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Automatic Stay on Arbitral Awards in light of Hindustan Construction Company v Union of India

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ABSTRACT

The provisions for automatic stay on the enforcement of an arbitral award under Section 36 of the Arbitration and Conciliation Act 1996, due to a challenge to set aside the award under Section 34 have long been criticized as going against the object of the Act, i.e. to provide a speedy and cost effective method of dispute resolution with minimal judicial intervention.

This irregularity was rectified by the Arbitration and Conciliation (Amendment) Act 2015 by amending Section 36 of the Act to negative the provisions for automatic stay on the filing of a Section 34 petition. Furthermore, the Supreme Court, in the case of BCCI v Kochi Cricket Pvt. Ltd. Had categorically stated that the judicial interpretation of Section 36 to allow an automatic stay on the enforcement of an arbitral award was patently false as the proceedings under Section 36 were merely procedural in nature. The Court also held that the 2015 amendment would also apply to Section 34 petitions filed before the commencement of the 2015 Amendment due to the same reason.

However, the legislature enacted the Arbitration and Conciliation (Amendment) Act 2019 to substantially negate all the progress made by the 2015 Amendment and the BCCI judgement by inserting Section 87 and repealing Section 26 that was inserted by the 2015 Amendment.

The present paper is an in-depth analysis of the evolution of the provisions for automatic stay on arbitral awards which finally led to the Supreme Court's decision in the case of Hindustan Construction Company v Union of India, in which the Court has held that Section 87 of the 2019 Amendment was violative of Article 14 of the Constitution, and that the language of Section 36 warrants no automatic stay on enforcement.

I. INTRODUCTION

Arbitration in India has undergone a number of changes in the past decade as the government at the Centre has been trying to perfect the formula for making the country a haven for

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contractual enforcement and ease of doing business.[3] Mechanisms for arbitration have a major role to play to achieve that end as alternate dispute resolution methods provide speedy and efficacious means for resolving disputes.

However, this object of the Arbitration and Conciliation Act 1996, i.e. to provide companies and investors with a time effective method for resolving disputes has been greatly hampered by the provisions for automatic stay on arbitral awards. An award holder under the 1996 Act could not realise the award that was made by the Arbitral Tribunal in their favour because the other party to the arbitration had challenged the award in Court, and due to the inherently sluggish nature of the Indian judicial system, the amount of the award would be stuck in pending litigations for long periods of time.

The Supreme Court, on 27 November 2019, delivered a landmark judgement in the case of **Hindustan Construction Company & Anr. v Union of India &Ors**.[4], wherein it has held that there would be no automatic stay on the enforcement of an arbitral award under Section 36 of the Arbitration and Conciliation Act 1996 due to the mere fact that an application to set aside the award under Section 34 has been filed before a Court.

The present paper seeks to critically analyse the provisions for automatic stay of arbitral awards throughout the course of its evolution through legislative amendments and judicial discourse that have finally resulted in the judgement in **Hindustan Construction Company v Union of India.**

II. PROVISIONS FOR AUTOMATIC STAY UNDER THE 1996 ACT:

The Arbitration and Conciliation Act 1996 (hereafter referred to as the 'Act' or the 'Principal Act') was enacted to replace the old Arbitration Act 1940 which was structured in a way that did not inspire trust in the arbitral process as the parties were given a number of opportunities to approach the courts for intervening. This, coupled with the inefficiency of the Indian judicial system had rendered arbitrations to be glaringly ineffective.

The Act of 1996, in its Statement of Objects and Reasons, sought to address these shortcomings in the old Act. The main objectives of the Act were *'to minimize the supervisory role of courts in the arbitral process'*[5], and *'to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court'*[6].

