'There has been considerable discussion in the Courts in England and Australia as to what are the essential characteristics of a Court as distinguished from a tribunal exercising quasi-judicial functions. *Vide* 1931 AC 275, - *R. v. London County Council*, 1931-2 KB 215; - *Cooper v. Wilson*, 1937-2 DB 309); - *Huddart Parkar and Co. v. Moorehead*, (1909) 8 CLR 330; and *Rola Co. v. The Commonwealth*, (1944) 69 CLR 185. In the Supreme Court, the question was considered in some fullness in - *Bharate Bank Ltd. v. Employees of Bharat Bank Ltd.*, AIR 1950 SC 188. It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court. [*Virindar Kumar v. State of Punjab*, AIR 1956 SC 153]'

For the purpose of arbitration, the term 'Court' was considered by the Supreme Court as:

'Unlike the 1940 Act, the Arbitrator is entitled to determine his own jurisdiction. In the event, the Arbitrator opines that he has jurisdiction in the matter, he may proceed therewith, which order can be challenged along with the award in terms of Section 34 of the 1996 Act. If the Arbitrator opines that he has no jurisdiction to hear the matter, an appeal lies before the Court. 'Court' has been defined in Section 2(1)(e) of the 1996 Act in the following terms:

> " "Court" means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes;"

It is not disputed before us that the Patna High Court does not exercise any original civil jurisdiction. The definition of "Court" as noticed hereinbefore means the Principal civil Court of original jurisdiction in a district and includes the High Court which exercises the original civil jurisdiction. If a High Court does not exercise the original civil jurisdiction, it would not be a 'Court' within the meaning of the said provision. Constitution of the Courts *vis-à-vis* the hierarchy thereof is governed by the 1857 Act, Section 3 whereof reads as under:

> "*3. Classes of Courts* - There shall be the following classes of civil Courts under this Act, namely:
>
> (a) The Court of the District Judge;
>
> (b) The Court of the Additional Judge;
>
> (c) The Court of the Subordinate Judge; and
>
> (d) The Court of the Munsif."

Chapter III of the 1857 Act relates to ordinary jurisdiction of the civil Courts. Section 18 provides for extent of original jurisdiction of District and Subordinate Judge in the following terms:

> "*18. Extent of original jurisdiction of District or Subordinate Judge.*—Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of Section 15 of the Code of Civil Procedure, 1908 to all original suits for the time being cognizable by civil Courts." [*M/s. Pandey & Co. Builders Pvt. Ltd. v. State of Bihar and another*, AIR 2007 SC 465]

Time Frame:

Section 9 of Act itself has given a time frame when an application has to be filed by a party before the Court as: '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…….'

Procedure:

There is no hard and fast rule or any straight jacket formula about how and when a Court should decide the preliminary issue of jurisdiction first, nor is there any mandatory obligation vast by any law on the Court to do so.

Before the Arbitral Proceedings:

In Section 9 of Act 1996, the expression 'before the arbitral proceedings' has been used. However, in the Act or in the decisions of the Court, no indication was given as to how long before. This aspect has been considered by the Supreme Court as:

'As per the law laid down by this Court in *M/s. Sundaram Finance Ltd* an application

under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In *M/s. Sundaram Finance Ltd.*, itself the Court has said- "It is true 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". Section 9 permits application being filed in the Court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word 'before' means *inter alia*, 'ahead of; in presence or sight of; under the consideration or cognizance of. The two events sought to be interconnected by use of the term 'before' must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or 'within sight' certainty. 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 *M/s Sundaram Finance Ltd.* puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. 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. The purposes of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide 'interim measures of protection'. The order passed by the Court should fall within the meaning of the expression 'an interim measure of protection' as distinguished from an all-time or permanent protection.

