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Prospective Applicability Of Section 34 Under The Arbitration Amendment Act, 2015

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Introduction

With its high definition and conformity to international norms, the Arbitration and Conciliation (Amendment) Act, 2015 has made a splash in Indian arbitration law. The Law Commission of India issued a study in August 2014, in accordance with its mandate to evaluate the provisions of the Arbitration and Conciliation Act, 1996, citing many shortcomings in the Act's operation. The Law Commission's 246th Report was heavily consulted when developing the Amendment Act, 2015, which went into effect on October 23, 2015.

The winds are unmistakably shifting. Despite the Amendment being a model of good intentions, its usefulness will only be shown over time. There are obstacles, such as determining the impact of the Amendment on court proceedings relating to arbitral procedures that began before the

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Amendment. The Law Commission's fix, Section 85A was purposefully discarded without discernment, making the Arbitration and Conciliation Amendment Ordinance, 2015 unclear concerning if and how it would apply. On the other hand, the Amendment Act filled the void by including Section 26, which defined the Amendment's applicability to a great extent.

There have been several reservations regarding the Amendment's intended use on new arbitrations and judicial cases since it took effect. A major issue that is now divided is whether and how the modifications would affect pre- and post-Amendment arbitral processes and judicial cases. The current tendency of India's High Courts has been too diverse and ambiguous to arrive at the proper legal position on the interpretation of Section 26 of the Arbitration Amendment Act and the Amendment Act's potential applicability. The proceptivity of the Amendment Act is confined to arbitral proceedings following the Amendment Act's start, as well as judicial proceedings in regard to the same, according to this article.

It further claims that Section 26 does not logically extend to post-arbitration proceedings, such as when an award was issued prior to the Amendment Act's enactment. Among the many differing viewpoints on Section 26, this article attempts to emphasize the pertinent issues and offer

clarity on how the old and new regimes are implemented in practice

Literature Review

Saloni Gupta's article *"Applicability of the 2015 Arbitration Amendment Act: Which Position Should Prevail?*" on 05 Aug 2019, Indian arbitration forum argues that the 2015 Amendment Act should be applied prospectively, with very few exceptions, because nothing is better than cherry-picking retrospectively. With a clear clarification of the elements in the new proposed Amendments, the misunderstanding regarding the application of the 2015 Amendment Act might be put to rest.

Shivani Kumbhojkar's research paper on *"Applicability Of Arbitration And Conciliation (Amendment) Act, 2015 On Pending Proceedings"* published on 06 July 2020, Mondaq[1] discusses using cases how, The Arbitration and Conciliation Act of 2015 was a step in achieving this legislative goal, as it made significant reforms to the whole arbitration procedure. The application of the revised

[1]Shivani Kumbhojkar's research paper on "Applicability Of Arbitration And Conciliation (Amendment) Act, 2015 On Pending Proceedings" published on 06 July 2020, Mondaq
URL: https://www.mondaq.com/india/arbitration-dispute-resolution/961996/applicability-of-arbitration-and-conciliation-amendment-act-2015-on-pending-proceedings

provisions to current or newly launched actions under the Arbitration and Conciliation Act became a major point of contention.

Vikas Mahendra's column *"Section 34 of the Arbitration Act: Prospective but Retrospective"* on Bar and bench [2]states that by putting aside a majority Award and raising a minority judgement to the level of an Award, the argument on dissenting opinion in arbitrations can be resolved.

Rishav Dutt, Shounak Mitra And Nand Gopal Khaitan's "*Judicial interference in arbitration: Section 34 saga"* on Lexology published on October 8 2020 concentrates on a few noteworthy examples, resulting in a little limited field in terms of court intervention in domestic arbitration rulings.