[3] India has moved from the 142nd position in 2014 to the 63rd position in 2019 on the World Bank's Ease of Doing Business Report 2020.
[4] Writ Petition (Civil) No. 1074 of 2019, Supreme Court, judgment rendered on November 27 2019.
[5] Section 5 of the Arbitration and Conciliation Act 1996.
[6] Section 35 and 36 of the Arbitration and Conciliation Act 1996

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However, even though the scope of judicial scrutiny under the original Act had been reduced significantly, the Courts have enlarged the scope of judicial review through judicial intervention. The most conspicuous instance of this phenomenon is the automatic stay on the enforcement of arbitral awards under Section 36. Under the original Act, Section 34 allowed a party to the arbitration proceedings to challenge the award that had been awarded by the Tribunal by way of an application to the Court for setting aside the award. Such an award could be set aside by the Court if it found that any of the requirements under sub-section (2) were met.

In a number of judgements rendered by the Apex Court, it has been held that as soon as an application under Section 34 was filed, it would constitute an automatic stay on the enforcement of the arbitral award under Section 36 of the Act. Such a provision greatly hampers the possibility of speedy dispute resolution, which is the primary object of the legislation.

In the case of **National Aluminium Company Ltd. V Pressteel & Fabrications (P) Ltd. & Another**[7], the Supreme Court held that there would be an automatic stay on the enforcement of an arbitral award if an application for setting aside the award was filed under Section 34 of the 1996 Act. However, in the Court's opinion, this provision defeated the purpose of the Act, and opined as below,

> *"10…At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the court below so that the applicant can withdraw it, on such terms and conditions as the said court might permit it to do as an interim measure. But then we noticed from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant.*
>
> *11. However, we do notice that this automatic suspension of the execution of the*

[7] (2004) 1 SCC 540

> *award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the Ministry concerned to Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."*

Furthermore, this issue was also addressed in the 246th Law Commission Report under the heading "Amendments to the Arbitration and Conciliation Act 1996", wherein it was suggested that amendments to Section 36 were necessary to increase the effectiveness of the arbitration process in India. The Report stated as under,

> *"43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under Section 34 has expired or after the Section 34 petition has been dismissed. In other words, the pendency of a Section 34 petition renders an arbitral award unenforceable. The Supreme Court, in* ***National Aluminium Co. Ltd. v Pressteel & Fabrications (P) Ltd****.* ***[National Aluminium Co. Ltd. v Pressteel & Fabrications (P) Ltd., (2004) 1 SCC 540]*** *held that by virtue of Section 36, it was impermissible to pass an order directing the losing party to deposit any part of the award into Court."*

III. ARBITRATION AND CONCILIATION (AMENDMENT) ACT 2015:

In light of the recommendations of the Supreme Court in NALCO and the 246th Law Commission Report, the legislature passed the Arbitration and Conciliation (Amendment) Act 2015, which came into effect from October 23 2015. The amendment was enacted to address the controversy created by the automatic stay on the enforcement of arbitral awards under Section 36 when an application under Section 34 was filed to set aside the award. This was done by amending Section 36 of the 1996 Act to specifically state that there would be no automatic stay on the arbitral award.

The amended Section 36 read as follows,

> *"(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.*

(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.

(3) Upon filing of an application under sub-section (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 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."

The changes made to the provision clarified certain aspects relating to the enforcement of the arbitral award. Firstly, that the mere filing of an application under Section 34 would not render the award unenforceable. The Court would have to grant a separate application filed specifically for staying the enforcement of the award. Secondly, a stay would not be granted as a vested right just because an application was filed before the Court. It would be upon the Court's discretion to grant the stay based upon reasons that would have to be recorded in writing. And lastly, if such a stay was granted by the Court, the provisions relating to the grant of stay of a money decree under the Civil Procedure Code 1908, would have to be taken into consideration.

However, while Section 36 of the 2015 Amendment was enacted to clarify the controversy related to the automatic stay of enforcement of arbitral awards, another change brought about by the Amendment Act of 2015 sparked controversy of a completely different nature in relation to Section 26 of the Amendment Act of 2015 which modified Section 85 of the original Act. Section 85 of the Act of 1996 read as follows,

85. Repeal and savings. —

"(1) The Arbitration (Protocol and Convention) Act 1937 (6 of 1937), the Arbitration Act 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal, —

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral

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proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

Section 26 of the Amendment Act of 2015 provided for its applicability. It stated that,

"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."

