



DOES THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015 APPLY TO COURT PROCEEDINGS FILED BEFORE ITS COMMENCEMENT?

Introduction

Recently, in three (3) identical matters (two (2) of which were filed by the Board of Control for Cricket in India (“**BCCI**”) against Rendezvous Sports World and Kochi Cricket Private Limited, respectively,) where the award-debtors sought to dismiss the applications to enforce the arbitral awards under the Arbitration and Conciliation Act, 1996 (the “**Arbitration Act**”), the Bombay High Court (the “**Court**”) ruled that such applications were not maintainable under the amended provisions introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (the “**Amendment Act**”).

As per the then prevailing provisions of Section 36 of the Arbitration Act (dealing with enforcement of awards), an award could be enforced only after the deadline (three (3) months from the date of receipt of the award by the challenging party) for filing a challenge application under Section 34 of the Arbitration Act (the “**Challenge Application**”) had elapsed. However, if a Challenge Application was filed within the deadline, then an award could be enforced only after the Challenge Application was adjudicated upon. Therefore, the filing of a Challenge Application under Section 34 automatically invoked a stay on the enforcement of the award.

The [Amendment Act](#) amended several key aspects of Indian arbitration law. Under the Amendment Act, Section 36 of the Arbitration Act was significantly overhauled to provide that an award could be enforced immediately after the expiry of the deadline, and anyone seeking to challenge the enforcement had to specifically approach an appropriate court for a stay on enforcement.

Pursuant to the amendment of Section 36 of the Arbitration Act, enforcement applications were filed in all the three (3) matters (referred above) seeking enforcement of awards against the award-debtors (the “**Enforcement Applications**”). Being aggrieved, the award-debtors (including BCCI) moved to dismiss the Enforcement Applications.

It may be highlighted here that Section 26 of the Amendment Act (discussed below) throws light on its applicability to proceedings instituted prior to its commencement. However, semantic ambiguities in the language of Section 26 of the Amendment Act have left room for interpretation of its applicability to court proceedings (such as a proceeding under Section 34 of the Arbitration Act), which is pending at the time of commencement of the Amendment Act, i.e., October 23, 2015. This was very issue that became the subject-matter of the controversy.

Issue for adjudication

Precisely stated, the core issue that arose for the Court’s determination was whether Section 26 of the Amendment Act warranted an interpretation such that the amended version of Section 36 of the Arbitration Act could apply to the Challenge Application, notwithstanding the fact that it was filed prior to October 23, 2015.

Section 26 of the Amendment Act is reproduced for the sake of convenience:

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Nothing contained in this Act (read as Amendment Act) shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act (read as the Arbitration Act), before the commencement of this Act (read as the Amendment Act) unless the parties otherwise agree but this Act (read as Amendment Act) shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act (Amendment Act).

The ruling

After carefully analyzing the provisions of Section 26 of the Amendment Act, the Court opined as follows:

- *Section 26 of the Amendment Act consists of two parts:* The first part provides that the provisions of the Amendment Act would, unless otherwise agreed, not apply to “arbitral proceedings” that commenced before October 23, 2015 (the date when the Amendment Act came in force), in accordance with Section 21 of the Arbitration Act. However, the second part provides that the Amendment Act would mandatorily apply “in relation to arbitral proceedings” commenced after October 23, 2015.
- *The expression “arbitral proceedings” as appearing in the first part of Section 26 of the Amendment Act does not cover post-award court proceedings:* Before arriving at this finding, the Court analyzed Sections 21 and 32 of the Arbitration Act.

Section 21 of the Arbitration Act, which deals with the commencement of arbitral proceedings provides that, unless otherwise agreed, arbitral proceedings in respect of a dispute commences on the date when a request for reference to arbitration is eventually received by the respondent.

Section 32 of the Arbitration Act, which deals with the termination of arbitral proceedings provides that, arbitral proceedings terminate either on the delivery of the final award by the arbitrator or, in certain circumstances, on the issuance of an order for termination by the arbitrator.

Thus, on a harmonious reading of both the sections i.e., Section 21 and Section 32 of the Amendment Act, it becomes clear that as the term “arbitral proceeding” is used only in the context of the actual adjudication proceedings before the arbitrator, proceedings instituted after the award is issued will not come within its ambit.

