



High Court of Delhi clarifies scope of Section 37 of the Arbitration and Conciliation Act, 1996¹

Brief Facts

Edelweiss Asset Reconstruction Co. Ltd. (“**Appellant**”) filed an appeal (“**Appeal**”) under Section 37 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) before a Single Judge of the High Court of Delhi (“**Court**”) against an order (“**Impugned Order**”) passed in an arbitration between M/s GTL Infrastructure Ltd. (“**Respondent No. 1**”) and M/s GTL Ltd. (“**Respondent No. 2**”). The Impugned Order, which was passed pursuant to an application filed by Respondent No. 2 under Section 17 of the Arbitration Act, directed Respondent No. 1 to pay INR 2.4 billion to Respondent No. 2, and to deposit INR 2 billion in an escrow account to be maintained by Respondent No. 2. The Appellant was not party to the pending arbitration proceedings between the Respondents in which the Impugned Order was passed but contended that it had a first charge over all the movable assets and bank accounts of Respondent No. 1 including the monies which were directed to be paid to Respondent No. 2 under the Impugned Order by virtue of two agreements, i.e., the Trust and Retention Agreement (“**TRA**”) and the Master Restructuring Agreement (“**MRA**”).

Respondent No. 1 filed an appeal against the Impugned Order under Section 37(2) of the Arbitration Act, which appeal was dismissed by order dated 4 March 2020 (“**4 March Order**”). Respondent No. 2 filed an application for enforcement of the Impugned Order under Section 36 of the Arbitration Act. The Appellant was neither impleaded in the first nor the second proceedings. The Appellant filed a suit before the High Court of Bombay seeking *inter alia* a permanent injunction restraining Respondent No. 1 from transferring the amount directed to be paid under the Impugned Order, prior to fully discharging the outstanding dues of the Appellant in terms of the TRA and the MRA (“**Suit**”).

The Respondents challenged the maintainability of the Appeal on the following grounds: (i) Impugned Order is an interim award under Section 31(6) and not an interim order under Section 17 of the Arbitration Act; (ii) Impugned Order stood merged with the 4 March Order; (iii) pendency of the Suit before the High Court of Bombay is a bar to filing the Appeal; and (iv) being a third-party to the arbitration proceeding, the Appellant could not have filed the Appeal.

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Issue (i): Whether the Appeal was maintainable?

Issue (ii): Whether a court, while exercising appellate jurisdiction under Section 37 of the Arbitration Act, can modify an interim order passed by the arbitral tribunal?

Judgment

Issue (i): The Court rejected all the grounds raised by the Respondents and held the Appeal to be maintainable as: (i) the language of the Impugned Order made it clear that it was an interim order under Section 17 of the Arbitration Act, as it used terms such as “*at this stage of the proceedings*” and “*presently in dispute*”; (ii) Appellant was not a party to the proceedings in which the 4 March Order was passed and therefore, it could not be precluded from filing the present Appeal; (iii) the remedy of an appeal available under a statute cannot be denied to an eligible appellant even if the appellant has elected to seek similar reliefs in other proceedings prior to filing the appeal available under the statute. Therefore, according to the Court, the pendency of the Suit before the High Court of Bombay cannot take away the statutory right available under Section 37 of the Arbitration Act; and (iv) the Court concurred with the decision of the High Court of Bombay in **Prabhat Steel Traders Private Ltd. v. Excel Metal Processes Pvt. Ltd.**,² which held that since the arbitral tribunal has the power to grant interim relief under Section 2(1)(h) read with the amended Section 17 of the Arbitration Act, which is capable of affecting the rights of third parties to the arbitration proceedings, an aggrieved third party can file an appeal under Section 37 of the Arbitration Act. It further placed reliance on the Supreme Court’s findings in **SBI v. Ericsson India Ltd.**³ wherein it was held that an arbitral tribunal has no jurisdiction to affect the rights and remedies of third party secured creditors while adjudicating the disputes before it.

Issue (ii): Although the general position of law is that a court is precluded from modifying an arbitral award when challenged under Section 34 of the Arbitration Act, the court can modify the interim order passed under Section 17 of the Arbitration Act while exercising its appellate jurisdiction under Section 37 of the Arbitration Act. The Court relied on the Supreme Court’s judgment in **Tirupati Balaji Developers (P) Ltd. v. State of Bihar**,⁴ to hold that the appellate jurisdiction under Section 37 of the Arbitration Act would include the power to modify an interim order passed by the arbitral tribunal. However, the Court clarified that such a power would not give a *carte blanche* to courts and it ought to be exercised keeping in mind the principles of minimal judicial interference espoused by the Arbitration Act.

The Court modified the Impugned Order and ordered that all payments that were directed to be deposited with Respondent No. 2 or in the escrow account, will be deposited in the account created and maintained in accordance with the TRA, subject to further orders passed by the arbitral tribunal.

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The Court's decision reiterates that the rights of secured creditors of parties ought to be protected despite being third parties to the arbitration proceedings. This will safeguard the interests of third party secured financial creditors and prioritise their claim over that of the unsecured creditors.

Although the present decision has broadened the scope of a court's power while dealing with appeals against interim orders passed by arbitral tribunals, there is no clarification regarding the situations where this will be applicable. This may lead to a surge in applications seeking modifications of interim orders by dissatisfied parties and will possibly result in more judicial interference by courts, consequently undermining the powers of an arbitral tribunal under Section 17 of the Arbitration Act.

Endnotes

- 1 Authored by Ila Kapoor, Partner, Ananya Aggarwal, Principal Associate and Akriti Kataria, Associate; *Edelweiss Asset Reconstruction Company Ltd. v. GTL Infrastructure Ltd. & Anr.*, ARB. A. (COMM) No. 13/2020 & I.A. No. 4322/2020, High Court of Delhi, judgment dated 18 November 2020.
Coram: C. Hari Shankar, J.
- 2 2018 SCC OnLine Bom 2347.
- 3 (2018) 16 SCC 617.
- 4 (2004) 5 SCC 1.

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