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.' [*Ashok Traders v. Gurumukh Das Saluja*, 2004 (1) SCR 404]

Interim measures of protection:

Section 9 empowers remedy in a party to the arbitration proceedings to seek interim measure of protection against a person who need not be either party to the arbitration agreement or to the arbitration proceedings. On a plain reading of Section 9 of the Act and going by the scheme of the said Act, there is no room to hold that by an interim measure under Section 9, the rights of third party, could be interfered with, injuncted or subjected to proceedings under Section 9 of the Act. Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of a party to an arbitration agreement with regard to the subject-matter of the arbitration agreement. This can be only as against the party to an arbitration agreement, or, at best, against any person claiming under him. A third party cannot be subjected to proceedings under Section 9 of the Act, initiated on the basis of an alleged arbitral agreement between the respondents. Therefore, a petition under Section 9 of the Arbitration and Conciliation

Act, against the party to the arbitration agreement, covering Bankers (in respect of Bank guarantees) who are not even party to the consignment agreement and the arbitration clause should not be maintainable. However, Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. That is to say, when a Bank guarantee has been issued by a Bank at the instance of one of the parties to the arbitration agreement, (being part of the contract agreement conditions) and when at the instance of the other party to the arbitration agreement the said Bank guarantee is to be encashed, the aggrieved party who approaches the Court under Section 9 for interim measure, will have to substantiate that they were claiming their right in respect of a portion of the subject-matter of the Arbitration Agreement, as they are affected by encashment of the Bank guarantee, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the third party *i.e.*, Bankers, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration Proceedings. Thus, the precise position on whom a Section 9 application can lie against is far from clear. What is clear is that granting interim measures against a person who has nothing to do with the proceedings, seems a dubious interpretation of Section 9. However, that concern can be addressed by requiring a nexus with the proceedings, and by hearing the person before ordering the measure against him/her or after granting *ad-interim* order. Thus, rather than the test being whether the person is a party to the proceedings or not, the test should be one of establishing a nexus with the proceedings. If a person is likely to affect the arbitration or the subject-matter thereof, a Section 9 application should lie, irrespective of whether he is a party or claiming under a party.

The Supreme Court has analysed the matter relating to Bank guarantees as:

'The rule is well established that a Bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the Bank under a performance guarantee is created by the document itself. Once the documents are in order, the Bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle their disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contract is not barred and the cause of action for the same is independent of enforcement of the guarantee. [*State of Maharashtra and another v. M/s National Construction Company, Bombay and another*, 1996 (1) SCC 735]

However, the Supreme Court has held as:

It is true that the Bank guarantee of Rs.85,000/- contains an express term to the effect that any demand made by the owner shall be conclusive and binding on the Bank notwithstanding any difference between the Owner and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority. Nevertheless, this express term merely reiterates the nature of a Bank guarantee which is payable on demand being made by the beneficiary of the Bank guarantee. A Bank guarantee which is payable on demand implies that the Bank is liable to pay as and when a demand is made upon the Bank by the beneficiary. The Bank is not concerned with any *inter se* disputes between the beneficiary and the person at whose instance the Bank had issued the Bank guarantee. All

the three Bank guarantees which have been invoked are payable on demand. There is, therefore, no merit in the submission that the Bank guarantees have not been properly invoked……The Bank guarantees are unconditional and payable on demand. The circumstances pointed out by learned Counsel for the first-respondent do not constitute a bar on the right of the appellant to encash the Bank guarantees. In the present case there is also no circumstance pointed out which would result in any irretrievable injustice to the first respondent of the kind referred to in the case of *Itek Corporation's* case (supra), if the Bank guarantees are realised. [*National Thermal Power Corporation Ltd. v. M/s Flowmore Private Ltd. and another*, AIR 1996 SC 445]

Contract of bank guarantee is a complete and separate by itself. If enforcement is in terms of the guarantee, Courts must not interfere with enforcement of bank guarantee. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an "on demand bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then Courts must not interfere with the enforcement of bank guarantee. The Court can only interfere if the invocation is against terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an "on demand guarantee" in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an Agreement was not signed, the guarantee could be enforced. The bank guarantee was enforced because the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the bank guarantee was against the terms of the bank guarantee. If it was in terms of the bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court. [*National Highway Authority of India v. Ganga Enterprises*, [2003] 3 RAJ 200 = [2003] 6 Supreme 527 = [2003] Supp1 JT 85 = [2003] 7 Scale 171 = [2003] 7 SCC 410 = AIR 2003 SC 3823 (SC)]

