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DECODING: COURT'S DISCRETION U/S 34 (5) AND (6) AND SECTION 36 OF THE A&C ACT

INTRODUCTION

- Up to the present date, the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] has been subjected to amendment thrice i.e. in the years 2015, 2019 and 2021. However, the most major overhaul to the Act was done through the Arbitration and Conciliation (Amendment) Ordinance, 2015 (later replaced by the Arbitration and Conciliation Amendment Act, 2015) [hereinafter referred to as 'the 2015 Amendment Act'], inter alia, amending sections 34 and 36 of the Act.

MEANING AND SCOPE OF SECTION 34(6) READ WITH SECTION 34(5)

- Section 34, the only provision under Chapter VII of Part I of the Act deals with the recourse that a party has against an Arbitral Award. Section 34 holds significance in the sense that it involves intervention of court and power to set aside the Arbitral Award.

- With no time limit prescribed for the courts to decide the section 34 application to set aside the arbitral award and following the recommendation of the Law Commission of India Report No. 246 in the year 2014¹, sub-sections (5) and (6) were inserted in section 34 of the Act by virtue of the 2015 Amendment Act. The object was to ensure that the genuineness and seriousness of the applicant and also to expedite the process of deciding the application for challenging the arbitral awards.

- Section 34(5) provides that an application under section 34 for setting aside arbitral award can be filed *only* after issuing a prior notice to the other party. Further, the application *has to* be accompanied by an affidavit by the applicant endorsing compliance with the requirement of serving of notice.

- Whereas as per section 34(6), the court *has to* dispose of the application filed under section 34(1) *in any event* within a period of one year from the date of serving of notice.

- The use of this mandatory nature of the language besides the objective behind the enactment of the Act became the premise of findings of High Courts of Patna², Kerala³, Himachal Pradesh⁴, Delhi⁵ and Guwahati⁶ to rule that sub-sections (5) and (6) of section 34 are mandatory in nature rather than directory.

- However, interestingly, the Act which stipulated the time limit provides for no consequence for the courts if the same stipulation is breached. In contrast, for the arbitral tribunal the consequences for failing to comply with the time limit have been provided under section 29A of the same Act. This consequential reasoning became the basis of the finding of the High Courts of Bombay⁷ and Calcutta⁸ to conclude that sub-sections (5) and (6) of section 34 are merely directory and not mandatory in nature.

- The Supreme Court of India (SCI) in the State of Bihar and Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti⁹ settled the conflicting views taken by the various High Courts and held that sections 34(5) and 34(6) form part of a composite scheme. The SCI further held "*section 34(5) to be procedural in nature and the object behind which is to dispose of applications expeditiously and not scuttle the same. Section 34(5) is not a condition precedent as section 34(1) does not refer to this sub-section. The only requirement is that an application for setting aside an award be in accordance with sub-sections (2) and (3). However, the endeavor of every court in*

¹ <https://lawcommissionofindia.nic.in/reports/rport246.pdf>.

² Bihar Rajya Bhumi Vikas Bank Samiti v. State of Bihar and Ors. L.P.A. No. 1841 of 2016 in C.W.J.C. No. 746 of 2016.

³ Shamsudeen v. Shreeram Transport Finance Co. Ltd., Arb. A. No. 49 of 2016.

⁴ Madhava Hitech Engineers Pvt. Ltd. v. The Executive Engineers and Ors. O.M.P. (M) No. 48 of 2016.

⁵ Machine Tool (India) Ltd. v. Splendor Buildwell Pvt. Ltd. and Ors. O.M.P. (COMM.) 199-200 of 2018.

⁶ Union of India and Ors. v. Durga Krishna Store Pvt. Ltd., Arb. A. 1 of 2018.

⁷ Global Aviation Services Private Limited v. Airport Authority of India 2018 SCC Online Bom 233. Maharashtra State Road Development Corporation Ltd. v. Simplex Gayatri Consortium and Ors. Commercial Arbitration Petition No. 453 of 2017.

⁸ Srei Infrastructure Finance Limited v. Candor Gurgaon Two Developers and Projects Pvt. Ltd., A.P. No. 346 of 2018.

