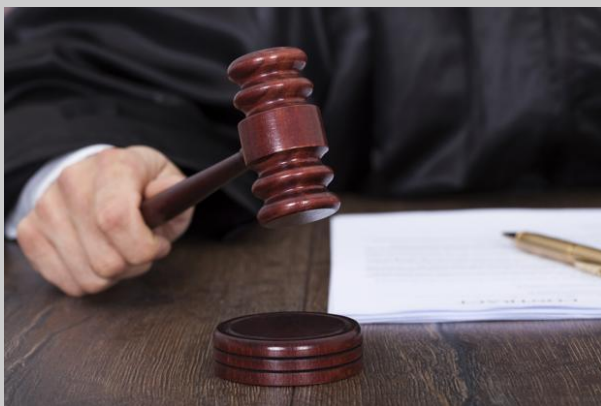


AMENDMENTS TO THE ARBITRATION ACT AND THEIR APPLICABILITY TO PENDING COURT PROCEEDINGS

The Arbitration and Conciliation Act, 1996 (the "Arbitration Act") underwent a massive overhaul in October 2015, when several sections of the Arbitration Act were amended. The amendments, initially made by an ordinance and subsequently incorporated in the Arbitration and Conciliation (Amendment Act), 2015 (the "Amending Act"), are intended to expedite arbitration proceedings in India.

In a recent judgment in Kochi Cricket Private Limited v. The Board of Control for Cricket in India (the "BCCI case"), the Bombay High Court has held that **the new amendments to the Arbitration Act will apply to arbitration-related court proceedings, even if such proceedings were commenced before the date the new amendments came into force** (23 October 2015). However, the amendments to the Arbitration Act will not apply to arbitral proceedings (proceedings before the arbitral tribunal) that have already commenced.



Any person seeking to execute an arbitral award in court will now be able to do so despite any challenge to the award pending in court. Any person who has filed such a challenge in court will need to file an additional application seeking the stay of any execution proceedings.

This decision of the Bombay High Court is likely to have an immediate impact on all pending arbitration-related court matters. Any person seeking to execute an arbitral award in court will now be able to do so despite any challenge to the award pending in court. Any person who has filed such a challenge in court will need to file an additional application seeking the stay of any execution proceedings.

The specific issue

In the BCCI case, the specific issue that the High Court had to consider was whether an amendment to Section 36 of the Arbitration Act would apply to a court proceeding commenced before 23 October 2015.

Under Section 34 of the Arbitration Act, after an arbitral tribunal makes an arbitration award, an aggrieved party may challenge the award by filing a petition in court. Before the amendment of the Arbitration Act in October 2015, Section 36 of the Arbitration Act provided that if such a Section 34 petition was filed, court proceedings for execution of the arbitral award were automatically stayed.

The recent amendment to Section 36 of the Arbitration Act alters this position. The amended section states that filing a Section 34 petition will not automatically make an arbitration award unenforceable; the party filing the Section 34 petition must now file a separate application along with the Section 34 petition, seeking a stay of execution proceedings. The stay may or may not be granted, and if granted, will be subject to

certain conditions, as the court may determine at its discretion. To give an illustration, while granting a stay of an award, a court may direct the person seeking the stay to deposit in court a part of or all of the amount awarded by the arbitrators. The amount so deposited will be subject to the outcome of the Section 34 petition. If the petition is dismissed, the arbitration award-holder may be entitled to withdraw the amount deposited in court.

The decision

In the BCCI case, Section 34 petitions had already been filed challenging certain arbitral awards, before the amendments to the Arbitration Act came into force on 23 October 2015. After the amendments came into force, the High Court had to decide whether execution proceedings could continue while the Section 34 petitions remained pending (i.e., whether the amendment to Section 36 applied to pending arbitration-related court proceedings).

After a detailed hearing, the Bombay High Court decided that the amendments to Section 36 will apply even to pending arbitration-related court proceedings. The High Court stated that in all pending Section 34 petitions challenging arbitral awards, the persons who have filed the petitions will now need to file separate applications if they wish to obtain stay of the execution of the awards.

Impact of the decision



The court may only grant a stay of execution proceedings subject to certain conditions, including deposit of the amount awarded or part thereof.

The Bombay High Court decision in the BCCI case will have a real impact on arbitration matters pending in court. The decision means that execution proceedings that have already been automatically stayed after the filing of Section 34 petitions, will now resume. Separate stay applications will need to be filed in pending Section 34 petitions in order to stay execution of the arbitral awards. As mentioned above, the court may only grant such a stay subject to certain conditions, including deposit of the amount awarded or part thereof.

Although the decision in the BCCI case was made in the context of Section 36 of the Arbitration Act, the High Court's finding in the matter would also be applicable with respect to amendments to other sections of the Arbitration Act. Therefore, the amended provisions of the Arbitration Act could also be held to be applicable to other pending court proceedings (for instance, proceedings with respect to the appointment of arbitrators or with respect to interim relief).

Contradictory judgments and Supreme Court appeal

The Bombay High Court judgment in the BCCI matter is clear that the 2015 amendments to the Arbitration Act apply to pending arbitration-related court matters. But the judicial opinion on this issue is anything but consistent across the country. Since the Amending Act came into force, other High Courts across the country have held variously that the Amending Act applies to court proceedings commenced before the Amending Act came into force, ^[1] that the Amending Act does not apply to court proceedings commenced before the Amending Act came into force ^[2] and that the Amending Act does not apply to court proceedings related to arbitrations that commenced before the Amending Act came into force. ^[3] Essentially there is disagreement in the views taken by different High Courts in this regard.

Given the far-reaching implications of a decision on this issue for pending arbitration matters, it is important that this issue is finally settled by the Supreme Court of India. An appeal has been filed before the

Supreme Court in the BCCI case, which should provide some certainty on the issue. However, as no stay has been granted by the Supreme Court in this appeal, the Bombay High Court's judgment holds the field. Parties are required to comply with this judgment by filing separate stay applications along with pending Section 34 petitions, seeking to stay the execution of arbitral awards. Where an award has been made in favour of a party, the party can now apply for execution of the award despite any pending Section 34 petition.

^[1] New Tirupur Area Development Corporation v. Hindustan Construction Company Ltd. (Madras High Court); Sri Tufan Chatterjee v. Sri Rangan Dhar (Calcutta High Court); M/s. Indiabulls Housing Finance Ltd. v. Leema Mary Rose S. and another (Madras High Court).

^[2] M/s. Reliance Capital Ltd. v. Chandana Creations and others (Calcutta High Court).

^[3] Electro Steel Casting Ltd. v. Reacon Engineers (India) Pvt. Ltd. (Calcutta High Court); M/s. Jumbo Bags Ltd. v. M/s. The New India Assurance Co. Ltd., (Madras High Court); M/s. Pragat Akshay Urja Ltd. v. State of Madhya Pradesh (Madhya Pradesh High Court); Sri Nitya Ranjan Jena v. Tata Capital Financial Services Ltd. (Calcutta High Court).

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