Injunction sought against a beneficiary seeking to enforce his/her rights under a Bank guarantee. Wrap-around agreement Contract for a captive power plant. Award of contract in favour of appellant. Appellant awarded a part of that work to first respondent. Contract was split up into four sub-contracts, *i.e.*, four work/purchase orders. It was a composite contract executable on a turnkey basis. As required by the terms and conditions of the said work/purchase orders, first respondent submitted four Bank guarantees from second respondent Bank. They were unconditional irrevocable Bank guarantees, under which respondent Bank agreed to pay to appellant the amount claimed or demanded by appellant. Appellant had the right to encash any or all of the guarantees for any breach in any of the terms of the four contracts. Bank guarantees were intended for securing the advances paid to first respondent and also for securing due performance of the contract. Appellant having invoked the four Bank guarantees, first respondent invoked the arbitration clause, as provided in the work/purchase orders. First respondent moved an application under Section 9 of the Arbitration Act seeking an interim injunction against appellant restraining them from encashing Bank guarantees. High Court was not justified in granting the injunction as prayed for as High Court erred in interfering with the Bank guarantees and in granting injunction as sought for…….Upon a careful reading of this agreement, the Court

is satisfied that the contract though, for the sake of convenience, was split up into four sub-contracts (*viz*., the four work/purchase orders), was a composite contract executable on a turnkey basis. The terms of this turnkey contract were reduced into writing by the wrap-around agreement of 10.5.2000. The Court is of the definite view that under the wrap-around agreement, the appellant had the right to encash any or all of the guarantees for any breach in any of the terms of the four contracts. Hence, the Court is unable to accept the submission of Mr. *Sorabjee* that the first three Bank guarantees were only for securing the advances paid and that it was only the fourth Bank Guarantee (No.291/99 dated 23.3.2000) that was liable to be called for failure to perform the contract. In fact, an appraisal of the terms of the contract leads the Court to the conclusion that the Bank guarantees were intended for both purposes: for securing the advances paid to the First Respondent and also for securing due performance of the contract…….The Court is *prima facie* not satisfied that performance had been duly and satisfactorily certified. Under the terms of the wrap-around agreement, the appellant was entitled to encash all or any of the Bank guarantees for breach of the First Respondent's obligations under any one of the contracts. It is the case of the appellant that there was no satisfactory performance of the contract, as a result of which, the appellant was justified in encashing the concerned Bank guarantee. Indeed, as per the terms of the Bank guarantee itself; the appellant is the best Judge to decide as to when and for what reason the Bank guarantees should be encashed. Further, it is no function of the Second Respondent-Bank, nor of this Court, to enquire as to whether due performance had actually happened when, under the terms of the guarantee, the Second Respondent-Bank was obliged to make payment when the guarantee was called in, irrespective of any contractual dispute between the appellant and the First Respondent…….As the Court stated repeatedly, the First Respondent can succeed only if the case can be brought under the two accepted exceptions to the general rule against intervention. Evidently, there is no egregious fraud so as to fall within the first exception. Hence, only one more point remains: whether encashment of the guarantees will create special equities (in particular, irretrievable injury) in favour of the First Respondent? The Court is not satisfied on facts that such is the present situation. There is no dispute that arbitral proceedings are pending. In fact, the Court was shown that one of the disputes referred to arbitration is whether the Bank guarantees are *null* and *void*. Further, one of the substantive prayers in the arbitration made on behalf of the First Respondent is to make an award declaring the four Bank guarantees unenforceable, illegal, void and liable to be discharged. Further, there is also a prayer for permanent injunction to restrain the appellant from encashing the Bank guarantees. Therefore, since this prayer is already pending before the Arbitral Tribunal, we see no situation of irretrievable injustice if, at the present moment, the appellant is allowed to encash the Bank guarantees. For justice can always be rendered to the First Respondent, if he succeeds before the Arbitrators. Nor do the Court sees any special equity in favour of the First Respondent, when there is in fact a dispute that performance was *prima facie* not satisfactory, which enabled the appellant to encash all or any of the four Bank guarantees. In this view of the matter, we see no merit in the stand taken by the First Respondent. The Madras High Court erred in interfering with the Bank guarantees and in granting injunction as sought for. In the result, the impugned judgment of the High Court is set aside and the judgment of the learned District Judge, Madurai is affirmed, except with regard to the maintenance of *status quo* directed on the encashment of guarantees. It is made clear that the appellant