While this section was meant to simply clarify the applicability of the amending Act, it sparked controversy as to the applicability of the 2015 Amendment to Section 34 petitions filed before the commencement of the Act. Therefore, the question that was constantly coming before the Courts was whether the 2015 Amendment would have prospective or retrospective application.

This resulted in a number of conflicting High Court judgements that could not come to a singular conclusion as to the applicability of the Amendment Act of 2015. However, this issue was finally resolved by the Supreme Court in the case of BCCI v Kochi Cricket Pvt. Ltd.[8]

A bare reading of Section 26 of the Amended Act of 2015 would reveal that the provision was divided into two parts that were separated by the word 'but'. The first part deals with the pre-amendment regime that stated that the Amendment would not apply 'to the arbitral proceedings 'that have commenced before the commencement of the Amendment in accordance with Section 21[9] of the 1996 Act unless the parties have agreed otherwise. The second part of the Section deals with the post-amendment and states that the Amendment would apply 'in relation to arbitral proceedings' that have commenced on or after the date of commencement of the Amendment.

The distinction made by the legislature in using the phrase 'to the arbitration proceedings' in the first part of the provision and 'in relation to arbitral proceedings' in the second part is an important aspect for comprehending the BCCI judgement.

[8](2018) 6 SCC 287

[9]Section 21 of the Arbitration and Conciliation Act 1996: Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

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The Supreme Court held that the term 'to the arbitral proceedings' in the first part dealt with proceedings that have been initiated in accordance with Section 21, which is a part of Chapter V of the original Act. Therefore, the first part only deals with arbitral proceedings conducted in accordance with Sections 18 to 27 of the Act. Furthermore, the reference to Section 21 was to restrict the applicability of the amended Section 36 to the proceedings before the Arbitral Tribunal. Furthermore, as the conduct of arbitral proceedings was predominantly a procedural right, the parties were given the autonomy to decide the application of the provisions of the Amendment.

The second part, however, using the term 'in relation to arbitral proceedings.' The Court held that the two parts of the provision must apply to different situations, and the arbitral proceedings contemplated under the first part should be excluded from the second part. Therefore, the second part would only apply to proceedings that were incidental to or in other words, 'in relation to' arbitral proceedings, meaning the proceedings before the Courts.

In light of this distinction, the Court held that the amended Section 36 would apply to the proceedings if an application under Section 34 was filed after the commencement of the 2015 Amendment, as they are proceedings 'in relation to arbitral proceedings.'

However, in the case where the application under Section 34 has been filed before the commencement of the Amending Act of 2015, the Court held that there was a microscopic difference between the enforcement of an arbitral award and the execution of an arbitral awards. Section 36 dealt with the execution of the arbitral award as if it was a decree of a Civil Court, and would be governed under Order 21 and Order 41 Rule 5 of the Civil Procedure Code 1908. Furthermore, under Order 41 Rule 5, an appeal would not operate as an automatic stay on the pending lis between the parties.

The Court relied upon Section 6 of the General Clauses Act, 1897 which states that the repeal of any enactment does not affect any right or privilege accrued or incurred under the repealed enactment to hold that the automatic stay on the operation of the arbitral award was not a vested right afforded to the parties by the pre-Amendment Section 36. The proceedings under Section 36 of the Act were merely procedural in nature, and the provisions for automatic stay could not be claimed as a vested right under Section 6.

Further, the Court also held that the automatic stay on the enforcement of an arbitral award went against the letter and spirit of the original Act of 1996, and it only served as a hindrance on the decree holders' enforcement of the award. Such an obstacle should not have been able to create a right in favour of the judgement debtor to bring the arbitral proceedings to a

standstill.

