

**understanding sections 9, 11 and 12 of the arbitration
and conciliation act, 1996 through the scope,
applicability and objects of the act**

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INTRODUCTION

The first codification of the Arbitration and Conciliation Act India was made in 1899. By this enactment, the various provisions of the English enactment were incorporated into Indian law. Then came the Indian Arbitration Act, 1940, which repealed the Arbitration Act of 1899 and the Code of Civil Procedure, 1908 with ss. 89 and 104(1), cls. (a)-(f) and Sch. 2. The Arbitration and Conciliation Act, 1996, updated the Indian Arbitration Act, 1940 in order to bring the law on lines of the Model law of the United Nations Commission on International Trade Law (UNCITRAL).

**SCOPE AND APPLICABILITY OF THE ARBITRATION AND
CONCILIATION ACT, 1996**

The scope of the Arbitration and Conciliation Act, 1996 extends not only to domestic arbitration, but also to international commercial arbitration and enforcement of foreign awards. It also introduces the law relating to conciliation. Part I of the enactment deals with domestic arbitration, part II deals with enforcement of foreign awards, part III deals with conciliation and part IV deals with the supplementary provisions. The applicability of the Arbitration and Conciliation Act, 1996 extends to the whole of India; provided that pt. I, III and IV will extend to the state of Jammu & Kashmir only in so far as they relate to

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international commercial arbitration. Moreover Arbitration and Conciliation Act, 1996 is applicable only to disputes, which are civil in nature.

OBJECTIVES OF THE ARBITRATION AND CONCILIATION ACT, 1996

Objectives of the Arbitration and Conciliation Act, 1996 include consolidation and amending of the law relating to domestic and international commercial arbitration as well as enforcement of foreign arbitral awards, to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration, to provide for arbitral tribunal give reasons for its arbitral award, to ensure that the arbitral tribunal remains within the limits of its jurisdiction, to minimise the supervisory role of the courts in arbitral process, to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceeding to encourage settlement of disputes, to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court, to provide that a settlement agreement reached by the parties as a result of the conciliation proceedings will have the same effect and status as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal and to provide that, for purposes of enforcement of foreign awards every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

ARBITRATION AND CONCILIATION ACT, 1996, s. 9

According to Arbitration and Conciliation Act, 1996, s. 9, 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 s. 36, apply to a court:

- (1) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (2) for an interim measure of protection in respect of any of the following matters, namely:
 - (i) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
 - (ii) securing the amount in dispute in the arbitration;
 - (iii) 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.
 - (iv) interim injunction or the appointment of a receiver; and
 - (v) such other interim measure of protection as may appear to the court to be just and convenient, and the court will have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

SCOPE AND APPLICABILITY OF THE ARBITRATION AND CONCILIATION ACT, 1996, S. 9

To invoke this provision, there should be a dispute which had arisen with respect to the subject matter of the agreement and referable to an arbitral tribunal. Moreover there has to be a manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application under this provision. The issuance of notice in a given case is sufficient to establish the manifest intention to have the dispute referred to an arbitral tribunal. Finally the

application may be entertained under this provision before the court only if in a given case the subject matter of the arbitration comes within its original civil jurisdiction, both pecuniary and territorial¹.

OBJECTIVES AND NATURE OF THE ORDER UNDER ARBITRATION AND CONCILIATION ACT, 1996, S. 9

The interim protection order is granted by the court to protect the interest of the party seeking such order until the arbitral tribunal finally adjudicates the rights, and to ensure that the award passed by the arbitral tribunal is capable of enforcement². The relief sought by an application under Arbitration and Conciliation Act, 1996, s. 9 is neither that in a suit nor under a right arising from contract³. The applicant for an order under this provision should be a party to the arbitration agreement.

LIMITATIONS OF THE ARBITRATION AND CONCILIATION ACT, 1996, S. 9

The provisions under Arbitration and Conciliation Act, 1996, s. 9 may not be used to frustrate the arbitration proceedings. Power to pass orders with respect to interim measures may not be exercised by a court if it would prejudice the powers vested in the arbitrator and render him incapable of resolving the dispute between the parties. It is not permissible for a party to move the court for securing the amount not in dispute in the arbitration nor is court entitled to pass any order where the amount sought to be secured was not in arbitration in

¹ *Harita Finance Ltd vs. ATV Projects India Ltd* 2003(2) Arb LR 376(Mad); *Sundaram Finance Ltd. vs. NEPC India Ltd*, 1999 INDLAW SC 1959, 1999 AIR (SC) 565.

² *National Shipping Company of Saudi Arabia vs. Sentras Industries Ltd* 2004 INDLAW MUM 56, 2004 AIR (Bom) 136 (DB).

³ *Firm Ashok Traders vs. Gurumukh Das Saluja* 2004 INDLAW SC 13, 2004 AIR (SC) 1433.

absence of any reference to arbitration or any intention to do so⁴. To entitle any party to an ad interim injunction, it must not only satisfy the court about its prima facie right, and that the refusal to grant injunction would result in irreparable injury and that balance of convenience lay in favour of granting the injunction rather than refusing it⁵.

