

## Amazon v. Future Retail - The Supreme Court of India upholds the validity of Emergency Arbitral Awards

### I. Introduction

In the last two years, the idea of urgent ad interim and interim reliefs in dispute resolution process have been catapulted to the forefront. Between the first and second wave of the pandemic caused by COVID-19, “urgency” in cases has been the sole criterion for deciding if a case ought to be heard through e-courts.

Until 4 years ago, litigants in India had to necessarily take recourse to Section 9 of the Arbitration and Conciliation Act, 1996 (“**Act**”) for interim reliefs before the Courts prior to constitution of the arbitral Tribunal. However, arbitration institutes such as the Mumbai Centre for International Arbitration and the Indian Council of Arbitration etc. have in line with international arbitration institutions such as the International Centre for Dispute Resolution, the International Chamber of Commerce, the Singapore International Arbitration Centre (“**SIAC**”) and the Hong Kong International Arbitration Centre incorporated a mechanism in their arbitration rules for emergency arbitration, thus, giving litigants an option to urge interim reliefs within the institutional framework prior to the constitution of the arbitral Tribunal. The powers of an emergency arbitrator generally correspond to the powers given to an arbitral Tribunal under the applicable law, however, any orders passed are subject to modification by the arbitral Tribunal once it is constituted.

One such award passed in an emergency arbitration conducted as per SIAC Rules assumed significance before the Indian Courts. In March 2021, Amazon.com NV Investment Holdings LLC (“**Amazon**”) moved the Hon’ble Delhi High Court under Section 17(2) of the Act to enforce an emergency arbitration award dated 25<sup>th</sup> October 2020 (“**Award**”) *inter alia* against the Future Retail Group. The Award was passed by an emergency arbitrator appointed under Schedule 1 of the SIAC Rules. On 18<sup>th</sup> March, 2021, the learned Single Judge passed a detailed judgment giving reasons for an order made under Section 17(2) read with Order XXXIX, Rule 2-A of the Code of Civil Procedure, 1908 (CPC) holding that an emergency arbitrator’s award is an order under Section 17(1) of the Act. This order was challenged by the Future Retail Group before a division bench of the Delhi High Court by way of a first appeal. The Delhi High Court vide order dated 22<sup>nd</sup> March 2021 stayed the order dated 18<sup>th</sup> March 2021. Against the order dated 22<sup>nd</sup> March 2021, appeals being Civil Appeal 4492-4493 of 2021 (“**Appeals**”) came to be filed before the Hon’ble Supreme Court of India (“**Supreme Court**”). These Appeals were heard and finally disposed of vide order dated 6<sup>th</sup> August 2021 as per which, the Supreme Court whilst re-emphasising party autonomy recognised under the Act, held that emergency arbitration awards were

recognised under section 17 of the Act. The Court further observed that such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties.

In this news alert we provide the key observations made by the Supreme Court.

## **II. Summary of the Judgment dated 6<sup>th</sup> August 2021 of the Supreme Court of India.**

### **A. Facts of the case:**

Amazon had entered into three shareholder agreements with Future Retail Limited (“FRL”), Future Coupons Pvt. Ltd. (“FCPL”) and its promoters/directors (collectively referred to as “**Biyani Group**”) (Respondents in the Appeals). The Shareholders’ Agreement dated 12<sup>th</sup> August 2019 was entered into by and between Amazon and the Biyani Group in relation to the Future Retail Limited (“**FRL Agreement**”). Under this Shareholders’ Agreement, FCPL was accorded negative, protective, special, and material rights with regard to FRL including, in particular, FRL’s retail stores. The rights granted to FCPL under this Shareholders’ Agreement were to be exercised for Amazon’s benefit and thus were mirrored in a Shareholders’ Agreement dated 22<sup>nd</sup> August, 2019 entered into between Amazon, FCPL and the Biyani Group (“**FCPL Agreement**”). Amazon agreed to invest a sum of Rs.1431 crore in FCPL based on the rights granted to FCPL under the FRL Agreement and the FCPL Agreement.

The basic understanding between the parties was that Amazon’s investment in the retail assets of FRL would continue to vest in FRL as a result of which, FRL could not transfer its retail assets without FCPL’s consent which, in turn, could not be granted unless Amazon had provided its consent. Further, FRL was prohibited from encumbering/transferring/selling/divesting/disposing of its retail assets to “restricted persons”, being prohibited entities, with whom FRL, FCPL, and the Biyanis could not deal and a list of such persons was set out in the FCPL Agreement. on 29<sup>th</sup> August, 2020, Respondents Nos. 1 to 13 entered into a transaction with the Mukesh Dhirubhai Ambani Group which envisages the amalgamation of FRL with the Mukesh Dhirubhai Ambani Group, the consequential cessation of FRL as an entity, and the complete disposal of its retail assets in favour of the said group.