In light of the abovementioned reasoning, the Apex Court held that as the execution of an award belonged solely to the realm of procedure, and it is established law that procedural changes to a legislation can be applied retrospectively, the provisions of the amended Section 36 would apply even to Section 34 petitions filed before the commencement of the Amendment.

IV. ARBITRATION AND CONCILIATION (AMENDMENT) ACT 2019:

On August 9 2019, the President of India gave assent to the Arbitration and Conciliation (Amendment) Act 2019, which amends the principal Act of 1996. This amendment was introduced by the Parliament on the basis of the **Report of the High-Level Committee to Review the Institutionalizing of Arbitration Mechanism in India** under the Chairmanship of Justice B.N. Srikrishna. The primary objective this Committee was to determine the roadblocks to the creation of an efficient arbitration system and the issues that hinder speedy dispute resolution, and to create a plan for making the Indian arbitration landscape more conducive to international and domestic arbitration.

Section 13 of the Amendment Act of 2019 introduced Section 87 which deals with the applicability of the 2015 Amendment. It reads as follows,

> ***"87.*** *Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act 2015 shall—*
>
> *(a) not apply to—*
>
> *(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act 2015;*
>
> *(ii) 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 Arbitration and Conciliation (Amendment) Act 2015;*
>
> *(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act 2015 and to court proceedings arising out of or in relation to such arbitral proceedings."*

Furthermore, Section 15 of the 2019 Amendment states that,

*"**15.** Section 26 of the Arbitration and Conciliation (Amendment) Act 2015 shall be omitted and shall be deemed to have been omitted with effect from the 23rd October 2015."*

In the BCCI case, the Supreme Court had addressed the proposed Section 87 of the Arbitration and Conciliation (Amendment) Bill 2018, and stated that,

> *"78. 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 7-3-2018.* ***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 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015.* ***This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, 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.****"*

However, despite the misgivings of the Supreme Court in both NALCO and BCCI, and the recommendations made by the 246th Law Commission Report, the legislature went on to enact Section 87 and repeal Section 26 of the Amendment Act 2015 which has reverted the arbitration landscape of India back to the pre-2015 Amendment phase wherein a Section 34 petition would result in an automatic stay on the enforcement of an arbitral award under Section 36.

V. HINDUSTAN CONSTRUCTION COMPANY V UNION OF INDIA: CASE ANALYSIS[10]

In the present case, the constitutional validity of Section 87 of the Arbitration and Conciliation Act 1996, as inserted by Section 13 of the Arbitration and Conciliation (Amendment) Act 2019 was challenged before the Supreme Court, along with the repeal of Section 26 of the Arbitration and Conciliation (Amendment) Act 2015 by Section 15 of the Amendment Act of 2019. In relation to these challenges, the Court primarily dealt with three

[10] Supra at note 2.

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issues that have been discussed below.

(A) WHETHER THERE IS AN AUTOMATIC STAY ON THE ENFORCEMENT OF ARBITRAL AWARDS UNDER SECTION 36 OF THE ARBITRATION AND CONCILIATION ACT 1996 IF AN APPLICATION TO SET ASIDE THE AWARD IS FILED UNDER SECTION 34 OF THE ACT?

It was argued before the Court that the interpretation of the previous Supreme Court judgements that an application under Section 34 of the Act would result in an automatic stay on the enforcement of the arbitral award under Section 36 was unwarranted. To substantiate this point, the scheme of UNCITRAL Model Law on International Commercial Arbitration (hereafter referred to as the Model Law) and its provisions were analysed at length by the Apex Court.

The Arbitration and Conciliation Act 1996, is explicitly based on the Model Law as evidenced by the Preamble to the statute. Furthermore, in Chloro Controls (I) Pvt. Ltd. V Seven Trent Water Purification Inc.[11], it was held that,

> *"93. As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the legislature and available for its consideration when it enacted the 1996 Act."*

In light of this, the Court thought it was pertinent to analyse Article 36(2) of the Model Law, upon which Section 36 of the 1996 Act is based. Article 36(2) states that,

> *"Article 36. Grounds for refusing recognition or enforcement-*
>
> *(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."*

It was argued that Article 36(2) specifically refers to applications for setting aside or suspension of an award in which the other party has to furnish security in order to obtain a stay by the Court. Furthermore, it was argued that Articles 34 and 35 of the Model Law follow the 'two bites at the cherry doctrine', and the award debtor is allowed to challenge the award to set it aside as well as when the award holder seeks to enforce the award.