Shaneen Parikh and Shalaka Patil's article "*End Game – The Supreme Court Settles the Applicability of the 2015 Amendments*" on December 2, 2019 . The judgment of the Supreme Court in BCCI v. Kochi, as well as the 2015 Amendments to the Arbitration and Conciliation Act, 1996 (Act) and afterwards the 2019 Amendments to the Act, were discussed.[3]

[2] Vikas Mahendra's column "Section 34 of the Arbitration Act: Prospective but Retrospective" on Bar and bench, 09 May, 2019, 5:52 pm
URL: https://www.barandbench.com/columns/section-34-arbitration-act-prospective-but-retrospective

[3] Shaneen Parikh & Shalaka Patil on December 2, 2019
URL: https://corporate.cyrilamarchandblogs.com/2019/12/supreme-court-settles-applicability-2015-amendments-arbitration-conciliation-act-1996/

Clarifying the Quandary In Section 26 Of The Amendment Act, 2015

Section 26 was included for clarification purposes. It had the greatest of intentions when it said that, unless the parties agreed differently, the Amendment would not apply to arbitrations started prior to the Amendment's implementation, according to the clause, Unless the parties otherwise agree, nothing in this Act shall apply to arbitral proceedings commenced before the commencement of this Act in accordance with the provisions of Section 21 of the principal Act, but this Act shall apply to arbitral proceedings commenced on or after the date of commencement of this Act.

It is critical to examine several of the provision's specially worded sections. The first portion states that the Amendment Act does not apply to "arbitral proceedings," while the second half states that the Amendment Act applies "in regard to arbitral procedures." The word "with respect to arbitral proceedings" appears only in the second half of Section 26 and is noticeably omitted from the first sentence. As a result, understanding the meaning of this phrase “in respect to arbitral proceedings” is critical for delving deeper into the debate.

In *Thyssen Stahlunion Gmbh Etc versus Steel Authority of India Ltd on 7 October 1999*[4], the Supreme Court construed the same word to encompass not only

[4] Thyssen Stahlunion GmBH v SAIL, (1999) 9 SCC 334.

arbitral proceedings but also court proceedings pertaining to arbitral proceedings. As a result, the word would encompass arbitral procedures pending before the arbitrator and judicial actions relating to the same arbitral processes. The Madras High Court heard a case under Section 34 of the 1996 Act, New *Tirupur Area Development Corpn. Ltd. v Hindustan Construction Co. Ltd*.[5]. The court debated the difference between "arbitral procedures" and "in respect to arbitral proceedings" in Section 26 of the Amendment Act. The inquiry was about the impact of Section 26 on any judicial actions (or procedures to be conducted in court) that occurred after the Amendment went into effect.

The legislature's intent, according to the court, was clear: The Amendment Act was prospectively applicable to "arbitral proceedings" that began before the Amendment, but retrospectively applicable to matters "in relation to arbitral proceedings" that began after the Amendment (including court actions, regardless of whether these court actions were in relation to arbitral proceedings that began before or after the Amendment Act).

Finally, the Court broadened the scope of Section 26's application by extending the Amendment Act to arbitration-related court proceedings that began before October 23, 2015, as well as court proceedings that began on or after October

[5] New Tirupur Area Development Corpn. Ltd. v Hindustan Construction Co. Ltd., A. No.
7674 of 2015 in OP No. 931 of 2015, decided on 26-1-2016.

23, 2015, and were related to arbitral proceedings that began before October 23, 2015.

The gap in Section 26 of the Amendment becomes obvious at this point. The statute does not appear to cover a single type of court case - those that began after the Amendment Act's enactment, but which arise from arbitral procedures initiated prior to the Amendment Act's enactment. NTADCL conveniently applied the Amendment Act to a category of court proceedings relating to arbitral proceedings that commenced or would commence before the Amendment Act, making no distinction between the said category and those court proceedings relating to arbitral proceedings that commenced or would commence after the Amendment Act.

This would entail that any arbitral processes that began before the new regime came into effect would have to be regulated by the old regime, and all connected judicial actions emerging from these arbitral proceedings would have to be guided by the new regime if started on or after the new regime. In that light, interpreting the Amendment to apply to any and all court proceedings commenced after the commencement of the Amendment Act is a powerful formula for absurdities in the operation of the law of arbitration – something the Supreme Court warned about in Thyssen[6], which was heavily relied upon in

[6] Thyssen Stahlunion GmBH v SAIL, (1999) 9 SCC 334.