is entitled to encash the Bank guarantees and the Second Respondent-Bank shall be free to honour its guarantees, subject to adjustment in the arbitral proceedings. The Bank must honour the Bank guarantee free from interference by the Courts. It is only in a case of fraud of an 'egregious nature' or in case of irretrievable injustice, that the Court should interfere. [*BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd.*, [2006] 2 Scale 186 = AIR 2006 SC 1108 = [2006] 3 SCJ 9 = [2006] 2 JT 192 = [2006] 1 ALR 388 = [2006] 2 Supreme 106 = [2006] 2 SCC 728(SC)]

Securing the amount in dispute in arbitration:

There are no guidelines as to how the power to grant relief of securing the amount in dispute in arbitration is to be exercised by the Court. Therefore, for obtaining an order for 'securing the amount in dispute', it is necessary for the aggrieved party to show that the amount is part the claim. In the absence of which there will be no case for grant of such interim measure. Though the power of the Court under these provisions would comprehend an order of pre-award attachment, the Court may not make such order if the circumstances of the case do not warrant it.

Detention and preservation of property:

A party to an arbitration agreement can approach Court for interim relief even before arbitration proceedings commence and Court can pass interim orders. Notice to opposite party invoking arbitration clause is not a must to invoke Section 9; but the application under section must manifest intention of applicant to take recourse to arbitral proceedings. [*Sundaram Finance Ltd. v. NEPC India Ltd.*, [1999] 1 Scale 40 = [1999] 1 SCJ 289 = [1999] 1 JT 49 = [1999] 1 ALR 305 = [1999] 1 Supreme 126 = [1999] 1 RAJ 365 = [1999] 2 SCC 479 = AIR 1999 SC 565(SC)]

Interim or interlocutory Injunctions:

Section 9(ii) (d) and (e) of the Act, 1996 empower the Court to order interim measures of protection in respect of interim injunctions or such other interim measure of protection as may appear it to be just and convenient. For this purpose, the Court has been empowered with the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. An interlocutory injunction is an order of the Court, couched in negative language, tailored for protecting the property or the rights of the parties from prejudice, pending the resolution of the dispute. An interlocutory injunction is a discretionary remedy. An interim injunction can only be granted in respect of enforcement or protection of a legal or equitable right. If there is a strong probability of his destroying the incriminating evidence in favour of the case of the applicant, the Courts normally give injunctive relief to the applicant; otherwise the award resulting from the arbitration will not be worth more than the paper on which it is written. In order to get an interim injunction, the first and the foremost requirement is that the petitioner must show that if the interim injunction is not granted it will result in irreparable injury to him, therefore, the burden is on him by evidence or by affidavit or otherwise to show that there is a *prima facie* case in his favour which needs adjudication at the trial. The existence of the *prima facie* right and infraction of the enjoyment of his property or a right is a *sine qua non* for the grant of temporary injunction. Once the Court is satisfied that non-interference by the Court would result in irreparable injury to him, he has to establish that there is no remedy, other than interim injunction, available to him.

The object of the interim measures of protection.