- *The expression “in relation to arbitral proceedings” as appearing in the second part of Section 26 of the Amendment Act includes not only the proceedings before the arbitrator, but also all court proceedings in connection with the arbitration:* Relying on the decision of the Supreme Court of India in *Thyssen Stahlunion GmbH v. Steel Authority of India Ltd.* (1999) 9 SCC 334, the Court held that the expression “in relation to arbitral proceedings” has a wide import, and must not be construed narrowly. It must be construed as including within its ambit, not just the actual proceedings before the arbitrator, but also all court proceedings in connection thereto.
- *The intention for using a different expression in each part of Section 26 of the Amendment Act is deliberate:* Strictly interpreting the provisions of Section 26 of the Amendment Act, the Court held that



the legislature had deliberately used a restrictive expression “arbitral proceedings” in the first part, and a much expansive expression (“in relation to arbitral proceedings”) in the second part. The legislature seemed to be well aware of the difference in the meaning; because, had the legislature intended that the first part operate in a manner similar to that of the second part, then, it would certainly have used an expansive expression instead of using a restrictive expression.

Therefore, the legislature had consciously intended to exclude only “arbitral proceedings” and not any other proceedings (pending on October 23, 2015) from being made subject to the provisions of the Amendment Act.

- *Section 26 of the Amendment Act is exhaustive in nature, and takes into account, all types of proceedings:* According to the Court, as the legislature had deliberately intended the first part to apply only to “arbitral proceedings”, and the second part to apply to all proceedings “in relation to the arbitral proceedings”, the legislature had, by implication, exhaustively taken into account every proceeding that may possibly arise in connection with an arbitration. The purport is that, unless the legislature understood the various types of proceedings that usually arise in connection with an arbitration, it would not have enacted that proceedings “in relation to arbitral proceedings” would while applying in the context of the second part of Section 26 of the Amendment Act, stand excluded in the context of the first part of the same.
- *As the first part of Section 26 of the Amendment Act applies only to proceedings before the arbitrator, the Challenge Applications would be governed by the amended version of Section 36 of the Arbitration Act:* Upon establishing that Section 26 of the Amendment Act was enacted deliberately, and that it was exhaustive in itself, the Court observed that proceedings in “relation to arbitral proceedings”, notwithstanding the fact that they were instituted prior to October 23, 2015, would be governed by the amended version of the Arbitration Act. Consequently, the Court held that the Challenge Applications were subject to the amended version of Section 36 of the Arbitration Act, and that unless a stay was obtained, their pendency would not render the Enforcement Applications toothless.
- *Additional observations:* In addition to the primary analysis of the Court, which focused on interpreting the words used in Section 26 of the Amendment Act, the Court made some additional observations in support of its conclusions, explained as under:
- The amendment to Section 36 was purely procedural, and no substantive right was taken away as a result of it. A substantive right existed in favour of the award-debtor only in respect of filing a challenge application under Section 34 of the Arbitration Act, and not in respect of ensuring that an automatic stay operates immediately on the filing of a challenge application.
- By virtue of the usage of the expression “has been filed” in the amended version of Section 36 of the Arbitration Act, the same, *de hors* the provisions of Section 26 of the Amendment Act, not only covered those challenge applications that are filed after October 23, 2015, but even those which were filed prior to that date. Thus, the Court justified its final conclusion on a ground independent of Section 26 of the Amendment Act.



Our Comments

At the outset, the ruling in this case should be appreciated for the depth shown in analyzing the relevant legal provisions.

The Court applied the literal rule of interpretation and arrived at a finding purely on the verbiage of the Amendment Act. Further, by arriving at such a finding, the Court also sought to uphold the spirit of the Amendment Act, which is to smoothen the arbitration process and make India a more arbitration friendly jurisdiction.

Moreover, the ruling is consistent with the view taken by the Madras High Court in *New Tirupur Area Development Corporation Ltd. v. M/S Hindustan Construction Co. Ltd.*, unreported and the Calcutta High Court in *Sri Tufan Chatterjee v. Sri Rangan Dhar* AIR 2016 Cal 213.

However, despite its technical merits, the verdict suffers from a practical drawback, i.e., it casts an undue burden not only on the litigants, but also on the courts. Every litigant, whose challenge application is currently pending in court will now be constrained to file an application for having the award stayed. This may unduly burden the courts (which are already heavily burdened), as the courts may now have to hear a significant number of stay applications.

Additionally, this and other decisions have been challenged in the Supreme Court of India, and a final, conclusive interpretation on this issue, i.e., applicability of the Amendment Act to court proceedings connected to arbitral proceedings, and in particular, pending on the date of commencement of the Amendment Act, is awaited.