NTADCL. The inconsistencies that would arise if the NTADCL view is deemed to be correct in law are discussed in the next section.

While the Amendment is a fine idea in theory, its practicality will only be shown over time. Furthermore, various obstacles have been identified when examining the impact of the Amendment on ongoing arbitrations. To address this deficiency in potential application of the Amendment Act, for example, one must analyse the precise reach of Section 26. Section 26 leaves unanswered the issue of judicial procedures pertaining to pre-amendment arbitral proceedings. In that circumstances, the default rule of prospective application of an Amendment provision would apply, especially if the provision impacts a substantive right (particularly in the case of Section 34 of the principal 1996 Act). According to this logic, any substantive provision of the 1996 Act (relating to the group of court proceedings not covered by Section 26) would be immune from the Amendment Act's retroactive effect.

Section 34 Of The 1996 Act's Substantive Nature: Prospective Application of Section 34 Under The Amendment Act

The following contributions focus on the substantive substance of the right established by Section 34 of the 1996 Act. It is argued that the Amendment Act would have no retroactive effect on-court actions brought under Section 34 in connection to arbitral procedures that began before the Amendment Act went into effect. As a result, in all such cases, the only question that counts is whether

the petitioner had a substantive right at the time the Amendment was enacted, or if it was only a matter of process.

Section 34 under the 1996 Act

1. **Setting aside an award under the 'Public Policy' exception:** Section 34 of the pre-Amendment system dealt with setting aside a domestic award, as well as a domestic award emanating from international commercial arbitration. In *ONGC Ltd. v Saw Pipes Ltd*.[7] ("Saw Pipes"), the word "public policy of India" employed in Section 34 was given a broader interpretation since the idea connoted something involving public benefit and public interest. 12 It was decided that an award might be set aside if it was in violation of (a) Indian law's essential policy; (b) India's interest; (c) justice or morality; or (d) in addition, if it was unlawful.

2. **'Automatic stay' on the award's execution if the challenge is accepted:** Surprisingly, Sections 34 and 36 of the pre-Amendment Act did not expressly mention an 'automatic stay' on the award's implementation, and it was only created by court interpretation in 2004. In National Aluminum Co. Ltd. v Pressteel & Fabrications (P) Ltd., the court noted that, based on the required wording of Section 34, where an

[7] Oil and Natural Gas Commission vs Saw Pipes Ltd AIR 2003 SC 2629

award is challenged under Section 34 within the time limits set out therein, the award must be vacated.

Section 34 as amended by the Amendment Act, 2015

1. **Setting aside an award under the 'Public Policy' exception:** The 2015 Amendment Act is based on the basic idea that judicial involvement in the case of a solely domestic award has significantly greater validity than when a court is assessing the correctness of a foreign or domestic verdict in international commercial arbitration. For example, the amended Section 34 of the Amendment Act clarifies that an award is in conflict with India's "public policy" only if — I the award was induced or influenced by fraud or corruption, or was made in violation of Section 75 or Section 81; or (ii) it is in violation of Indian law's fundamental policy. (iii) It contradicts the most fundamental ideals of morality and fairness. The Amendment further states that determining whether there is a violation of Indian law's basic policy does not require an examination of the dispute's merits. "An arbitral award arising out of arbitrations other than international commercial arbitrations may also be set aside by the court if the court finds that the award is vitiated by patent illegality showing on the face of the award," according to the revised Section 34(2A) of the Amendment. Section 34(2A) further provides that "an award shall not be thrown aside solely on the premise of an

erroneous application of the law or by re-appreciating evidence" to create a balance and avoid undue involvement. This eliminates the unexpected repercussions of the Supreme Court's judgment in Saw Pipes, which, while addressing a solely domestic award, had the effect of being equally applied to verdicts resulting from foreign commercial arbitrations.

