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# INTERPLAY BETWEEN SECTION 34 AND SECTION 36(2) OF THE ARBITRATION & CONCILIATION ACT, 1996

## INTRODUCTION

1. The Arbitration and Conciliation Act, 1996 (said Act) was enacted to lay down the law and procedures in relation to alternative dispute resolution mechanism in India.

2. Under the said Act, an arbitral award passed by an arbitral tribunal may be challenged before a court on any of the grounds mentioned under section 34.

3. Before 2015, an award challenged under section 34 was subject to automatic stay. The decision in *National Aluminum Company Ltd. Vs. Pressteel & Fabrications (P) Ltd. (2004) 1 SCC 540* clarified and followed the manner of automatic suspension.

4. However, the automatic stay rule consequently imposed various hardships upon the award-holder including delay in getting reliefs. It also fell against the object of quick dispute resolution system which the said Act sought to promote.

5. The issue was addressed under The Arbitration and Conciliation (Amendment) Act, 2015. Section 36(2) was inserted to uplift the implied provision of automatic stay. *BCCI vs. Kochi Cricket (P) Ltd. (2018) 6 SCC 287* has also confirmed that the said Act has done away with the concept of automatic stay.

### B. Section 34

1. An award may be challenged before the court under section 34 on any of the following grounds:

- Incapacity of the party
- Invalidity of the arbitration agreement
- Improper notice of arbitration
- Dispute falling outside the terms of submission
- Arbitral tribunal formed outside the scope of agreement or the said Act
- Subject-matter of dispute not capable of settlement by arbitration
- Conflict with public policy of India
  - o Induced or affected by fraud or corruption
  - o Contravention with fundamental policy of Indian law
  - o Conflict with most basic notions of morality and justice
- Award vitiated by patent illegality

2. Challenge under section 34 may not be brought after expiration of three months from the date on which the

party receives the award or from the date on which the request for delivery of the award was disposed of.

3. The limitation period of three months may be further extended by thirty days when sufficient cause is shown to the court for the delay in making the application.

### C. Section 36

1. An award under Part I of the said Act is enforceable in the same manner as if it were a decree of the court.

2. However, once a stay application on the award has been allowed by the court, the award-holder loses its right, even though temporarily, to seek execution of the award

- either until the award gains finality by reason of rejection of section 34 application

- or the interim order of stay is cancelled or reversed.

3. Section 34 and section 36 applications may be brought parallelly.

4. Once a challenge under section 34 is rejected, the award becomes enforceable under section 36 and the stay, if any, stands vacated. (*Venture Global Engineering LLC vs. Tech Mahindra Limited (2018) 1 SCC 656*).

### D. Section 36(2)

1. Section 36(2) states that filing of an application under section 34 for setting aside shall not by itself render an award unenforceable and a separate application for that purpose shall have to be filed, on consideration of which the court may grant an order of stay on the operation of the award.

2. The scope of stay has now been transferred to the domain of discretionary powers of the court while earlier (prior to amendment of 2015) it was automatic in nature.

### E. Section 36(3)

1. Post-amendment, the said Act also provides that on an application filed under section 36(2), the court may grant stay on the operation of the award on such conditions as it may deem fit reasons for which are to be recorded in writing.

2. The Act also clarifies that in the procedure of consideration of the application in cases where the award is a money award (the award is for payment of money), the court shall refer to the provisions of the Code of Civil Procedure, 1908 (CPC) in relation to the grant of stay of



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a money decree.

3. Under section 36(3) the court may grant stay on the imposition of conditions as may be directed by the court. In the matters of stay of execution of a decree, CPC provides for furnishing security to an extent commensurate with the amount of the decree. Thus, for the stay of an award, the court has powers to direct the award-debtor or any party who makes the application for stay to furnish security or impose such conditions as it may deem fit.

4. The term "...on such conditions as it may deem fit..." was interpreted in *Nitu Shaw vs. Bharat Hitech (Cements) Private Limited* wherein the court held that immovable property may be furnished as security. Furnishing security may not necessarily mean security in the form of cash or bank guarantee.

#### **F. Correlation between section 34 and section 36(2)**

1. The grounds for setting aside of an award under section 34, in usual course are to be established by the party challenging the award in the procedure of adjudication.

2. There are no conditions precedent for a court to grant stay except for the *prima facie* satisfaction of the court as to the existence of circumstances that would warrant such stay.

3. The court examines the existence of a *prima facie* case on the basis of the grounds and case made out by the award-debtor under section 34, before granting stay on the operation of the award.

#### **G. Conditional vs. Unconditional Stay**

1. The said Act, vide an amendment ordinance of 2020 provided that where the award in itself or the contract or agreement relied upon in the making of award has been affected by fraud, the court shall grant unconditional stay on the operation of the award.

2. An unconditional stay is ideally granted without furnishing any security and for an indefinite period of time, i.e., until the section 34 application reaches finality.

3. *Kishor N Shah vs. Urban Infrastructure Trustees Limited* refused the grant of an unconditional stay and although the prayer did not request the stay to be on 'such conditions as it may deem fit', the court granted the award-debtors an option by means of conditional stay.

4. *Pam Developments (P) Ltd. Vs. State of W.B. (2019) 8 SCC 112* interpreted section 36(3) and the Law Commission Report and held that unconditional stay cannot be construed as the intent of the legislature and that stay shall be subject to such conditions as deemed appropriate. It also held that the provision makes no exception for the government.

#### **H. Conclusion**

1. Removal of the provision for automatic stay, ever since the amendment of 2015 is being seen as the right step in the direction of pro-arbitration regime.

2. It also gives effect to the purpose of choosing the arbitral forum and finality of award and the fact that the courts are not to interfere with the award unless any of the grounds under section 34 are found to be present in the award or the award is unreasoned as against the requirement under section 30.

3. In essence, section 34 becomes a hindrance to the enforcement of an arbitral award since the statute expressly mentions that an award may be enforced only when the time period for filing an application under section 34 has expired. (*Srei Equipment Finance Limited vs. Marg Limited*)