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Supreme Court rules that emergency arbitration awards made in India seated arbitrations can be enforced under Section 17(2) of the Arbitration and Conciliation Act, 1996 and no appeal lies under Section 37 therefrom.

Amazon.Com NV Investment Holdings Llc v. Future Retail Limited & Ors.

Citation	Civil Appeal Nos. 4492-4493 of 2021
Date	August 06, 2021
Court	Supreme Court of India
Coram	Hon'ble Mr. Justice R.F. Nariman, Hon'ble Mr. Justice B.R. Gavai

1. FACTUAL MATRIX

1.1 The Appellants ["**Amazon**"] invested INR 1431 Crore in Future Coupons Private Limited ("**FCPL**") based on certain special, material protective/negative rights available to FCPL in Future Retail Limited ("**FRL**"). These covenants *inter alia* included that the Retail Assets of FRL would not be alienated without the prior written consent of Amazon and never to a Restricted Person mentioned under Schedule III *of the Shareholders Agreement ("**SHA**")*. The investment was recorded in the Share Subscription Agreement which stipulated that Amazon's investment in FCPL would flow down to FRL in tune with the agreed commercial understanding.

1.2 Within months of investment, Amazon noticed that the controlling group comprising of promoter/directors of FRL, and its two subsidiary corporations ("**Biyanis**") breached its contractual obligations, and approved transaction relating to the transfer of FRL's Retail Assets to Mukesh Dhirubhai Ambani Group ("**Reliance Industries Group**") which is a *Restricted Person* under the SHA, leading to the dispute. The agreements envisaged settlement of disputes through arbitration conducted under the Singapore International Arbitration Centre ("**SIAC**") Rules seated at New Delhi, with India being the governing law.

1.3 Amazon initiated arbitration proceedings and filed an application seeking emergency interim relief under SIAC Rules on 5 October 2020. Pursuantly, an Emergency Arbitrator ("**EA**") was appointed and granted injunctive relief to Amazon vide an interim award on 25 October 2020. Thereafter, Amazon approached the High Court of Delhi under Section 17(2) of the Arbitration and Conciliation Act, 1996 ("**Act**") to enforce the EA award. The Ld. Single passed an order under Section 17(2) read with Order 39 Rule 2-A of the Code of Civil Procedure, 1908 ("**CPC"**) on 18 March 2021 *inter alia* holding that EA award is an order under Section 17(1) of the Act.

1.4 FRL preferred an appeal against the judgment dated 18 March 2021 under Order 43 Rule 1(3) of the CPC to the Division Bench, which stayed the judgment on 22 March 2021 until next date of hearing. Against this order, Special Leave Petitions were filed before the Supreme Court, which stayed all proceedings before the High Court and set the matter down for final disposal.

2. ISSUES

2.1 Whether the EA award can be said to be an order under Section 17(1) of the Act?

2.2 Whether an order passed under Section 17(2) of the Act in enforcement of the EA award by a learned Single Judge of the High Court is appealable?

3. CONTENTIONS OF THE APPELLANT

A. Issue 1

3.1 Amazon relied on Sections 2(1)(a), 2(1)(c), 2(1) (d), 2(6), 2(8) and 19(2) to argue that the Act reflects the *grundnorm* of arbitration as being party autonomy, which is respected by these provisions and delineated in several judgments such as *Antrix Corporation Ltd.*

v. Devas Multimedia Pvt. Ltd.[1], *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*[2] and *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd*.[3]

3.2 It was contended that a conjoint reading of the aforesaid provisions coupled with there being no interdict, either express or by necessary implication, against an EA would show that an EA's orders/award, if provided for under institutional rules, would be covered by the Act.

3.3 Further, as per Rule 3.3 of the SIAC Rules, the arbitral proceedings in the present case can be said to have commenced from the date of receipt of a complete notice of arbitration by the Registrar of the SIAC, which would indicate that arbitral proceedings under the SIAC Rules commence much before the constitution of an arbitral tribunal under the said Rules. This being the case, when Section 17(1) uses the expression "during the arbitral proceedings", the said expression would be elastic enough, when read with Section 21 of the Act, to include emergency arbitration proceedings.