If the interim measure of protection ordered purports to give the same relief as

the Arbitral Tribunal will finally award, it will defeat the entire purpose of arbitration proceedings. In such a situation, the Court should not snatch the decision making power out of the hands of the Arbitral Tribunal, notwithstanding that it can, and should, in the right case, provide reinforcement for the arbitral process by granting interim relief.

Relevant decisions of Supreme Court under Section 9:

During pendency of petition under Section 34 of the Arbitration and Conciliation Act to set aside the award in a Court having jurisdiction, another Court which also has jurisdiction over the subject-matter cannot entertain application under Section 36 to execute the award. [*Khaleel Ahmed Dakhani v. Hatti Gold Mines Company Ltd.*, [2000] 2 Scale 555 = [2000] 3 SCC 755 = AIR 2000 SC 1926 = [2000] 2 RAJ 1 = [2000] 2 Supreme 549 = [2000] 3 JT 492 = [2000] 1 ALR 668(SC)]

Part I of the Arbitration and Conciliation Act, 1996, is to apply also to International Commercial arbitrations which take place out of India, unless the parties by agreement express or implied exclude it or any of its provisions. [*Bhatia International v. Bulk Trading S.A.*, [2002] 2 SCJ 420 = [2002] 1 ALR 675 = [2002] 2 SCR 411 = [2002] 1 RAJ 469 = [2002] 2 Supreme 395 = [2002] 3 JT 150 = [2002] 2 Scale 612 = [2002] 4 SCC 105 = AIR 2002 SC 1432(SC)]

The bar enacted by Section 69 of the Partnership Act does not affect the maintainability of an application under Section 9 of the Arbitration and Conciliation Act. It is a serious matter to appoint a Receiver, on a running business. [*Firm Ashok Traders v. Gurumukh Das Saluja Etc.*, [2004] 1 Supreme 754 = [2004] 1 RAJ 270 = [2004] 2 JT 352 = [2004] 1 ALR 141 = [2004] 1 Scale 297 = [2004] 3 SCC 155 = AIR 2004 SC 1433(SC)]

The Bank must honour the bank guarantee free from interference by the Courts. It is only in a case of fraud of an 'egregious nature' or in case of irretrievable injustice, that the Court should interfere. [*BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd.*, [2006] 2 Scale 186 = AIR 2006 SC 1108 = [2006] 3 SCJ 9 = [2006] 2 JT 192 = [2006] 1 ALR 388 = [2006] 2 Supreme 106 = [2006] 2 SCC 728 (SC)]

It would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the Courts in this connection. [*Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.*, [2007] 7 SCC 125 = AIR 2007 SC 2563 = [2007] 9 JT 147 = [2007] 5 Supreme 844 (SC)]

Guidelines for Interlocutory Interim Injunctions.

(1) The plaintiff has a strong case for trial. In other words, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

In *Hindustan Petroleum Corpn Ltd v. Sriman Narayan*, (2002) 5 SCC 760, the Supreme Court stated that the decision whether to grant an interlocutory injunction has to be taken by the Court at a time when the exercise of the legal right asserted by the plaintiff and if alleged violation are both contested and remained uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. It is

elementary that grant of interlocutory injunction during the pendency of the legal proceedings is a matter requiring the exercise of the discretion of the Court. For exercising the discretion, the Court restated the guidelines set forth in *Dorab Cawasji Warden* case in the following language:

(a) Whether the person seeking temporary injunction has made out a *prima facie* case. This is *sine qua non*.

(b) Whether the balance of convenience is in his favour, *i.e.*, whether it could cause greater inconvenience to him if the injunction is not granted that than the inconvenience which the other side would be put to if the injunction is granted. As to that the governing principle is whether the party seeking injunction could be adequately compensated by awarding damages and the defendant would be in a financial position to pay them.

(c) Whether the person seeking temporary injunction would suffer irreparable injury.