2. **'Automatic stay' on the award's execution if the challenge is accepted:**

   To address the "mischief" caused by the automatic stay under the pre-amendment system, the changes state that an award will not become unenforceable simply because an application under Section 34 is filed. If an application to set aside an arbitral award has been filed in court under Section 34, the filing of such an application does not render the award unenforceable unless the court granted a stay of the arbitral award's operation on a separate application made for that purpose**.**

When a challenge under Section 34 is brought in connection to arbitration proceedings that began before the Amendment Act took effect, the Amendment Act will be applied prospectively

If a new challenge (to a pre-Amendment arbitration award) is filed after the Amendment, the application will be governed solely by the pre-Amendment

rules. As noted in Thyssen16, once the arbitral processes have begun, the right to be regulated by an old regime for the execution of the verdict cannot be said to be an inchoate right. It is unquestionably a right that has accumulated. It would be irrational to claim that in order for a right to accrue, i.e., for an award to be enforced under the old system, some legal processes for its enforcement must have been ongoing under the old regime at the time the new regime took effect.

The following three limbs can be used to express the argument:

1. **A substantive right: Ability to appeal a decision:** It is well established that the right of appeal is a vested right inherited by a party from the outset of the action in a court of the first instance, and that such a right cannot be taken away unless by express provision or necessary inference. This also precludes any counter-submissions. Because the termination of arbitral proceedings and the setting aside of the award are two independent proceedings, a reference to the new regime for setting aside the award must be made after the procedures are ended and the final judgment is made. An appeal is a continuation of a suit, and it is not only that a right of appeal cannot be taken away by a procedural enactment that is not retroactive, but it also cannot be impaired or jeopardized, nor can new conditions be imposed on the filing of the appeal; nor can an existing condition be made more onerous or stringent in order to affect a right of appeal arising out of a suit filed before the enactment. 19 As a result, under Section 34 of the pre-Amendment 1996

Act, the right to set aside an award is a substantive one.

2. **Substantive Right Accumulation in the 1996 Regime:** When arbitration procedures are launched under the pre-Amendment regime, substantive rights are accrued. For example, a broader cause like "patent illegality" against an arbitral award from an "international commercial arbitration situated in India"; an automatic suspension of the award's execution without effecting the challenge in declaring it infructuous, etc. The Amendment Act, on the other hand, prohibits the use of the broader basis of "patent illegality" against arbitral decisions in international commercial arbitrations, and it also makes the Section 34 right more onerous by removing the immediate suspension of the award's execution.
3. **An Accrued Substantive Right cannot be affected by an Amendment Act:** It is impossible to deny that the Amendment has imposed a restriction or had an influence on the right under Section 34. As a result, the question is whether such a restriction or burden on the right to set aside an award can be imposed (arising from pre-Amendment arbitral proceedings). That is not the case, according to the Judicial Committee's decision in *Colonial Sugar Refining Co. Ltd. v Irving*[8], which stated that any interference with existing rights is contrary to the well-known principle that statutes cannot be held to act retrospectively unless there is a clear intention to do so.

[8] Colonial Sugar Refining Co. Ltd. v Irving, 1905 AC 369 (PC) : (1904-07) ALL ER Rep
1620 (PC).

The Supreme Court famously said in *Hoosein Kasam Dada India Ltd. v State of M.P.*[9] that "a pre-existing right of appeal is not abolished by an amendment if the modification is not rendered retroactive by clear words or required intendment." The existence of a pre-existing right of appeal must entail that the old legislation that established that right of appeal must also exist to sustain the maintenance of that right. The previous Act is still in effect to protect the pre-existing right of appeal." The Calcutta High Court used the same reasoning in Nagendra Nath Bose v Mon Mohan Singha.[10] As a result, Section 26 of the Amendment Act would be made nonsensical if the new regime is applied to court proceedings (commenced after the Amendment) relating to pre-Amendment arbitral proceedings while the old system is applied to those arbitral proceedings.