B. Issue 2

3.4 Amazon submitted that an appeal under Section 37(2)(b) is restricted to granting or refusing to grant an interim measure under Section 17, which would refer to Section 17(1) and not Section 17(2). The Act is a complete code and if an appeal does not fall within the four corners of Section 37, then it is not maintainable, as has been held by several judgments of this Court.

3.5 Appellant then referred to Section 17(2) and argued that enforcement orders were made under the Act and not under the CPC, thus the appeal filed under Order 43, Rule 1(r) would not be maintainable when read with Section 37 of the Act. Amazon also assailed the observations that *group-of-companies* doctrine cannot be invoked as *prima facie* agreements are between different parties, which betrays a complete non-application of mind.

3.6 By virtue of the 2015 Amendment to the Act, a non-obstante clause was added to Section 37(1), thereby making it abundantly clear that unless an appeal falls within the four corners of Section 37, the moment an order is passed under the Act, no other appeal could possibly be filed if it was outside the four corners of Section 37.

4. CONTENTIONS OF THE RESPONDENT

A. Issue 1

4.1 Respondents contended that the "arbitral tribunal" spoken of in Sections 10 to 13, 16, 17, 21, 23, 27, 29A, and 30 of the Act, and referable to Section 2(1)(d) of the Act, is exhaustively defined, which means a sole arbitrator or a panel of arbitrators, which, when read with these provisions, would only include an arbitral tribunal which can not

[1] (2014) 11 SCC 560.
[2] (2016) 4 SCC 126.
[3] (2017) 2 SCC 228.

only pass interim orders, but which is constituted between the parties so that interim and/or final awards can be passed by this very tribunal.

4.2 Respondents further contrasted the language of Section 9(1) with the language of Section 17(1), that Section 17(1) would only apply where a party, during arbitral proceedings, applies to an arbitral tribunal (as defined) for interim relief, which cannot possibly apply to an EA who is admittedly appointed only before an arbitral tribunal is properly constituted. By way of contrast, under Section 9(1), an interim measure by the courts may be availed by a party even before arbitral proceedings commence, up to the stage of enforcement in accordance with Section 36.

4.3 Moreover, the 246th Law Commission Report advocated the amendment of Section 2 of the Act, to include within sub-section (1)(d) a provision for the appointment of an EA. Despite this suggestion being made, Parliament did not adopt the same when it amended the Act in 2015, thereby indicating that such orders would not fall within Section 17(1) of the Act.

B. Issue 2

4.4 Respondent argued that on reading Section 9 together with Section 37 of the Act, it is implied that orders may be made under Section 9 until enforcement of an award in accordance with Section 36. Moreover, Section 36 makes it clear that the contours of Section 37 do not go beyond orders and awards made under the Act. Since orders made in enforcement proceedings are not under the Act but only under the CPC, therefore, in enforcement proceedings – both under Section 17(2) and under Section 36(1) – appeals can be filed from such orders under the CPC.

4.5 Respondents also stressed upon the language of Section 36(1), which made it clear that when a final award is made, it shall be enforced in accordance with the provisions of the CPC in the same manner as if it were a decree of the court, thereby arguing that by a legal fiction, an award is deemed to be a decree for the purposes of enforcement, which would include all purposes, including appeals from orders passed in enforcement proceedings.

4.6 FRL also stressed upon the language of Section 17(2) to indicate that the words "as if" contained in Section 17(2) of the Act contain a legal fiction which, when taken to its logical conclusion, would necessarily mean that enforcement proceedings would be outside the pale of the Act and within the confines of the CPC.

