

ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

THE SECOND INNINGS: Supreme Court's take on the fate of Automatic Stay granted to Section 34 petitions post the Amendment Act.

Contributed by: Madhu Sweta and Kanika Tandon | 4 April 2018

The controversy pertaining to the amended provisions of Section 36 of the Arbitration and Conciliation (Amendment) Act, 2015 (**"The Amendment Act"**) has finally seen the dawn of the day, settling the existing ambiguity with regard to Section 36 and the mishmashes arising out of the judgment of Delhi High Court (**"HC"**) titled, *"Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia and Ardee Infrastructure Pvt. Ltd. v. Yashpal & Sons"*¹ which was discussed in detail in our previous write-up article² on the same subject.

Recently the Supreme Court (**"SC"**) in the judgment titled, *"Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd"*³ has at last settled the on-going divergence of various High Courts by deciding the Moot Question in hand: **'Whether Section 36, as substituted by the Amendment Act, 2015 would apply in its amended form or original form to pending appeals instituted under Section 34 before the date of amendment, i.e. 23.10.2015?'**

INTRODUCTION

The bone of contention arising out of the foregoing Moot Question stands finally settled by the Supreme Court vide the present verdict, wherein the SC has 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 now be covered under the amended provisions of the Act and consequently, the contesting party would thereby not be entitled to automatic stay of enforcement of the award till the disposal of the said petitions.

Keeping Section 26 of The Amendment Act⁴ as the axis of the dispute, the SC not only discusses the applicability of the amended Section 34 and Section 36(2), 36(3) of The Amendment Act, but also hinges a clear and much awaited interpretation of Section 26 of The Amendment Act in regard to arbitral and court proceedings.

¹ FAO(OS) no. 221/2016 and FAO(OS) No.222/2016, judgment delivered on 06.01.2017

² 'ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015, THE FATE OF AUTOMATIC STAY ON SECTION 34 PETITIONS FILED POST AMENDMENT' dated 02.02.2017.

³ Civil Appeal Nos. 2879-2880 of 2018, decided on 15.03.2018

⁴ 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.

FACTUAL BACKGROUND:

The case comprises of the following 8 appeals in totality, out of which four (4) appeals pertain to Section 34 applications which were filed before the cut-off date of 23.10.2015, and the remaining four (4) appeals pertain to those Section 34 applications which were filed after the said cut-off date.

S. No	Filed before the Cut-off date	Filed after the Cut-off date
1.	BCCI v. Kochi Cricket	Wind World v. Enercon GMBH
2.	Arup Deb v. Global Asia	Yogesh Mehra v. Enercon
3.	Maharashtra Airports v. PBA Infrastructure	Ajay Mehra v. Enercon
4.	UB Cotton v. Jayshri Ginning	Anuradha Bhatia v. Ardee Infrastructure

The Appellants contended that their petitions under Section 34 of The Act shall be governed by the un-amended provisions of Section 36 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 of Section 36 shall apply thereby denying an automatic stay to the Appellants. The pre-amended and the amended provision of Section 36 of the Act are reproduced as under:

Pre-Amended Section 36	Amended Section 36
Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”	<p>(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.</p> <p>(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.</p> <p>(3) Upon filing of an application under subsection (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing: Provided that the Court shall, while</p>

	considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).”
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ARGUMENTS BY THE APPELLANTS:

- i. That Section 26 of the Amendment Act comprises of two parts. The second part of makes the Amendment Act applicable in relation to arbitral proceedings commenced on/after 23.10.2015, whereas the first part is in nature of a proviso or exemption to the same. Section 26 of The Amendment Act also does not express any intention of retrospective operation.
- ii. That the vested right to challenge arbitral awards would continue by the virtue of Section 36 of the old Act, which would apply to all cases.
- iii. That Section 36 is substantive in nature and that the expression “arbitral proceedings” in both parts of Section 26 refers only to proceedings before an arbitrator and is the same in both parts.
- iv. That Section 36 of the Act should not be given a retrospective approach as there is no distinction between execution and enforcement, and “enforcement” under Section 36 is nothing but execution of an award, as if it were a decree under the Code of Civil Procedure, 1908.

ARGUMENTS BY THE RESPONDENTS:

- i. That no vested right exists inasmuch as Section 34 proceedings are not appellate proceedings.
- ii. That Section 26 of the Amendment Act evinces a contrary intention and would take away any such right assuming a vested right is involved.
- iii. That Section 36 is more in the form of an execution proceeding which is procedural in nature and would thus will be retrospective in nature.