[11] (2013) 1 SCC 641

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The Court held that Section 36 of the 1996 Act does not follow the same principle and that when an award is made in India, it becomes final and binding, and may be enforced straightaway under the Civil Procedure Code 1908 in the same manner as if it were a decree of the Court. There could be no recourse in the favour of the award debtor to challenge the award on the same grounds for both the recognition of the award and its enforcement. This is also evident from a reading of Section 36 in consonance with Section 35[12] of the 1996 Act.

This view would be contrary to the view taken by the Supreme Court in the cases of **National Aluminium Company Ltd. VPressteel& Fabrications (P) Ltd. &Anr.**[13], **National Buildings Construction Corporation Ltd. v Lloyds Insulation India Ltd.[14], Fiza Developers and Inter-trade Pvt. Ltd. v AMCI (India) Pvt. Ltd. and Anr.**[15]. In the abovementioned judgements the Supreme Court had held that there was an implied prohibition of the enforcement of an arbitral award as a decree of the court unless the time for making an application to set aside the arbitral award under Section 34 had expired, or such application having been made, only after it has been refused.

However, the Court, in the present case, held that "to state that an award when challenged under Section 34 becomes unexecutable merely by virtue of such challenge being made because of the language of Section 36 is plainly incorrect." According to the Court, the correct interpretation of Section 36 may only be made if it is harmoniously read with Section 35 of the 1996 Act. In **Leela Hotels Ltd. V Housing and Urban Development Corporation Ltd.**[16], a three-judge bench had held that

> *"45. Regarding the question as to whether the award of the learned arbitrator tantamounts to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act 1996, makes it very clear that such an award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the court. The said language leaves no room for doubt as to the manner in which the award of the learned arbitrator was to be accepted."*

In light of this, the Court, in paragraph 26 of the judgement, held that "to read Section 36 as inferring something negative, namely, that where the time for making an application under Section 34 has not expired and therefore, on such application being made within time, an

[12] Finality of arbitral awards.- Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.
[13] Supra at note 5.
[14] (2005) 2 SCC 367
[15] (2009) 17 SCC 796
[16] (2012) 1 SCC 302

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automatic-stay ensues, is to read something into Section 36 which is not there at all. Also, this construction omits to consider the rest of Section 36, which deals with applications under Section 34 that have been dismissed, which leads to an award being final and binding (when read with Section 35 of the Arbitration Act 1996) which then becomes enforceable under the CPC, the award being treated as a decree for this purpose."

Additionally, the Court relied on Section 9 of the 1996 Act, which specifically enables a party to apply to a Court for reliefs after making of the arbitration award but before it is enforced in accordance with Section 36. The decisions in NALCO, Fiza Developers and Intra-Trade Pvt. Ltd. overlook this statutory provision. Furthermore, in **Dirk India Pvt. Ltd. v. Maharastra State Power Generation Company Ltd.**[17], the legislative intent behind Section 9 was interpreted by the Court. It was held that,

> *"when an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement."*

The Court held that the judgements in NALCO and Fiza had not considered the inter-relationship between Sections 9, 35 and 36 of the 1996 Act, and therefore have stated the law incorrectly. Consequently, the Supreme Court has explicitly overturned these judgements, and "the resultant position is that Section 36 - even as originally enacted - is not meant to do away with Article 36(2) of the UNCITRAL Model Law, but is really meant to do away with the two bites at the cherry doctrine in the context of awards made in India, and the fact that enforcement of a final award, when read with Section 35, is to be under the CPC, treating the award as if it were a decree of the court."