5. JUDGMENT OF THE SUPREME COURT

A. Issue 1

5.1 The Hon'ble Court was persuaded by Amazon's contentions and observed that there can be no doubt that the "arbitral tribunal" as defined under Section 2(1)(d) speaks only of an arbitral tribunal that is constituted between the parties and which can give interim and final relief, "given the scheme of the Act". However, like every other definition section, the definition contained in Section 2(1)(d) only applies "unless the context

otherwise requires". Given that the definition of "arbitration" in Section 2(1)(a) means any arbitration, whether administered by a permanent arbitral institution or not, when read with Sections 2(6), 2(8) and 19(2), would make it clear that even interim orders that are passed by EA under the rules of a permanent arbitral institutions (chosen by the parties), on a proper reading of Section 17(1), be included within its ambit.

5.2 Rejecting Respondent's contentions, the Court observed that it is significant to note that the words "arbitral proceedings" are not limited by any definition and thus encompass proceedings before an EA, which is made lucid with reference to Section 21 of the Act read with the SIAC Rules. The definition of "arbitral tribunal" contained in Section 2(1)(d) should not be read in a manner to constrict Section 17(1), making it apply only to an arbitral tribunal that can give final reliefs by way of an interim or final award as the it would run contrary to objectives of the Act.

5.3 The heart of Section 17(1) is the application by a party for interim reliefs. There is nothing in Section 17(1), which when read with the other provisions of the Act, interdicts the application of rules of arbitral institutions agreed between parties providing for emergency arbitration. This being the position, at least insofar as Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an EA and is not in conflict with the scheme of the Act.

5.4 Since Section 9(3) and Section 17 form part of one scheme, it is clear that an "arbitral tribunal" as defined under Section 2(1)(d) would not apply and the arbitral tribunal spoken of in Section 9(3) would be like the one spoken of in Section 17(1), which certainly includes an EA appointed under institutional rules. Moreover, the introduction of Section 9(2) and 9(3) to the Act would show that the objective was to avoid courts being flooded with Section 9 petitions when an arbitral tribunal is constituted for two good reasons- *one,* that the clogged court system ought to be decongested, and *two,* that an arbitral tribunal, once constituted, would be able to grant interim relief in a timely and efficacious manner.

5.5 A party cannot be heard to say, after it participates in an EA proceeding, having agreed to institutional rules made in that regard, that thereafter it will not be bound by an EA's ruling. It cannot lie in the mouth of FRL to ignore an EA's award by stating that it is a nullity when it expressly agrees (under SIAC Rules) to the binding nature of such award and further undertakes to carry out the said interim order immediately and without delay.

5.6 Even though, the 246th Law Commission Report recommended recognition and enforcement of EA awards/orders under Section 2(1)(d) of the Act and the same was not incorporated in the statute, it does not *ipso facto* rule out the enforceability. As per the decision in *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd*.[4] , the mere fact that a recommendation in a Law Commission Report is not followed by Parliament, would not necessarily lead to the conclusion that what has been suggested by the Law Commission cannot form part of the statute when properly interpreted by the Courts.

[4] (2021) 4 SCC 713.

As such, EA award can be said to be made under Section 17(1) of the Act and can be enforced under the provisions of Section 17(2) of the Act.

B. Issue 2

5.7 The expressions "in relation to" and "any proceedings" would include the power to enforce orders that are made under Section 9(1) and are not limited to incidental powers to make interim orders. Thus, if an order under Section 9(1) is flouted by any party, proceedings for enforcement of the same are available to the court making such orders under Section 9(1). These powers are, therefore, traceable directly to Section 9(1) of the Act – which then looks to the CPC. Thus, an order made under Order 39 Rule 2-A, in enforcement of an order made under Section 9, would also be referable to Section 9(1) of the Act.

5.8 Given the fact that post the 2015 amendment, the Act has provides in Section 17(1) the same powers to an arbitral tribunal as are given to a court under Section 9, it would be anomalous to hold that if an interim order was passed by the tribunal and then enforced by the court with reference to Order 39 Rule 2-A of the CPC, such order would not be preferable to Section 17. Section 17(2) was necessitated because the earlier law on enforcement of an arbitral tribunal's interim orders was found to be too cumbersome.