THE JUDGMENT

The SC categorises the judgment to deal with four major facets which provide detailed insights into the withstanding dispute. These facets are discussed as follows;

- I. Interpretation of Section 26 of the Amendment Act with respect to Section 34 and 36 petitions-
 - i. Section 26 of the Amendment Act bifurcates proceedings with great coherence, into two sets of proceedings- Arbitral proceedings and Court proceedings in relation thereto.
 - ii. The scheme of Section 26 makes it clear that the Amendment Act is prospective in nature and will apply only to those **arbitral proceedings** that are commenced, as understood

under Section 21 of the 1996 Act, on/after the Amendment Act and to those court proceedings which have commenced on/after the Amendment Act came into force.

- iii. Section 26 postulates that the court proceedings in relation to such Arbitral proceedings are independent and shall not be viewed as a continuation of arbitral proceedings.

II. The true definition of Substantive Vested Right

- i. While expounding the definition of “vested rights”, the Court placed reliance on the judgment of *Narhari Shivram Shet Narvekar v. Pannalal Umediram*⁵ stating that the right of the judgment debtor to pay up the decree passed against him cannot be said to be a vested right, nor can the question of executability of the decree be regarded as a substantive vested right of the judgment debtor.
- ii. A decree is enforced under the Code of Civil Procedure, 1908 only through an execution process (Order XXI). Section 36(3) as amended refers to the provisions of the Code of Civil Procedure for grant of a money decree i.e. (Order LXI, Rule 5). This being so, it is clear that section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and Order LXI.
- iii. Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

III. Applicability of Section 36 of the Amendment Act

- i. Section 36 prior to the amendment was considered to be a clog on the right of decree holder who cannot execute the award in its favour. This does not mean that there is a corresponding right in the judgment debtor to stay the execution of such an award.
- ii. Section 26 in relation with Section 36 postulates that Court Proceedings are related to Arbitral Proceedings, being independent from arbitral proceedings would not be viewed as a continuation of arbitral proceedings, but would rather be viewed independently or separately.
- iii. The expression “has been” in Section 36(2) as amended, makes it unambiguous that the Section itself refers to Section 34 applications, which have been filed prior to the commencement of the Amendment Act and thus the said section would apply to even Section 34 Applications that have been filed prior to the commencement of the Amendment Act of 2015.

⁵ *Narhari Shivram Shet Narvekar v. Pannalal Umediram* [(1976) 3 SCC 203]

- iv. The Court reserved its comments on the proposition of whether a proceeding under Section 36 could be said to be a proceeding which is independent of Section 34.
- IV. Applicability & Limitation of the proposed Arbitration & Conciliation (Amendment) Bill, 2018.
- i. While taking note of the Arbitration Amendment Bill, 2018 the Court held that if such bill and in particular, Section 87⁶ is enacted, then the same would be wholly contrary to the objective of the Arbitration Act. For the foregoing reason, the Court also held that a copy of the judgment is to be sent to the Ministry of Law and Justice and the Learned Attorney General for India. The observation of the Court in this regard is as follows-

“...57. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government’s press release dated 7th March, 2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons, “...have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act”, and will now not be applicable to Section 34 petitions filed after 23rd October, 2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23rd October, 2015 .This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23rd October, 2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings have been initiated only after 23rd October, 2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of Courts, which ultimately defeats the object of the 1996 Act...”

ANALYSIS:

Although the judgment does create a rippling effect on all pending Section 34 applications filed prior to the commencement of the Amendment Act who have been savouring the leverage of an automatic stay, yet the intent of such a decision speaks volumes of Court’s intention to increase compliance of parties of an arbitral award, even in respect of arbitrations initiated prior to the cut-off date. The ball now lies in Government’s court which may or may not accept the recommendation of the Court and still proceed ahead to enact Section 87 as proposed under the Arbitration

⁶ <http://pib.nic.in/newsite/erelease.aspx?relid=177117> - A new section 87 is proposed to be inserted to clarify that unless parties agree otherwise the Amendment Act 2015 shall not apply to (a) Arbitral proceedings .which have commenced before the commencement of the Amendment Act of 2015 (b) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Amendment Act of 2015 and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015 and to court proceedings arising out of or in relation to such Arbitral proceedings.

Amendment Bill, 2018. The Court held that a copy of the judgment is to be sent to the Ministry of Law and Justice and the Learned Attorney General for India but the Court did not itself express any speculation on the amendments made to Section 34 as the same were not diametrically before the Bench. However, The Court observed that, *“it is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature”*.



Madhu Sweta
Partner
madhu@singhania.in



Kanika Tandon
Associate
kanika@singhania.in