HEADS I WIN, TAILS YOU LOSE: A CRITICAL ANALYSIS OF AN UNSUCCESSFUL PARTY'S RIGHT TO SEEK POST-AWARD INTERIM MEASURES UNDER THE INDIAN ARBITRATION ACT

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The issue of an 'unsuccessful' party's right to seek post-award interim measures under the Indian Arbitration Act is currently in legal limbo. High Courts across the country have taken divergent interpretations while granting such measures under Section 9 of the Arbitration Act, and the matter is currently sub-judice before the Supreme Court. On the one hand, the High Courts of Andhra Pradesh, Gujaratand Telangana, endorsing the literal rule of interpretation, have declared that "any party" can seek interim protection after the award is granted since the Arbitration Act makes no such distinction between 'winning' and 'losing' parties. On the other hand, the High Courts of Delhi, Bombay and Karnataka have opined that since interim measures are aimed at 'preserving' the subject matter of an award till it is enforced, only a 'successful party' can benefit from post-award interim relief. However, neither of the approaches is devoid of flaws or impracticalities and fails to consider nuanced situations such as that of 'partially successful' parties or requests for non-prejudicial interim relief. Accordingly, the authors seek to address this legal conundrum and recommend a workable approach for granting post-award interim measures under the Indian Arbitration Act. In sum, the authors argue that any adjudication in this regard cannot solely rely on whether a party has been successful in the arbitration and, instead, must take into account other considerations, such as the nature of the interim relief sought and the varied outcomes of a challenge to the arbitral award.

Keywords: post-award, interim protection, successful party, arbitral award

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I. INTRODUCTION

A distinctive feature of India's Arbitration and Conciliation Act, 1996 ("**Act**"), is the ability of parties to seek interim relief from the courts "*after making of the arbitral award but before it is enforced*".[1] Going one step ahead of the UNCITRAL Model Law,[2] Section 9 of the Arbitration Act provides for such 'post-award measures' in recognition of the need to preserve the subject matter of an award *even after* the culmination of the arbitral proceedings.

At first glance, the provision reads neutrally; "*any party*" may apply to a court and seek post-award interim relief.[3] This literal interpretation of Section 9 of the Act has been endorsed by the High Courts of Andhra Pradesh,[4] Gujarat[5] and Telangana.[6] The rationale behind this is simple since the Act does not distinguish between 'successful' or 'winning' and 'unsuccessful' or 'losing' parties, the remedy of post-award measures should be available to both. In this manner, the Courts have restrained themselves from creating any artificial distinctions in the plain wording of the provision and have accorded primacy to the legislative drafting.

On the other hand, the High Courts of Delhi,[7] Bombay[8] and Karnataka,[9] have taken a far more nuanced approach. Emphasis has been placed on the fact that since interim measures are aimed at 'preserving' the subject matter of an award till it is enforced, only a 'successful party' can benefit from post-award relief. While an unsuccessful party may challenge an award under Section 34 of the Act, setting aside an award does not automatically result in a decree of the claims raised in its favour. Accordingly, the courts have held that any post-award interim measures would not aid an unsuccessful party's eventual relief.

Notably, the Supreme Court is hast to render an authoritative pronouncement. However, as several challenges have emanated from the High Court's decisions, the Supreme Court has clubbed the appeals together and is currently deliberating upon the issue.[10]

In light of the above, this article critically evaluates the divergent approaches to the *locus standi* for seeking post-award measures under Indian law. Part I of the article discusses the decisions of the Bombay, Delhi and Karnataka High Court, whereas Part II analyses the judgments of the Andhra Pradesh, Gujarat and Telangana High Courts in this regard. Notably, while the two streams of decisions reach diametrically opposing conclusions, the authors recognise that neither approach lacks flaws or impracticalities. Accordingly, in Part III of the article, the authors have also considered a possible *middle-ground approach* that factors in various factual scenarios and attempts to produce a workable result. Moreover, the authors have