⁹ AIR 2018 SC 3862.



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which a section 34 application has been filed shall be to stick to the time limit prescribed under the Act”.

- Moreover, as per the language of section 34(6) the one year time limit has to be calculated from the date of the serving of notice under section 34(5) and not from the date of filing of the section 34(1) application which will be different and latter in point of time from the date of serving of notice under section 34(5). Hence, if strict rule of literal interpretation is made applicable in the case of time limit provided in section 34(6), then eventually the court will be left with the time even less than one year.
- **Maxwell** in *Interpretation of Statutes (10th Edition)* says that “considerations of convenience and justice are uppermost, and if general inconvenience or injustice results, without promoting the real aim and object of the enactment, the provision must be declared to be directory”.
- Hence, sections 34(5) and 34(6) of the Act have to be read directory simply because the vested right of a disputing party cannot be taken away merely on non-compliance of these provisions and the time limit.

COURT'S DISCRETION UNDER SECTION 36 FOR SECURING THE AWARDED AMOUNT

- Section 36 provides for the enforcement of arbitral awards under Chapter VIII of the Act. Originally drafted, section 36 had the effect of automatic stay on the filing of an application under section 34, leaving arbitral award unenforceable.
- This position was done away with by the 2015 Amendment Act following the observation of the SCI in the *National Aluminum Co. Ltd. v. Pressteel & Fabrications*¹⁰ and following the recommendation of the Law Commission of India in its 246th Report.
- Now, sub-section (2) of section 36 clearly provides that filing of an application to set aside the arbitral award under section 34 shall not by itself render the award unenforceable. The party seeking to stay the enforcement of the award has to make a separate application for the same.
- Further, the court under sub-section (3) of section 36 on receipt of such application, may grant such stay with or without conditions for reasons to be recorded in writing. Provided that the court shall have due regard to the provisions of grant of stay of a money decree under the Code of Civil Procedure, 1908 (CPC).
- The relevant provisions under the CPC in this regard are Rules 1 and 5 of Order XLI, which deal with appeals from money decrees and stay on execution of a money decree. On plain reading of these provisions, an unconditional stay on the execution of a money decree does not appear to be contemplated in the CPC and has been clearly ruled out by judicial precedents as well.

- The SCI in *Pam Developments Private Limited. v. State of West Bengal*¹¹ clarified that “when it comes to applications for stay of awards under section 36 of the Act, the courts are not strictly bound by the provisions of the CPC relating to stay of a money decree”.
- If the courts are not strictly bound by the CPC provisions then what can be the other conditions that the court can impose for securing the awarded amount is an issue that needs clarification. Further, while imposing such conditions can courts ignore the stipulated time limit of one year under newly inserted section 34(6) certainly needs some consideration.
- The plain reading of section 36(2) read with section 36(3) of the Act clearly affords discretion to courts to impose such conditions as they may deem fit. Moreover, the SCI's ruling section 34(6) to be directory and not mandatory has made the situation a bit more serious, which requires introspection.

CONCLUSION

- The recourse to arbitration is best served when the courts' interference/intervention remains minimal. All the alternative dispute settlement procedures including arbitration are alternatives rather than extension, supplementary and complementary to the courts' traditional way of resolving disputes. By end of the month of May 2022, around 4 crore cases are pending across all levels of courts in India of which around 3 crore cases are more than one year old.¹² In future, with the rising number of disputes and the courts' inability to decide cases expeditiously for numerous reasons, these alternative ways of resolving disputes are certainly going to be a preferred choice of disputing parties. Though mandatory stay on enforcement of the Award has been abolished in the 2015 Amendment Act, leading to an equitable position for the Award holder, who is not at injury by merely filing of a Petition under Section 34, yet, declaration of the provisions of Section 34(6) envisaging disposing of the Petition under 34 of the Act as directory has led to a situation of injury to the person against whom the Award has passed and he had preferred Appeal against it.

¹⁰ (2004) 1 SCC 540.

¹¹ (2019) 8 SCC 112.

¹² National Judicial Data Grid, <https://njdg.ecourts.gov.in/njdgnew/index.php>.