

**ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015**  
**THE FATE OF AUTOMATIC STAY ON SECTION 34 PETITIONS FILED POST**  
**AMENDMENT**

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2 Feb 2017

### INTRODUCTION

The Division bench<sup>1</sup> of the Delhi High Court (“HC”) in a batch of Petitions titled, “*Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia & Ardee Infrastructure Pvt. Ltd. v. Yashpal & Sons*”<sup>2</sup> augments more ambiguity to the already existing controversy with regard to the applicability of the amended provisions viz. Section 34 and Section 36 of the Arbitration and Conciliation (Amendment) Act, 2015 (“**The Amendment Act**”).

The HC observed that all petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (“**The Act**”) prior to the amendment i.e. 23.10.2015, would be considered under the unamended provisions of the 1996 Act and consequently, the contesting party would be entitled to automatic stay of enforcement of the award till the disposal of the said petitions.

The Bench keeping Section 26 of The Amendment Act as the axis of the dispute, not only discusses the applicability of the amended Section 34 and Section 36(2), 36(3) of The Amendment Act, but also hinges out the much awaited interpretation of Section 26 of The Amendment Act in regard to arbitral and court proceedings. It thus pivots a clear interpretation of the amended section, thereby adding to the spectrum of conflicting decisions.

### FACTUAL BACKGROUND:

An Arbitration notice was sent on 07.06.2011 by the Respondents. The statement of claim was filed in February 2013 and an interim award was made on 10.07.2014. The final award was made by the Arbitral tribunal on 13.10.2015. The batch petitions challenging the award under Section 34 was however filed on 04.01.2016.

On 31.05.2016, learned Single Judge of the HC passed an order directing the Appellants to deposit Rs. 2.70 crores without prejudice to the rights and contentions of the parties. It was further directed that failure to make such a deposit would result in dismissal of objections filed by the Appellant under Section 34 of The Act whereas successful deposit of the said amount would amount to issuance of notice to the Respondents regarding the objections filed by the Appellants under Section 34.

The Appellants contended that their petitions under Section 34 of The Act shall be governed by the unamended provisions and they shall thus have the right to an automatic stay on the award upon filing the said petitions. Whereas the Respondents argued that the amended provisions shall apply thereby denying an automatic stay to the Appellants and requiring them to deposit Rs.2.70 crores as ordered by the Court.

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<sup>1</sup> Comprising of Hon’ble Mr. Justice BD Ahmed and Hon’ble Mr. Justice Ashutosh Kumar

<sup>2</sup> FAO(OS) no. 221/2016 and FAO(OS) No.222/2016, judgment delivered on 06.01.2017

### ARGUMENTS BY THE APPELLANT:

- i. The Act gives a vested right in the form of an automatic stay on the enforcement of an award to a party filing an objection under Section 34. However, The Amendment Act, by virtue of Section 36(2) and Section 36(3) takes away such right.
- ii. Section 26 of The Amendment Act<sup>3</sup> does not express any intention of retrospective operation; and therefore the amended provisions of Sections 34 and 36 would have a prospective operation and would not be applicable to the present case. In such scenario, Section 6 of the General Clauses Act, 1897<sup>4</sup> would be applicable which states that the repeal of an enactment would not affect any right accrued or acquired under the previous enactment, unless a different intention appears in the repealing act.

### ARGUMENTS BY THE RESPONDENTS:

- i. The legislature in the first half of Section 26 of The Amendment Act has deliberately used the phrase “to arbitral proceedings” instead of “in relation to arbitral proceedings” to limit its scope so that it cannot be expanded to include post arbitration proceedings (including court proceedings).
- ii. Section 6 of the General Clauses Act ought not to be resorted because of the use of the restrictive phrase in Section 26 of The Amendment Act. Section 6 does not apply to the present case as the legislature deliberately kept “post-arbitral proceedings” outside the application of the first part of Section 26 of The Amendment Act.
- iii. Hence, automatic stay can only be viewed as an interim relief and not a right and such relief is not completely taken away but made subject to an order of the Court upon application.

### ISSUES:

Whether there is/was any difference in the expressions “to the arbitral proceedings” and “in relation to arbitral proceedings” appearing in the two parts of Section 26 of The Amendment Act?

### JUDGMENT

The HC observed that if a narrow view of the expression “to the arbitral proceedings” is to be taken, then Section 26 of the Amendment Act is silent on those categories of cases where the arbitral proceedings were commenced prior to 23.10.2015 and where the award was made prior to

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<sup>3</sup>Section 26, Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

<sup>4</sup> Section 6, Effect of repeal. Where this Act, or any 1 [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

23.10.2015, but where either a petition under Section 34 was under contemplation or was already pending on 23.10.2015.