[1] The Indian Arbitration and Conciliation Act 1996, s 9.
[2] UNCITRAL The Model Law on International Commercial Arbitration (1985) UN Doc A/40/17, Annex I.
[3] The Indian Arbitration and Conciliation Act 1996, s 9.
[4] *I Sudershan Rao v. Evershine Builders Private Limited* [2012] Civ. MA. No. 1362 of 2011 (AP HC,20 June 2012).
[5] *GAIL (India) Limited v. Latin Rasayni* [2014] SCC OnLine Guj 14836.
[6] *Saptarishi Hotels Private Limited v. National Institute of Tourism & Hospitality* [2019] SCC OnLine TS 1765.
[7] *Technimont Private Limited v. ONGC Petro Additions Private Limited* [2020] SCC OnLine Del 653.
[8] *Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited* [2013] SCC OnLine Bom 48.
[9] *Padma Mahadev v. Sierra Construction Private Limited* [2021] Com. App. No. 2 of 2021 (Kar HC, 22 March 2021).
[10] *Home Cares Retail Marts Private Limited v. Haresh N.Sanghavi* (SLP (C) No. 29972 of 2015).

also explored the possibility of 'partially successful parties' and their rights to seek post-award interim relief.

II. SECTION 9 IS A WINNER'S CLUB: DECISIONS OF THE BOMBAY, DELHI AND KARNATAKA HIGH COURTS DECISIONS.

The seminal pronouncement concerning the debate surrounding an unsuccessful party's ability to seek post-award measures is the Division Bench of the Bombay High Court's decision in *Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited* ("***Dirk***").[11] The other judgments discussed in this article mostly rely on or distinguish *Dirk* while putting forward their reasoning.

In *Dirk,* the appellant had raised certain claims before an arbitral tribunal, which had been rejected. Accordingly, the appellant challenged the award under Section 34 of the Act[12] before a Single Judge of the Bombay High Court. The appellant also filed a petition seeking post-award measures under Section 9 of the Act, which the respondent opposed on maintainability. However, the Single Judge chose not to adjudicate upon the issue of maintainability until the challenge to the award was disposed of.

Both the parties, aggrieved by the Single Judge's decision, approached the Division Bench of the High Court in appeal. After extensive deliberation, the Court held that a party against whom an arbitral award has been decided could not seek protection under Section 9 of the Act since:

> *"14. .... An interim measure of protection within the meaning of Section 9(ii) is intended to protect, through the measure, the fruits of a successful conclusion of the arbitral proceedings. A party whose claim has been rejected in the course of the arbitral proceedings cannot obviously have an arbitral award enforced in accordance with Section 36. The object and purpose of an interim measure after the passing of the arbitral award but before it is enforced are to secure the property, goods or amount for the benefit of the party which seeks enforcement."*
>
> [Para 14 in ***Dirk***; *emphasis supplied*]

The Court's rationale was the legislative intent behind post-award measures. Section 9 ensures effective enforcement of the award under Section 36 of the Act- which is the sole prerogative of the 'winning' party.

Additionally, the Courts opined that under Section 34 of the Act, the courts could only set aside or confirm the findings of a tribunal and could not modify or alter the same. Further, merely by setting aside an award, the underlying claims of an unsuccessful party do not automatically get decreed in its favour. Therefore, an unsuccessful party has no interest in the outcome of the Section 34 proceedings for it to be protected by way of interim relief.

[11] cf Dirk (n 8).

[12] Section 34 of the Arbitration Act, which reflects Article 34 of the UNCITRAL Model Law, provides the procedure and grounds for challenging an arbitral award.

The approach of the Bombay High Court was endorsed by the Delhi High Court in *Technimont Private Limited v. ONGC Petro Additions Private Limited* (‘***Technimont***’)[13] In *Technimont,* the respondent had sought an extension over the bank guarantees executed between the parties as interim relief, during the pendency of its challenge to the award Section 34 of the Act. The Delhi High Court relied upon *Dirk’s* clarification that since no sum was due in its favour, it could not seek an extension over a bank guarantee as in interim relief. In particular, the Court clarified that:

> *“69. It follows that till such time there is an adjudication of the counterclaims, in favour of the respondent, no sum is due in praesenti, nor any sum is payable to the respondent, for it to invoke the bank guarantees.”*
>
> [Para 69 in ***Technimon***t]

