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29th MARCH 2022

SECTION 34(6) READ WITH SECTION 36(2) OF THEARBITRATION AND CONCILIATION ACT, 1996 -DIRECTORY OR MANDATORY?

INTRODUCTION AND BACKGROUND

• Ever since the enactment of the Arbitration and Conciliation Act, 1996 **("Arbitration Act")**, there has been ample scrutiny of the regime's efficacy in India. In order to further the objective of the statute, that is, to ensure speedy and effective resolution of disputes and reducing the burden on the Courts, the Arbitration and Conciliation (Amendment) Act, 2015 **("Amendment Act")** was implemented.

• Amongst the varied amendments that it brought to the fore, the following are notable:

a. Section 34(5) - *"An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement."*

b. Section 34(6) - *"An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."*

c. Section 36 (2) - *"Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose."*

• The purpose of these amendments was to make the process of application for setting aside of the Award time bound.

Whether the Court has to ensure compliance of Section 34(6) of Arbitration Act?

• Strict compliance of Section 34(6) in granting an award of stay, was questioned in *State of Bihar and Others vs. Bihar Rajya Bhumi Vikas Bank Samiti (2018) 9 SCC 472,* where the Hon'ble Supreme Court examined whether the aforementioned provisions were mandatory or directory in nature. It was held that the objective of Section 34(5) and (6) is the requisite that an application under Section 34 should be disposed of expeditiously within a period of one year from the date of service of notice. It was also held that Section 34(6) should be considered directory in nature as no consequence is provided by the Legislature for its non-compliance, and the vested rights of the party to challenge an Award under Section 34 cannot be taken away for non-compliance of provision of issuance of prior notice before filing of Arbitration petition.

• *In Global Aviation Services Pvt. Ltd. vs. Airport Authority of India [2018 SCC OnLine Bom 233]*, the Bombay High Court opined that the time limit of one year given under Section 34(6) is directory in nature, because there is no penalty or consequence given for not complying with the provision, thereby, rendering it not mandatory.

Usage of "shall" in Section 34(5) and (6) of Arbitration Act

• It may appear that the word "shall" has been used by the Legislature in Section 34(5) and (6) of the Arbitration Act in order to render their nature mandatory and not leave it up to the discretion of the Court. The implication of using "shall", however, was previously decided by the Hon'ble Supreme Court, in *Salem Advocate Bar Association vs. Union of India [AIR 2003 SC 189]* in the context of Order 8 Rule 1 of the CPC, 1908. It was held that the word "shall" by itself does not make a provision mandatory, rather it has to be decided from the context, whilst keeping in mind the legislative intent and the correlation of the provision itself with the rest of the statute.discretion of the Court. The implication of using "shall", however, was previously decided by the Hon'ble Supreme Court, in *Salem Advocate Bar Association vs. Union of India [AIR 2003 SC 189]* in the context of Order 8 Rule 1 of the CPC, 1908. It was held that the word "shall" by itself does not make a provision mandatory, rather it has to be decided from the context, whilst keeping in mind the legislative intent and the correlation of the provision itself with the rest of the statute.

Procedural law - Strict or liberal interpretation?

• The Apex Court has held on several occasions that rules of procedure are made to advance the cause of justice and not to defeat it. Hence, procedural law has to be interpreted in a way which will take into account the balance of convenience of both the parties.It should not be construed in a manner which will render the Court helpless to meet the ends of justice in extraordinary situations.[*Kailash vs. Nanhku* (2005) 4 SCC 480]

Paramita Banerjee
Associate, MCO Legals
B.A., LLB (Hons.),
School of Law,
Christ University,
Bangalore

Expertise:
Litigation & Corporate/
Commercial Arbitration

paramita.b@mcolegals.co.in

Ishika Chattopadhyay
Research Partner
B.A. LLB. (Hons)
Calcutta University

· Therefore, if the Court has to enter into the complexity or merits of an application under Section 34 for the sake of justice, it may take longer than the stipulated time under Section 34(6) of the Arbitration Act.

· Consequently, if the sub-section is given a strict interpretation, the Court will be rushed and as a result, an innocent party might suffer.

Ambiguity of the provision

· When sub-section (6) is read with sub-section (5) of the Arbitration Act, it appears that there is some ambiguity, because the one year time period is calculated from the date of service of the notice. However, there is no clarity regarding time period within which the application has to be filed from the date of service of the notice.

• Therefore, if the application is filed at a later date from the date of service, for instance after two months, then the one year period is cut short and the Court gets only ten months to decide on the matter.

Conclusion

• It may be concluded that the Court is not mandatorily required to dispose of an application under Section 34 of the Arbitration Act within one year as stipulated under Section 34(6) of the Arbitration Act. If the Court deems fit, it may take longer than one year to conclusively decide the matter.

• Therefore, the provision has to be interpreted in a liberal way in order to best meet the ends of justice.