

then is section 36 of the Act as amended by the 2015 Amendment Act applicable or is section 36 as it originally stood applicable?

Facts

- In an arbitration between Chetan R. Shah (**Applicant**) and Emkay Fincap Ltd (**Respondent**), the notice invoking arbitration agreement was issued in June 2011. The Award was passed on 27 March 2015 (**Award**), and in June 2017, the Applicant filed an application under section 34 of the Act (**Section 34 Application**), to set aside the Award. On 23 June 2017, the Applicant also filed a Notice of Motion in the Section 34 Application under section 36 of the Act, seeking a stay on the Award (**Notice of Motion**). On 21 August 2019, the Court admitted the Section 34 Application.
- The Applicant submitted that since the arbitration proceedings have commenced prior to 23 October 2015 and the Award was made prior to 23 October 2015, the Applicant would be entitled to an unconditional stay against the enforcement of the Award.
- The Respondent submitted that section 87 of the Act clearly provides that unless the parties otherwise agree, the amendments made by the 2015 Amendment Act shall not apply. The Respondent relied upon the arbitration clause between the parties which read as follows:

“...The award delivered by the Sole Arbitrator shall be final and binding upon the parties. The provisions of The Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act”) along with all the statutory modifications and re-enactment so far as they are consistent with this reference shall be deemed to have been incorporated herein and all the provisions of the “said act” shall apply to the reference hereunder contemplated.”

Observations and findings

Arbitration Agreement provides that the Act along with statutory modifications shall be applicable

- The Court observed that the arbitral proceedings were commenced when the notice invoking arbitration agreement was received in June 2011 i.e. before section 36 was amended. However, in view of the specific agreement between the parties that the provisions of the Act along with all the statutory modifications and re-enactments shall apply to the reference made under the said arbitration agreement, the parties would be governed by the Act in force on the date of the execution of the said arbitration agreement and also the statutory modifications and re-enactments thereafter.

Judicial Pronouncements

- The Applicant sought to rely upon the decision of the Court in *Godrej Industries Limited*² and *Iqbal A. Parekh*³. The Court observed that although in the said cases, it has been held that since the arbitral proceedings were commenced prior to 23 October, 2015, section 36 of the Act as amended by the 2015 Amended Act would not apply, the facts therein differed from the present case. In *Godrej Industries Limited* and *Iqbal A. Parekh*, the arbitration agreement did not provide that the parties had agreed to the applicability of the Act and its subsequent statutory amendments and re-enactments.
- Relying upon the decision of the Court in *Kolhapur Municipal Corporation*⁴, the Respondent submitted that the present case would be governed by section 36 of the Arbitration and Conciliation Act, 1996, as amended by the 2015 Amendment Act.
- In *Kolhapur Municipal Corporation*, the Court *inter alia* held that :
 - The parties entered into an arbitration agreement on 14 November 1995 i.e. much prior to the enactment of the Act. However, the arbitration agreement provided that the arbitration shall be conducted in accordance with the Arbitration Act, 1940 or any statutory modification thereafter;

² *Godrej Industries Limited v. Darius Rutton Kavasmaneck* in Commercial Arbitration Petition No. 1021 of 2019.

³ *Iqbal A. Parekh v. J.P.B. Developers LLP* in Notice of Motion No. 1066 of 2019 in Commercial Arbitration Petition No. 500 of 2019. In *Iqbal A. Parekh*, the subject arbitral proceedings commenced before 23 October 2015. Accordingly, the Court held that since the arbitral proceedings commenced prior to the date of the 2015 Amendment Act, the applicant would be entitled to an automatic stay of the impugned award.

⁴ *The Kolhapur Municipal Corporation v. Fairdeal Construction*, 2019 SCC OnLine Bom 2931

- The arbitration agreement was invoked after 1996 and thus the Court held that a reference to the Arbitration Act, 1940 made in the agreement shall be read as reference made to the Act in view of section 8 of General Clauses Act, 1897;
- Since the arbitration agreement was invoked prior to the 2015 Amendment Act, the applicant would ordinarily be entitled to an automatic stay on enforcement of the award;
- However, in view of the language of the arbitration agreement entered into between the parties, section 87 of the Act inserted by the 2019 Amendment Act would not assist the case of the petitioner. The parties, thus, would be governed by section 36 of the Act as duly amended, and the petitioner would not be entitled to seek any automatic stay on the enforcement of the impugned award.

The Court held that its judgment in the *Kohlapur Municipal Corporation* squarely applied to the present case.

Conclusion

- The Court concluded that since the parties had agreed that not only the provisions of Act would apply but also statutory modifications or re-enactments thereof, though the arbitration notice was issued in June 2011 i.e. prior to the amendment to section 36 of the Act by the 2015 Amendment Act, the Applicant was not entitled to any automatic stay of the Award.
- The Court allowed a stay on the enforcement of the Award provided that the Applicant deposited 50 % of the sum awarded with interest before the Court, within a period of four weeks from the date of the order.

Analysis

- The derogable nature of section 87 of the Act is a positive step in reinforcing party autonomy. Moreover, it is an opportunity to parties to avoid a situation where they may have to suffer due to an erstwhile provision in the Act, despite a more effective and amended law being in force. For example, the Fifth and Seventh Schedules of the Act aid in ensuring the constitution of a fair and impartial arbitral tribunal. If the parties have specified in their arbitration agreement that the Act with any statutory modifications thereof would be applicable, then the parties may benefit from the applicability of such Fifth and Seventh Schedules.
- Previously, the Supreme Court in *S.P. Singla*⁵ examined an arbitration clause⁶ that provided that the Arbitration Act, 1940 or statutory modifications thereof shall apply to the arbitration proceedings. The Supreme Court held that the said proviso to the arbitration clause could not be considered as an agreement between the parties such that the 2015 Amendment Act would be applicable. The Supreme Court further held that since the arbitration commenced in 2013, the 2015 Amendment Act could not be invoked. Given that the arbitration clause in *S.P. Singla* differs from the present case, the fate of arbitration clauses akin to the present case remains to be seen.
- While the 2019 Amendment Act has legislatively superseded *BCCI*⁷ questions as to the constitutionality of section 87 of the Act are currently pending in the Supreme Court. Till the Supreme Court decides that issue, the current decision very much aids parties in applying the 2015 Amendments retrospectively if their arbitration agreement so permits them.

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⁵ *S.P. Singla Construction (P) Ltd. v. State of Himachal Pradesh & Anr.*, (2019) 2 SCC 488

⁶ “...Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause.”

⁷ *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*, (2018) 6 SCC 287