In a similar vein, the Karnataka High Court in *Padma Mahadev v. Sierra Construction Private Limited (“**Padma Mahadev**”)*[14] rejected a losing party’s request for interim relief, reiterating that

“...(*e)ven if the Court which decides an application made by unsuccessful claimant is satisfied that a part of the claim of the claimant could not have been rejected by the Arbitral Tribunal, at the highest, that part of the award could be set aside, so that the claimant can again take recourse to arbitral proceedings.* (emphasis supplied).”[15]

Therefore*,* per the Court, a losing party would not have enforceable claims even after disposing of a petition under Section 34. Accordingly, it opined that a losing party could not seek recourse under Section 9 of the Act.

Summing up, the decisions mentioned above hold against an unsuccessful party seeking post-award measures since - (i) Section 9 is to be interpreted purposively, keeping in mind the limitations of Sections 34 and 36 of the Act; (ii) the setting aside of an award does not result in the claims being declared in favour of the award-debtor; and (iii) what a party cannot achieve directly through Section 34 proceedings, cannot be achieved indirectly under Section 9 proceedings.

The authors opine that in *most circumstances*, the Court's reasoning holds since it would be against the legislative intent if a party did not succeed before an arbitral tribunal but could still secure a ruling in their favour under the guise of “*interim relief*”. Notably, interim relief is granted to ensure effective *final* relief. However, as pointed out by *Dirk* and the subsequent decisions, setting aside an award does not create any enforceable rights in favour of the award-debtor; it simply means the award rendered is nullity. Therefore, in general, any interim relief that an unsuccessful party may seek under Section 9 has no relation to the outcome of the Section 34 proceedings.

[13] cf Tecnimont (n 7).
[14] cf Padma (n 9).
[15] cf Padma (n 9).

Moreover, allowing an unsuccessful party to pursue such litigation would contravene a few core principles of arbitration, i.e., minimal judicial intervention and speedy resolution of disputes. Hence, the authors accord merit to the Courts' reasoning for most of the part. However, it is opined that there cannot be a *blanket* prohibition on unsuccessful parties seeking post-award interim relief under Section 9, especially when a plain reading of the provision does not warrant such an interpretation.

III. EVERYBODY IS A WINNER, AND THE PRIZE IS POST-AWARD INTERIM RELIEF: APPROACH OF THE ANDHRA PRADESH AND TELANGANA HIGH COURTS.

The first case in the line of judgments upholding the neutrality of Section 9 of the Act is the Andhra Pradesh High Court's decision in *I Sudershan Rao v. Evershine Builders Private Limited* (*"**Sudershan Rao**"*).[16] Here, the respondent had initiated arbitration proceedings over the sale of the disputed property and had sought specific performance from the appellant in this regard. The arbitral tribunal rejected the claim for specific performance but awarded damages to the respondent. Subsequently, the respondent challenged the award under Section 34 of the Act and filed an application under Section 9 of the Act seeking a temporary injunction to restrain the appellant from alienating the property, which the Court granted. As a result, the appellant approached the High Court on the ground that since the arbitral tribunal had rejected the relief of specific performance, the respondent could not secure the relief through post-award proceedings under Section 9 of the Act.

The Andhra Pradesh High Court rejected the appellant's reasoning. It held that the fact that the arbitral tribunal had dismissed the claim for specific performance was of no consequence to grant interim relief since the tribunal's findings were yet to be confirmed in the Section 34 petition. Without expressly considering the issue of 'successful' and 'unsuccessful' parties under Section 9, the Court simply declared that Section 9 permits directions for the preservation of property subject to a final decision under Section 34 of the Act. The Court's reasoning implies that since the courts can modify or reject an award, there is no bar on a 'losing' party from the court for interim ref.

The subsequent judgment for this discussion is the Gujarat High Court's decision *GAIL (India) Limited v. Latin Rasayni (**"GAIL"**)*.[17] In *GAIL*, the arbitration proceedings arose out of disputes with the disconnection of the appellant's gas supply by the respondent. The resultant award was held in favour of the respondent, and the appellant's claim for wrongful disconnection was rejected. Subsequently, the respondent filed an application for interim relief seeking the appellant's immediate restoration of the gas supply by the appellant. The district court granted this, and the order under Section 9 of the Act was accordingly challenged before the High Court.

