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“DECODING: THE ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2020 WITH SPECIAL REFERENCE TO SECTION 36(3) OF THE ARBITRATION & CONCILIATION ACT, 1996.

On 4th November 2020, The Hon’ble President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020, amending certain provisions of the Arbitration & Conciliation Act, 1996. The amendment is introduced to seek remedies for the issues raised by various stakeholders after the Arbitration and Conciliation (Amendment) Act, 2019 came into effect. With the recent amendment of 2020, all the stakeholders will get an opportunity to seek an “unconditional stay” on enforcement of arbitral awards where the underlying arbitration agreement or contract or making of the arbitral award are induced by fraud or corruption.

Before going to the Ordinance, let’s understand what we mean by automatic stay (or unconditional stay) in the Arbitration Landscape. Until 2015, under the Arbitration and Conciliation Act, 1996, as and when a party challenged an Award under Section 34 of the Act, automatic stay of the award was granted to the party. There was no need or requirement under the Act, for the party to file a separate application, seeking stay of operation of the Award. However, this was altered by the Arbitration & Conciliation Amendment Act, 2015 and clause 3 to section 36 was added to the Act, which made it mandatory for the party challenging the award, to file a separate application seeking stay of operation of the Award, subject to conditions as may be imposed by the court, before granting any stay on the arbitral award. Though, the amendment still remained silent on whether the benefits of section 36(3) of the Act will also be transferred or available to the arbitrations or court proceedings arising out of arbitration agreements before the cut of date i.e. October 2015. This issue raised a lot of hues and cry upon this confusion which arose as the aftereffect of the 2015 amendment.

Following the issues, In the case of *BCCI vs. Kochi Cricket Private Limited* ((2018) 6 SCC 287), the Supreme Court held that no automatic stay would be available on the proceedings commenced before the Arbitration & Conciliation Amendment Act, 2015. It

also upheld the provisions of section 26 of the Amendment Act, 2015 which provided for its prospective application.

But later, the Srikrishna Committee report, 2017 (*Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*) negated the benefit for section 36(3) to the arbitration proceedings commenced before the 2015 Amendment. Based on this report, the government came with the Arbitration & Conciliation Amendment Act, 2019, which let go of section 26 of the Act and it introduced section 87 which specifically stated that the application of Amendment Act, 2015 will apply only to arbitral proceedings which commenced on or after the Arbitration and Conciliation Amendment Act, 2015. Section 21 of the Act provides deals with the provisions in respect of commencement of arbitral proceedings. The parties are free to agree and determine when the arbitration proceedings can officially commence. But in absence of such agreement or where parties fail to arrive at an agreement, the arbitral proceedings can commence when one party issues a notice to the other party, in writing, showing its intention to refer the dispute to arbitration.

The recommendations of the *Shri Krishna Committee* contradicted the BCCI case judgment and took back to the old position before the 2015 Amendment Act that no benefit of section 36(3) will be granted to any arbitral proceeding or court proceedings arising out of the arbitration agreement initiated before the cut of date of October 2015.

The newly added Section 87 of the Arbitration & Conciliation Amendment Act, 2019 was challenged in *Hindustan Construction Company Limited & Anr. vs. UOI* (WP (Civil) No. 1074 of 2019). The Supreme Court restored the position held in the BCCI case judgment and invalidated section 87 of the Amendment Act, 2019.

Now, coming to the current Ordinance of 2020, Section 2 of the Ordinance has amended section 36 of the Act by adding a second proviso to clause 3 of section 36, which reads:



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"Provided further that where the Court is satisfied that a prima facie case is made out,—

(a) that the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."

Explanation.— For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Concluding the present position, it can be said through the Ordinance, 2020, parties get an opportunity, in fact, to seek automatic stay (or Unconditional Stay) over the operation of the arbitral award, where the concerned arbitration agreement or contract has been obtained by fraud or corruption. Therefore, a prima facie case of fraud or corruption needs to be pleaded and established while challenging the arbitral award, and if, prima facie case is satisfied that there is fraud or corruption, there there will be automatic stay. For this, when the party is pleading under section 34 of the Act, he has to file a separate application under section 34 (2) for stay. In this stay application, if fraud or corruption is established, automatic stay will be granted and court will not have jurisdiction to enforce any conditions on the same.

Confusions and doubts regarding the interpretation of the term “fraud” and ‘corruptions’, shall subsist, as both are very wide and broad. The definition of fraud can be referred to in Section 17 of the Indian Contract Act, 1872 and Section 421 of the Indian Penal Code. Whereas, the term “corruption” is not defined anywhere as such in Indian laws, therefore, literal interpretation has to be given for the definition of “corruption”.

It appears that the Ordinance, 2020 is taking us prior to the times in 2015. The issue that lingers is how the courts will interpret the meaning and definition of “fraud” and “corruption”, post Ordinance, 2020. Whether, the courts will rely on the arbitration pleadings already laid before it or the court will allow the fresh pleadings on this matter at the time of the challenge of arbitral award. For this, we have to wait for the time to come. Even before this latest Ordinance, both the terms, fraud and corruption, are considered to be matters in conflict with the public policy by virtue of section 34 of Act, and an arbitral award is obligated to be set aside, if, it is in conflict with the public policy of India. Now, In present situation, this area has become even more wider and broader to take the dig at the arbitral award passed by the court at all the stages of the arbitral proceedings before enforcement.