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# ANALYSING STAY OF AN ARBITRAL AWARD UNDER SECTION 36(2) OF THE ARBITRATION AND CONCILIATION ACT, 1996



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## Introduction

- <sup>1</sup> Section 36(2) of the Arbitration and Conciliation Act, 1996 (said Act) comes into play only after a challenge to the arbitral award is made by a party under Section 34 of the said Act. Section 34 deals with setting aside of the whole or a part of the award on any of the grounds of challenge available under such section.
- <sup>2</sup> Prior to the amendment of 2015, a challenge to the award attracted automatic stay on the execution of the award meaning that the award could not be enforced until the challenge to the award was disposed of.
- <sup>3</sup> However, by the amendment of 2015, Section 36(2) was introduced which expressly barred the provision for automatic stay and envisaged that the party challenging the award under Section 34 must file a separate application praying for a stay on the execution of the award, which the Hon'ble Court may grant upon conditions or may not grant at all.

## Status of Section 36(2)

- <sup>1</sup> In essence, the law as it stands today is that in order to resist enforcement of the award, a mere challenge under Section 34 of the said Act would not be enough and that the party must also additionally pray for a stay of the award.
- <sup>2</sup> Such stay, if granted by a competent court, must also be binding on the award-holder who shall thereafter be consequently stayed from moving ahead with the enforcement application under Section 36(1) of the said Act until the stay is uplifted or the Section 34 application is finally decided.
- <sup>3</sup> Section 36(3) further provides that a stay in respect of an award may be granted subject to such conditions as the court may deem fit. The court in determining the fate of the application, shall have due regard to the provisions for stay of a money decree under the Code of Civil Procedure, 1908 (CPC).

- <sup>4</sup> In order to protect the interest of both the parties to the dispute, the court may direct the party seeking stay of the award to furnish security as a condition precedent for allowing the stay application.

## Whether it is mandatory and condition precedent upon an award-debtor to secure an award under Section 36 (2) of the said Act

- <sup>1</sup> The relevant statute by itself does not mandate a party to secure an award once a challenge has been made against the award. However, since the scope of automatic stay has been done away with in the 2015 amendment and in view of the decision of the Supreme Court in *Hindustan Construction Company vs. Union of India (2019) SCC OnLine SC 1706*, it is now advisable for the parties to secure the award and seek stay thereupon to ensure that the award does not stand executed even before the challenge under section 34 is decided on merits.
- <sup>2</sup> Since automatic stay is not available on making a challenge to the award, the award-holder is well within its rights to move ahead with the execution unless a stay on the operation of the award is granted under section 36(2).
- <sup>3</sup> In *Pam Developments vs. State of West Bengal (2019) 8 SCC 112*, the Supreme Court had opined that the purpose of furnishing security against stay of an award is to balance the equities between the parties and cause no undue hardship to an award-holder after the execution has been stayed.
- <sup>4</sup> The judiciary has highlighted the importance of pro-arbitration approach. In line with *BCCI vs. Kochi Cricket (P) Ltd. (2018) 6 SCC 287*, the decisions of the court have been in favour of securing an award which provides the award-holder with an immediate relief by way of the awarded amount being furnished as security irrespective of the fate of the challenge unlike in cases of automatic stay which would stall the process

of execution for several years thus killing the object of the said Act, i.e., speedy resolution of disputes through alternate dispute mechanism.

- 5 Securing an award is now encouraged by courts in order to ensure benefit to both the parties.
- 6 At the same time, a stay must not be granted in usual course. The party seeking stay must establish its right to being granted the stay by showing that it would otherwise suffer undue hardship. (*Malwa Strips Private Limited vs. Jyoti Limited (2009) 2 SCC 426*)

#### **When an award is not executable, should a party invoke 36(2)**

- 1 Under Section 36(1), an award becomes enforceable when the time for making an application for setting aside of the award expires, subject to the provisions of section 36(2), i.e., where an award has been stayed by an order of the court.
- 2 In essence, an award can only be enforced after three months from the date on which the parties received the arbitral award [Section 34(3)] has expired, since that is the time that is made available to the parties to challenge the award if they are dissatisfied with the same.
- 3 In case of foreign awards, Section 48 of the said Act lays down the conditions under which the request for execution may be refused.
- 4 The Calcutta High Court in *EIG (Mauritius) Limited vs. McNally Bharat Engineering 2021 SCC OnLine Cal 2915* held “that a party seeking to resist the enforcement of a foreign award has to trek through a terrain more arduous than the landscape of Section 34 where the award can trip on multiple pitfalls.”
- 5 Contrary to the above view, in *India Cements Capital Limited vs. William*, a revision petition was filed against an order of the court that had denied execution of the award. The revision petitioner argued that an award-debtor may only take the recourse of section 34 in order to challenge the award and cannot resist enforcement through a short-cut under section 47 (Questions to be determined by a court executing decree) of the CPC.
- 6 The court held that by reason of a provision for challenge being available under section 34, it cannot be argued that the right of a party to raise questions as to the execution would cease to exist. Thus, the party was entitled to raise questions of validity of the award in the execution. The argument that allowing a party to make contention during the execution would effectively add an extra ground of challenge under section 34 was also rejected.

7 Thus, when an award is not executable, it is not mandatory for a party to invoke section 36(2). Although section 36(2) provides a shield of protection, other remedies and modes of challenge against the execution are also available to the parties.

8 Even where an award has been stayed under section 36(2) but the award is ultimately upheld during disposal of the section 34 application, the award becomes absolute and enforceable. However, order under Section 34 can be challenged under section 37 and thereafter through Special Leave Petition.

#### **Conclusion**

- 1 Therefore, the clear intent of the legislature and the judiciary can be interpreted from the general tendencies of the courts in the recent past, which have sought to balance the right of both Award Holder viz-a-viz the Award Debtor to secure the means of Justice.
- 2 The approach of courts though has been considerably liberal towards grant of stay for enforcement of the Award on deposit of part or full amount of the Awarded amount. However, the Court have nowhere lost sight of the plight of Award Holder, who had been consistently allowed to withdraw the deposited amount by Award Debtor either on giving of some security such as Bank Guarantees, etc or otherwise.
- 3 The award-debtor is not mandated to apply for stay of the award. However, the stay in a way protects the interest of both the parties. The award-debtor is secured against execution of the award while the challenge is pending in court and the award-holder is secured against the loss it may suffer in approaching the award-debtor to clear its dues in terms of such award, if the award is not set aside and the right of the award-holder to seek payment or relief in terms of the award accrues again.