(B) WHETHER THE 2019 AMENDMENT ACT REMOVES THE BASIS OF THE BCCI JUDGEMENT?

It was argued on behalf of the Petitioners that 'the question of removing the basis of a judgement cannot arise unless and until the judgement is present to the mind of the legislature', and that the BCCI judgement should have been referred in the Statement of

[17] 2013 SCC Online Bom. 481

Objects and Reasons of the 2019 Amendment Act.

However, the Court rejected this argument stating that the referral of the judgement in the Statement of Objects and Reasons is not a mandatory requirement for the removal of the basis of the judgement by the legislature. What is necessary is to see whether the impugned legislation, in substance, removes the basis of a decision of the Court. In light of this, the Supreme Court relied on the judgement in the case of **Goa Foundation v State of Goa**[18], wherein it was held that,

> *"24. The power to invalidate a legislative or executive act lies with the Court. A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers. However, the legislature would be competent to pass an amending or a validating act, if deemed fit, with retrospective effect removing the basis of the decision of the Court. Even in such a situation the courts may not approve a retrospective deprivation of accrued rights arising from a judgment by means of a subsequent legislation (**Madan Mohan Pathak v Union of India [Madan Mohan Pathak v Union of India,** (1978) 2 SCC 50 : 1978 SCC (L&S) 103]). However, where the Court's judgment is purely declaratory, the courts will lean in support of the legislative power to remove the basis of a court judgment even retrospectively, paving the way for a restoration of the status quo ante. Though the consequence may appear to be an exercise to overcome the judicial pronouncement it is so only at first blush; a closer scrutiny would confer legitimacy on such an exercise as the same is a normal adjunct of the legislative power. The whole exercise is one of viewing the different spheres of jurisdiction exercised by the two bodies i.e. the judiciary and the legislature. The balancing act, delicate as it is, to the constitutional scheme is guided by the well-defined values which have found succinct manifestation in the views of this Court in Bakhtawar Trust [**Bakhtawar Trust v M.D. Narayan, (2003) 5 SCC 298]."***

In light of the aforesaid judgement, the Court held that "Section 15 of the 2019 Amendment Act removes the basis of BCCI (supra) by omitting from the very start Section 26 of the 2015 Amendment Act. Since this is the provision that has been construed in the BCCI judgment (supra), there can be no doubt whatsoever that one fundamental prop of the said judgment has been removed by retrospectively omitting Section 26 altogether from the very day when it

[18] (1969) 2 SCC 283

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came into force."(Paragraph 45)

However, the Court went on to state that the BCCI judgement illuminated the correct position of law with regards to Section 36, and it has interpreted the applicability of the provision in consonance with the view taken in the BCCI judgement, i.e. that the proceedings under the provision are merely procedural in nature, and there is not vested right on the award debtor to receive an automatic stay on the enforcement of the arbitral award as has been discussed in the previous section of this paper.

(C) WHETHER THE INTRODUCTION OF SECTION 87 INTO THE ARBITRATION ACT 1996, AND DELETION OF SECTION 26 OF THE 2015 AMENDMENT ACT BY THE 2019 AMENDMENT ACT IS VIOLATIVE OF ARTICLES 14 19(1) (G), 21 AND ARTICLE 300-A OF THE CONSTITUTION OF INDIA?

The Srikrishna Committee Report recommended the introduction of Section 87 owing to the fact that there were conflicting High Court judgments on the reach of the 2015 Amendment Act at the time when the Committee deliberated on this subject. However, the Report precedes the judgement of the Supreme Court in BCCI. The uncertainty that was present in the interpretation of the application of the law by different High Courts was removed by the BCCI judgement. Consequently, the removal of Section 26 and the insertion of Section 87 without any justification and contrary to the objects of the 2015 Amendment Act was, in the Court's opinion, manifestly arbitrary.

