



## SC RULES: AMENDED SECTION 36 SHALL EVEN APPLY TO SECTION 34 APPLICATIONS FILED BEFORE THE 2015 AMENDMENT ACT

### **Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors.<sup>1</sup> (March 15, 2018)**

#### BACKGROUND

1. Prior to the Arbitration and Conciliation (Amendment) Act, 2015 (“**Amendment Act**”), Section 36 of the Act provided that mere filing of an application to set aside an arbitral award under Section 34 of the Act, would amount to a stay on the enforcement proceedings. The Amendment Act, substituted Section 36 of the Act, to provide that filing an appeal would not tantamount to an automatic stay on the enforcement proceedings, and a stay would be conditional to furnishing security of the award amount.
2. The issue before the Supreme Court (“**SC**”) was whether the amended Section 36 of the Act, would apply to appeals filed under Section 34 of the Act before the date of commencement of the Amendment Act i.e. October 23, 2015.

#### INTERPRETATION OF SECTION 26 OF THE AMENDMENT ACT

3. Referring to the 246<sup>th</sup> Report of the Law Commission<sup>2</sup>, the SC noted that Section 26 of the Amendment Act<sup>3</sup> has dealt with the applicability of the Amendment Act in two distinct parts. The SC observed 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.”*
4. Interpreting the use of the words *“in relation to arbitral proceedings”*, the SC construed that Section 26 is bifurcated into two parties i.e. arbitral proceedings and court proceedings. The SC held that the first part of Section 26 of the Amendment Act deals with arbitral proceedings before an arbitral tribunal, and the second part refers to court proceedings arising in relation to arbitration proceedings. The SC observed that *“whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings “in relation to” arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26”*. The SC clarified that the first part of Section 26 of the Amendment Act, provides *“that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act; and to Court proceedings which have commenced on or after the Amendment Act came into force.”*
5. Relying upon Section 26 of the Act, the SC held that when an appeal has been filed under Section 34 of the Act, after the commencement of the Amendment Act, the Amendment Act would be applicable. The SC held that *“from a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted.”*
6. The SC drew a parallel between the meaning ascribed to ‘enforcement’ under Section 36 of the Act and Order XXI and Order XLI, Rule 5 of the Code of Civil Procedure, 1908 (“**CPC**”). The SC held that *“Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and Order LXI, Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards.”*
7. Relying upon *Narhari Shivram*<sup>4</sup>, the SC concluded that since execution of a decree is within the realm of procedure, *“there is no substantive vested right in a judgment debtor to resist execution and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of*

<sup>1</sup> Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]

<sup>2</sup> GOVERNMENT OF INDIA. LAW COMMISSION OF INDIA. Report No. 246. *Amendments to the Arbitration and Conciliation Act 1996.*

<sup>3</sup> Section 26 Act not to apply to pending arbitral proceedings: - *“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 or on after the date of commencement of this Act.”*

<sup>4</sup>*Narhari Shivram Shet Narvekar v. Pannalal Umediram* (1976) 3 SCC 203


commencement of the Amendment Act”.

8. Relying upon *National Aluminium Company*<sup>5</sup>, the SC concurred that “It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons.”

## CONCLUSION AND ANALYSIS

9. Section 26 of the Amendment Act weighed in on the SC, and the SC ruled that court proceedings arising from arbitrations were distinct from arbitration proceedings before an arbitral tribunal. The SC held that the amended Section 36 would be applicable to applications filed under Section 34 of the Act (i.e. court proceedings), even if such applications were filed before the date of commencement of the Amendment Act. While the decision of the SC is welcome as it fills a major lacuna in the law, a brewing cause of concern is that this ruling will turn pending Section 34 applications on their heads.
10. The Union Cabinet on March 7, 2018, approved the Arbitration and Conciliation (Amendment) Bill, 2018 (“**Bill**”) which proposes the insertion of Section 87 in the Act. Section 87 proposes that the Amendment Act shall not apply to arbitral proceedings or court proceedings, which commenced before the Amendment Act. If enacted, this provision will probably contradict the judgment. The SC has directed the legislature to reconsider Section 87 of the Bill as it would put all the amendments made by the Amendment Act on a back burner.

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<sup>5</sup>*National Aluminium Co. Ltd. v. Pressteel & Fabrications (P)*, (2004) 1 SCC 540,