Amazon initiated arbitration proceedings and filed an application on 5<sup>th</sup> October, 2020 seeking emergency interim relief from the emergency arbitrator under the SIAC Rules in the form of injunctions against the aforesaid transaction. The emergency arbitrator passed an Award in favour of Amazon. The Biyani Group however went ahead with the impugned transaction,

describing the Award as a nullity and the emergency arbitrator as *coram non judice*, in order to press forward for permissions before statutory authorities/regulatory bodies. FRL, consistent with this stand, did not challenge the emergency arbitrator's award under Section 37 of the Act, but instead chose to file a civil suit before the Delhi High Court being C.S. No. 493 of 2020, in which it sought to interdict the arbitration proceedings and asked for interim relief to restrain Amazon from writing to statutory authorities by relying on the emergency arbitrator's order, calling it a "tortious interference" with its civil rights.

Meanwhile, Amazon went ahead with an application filed under Section 17(2) of the Act which was heard and disposed of by a learned Single Judge of the Delhi High Court. Since breaches of the aforesaid Agreements were admitted, the only plea raised was that the emergency arbitrator's award was a nullity. Upon hearing the parties, the learned Single Judge held that the Award was enforceable as an order under the Act.

#### **B. Outcome:**

A Division Bench of the Supreme Court comprising Justice R.F. Nariman and Justice B.R. Gavai considered the following two questions in the Appeals :

- a) **Whether an "award" delivered by an Emergency Arbitrator appointed under Schedule 1 of the SIAC Rules can be said to be an order under Section 17(1) of the Act?**

Answering this question in the affirmative, the Supreme Court held as follows:

- i. A conjoint reading of sections 2(6), 2(8), 19(2) and 21 of the Act reveals that parties are free to agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings. Section 21, which is expressly subject to the arbitration agreement between the parties, provides that arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.
- ii. Placing reliance on a catena of judgments, the Supreme Court emphasised the principle of party autonomy as being one of the pillars of the Act. The Court emphatically held that there is nothing in the Act that prohibits contracting parties from agreeing to a provision for an award by an emergency arbitrator.

- iii. There is nothing in Section 17(1), when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. The words "arbitral proceedings" are not limited by any definition and thus encompass proceedings in an emergency arbitration including interim awards that are passed by emergency arbitrators.
- iv. The introduction of Sections 9(2) and 9(3) was with a view to decongest the court system and for constitution of arbitral tribunals which provide interim reliefs in a timely and efficacious manner. An emergency arbitrator's order would be an order which furthers this objective and gives the parties urgent interim relief in cases which deserve such relief.
- v. After participating in an emergency award proceeding, agreeing to institutional rules made in that regard and undertaking to abide by the award, a party cannot be heard to thereafter claim that it will not be bound by an emergency arbitrator's ruling.
- vi. In the context of reliance placed on law commission reports, the Supreme Court held that merely because recommendations in a Law Commission Report were not followed by Parliament, would not necessarily lead to the conclusion that what has been omitted does not form part of a statute when properly interpreted.

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

Declaring that no appeal lies under Section 37 of the Act against an order of enforcement of an emergency arbitrator's order made under Section 17(2) of the Act, the Supreme Court held as follows:

- i. The 2015 Amendment Act has provided in Section 17(1) the same powers to an arbitral tribunal as are given to a court. Therefore, 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 XXXIX Rule 2-A of the Code of Civil Procedure, such order would not be referable 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. 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).

- ii. Section 17(2) creates a legal fiction. This fiction is created only for the purpose of enforceability of interim orders passed by an arbitral tribunal. To extend it to appeals being filed under the Code of Civil Procedure would be a big leap not envisaged by the legislature at all in enacting the said fiction. The legal fiction created under Section 17(2) for enforcement of interim orders is created only for the limited purpose of enforcement as a decree of the court. To extend this fiction to encompass appeals from such orders is to go beyond the clear intent of the legislature.
- iii. Section 17(1) is a mirror image of Section 9(1) as to the interim measures that can be made. By adding Section 17(2) as a consequence thereof, significantly, no change was made in Section 37(2) (b) to bring it in line with Order XLIII, Rule 1(r). The opening words of Section 17(2), i.e. “subject to any orders passed in appeal under Section 37...” also demonstrates the legislature’s understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1).
- iv. An appeal against an order refusing an injunction may be allowed, in which case subsection (2) of Section 17 then kicks in to enforce the order passed in appeal. Also, the legislature made no amendment to the granting or refusing to grant any measure under Section 9 to bring it in line with Order XLIII, Rule 1(r), under Section 37(1)(b). What is clear from this is that enforcement proceedings are not covered by the appeal provision.
- v. The arbitral tribunal cannot itself enforce its orders, which can only be done by a court with reference to the Code of Civil Procedure. But the court, when it acts under Section 17(2), acts in the same manner as it would act to enforce a court order passed under Section 9(1). If this is so, then what is clear that the arbitral tribunal’s order gets enforced under Section 17(2) read with the CPC.
- vi. Pursuant to the 2019 Amendment Act, it is clear that Section 37 is a complete code so far as appeals from orders and awards made by an arbitral tribunal are concerned.

### **III. Conclusion**

The judgment of the Supreme Court assumes significance as it has not only re-emphasised ‘party autonomy’ as a guiding principle of the Act but has also brought to the fore the option of ‘Emergency Arbitrations’ which, in light of the judgment, are now recognised remedies for interim relief and are enforceable under Indian law. The judgment has been celebrated widely among litigants as well as lawyers given that parties will now be able to avail interim relief expeditiously without having to burden the Courts.

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