Unlike *Sudershan Rao*, the Gujarat High Court, in this case, expressly addressed the issue of whether an unsuccessful party may seek post-award measures. Rejecting the appellant's

[16] cf Sudershan (n 4).
[17] cf GAIL (n 5).

contention that the respondent did not possess the requisite *locus standi* to seek interim relief, the Court held that:

> "...(*i)n the opinion of this court, section 9 of the Act does not draw any distinction between the party who has succeeded in the arbitral proceedings and a party who has failed therein. Under the circumstances, either party would be entitled to approach the court seeking an interim measure under section 9 of the Act.*"
>
> [Para 23 in ***GAIL***; emphasis supplied]

Additionally, the Court relied on the fact that, in this case, the appellant had *unilaterally* disconnected the respondent's gas supply post the award without enforcing the award under Section 36 of the Act. Section 36 of the Act stipulates that an award can be enforced only when the time limit for challenging an award under Section 34 of the Act expires.[18] In this vein, the Court opined that the appellant's actions were rightfully restrained since they were contrary to the legislative intent behind Section 36 of the Act.

Following *SudershanRao*,[19] the Telangana High Court iterated a similar opinion in *Saptarishi Hotels Private Limited v. National Ins. It held Tourism & Hospitality* (*"**Saptarishi Hotels**"*).[20] Here, the appellant had its claims rejected by the Tribunal and had, accordingly, filed a petition under Section 34 of the Act before the Commercial Court. The appellant also filed a petition under Section 9 of the Act seeking interim protection from being dispossessed from the suit property, deemed non-maintainable by the Commercial Court.

In the resultant appeal, the Telangana High Court set aside the Commercial Court's order and observed that the courts possess the power to modify an award under Section 34 of the Act. Thus, even a losing party during the pendency of a Section 34 petition cannot be left without remedy and can seek interim protection under Section 9 of the Act when necessary. In this vein, the Court distinguished Dirk and held that:

> *"27. The core issue upon which both the aforestated judgments turned, was the understanding of the Bombay and Delhi High Courts to the effect that the Court exercising jurisdiction under Section 34 of the Act of 1996 would not have the power to modify an arbitral Award. Though the language of Section 34 lends itself to such an interpretation, the practice in reality, in so far as the exercise of jurisdiction under Section 34 is concerned, demonstrates that it is to the contrary and Courts, time and again, interfere with arbitral Awards in exercise of jurisdiction under Section 34 and also modify them."*
>
> [Para 27 in ***Saptarishi Hotels***; emphasis supplied]

[18] The Indian Arbitration and Conciliation Act 1996, s 36.
[19] cf Sudershan (n 4).
[20] cf Saptarishi (n 6).

Reading the judgments as mentioned earlier together, the High Courts of Andhra Pradesh,[21] Gujarat[22] and Telangana[23] broadly state that (i) Section 9, in particular, the phrase "*any party*", is to be accorded a literal interpretation; and (ii) an unsuccessful party's rights are to be protected since the courts may modify the award in its favour under Section 34 of the Act.

With respect to *(i)*, the authors agree with the reasoning adopted by the Courts. A plain reading of Section 9 of the Act does not imply, in any manner whatsoever, that the term "*party*" should be accorded a restrictive meaning. It is trite law that if the words in a statute are plain and unambiguous, they should be expounded in their natural and ordinary sense.[24] Hence, the term 'successful party' should not be read into the abovementioned provision.

However, the authors clarify that the Andhra Pradesh High Court's implicit, and the Telangana High Court's express reliance on the courts' power to modify an award under Section 34 of the Act, is no longer a valid argument. This is because the Supreme Court in *the Project Direction, National Highway No. 45E and 220, National Highways Authority of India v. M. Hakeem,*[25] has explicitly declared that courts do not have any power to modify, vary or revise an award under Section 34 of the Act.

