

Dispute Resolution Hotline

March 22, 2018

TIME TO ENFORCE YOUR ARBITRAL AWARD! SUPREME COURT SHEDS LIGHT ON THE APPLICABILITY OF THE AMENDMENTS TO THE ARBITRATION LAW

- Stay on enforcement of arbitral awards lifted.
- Law as amended by the Arbitration & Conciliation (Amendment) Act, 2015 will apply to those arbitral proceedings which commenced on or after October 23, 2015 and will apply to those court proceedings (which relate to arbitration) which commenced on or after October 23, 2015
- Amended Section 36 to apply even in cases where application for setting aside the award was filed prior to October 23, 2015 i.e. date of commencement of the Amendment Act

INTRODUCTION

Do you have an arbitral award in your favour which you have been unable to enforce? Well you may now. On October 23, 2015, amendments were made to the Arbitration & Conciliation Act, 1996 ("Principal Act"). These amendments introduced much needed changes in the law and have been instrumental in robust growth of arbitration in India over the last couple of years.¹ However, there remained ambiguity surrounding applicability of these amendments to court proceedings particularly those arising out of an arbitration which commenced before October 23, 2015.

One particular issue which arose in a number of cases was in context of enforceability of the domestic awards. Prior to the amendment, filing and pendency of an application for setting aside of an award, operated as an automatic stay against its enforcement. The amendment made to Section 36 of the Act lifted this automatic stay. Instead the award debtor is now required to make an application seeking stay. Further the grant of such stay by court may be conditional upon furnishing of security. Accordingly, various execution petitions were filed in courts around the country even though a setting aside application was pending. In all such cases, the issue that arose was, whether the parties could take advantage of the amended provisions even though the arbitration was under the old regime.

The Supreme Court ("Court") in the case of *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd.*² (which was tagged along with several other appeals) has upheld the applicability of Section 36 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act"). Judgment debtors can no longer enjoy an automatic stay on the execution of the arbitral award irrespective of whether their challenge against the award was filed prior to or post the commencement of the Amendment Act.

JUDGMENT

Interpretation of Section 26

The instant case revolved around interpretation of Section 26 of the Amendment Act, which reads as follows:

"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." [Emphasis supplied]

The Court made a clear distinction between the two limbs of Section 26. It held that the first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The Court noted that in the first limb of the Section 26, "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the Principal Act and that the expression used is "to" and not "in relation to". Regarding the second limb, the Court noted that the expression "in relation to" is used instead and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

The Court further observed that the expression "the arbitral proceedings" refers to proceedings before an arbitral tribunal as is clear from the heading of Chapter V of the Principal Act. Thus, the Court concluded that the first part of the Section deals with arbitral proceedings before the Arbitral tribunal alone. The Court then went on to highlight the contrast between the first and second limbs of section 26 and held that the second part only deals with court proceedings which relate to the arbitral proceedings. It then concluded that the Amendment Act is prospective in nature and will apply (i) to arbitral proceedings which have commenced on or after October 23, 2015; and (ii) to court proceedings which have commenced on or after October 23, 2015.

No substantive vested right in a judgment debtor to resist execution

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As per the old Section 36, if an application under Section 34 was filed, the arbitral award could be enforced only after the Section 34 was refused. There was thus an automatic stay on the execution of the arbitral award by mere filing of a Section 34. The Counsel representing the judgment debtors argued that a substantive change has been made to an arbitral award, which earlier became an executable decree only after the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege enjoyed by judgment debtors.

The Court however found that the automatic stay on execution under the old regime was only a procedural clog on the right of the decree holder, who could not execute the award in his favour unless the conditions under the un-amended Section 36 were met. This did not mean that there was a corresponding right in the judgment debtor to stay the execution of an award. Thus, it was the Court's conclusion that since 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 amended, would apply even in cases where an application for setting aside an award was pending on the date of commencement of the Amendment Act.

Legislative intent and removal of the mischief in the law

The Court considered an earlier judgment in *National Aluminium Company Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr*³. This was also referred to in the 246th Law Commission Report "**Law Commission Report**") wherein it had been recommended that the erstwhile Section 36 be substituted, as the automatic suspension of the execution of the award, the moment an application challenging the award is filed, leaving no discretion in the court to put the parties on terms, defeated the objective of the alternate dispute resolution system.

In light of the same, the Court held that looking at the practical aspects, past recommendations of this Court, the Law Commission Report, the nature of rights involved, and the sheer unfairness of the un-amended provision granting an automatic stay, it is clear that Section 36 as amended should also apply in circumstances where application under Section 34 was filed before the commencement of the Amendment Act.

On the proposed Arbitration & Conciliation (Amendment) Bill, 2018

After arguments had been concluded, Government of India issued a press release dated March 7th, 2018, referring to a new Section 87 in a proposed Arbitration & Conciliation (Amendment) Bill, 2018 ("**Amendment Bill**"). The new proposed Section 87 seeks to make the Amendment Act only applicable to "*arbitrations commenced after 23 October 2015; and court proceedings initiated in relation to arbitrations, if the arbitration was itself commenced after 23 October 2015*".

The Court heavily critiqued the proposed amendments on the ground that the proposed Section 87, if approved, would result in the Amendment Act not applying to a very substantial chunk of arbitrations which can benefit from the progressive regime adopted by the Amendment Act. The court went so far as directing that its judgment be forwarded to the Law Ministry for a more thorough consideration on these matters keeping the statement of objects and reasons of the Amendment Act at the forefront. The Court held that the Law Commission Report had itself bifurcated proceedings into two parts. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated.

ANALYSIS

Arbitration is considered a good alternative and a better method to resolve commercial disputes in terms of flexibility, speed and cost-effectiveness. However, arbitration in India is anything but this and is often criticized for being slow, expensive and ineffective. In an attempt to remedy such issues and to encourage parties to choose India as a preferred seat of arbitration, the Amendment Act was introduced. However, due to certain lack of clarity in the drafting of the Amendment Act, the provisions therein were yet to see the effectiveness that was envisaged. This decision of the Court was eagerly awaited because of the complete lack of certainty on a critically important aspect of the legislation.

This decision of the Court should impact a lot of pending court proceedings and also increase voluntary compliance by parties of the arbitral award, even in respect of arbitrations initiated prior to the commencement of the Amendment Act. If a party is anyway required to deposit the value of the award in court, then the motivation to delay enforcement of an award by filing a challenge, in all but such cases where the award debtor genuinely believes that there are valid reasons to set aside the award, is done away with to a large extent.

Interestingly, the Court has not directly commented on the applicability of the amended provisions to court proceedings under sections 9 and 11 of the Act. However, the interpretation of section 26 provided by the Court suggests that in the event such proceedings are initiated on or after October 23, 2015, it would be governed by the Amended Act. It should be noted that in context of Section 34, the Court has noted that in circumstances where such a Section 34 has been filed post October 23, 2015, it shall be governed by the amended provisions.

Through this judgment, the judiciary has clearly signaled its commitment to take a pro-arbitration and pro-enforcement approach. However, if the Government refuses to accept the recommendations of the Court and goes on to enact the proposed Section 87, then there may be a plethora of permutations and combinations of laws that would apply, depending on the date of commencement of arbitration, leading to a lot of confusion and further delay in the effectiveness of the Amendment Act.

– Siddharth Ratho, Ashish Kabra & Vyapak Desai

You can direct your queries or comments to the authors

¹ To read about the amendments, please [click here](#)

² Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016)

³ (2004) 1 SCC 540

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Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business

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