It is not enough for the petitioner to show that he has a *prima facie* case but he has to further show:

(a) That in the event of withholding the relief of interim measures he will suffer an irreparable injury;

(b) That in the event of his success in the arbitration proceedings he will not have the proper remedy, in being awarded adequate damages;

(c) That in taking into consideration the comparative mischief of inconvenience to the parties, the balance of convenience is in his favour or in other words;

(d) That his inconvenience in the event of withholding the relief of interim measures will in all events exceed that of the respondents in case he is not granted relief; and lastly;

(e) The petitioner must show a clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired.

Pre-Award Attachments:

The words 'such other interim measures of protection as may appear to the Court to be just and convenient' in Section 9(ii)(e) appear to have been inspired by similar words in Section 94(e) of the Code of Civil Procedure 1908. In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed…make such other interlocutory orders as may appear to the Court to be just and convenient. This procedure is known as attachment before judgment.

Guidelines:

In *Renox Commercials Ltd. v. Inventa Technology Pvt. Ltd.*, AIR 2000 Mad. 213, on an illuminating review of the earlier dicta, *Karpagavinayagam*, J., of the Madras High Court, has stated the following guidelines to warrant an order of attachment before judgment:

(a) An order under Order XXXVIII, Rule 5 can be issued *only if circumstances exist as are stated therein to the satisfaction of the Court*.

(b) The Court would not be justified in issuing an order for attachment before judgment, or for security *merely because it thinks that no harm would be done thereby or that the defendants would not be prejudiced.*

(c) *The affidavit* in support of the contentions of the applicant *should not be vague and it must be properly verified.* Where it is affirmed true to knowledge or information, *it must be stated as to which portion is true to knowledge and the source of information should be disclosed and the grounds for belief should be stated.*

(d) A mere allegation that the defendant is selling off his properties is not sufficient. *Particulars must be stated.*

(e) An order of attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution, as it may be likely to ruin the reputation of the party against whom the power is exercised. As the Court must act with the utmost circumspection before issuing an order of attachment, *the affidavit filed by the applicant should clearly establish that the defendant, with intent to obstruct or delay the execution of the decree that may be passed against him, is about to dispose of the whole or any part of his property*.

(f) *A mere mechanical repetition of the provisions in the Code or the language therein without any basic strata of truth underlying the allegation or vague and general allegations* that the defendant is about to dispose of the property or to remove it beyond the jurisdiction of the Court, totally unsupported by particulars, *would not be sufficient compliance with Order XXXVIII, Rule 5 of CPC.*

(g) An attachment before judgment is not a process to be adopted as a matter of course. The suit is yet to be tried and the defence of the defendant is yet to be tested. At the nebulous juncture, *the relief that is extraordinary could be granted only if the conditions for its grant, as per the provisions of the CPC, stand satisfied.* This process is never meant as a lever for the plaintiff to coerce the defendant to come to terms. Hence, utmost caution and circumspection should guide the Court.

STATUS QUO ORDERS VIS-À-VIS CONTEMPT JURISDICTION — A CRITICAL STUDY

By

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Very often, we come across "*Status Quo*" orders either of the Sub-ordinate Courts or of the High Courts too, mostly while granting *ex parte* orders in injunction suits. But, while passing *ex parte* "*Status Quo*" orders, generally subject to exception, if any, the nature of the order is only cryptic such as "*Status Quo*" orders or both parties are to maintain *status quo*, leading to several complications as to who among the two whether the plaintiff or defendant is in possession of the property. By and large the law on the subject appears to be a dead letter.

With due respect this vague, nebulous in character of the nature of these "*Status-Quo*" orders without deciding as to who among the parties whether the Plaintiff-Petitioner is in possession or the defendant-respondent is in possession in suits for injunction leading to several complications of Criminal Cases and also resulting in some cases contempt proceedings or for action of disobedience as provided under 39-2A CPC. Hence, in order to avert such complications an honest endeavour is made in my characteristic, forth right, fearless strain, dedicated entirely to the service of law, and to the legal institutions even under the umbrella of Legal Services Authority to enlighten all concerned based on some authorities on this subject of day-to-day occurrence, in the judicial administration.