In light of this, the Court held that,

> *"To refer to the Srikrishna Committee Report (without at all referring to this Court's judgment) even after the judgment has pointed out the pitfalls of following such provision, would render Section 87 and the deletion of Section 26 of the 2015 Amendment Act manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be sub served by the Arbitration Act 1996 and the 2015 Amendment Act. This is for the reason that a key finding of the BCCI judgment (supra) is that the introduction of Section 87 would result in a delay of disposal of arbitration proceedings, and an increase in the interference of courts in arbitration matters, which defeats the very object of the Arbitration Act 1996, which was strengthened by the 2015 Amendment Act."*

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Further, in the case of **CanaraNidhi Ltd. V M. Shashikala**[19], it has been held that *"an application under Section 34 is a summary proceeding and not a regular suit, and that a court reviewing an award under Section 34 does not sit in appeal over the award."* In addition to this, in the case of **Ssangyong Engineering & Construction Co. Ltd. v NHAI**[20], it was held that Supreme Court cannot interfere with an award on the basis of its merits.

Furthermore, Order 41 Rule 5 of CPC is applicable to 'full-blown appeals', and the reasoning that it would not be applicable when it comes to the review of arbitral awards by reason of Section 36 of the Act, which is a rehearing of the original proceeding where the chance of succeeding is far greater than in a restricted view of the validity of arbitral awards under Section 34 should be enough of a reason to negate the enactment of Section 87, which negates the amendments made by the 2015 Amendment Act.

In light of the abovementioned reasons, the Court struck down Section 87 as being manifestly arbitrary and violative of Article 14 of the Constitution. It went on to state that "the retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act 1996 and the 2015 Amendment Act, but also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed. In fact, refund applications have been filed in some of the cases before us, praying that monies that have been released for payment as a result of conditional stay orders be returned to the judgment-debtor." Consequently, the Court thought that it was unnecessary to examine the constitutional challenges based on Articles 19(1) (g), 21 and 300-A of the Constitution of India.

Finally, the Court held that the BCCI judgement would apply so as to make the statutory amendments made by the 2015 Amendment Act applicable to all court proceedings initiated after 23.10.2015, and to facilitate this, Section 13 of the 2019 Amendment which repealed Section 26 inserted by the 2015 Amendment was also declared to be inoperative.

VI. CONCLUSION:

In summarization, the Supreme Court has finally laid to rest the saga of the automatic stay on arbitral awards that had been ongoing since the inception of the Arbitration and Conciliation Act 1996. The following are the main issues that were resolved by the judgement,

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[20] 2019 SCC Online 677

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i. That the language of Section 36 of the Act does not warrant an automatic stay on the enforcement of an arbitral award due to the mere filing of a Section 34 petition.

ii. That the legislature, by inserting Section 87 and deleting Section 26 through the Amendment Act of 2019, had subverted the purpose of the 1996 Act and the 2015 Amendments, and was contrary to public interest because it sought to revive the pre-2015 Amendment automatic stay regime that was a major cause of delay to the disposal of arbitral proceedings, and thus the Court declared Section 13 and 15 of the 2019 Amendment as manifestly arbitrary and unconstitutional as being violative of Article 14 of the Constitution.

iii. That the ratio in the BCCI case is the current position of the law, and would be used to interpret the applicability of the 2015 Amendments to the arbitral proceedings and proceedings in relation to them.

Realisation of arbitral awards had been a very arduous and time consuming process in India due to the operation of the automatic stay clause under Section 36. Arbitral awards, when the automatic stay on their enforcement was applicable, would be stuck in litigation for years because the award debtor could simply challenge the award under Section 34, and not have to pay a single penny to the award holder for long periods of time. This cause the capital which would have otherwise bolstered the economy to be stuck in the courts with INR 38,000 crores held up in litigation in the roads sector alone.

The provisions for automatic stay were clearly antithetical to the objects and purpose of the Arbitration and Conciliation Act 1996, and by striking the provision down and settling the issue that was rejuvenated by the 2019 Amendment, the Supreme Court has brought much needed help to award holders who do not have to wait for years before realising their awards.

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