Critics have propounded an additional argument that if an unsuccessful party's rights are not protected during the pendency of the challenge to an award, it will render the party's right to initiate fresh arbitration proceedings and ensure realisable claims, otiose.[26] However, the authors strongly disagree with this reasoning. It is imperative to note that fresh arbitration proceedings are not *automatically* initiated upon setting aside an award. The Act *indicates* that parties may restart the arbitration process once an award is set aside and does not codify the details or procedure. Additionally, the Act does not stipulate a timeline within which fresh proceedings are to be initiated; Section 43 of the Act merely states that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing *limitation.* By necessary implication, in most cases, a party would have up to 3 years after setting aside an award to start fresh proceedings, defeating the purpose of "*interim*" relief.

Notably, even the Andhra Pradesh High Court[27] has acknowledged that the post-award relief under Section 9 is *subject to* the final relief rendered in the corresponding Section 34 challenge to the award. Accordingly, the authors opine that there is no rationale to extend this

[21] cf Sudershan (n 4).
[22] cf GAIL (n 5).
[23] cf Saptarishi (n 6).
[24] *Nathi Devi v. Radha Devi Gupta*, AIR 2005 SC 648.
[25] *Project Direction, National Highway No. 45E and 220, National Highways Authority of India v. M. Hakeem* (2021) 9 SCC 1.
[26] Rohan Tigadi, 'Unsuccessful Party & Post Award Interim Measures' (*India Corp Law*, 5 September 2021) <https://indiacorplaw.in/2021/09/unsuccessful-party-post-award-interim-measures.html#:~:text=Section%209%20of%20the%20Arbitration,post%20award%20interim%20measures%E2%80%9D)> accessed 14 March 2023; Rohan Dembani and Adesh Arora, 'The Sierra Construction Case: Analysis of Judicial Disposal in Denying Interim Protection' (*Competition and Commercial Law Review*, 3 August 2021) <https://www.tcclr.com/post/the-sierra-constructions-case-analysis-of-judicial-disposal-in-denying-interim-protection> accessed 14 March 2023.
[27] cf Sudershan (n 4).

'interim' relief, either under the Act or in case law, *beyond* the Section 34 proceedings till the initiation of a *fresh* arbitration altogether.

Therefore, per the authors, the only argument that remains worth considering is that of literal interpretation since any binary between 'successful' and 'unsuccessful' parties is one of judicial creation.

IV. NEITHER A LOSER NOR A WINNER: ANALYZING THE POSITION OF 'PARTIALLY SUCCESSFUL PARTIES.'

An interesting conundrum is the ability of 'partially successful parties' to seek post-award measures under Section 9 of the Act. This situation arose in *Nussli Switzerland v. Organizing Committee Commonwealth Games ("***Nussli***"),*[28] wherein the appellant had part of its claims accepted in the arbitral award. However, the amount was subsumed into a larger amount awarded to the respondent. In this case, the Delhi High Court categorised the appellant as a 'losing party' since, in a net-net scenario, no sum was payable to the respondent. In this manner, the Court placed reliance on *Dirk* and held that the appellant could not seek interim relief under Section 9 since it did not have an '*enforceable claim*'. However, the authors believe that the Court erred in its approach.

While it is now settled that the courts cannot "*vary, modify or revise*" an award under Section 34 of the Act, certain High Courts have opined that *modifying*an award differs from *partially setting* aside an award. Relying on the principle of severability, the High Courts of Bombay,[29] Delhi[30] and Kerala[31] have observed that if a partial challenge to an award is permissible, so should the partial setting aside of an award. Accordingly, in a situation where an arbitral tribunal has allowed ten claims, the courts are empowered to sever the award and only uphold five claims- whilst declaring that the other five are barred by limitation.

Importing the above observations to *Nussli*, the authors opine that the Court was mistaken in declaring the appellant as a 'losing' party. Therein, the appellant had succeeded before the tribunal, and only the *quantum* of its success was less than the respondents. In light of the above judgments, it was possible for Section 34 to uphold only the appellant's claims and set aside the respondent's claims- thereby converting the appellant into a 'successful party', i.e. one with realisable claims capable of being enforced under Section 36 of the Act. Therefore, the authors believe that in such situations, a 'partially successful' party should be able to seek interim relief *To the extent of* the award rendered in its favour, i.e. they should be treated as 'successful parties' to this end.