A right to set aside under Section 34 would not be impacted by an Amendment in the event of existing challenges before the court, according to the legislation. This is true even if the challenge is brought after the Amendment has become effective and is related to pre-Amendment arbitral proceedings. In the end, it doesn't matter when the Amendment Act went into effect. The date of the initial arbitral procedure (pre or post-

[9] Hoosein Kasam Dada (India) Ltd. v State of M.P., AIR 1953 SC 221.
[10] Nogendra Nath Bose v Mon Mohan Singha, 1930 SCC OnLine Cal 90 : (1929-30) 34
CWN 1009.

Amendment), which finally leads to a challenge under Section 34, is the one that has to be investigated.

Recent Trends

In ***BCCI v. Kochi Cricket Pvt. Ltd***[11], the Supreme Court declared that amendments to the Arbitration and Conciliation Act, 1996, passed by the Arbitration and Conciliation (Amendment) Act, 2015, which went into force on October 23, 2015, are prospective. The Court did, however, declare Section 36 of the 1996 Act to be exempt, and that it would apply retroactively. Prior to the 2015 amendment to the 1996 Act, courts would issue an automatic stay on the enforcement of an award under Section 36 until the time limit for disputing the judgement had passed or the challenge had been decided, whichever occurred first. As a result of the 2015 amendment, Section 36 has been updated to state that no automatic stay will be issued on the enforcement of an award, and that such a stay can only be granted on the basis of a separate application to the court.

The Supreme Court ruled in ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI) 2019***[12], that amendments to Section 34 of the Act, which went into effect on October 23, 2015, will apply to all Section 34 applications filed after that date, even if the underlying arbitration

[11] (2018) 6 SCC 287.
[12] AIR 2019 SC 5041

began before the amendment. The Supreme Court has thereby given the amendment a significant retrospective consequence, despite the fact that the decision's declared goal was to render the alterations entirely prospective.

Srei Equipment Finance Ltd v. Jagdish Kishinchand Valecha, The Calcutta High Court stated that the Arbitration Act of 1996 guarantees party autonomy at all levels and that the parties' freedom to choose their next course of action must be safeguarded. As a result, after setting aside the award, the Court appointed a new arbitrator with the parties' permission to resolve the disputes once more.

Haldiram Snacks Pvt Ltd v. Megha Enterprises And Ors The Court concluded that it could not overturn an arbitral judgment simply because it disagreed with the arbitral tribunal's conclusion based on the facts presented by the parties. In addition, the court cannot reappreciate evidence under section 34.

The Supreme Court concluded in ***Hindustan Construction Co. Ltd. and Anr. v. Union of India and Ors***[13]. that the **NALCO Judgment** was incorrect. The Supreme Court decided that inferring something negative from Section 36, such as that the provision is invalid whenever an application is filed under Section 34, is incorrect and contrary to the

[13] WP (Civil) No. 1074 of 2019

statutory framework, as other sections such as Sections 9, 34, 35, and 36 demonstrate (second part). As a result, the automatic stay provision in the Judgment is incorrect.

Conclusion

The Amendment Act, without a doubt, poses certain challenges. The court must, however, begin the creative effort of giving the Amendment Act's application 'force and vitality,' and in doing so, it must not change the material from which the Act is woven, but it may and should iron out the wrinkles. It is hoped that the Madras High Court's decision in NTADCL would be declared invalid in law due to the heinous consequences it may have on the execution of the law. There is no disagreement about the broad principles that apply to the current hypothesis. The unresolved category of court proceedings under Section 26 of the Amendment would have to be settled under the general rule that an unaddressed matter must be dealt with according to the law as it stood prior to the amending act. And when the amending legislation, which deals with substantive rights, is implemented retroactively, it must pass the fairness test. Unless the act expressly states otherwise, it is a well-established concept that a new law dealing with substantive rights is typically prospective in application. As a result, the straightforward conclusion is that the 1996 Act would apply to any arbitration procedures that began before the Amendment Act, right up to the completion of the proceedings as a challenge or enforcement of the judgement.