5.9 There is no doubt that the arbitral tribunal cannot itself enforce its orders, which can only be done by a court with reference to the CPC. But the court, when it acts under Section 17(2), acts in the same manner as it acts to enforce a court order made under Section 9(1). If this is so, then what is clear is that the arbitral tribunal's order gets enforced under Section 17(2) read with the CPC. Even though Section 17(2) creates a legal fiction, this fiction is created only for the purpose of enforceability of interim orders made by the arbitral tribunal. To extend it to appeals being filed under the CPC would be a big leap not envisaged by the legislature at all in enacting the said fiction.

5.10 The Court also observed that Section 37 is a complete code so far as appeals from orders and awards made under the Arbitration Act are concerned and this position has further been strengthened by the addition of the non-obstante clause by the Arbitration and Conciliation (Amendment) Act, 2019. The Supreme Court noted the decisions in *Deep Industries Ltd. V. ONGC*[5]*, BGS SGS Soma JV v. NHPC*[6]*, Kandla Export Corporation v. OCI Corporation*[7]*, and Chintels (India) Ltd. V. Bhayana Builders (P) Ltd* [8]*,* to observe that appeals under Order 43 Rule 1 of CPC is ruled out specifically when it comes to orders for enforcement made under the Act.

5.11 This also follows from the opening words of Section 17(2), namely, "subject to any orders passed in appeal under Section 37..." which demonstrate the legislature's

[5] (2020) 15 SCC 706.
[6] (2020) 4 SCC 234.
[7] (2018) 14 SCC 715.
[8] (2021) 4 SCC 602.

understanding that orders passed in an appeal under Section 37 are relatable only to Section 17(1). A literal reading of Section 17 would show that the grant or non-grant of interim measures under Section 37(2) (b) refers only to Section 17(1) of the Act. Also, in the context of Section 37(2)(b), the entirety of Section 17 was referred to when Sections 17 and 37 were first enacted in 1996. It is only by the 2015 Amendment Act that Section 17 was bifurcated into two sub-sections. What is significant in this context is that no corresponding amendment was made to Section 37(2)(b) to include within its scope the amended Section 17. As such, no appeal lies under Section 37 of the Act against an order of enforcement of EA award made under Section 17(2) of the Act.

6. CONCLUSION

6.1 The Supreme Court set aside the impugned orders passed by the Division Bench and disposed the special leave petitions holding-

- EA award can be said to be made under Section 17(1) of the Act and can be enforced under the provisions of Section 17(2) of the Act.
- No appeal lies under Section 37 of the Act against an order of enforcement of EA award made under Section 17(2) of the Act.

7. PSL Opinion

7.1 The judgment eliminates the dark shadows of doubt and uncertainty looming over recognition and enforcement of emergency arbitration awards in India. It may herald a progressive development of the relatively new, yet effective concept of emergency reliefs, a remedy already in vogue in commercial arbitrations globally. The debate on this contentious issue captured the imagination of academicians and practitioners alike and opinions vacillated radically due to lack of legislative clarity and judicial precedents. The judgment is certainly an expression of highly 'creative', 'purposive', and 'contextual' interpretation and appears to be a step further than merely "ironing out the creases" found in the Act.

7.2 Parties must bear in mind cautiously that Emergency Awards in India seated arbitrations are now enforceable without recourse to any appeal either under the Arbitration Act or the CPC. As such, express reservation must be made in the agreement qua exclusion of EA provisions while choosing institutional rules which provide such emergency interim measures, if parties do not wish to be subjected to such rigors. One vital aspect pertaining to enforceability of EA awards in foreign seated arbitrations remains shrouded in ambiguity though and it may be argued that such awards are enforceable under Section 9 of the Act.

7.3 Moreover, it will be interesting to see how this judgment plays out in ad hoc arbitrations as parties usually refer to the Act to govern proceedings which has no specific provision for EA. By necessary implication, a likely fallout of the judgment may be that a grant or refusal to grant an interim relief by the EA (which is now considered to be an 'arbitral tribunal') may be appealed as per Section 17(2) under Section 37 of the Act. It remains

to be seen whether the deemed ‘legal fiction’ created in favor of enforcement becomes stranger in practical reality and does more harm than good to the cause decongesting courts.