[28] *Nussli (Switzerland) Limited v. Organizing Committee Commonwealth Games* [2014] SCC OnLine Del 4384.
[29] *RS Jiwani v. Ircon International* [2010] 1 Mah LJ 547 (FB); *National Highways Authority of India v. Additional Commissioner* [2022] SCC OnLine Bom 1688.
[30] *Union of India v. Alcon Builders Private Limited* [2023] SCC OnLine Del 160.
[31] *Navayuga Engineering Company Limited v. Union of India* [2021] SCC OnLine Ker 5197.

V. THE WAY FORWARD- ADOPTING A MIDDLE GROUND FOR "NON-PREJUDICIAL INTERIM RELIEF'

Harmonising the observations in Parts II, III and IV, the authors believe that, *in general*, an unsuccessful party should not be permitted to seek post-award measures. As stated above, the setting aside of an award does not create any enforceable rights in favour of the award-debtor. Hence, any interim relief (to aid the final relief in the proceeding) granted to the 'losing party' has no relation to the outcome of a challenge to the arbitral award. However, it is equally valid that an absolute restriction is neither supported by a plain reading of the section nor practical.

Accordingly, the authors opine that the correct approach is to consider the *nature* or *type* of relief while dealing with a request for post-award measures. For 'successful parties', i.e., parties with an enforceable claim, generally, all forms of post-award measures would come under the purview of Section 9. This would also apply to a 'partially successful' party *to the extent of* the award rendered in its favour. On the other hand, for 'losing parties', rather than a blanket exemption, it would be prudent for courts to carve out an exception where '***non-prejudicial interim relief***' is being sought.

A prime illustration of what could be considered 'non-prejudicial interim relief' is the case of *Wind World (India) Limited v. Enercon Gmbh ("**Wind World**")*.[32] Here, the Section 9 relief sought by the unsuccessful party was preserving the confidentiality of certain documents until the Section 34 challenge to the award was disposed of. This was a classic situation where the interim relief sought was neither prejudicial to the successful party nor did it create any obstruction to the enforcement of the award. However, the Bombay High Court did not delve into the details and simply dismissed the application based on the dicta in *Dirk*. Nonetheless, the authors believe that cases like *Wind World* demonstrate why the courts cannot dismiss unsuccessful parties altogether from the scope of Section 9.

Another example where the authors believe that an unsuccessful party should be allowed to approach the courts under Section 9 is for factual scenarios akin to the *GAIL*[33]decision. As a recall, here, the successful party had attempted to unilaterally enforce the award through its actions immediately after the pronouncement. Accordingly, the Court had restrained the party since, as per Section 36 of the Act, an award is to be enforced only after the time limit for challenging the award under Section 34 expires. In essence, the Court granted the interim relief sought by the unsuccessful party to preserve the legislative intent behind Section 36 of the Act. This relief cannot be prejudicial to either party and hence the authors believe that such cases should fall under the exception to the general rule for post-award measures.

VI. CONCLUSION

As mentioned above, the question as to whether an unsuccessful party may seek post-award measures under Section 9 of the Arbitration Act is currently pending before the Supreme Court in *Home Cares Retail Marts Private Limited v. Haresh N. Sanghavi*[34]and its corresponding

[32] *Wind World (India) LimitedvEnercon Gmbh* [2017] SCC OnLine Bom 1147.
[33] cf GAIL (n 5).
[34] cf Home Cares (n 10).

tagged petitions. However, a decision in this regard is not expected until the second half of 2023. Therefore, until then, judicial uncertainty prevails due to the various conflicting decisions of the High Courts.

Accordingly, through this article, the authors have critically analysed the divergent approaches surrounding the debate on post-award measures - and have attempted to present a workable solution considering the divergent approaches. As the authors have demonstrated, the situation is not black and white- instead, there are several hues of grey in the form of 'partially' successful parties and 'non-prejudicial relief'. Therefore, the authors believe that rather than categorising petitioners into 'winners' and 'losers', the courts should take a holistic approach which takes into account the various outcomes of the associated challenge to the underlying award and, more importantly- the *nature* of the post-award interim relief sought.