DISTINCTION BETWEEN INTERIM MEASURES UNDER ARBITRATION AND CONCILIATION ACT, 1996, SS. 9 AND 11

Under the Arbitration and Conciliation Act, 1996, the arbitral tribunal is empowered by s. 17 to make orders amounting to interim measures. The difference between the two is that s. 17 would operate only during the existence of the arbitral tribunal and its being functional. During that period, the power conferred on the arbitral tribunal under s. 17 and the power conferred on the court under s. 9 may overlap to some extent but so far as the period pre or post the arbitral proceedings is concerned, the party requiring an interim measure of protection will have to approach only the court⁶. This provision permits a party to file an application for interim relief even during subsistence of arbitral proceedings notwithstanding s. 17⁷.

ARBITRATION AND CONCILIATION ACT, 1996, S. 11 PROVIDES FOR APPOINTMENT OF ARBITRATORS

Arbitration and Conciliation Act, 1996, s. 11(1) states that a person of any nationality may be appointed as an arbitrator, except where the party agrees

⁴ *Parmali Wallace Ltd. vs. Union of India* 1998(2) Arb LR 487.

⁵ *Ram Narain Pratap Narain vs. Uttar Pradesh State Electricity Board*, 1982 AIR (All) 14.

⁶ *Firm Ashok Traders vs. Gurumukh Das Saluja*, 2004 INDLAW SC 13, 2004 AIR (SC) 1433.

⁷ *Ashok Leyland Finance Ltd vs. Sanatan Transport Co. pvt Ltd.* 2005(2) Art LR 220 (Bom).

otherwise. S. 11(2) states that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. S. 11(3) provides that in arbitration by three arbitrators, each party has to appoint one arbitrator. The two appointed arbitrators have to appoint a third arbitrator, who is to act as the presiding arbitrator. Where a party fails to appoint an arbitrator within thirty days from the date of their appointment, a party may make a request and then the appointment will be made by the chief justice or by any person or institution designated by him. S. 11(6) provides were, under an appointment procedure agreed upon by the parties-(a) a party fails to act as required under that procedure, or the parties, or the two appointed arbitrators, fails to reach an agreement expected of them under the procedure or a person, including an institution, fails to perform any function entrusted to him or it under the procedure, a party may require the chief justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Chief Justice or his designate while functioning under s. 11(6) is bound to decide whether:

- (1) he has jurisdiction, in the sense whether party-making motion has approached the right high court;
- (2) there is a valid arbitration agreement in terms of s. 7; and
- (3) person before him with the request is a party to the arbitration agreement and there is a dispute/live claim subsisting, which is capable of being arbitrated upon.

S. 11(7) states that a decision of the Chief Justice or any person or institution designated by him is final on a matter entrusted by sub-s. (4) or sub-s. (5) or sub-s. (6).

Sub-s. (8) states that the chief justice in appointing an arbitrator should have due regard to:

- (1) any qualifications required of the arbitrator by the agreement of parties.
- (2) Other considerations as are likely to secure the appointment of an independent and impartial judiciary.

**WHETHER POWER UNDER ARBITRATION AND CONCILIATION
ACT, 1996, S. 11(6) IS ADMINISTRATIVE OR JUDICIAL**

In *Konkan Rly Corporation Ltd vs. Rani Constructions Pvt Ltd*⁸, the court held that the power of chief justice under s. 11(6) is administrative rather than judicial. This decision was overruled in *SBP & Co vs. Patel Engineering Co Ltd*⁹; the majority view was that the power is a judicial power and not an administrative power. It was contended that dragging a party to arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute may certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of arbitration.

In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. Here 'may' should not be treated as shall and it is not mandatory.

**ARBITRATION AND CONCILIATION ACT, 1996, S. 12 DEALS
WITH THE GROUNDS FOR CHALLENGE**

One of the grounds for challenge is the existence of a doubt about the arbitrator's independence or impartiality. S. 12(1) says that when a person is

⁸ 2000 INDLAW SC 29, 2000 (8) SCC 159.

⁹ AIR 2006 SC 450.

approached in connection with his possible appointment as an arbitrator, he is under a duty to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The present Act does not contemplate the removal of an arbitrator by the court, it contemplates the removal of an arbitrator either by the parties themselves or by the Arbitral tribunal. Subject to sub-s. (1), the parties who are free to choose their own tribunal may, provided they act with full knowledge, choose dishonest, partial or interested arbitrators. Sub-s. (2) casts a duty on the arbitrator after his appointment and throughout the arbitral proceedings to make to the parties disclosures, mentioned in sub-s. (1) relating to matters which may have arisen after the appointment began. He may not do so if he has already made the disclosure before the appointment. The appointment of an arbitrator may be challenged on only one or more of the following grounds:

- (1) that circumstances arose which give rise to justifiable doubts as to his independence or impartiality; or
- (2) that he does not possess the qualifications agreed to by the parties.

The appointment may not be challenged on any other grounds. The appointment may be challenged only on the grounds or reasons before the appointment.