If the applicability of the amendments to both parts of Section 26 is treated differently, it would lead to serious inconsistencies especially in the interplay between Section 9 and 17, where the court proceedings (in relation to arbitral proceedings which commenced before the amendment) would be under Section 9 of the new Amendment Act and the arbitral proceedings (which commenced before the Amendment) would have to be under the old regime (including Section 17).

The **Court further** classified all arbitral proceedings which commenced in accordance with Section 21, prior to 23.10.2015 into three categories:

- a) where the arbitral proceedings had commenced prior to 23.10.2015 and were pending before an arbitral tribunal on 23.10.2015;
- b) where the arbitral proceedings had commenced prior to 23.10.2015 and the award was also made prior to 23.10.2015, but the petition under Section 34 seeking the setting aside of the award was made after 23.10.2015;
- c) Where the arbitral proceedings had commenced prior to 23.10.2015 and not only the award was made prior to 23.10.2015, but the petition under Section 34 had also been instituted before court prior to 23.10.2015.

With respect to these categories the HC opined that if the first part of Section 26 would only deal with the first category of cases i.e. before arbitral tribunals and not to court proceedings, then nothing in Section 26 of the Amending Act shall pertain to the second or third category of cases.

Thus, if the expression 'to arbitral proceedings' used in the first limb of Section 26 is given the same expansive meaning as the expression 'in relation to arbitration proceedings' as appearing in the second limb of Section 26, then, the matter becomes very simple and does not result in any anomaly. It would certainly not be the intention of the legislature to have the arbitral tribunal and the courts apply different standard in relation to the same proceedings.

**HC while** relying on the observations of the Supreme Court in ***Thyssen Stahlunion GmbH v. Steel Authority of India Limited***<sup>5</sup> held with regard to automatic stay that all aspects of enforceability of an award entail an accrued right both; in the person in whose favour the award is made and against whom the award is pronounced and henceforward, an automatic stay on the award upon filing of petition under Section 34 of The Act was an accrued right in favour of the Appellants. Thus, all the arbitral proceedings (the entire gamut, including the court proceedings in relation to proceedings before the arbitral tribunal), which commenced in accordance with the provisions of Section 21 of the said Act prior to 23.10.2015, would be governed, subject to an agreement between the parties to the contrary, by the unamended provisions and, all those in terms of the second part of Section 26, which commenced on or after 23.10.2015 would be governed by the amended provisions.

#### **Analysis:**

Although this decision comes as a refreshing respite for some, it adds to the prevailing confusion infused by the contradictory decisions of various High Courts with regard to the application of the provisions of Section 26 & Section 36 of The Amendment Act, wherein it was opined that 'arbitral

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<sup>5</sup> 1999 (9) SCC 334

proceedings' do not include 'court proceedings' and thus, the amendments would apply to court proceedings but not to arbitral proceedings. These decisions are discussed as follows:

- i. The Division Bench of Kolkata High Court in **Sri Tufan Chatterjee v. Sri Rangan Dhar**<sup>6</sup>, held that even the pending court proceedings relating to arbitration, which were pending as on date when the amendments were notified, must be governed by The Amendment Act and not the unamended one.
- ii. The Madras High Court in the matter of **New Tirupur Area Development Corporation Ltd. v. M/s Hindustan Construction Co. Ltd**<sup>7</sup>, decided against the use of provisions contained in The Amendment Act to court proceedings, for such arbitrations which commenced prior to amendments being notified.
- iii. Bombay High Court, adding to the confusion, held in the matters of **Rendezvous Sports World v. BCCI**<sup>8</sup> that amendments brought to Section 36 of The Act are procedural in nature and further balances the rights of both parties and ordered the BCCI to file an application seeking stay against enforcement of arbitral awards under challenge. This decision is pending adjudication before the Supreme Court of India now.
- iv. Although, The Delhi High Court had previously also taken a view contradictory to that of the **Bombay** High Court and in consonance with the current judgment in the case of **Ministry of Defence, Government of India v. Cenrex SP. Z.O.O. & Ors**<sup>9</sup>, The Court while relying upon Section 6 of the General Clauses Act, came to a conclusion that an Act (or an Ordinance for that matter) cannot have retrospective operation unless so provided in the Act and any vested right in such Act/ provision cannot be deemed to be taken away by means of the amending or the repealing Act.

Amidst the opposing views of different High Courts across the realm, if the ratio of the present case in hand is accepted and followed, then the mere intention and purpose behind the amendment of Section 36 of The Act is lost. Although the present decision may seem plausible enough, but the conflict between these wide-ranging observations and judgments across the nation has to be settled by the Supreme Court at the earliest, giving such polemic it's logical and peaceful conclusion.

*(The author would like to thank Kanika Tandon, Associate of the firm for the valuable assistance in researching for this article.)*



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<sup>6</sup> AIR (2016) Cal 213

<sup>7</sup> Application No. 7674 of 2015 in O.P. No. 931 of 2015

<sup>8</sup> 2016 SCC Online Bom 255.

<sup>9</sup> 2016 (1) Arb LR