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WITHDRAWAL OF SECURITY - IMPACT ON THE APPLICATION UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996.

A. INTRODUCTION

1. Section 36 of the Arbitration and Conciliation Act, 1996 (the said Act) provides for enforcement of an arbitral award in accordance with the provisions of the Code of Civil Procedure, 1908 (CPC) in the same manner as if it were a decree of the court.
2. When the limitation period for bringing a challenge to the award expires or when such challenge is rejected by the Court, the award becomes final and binding and thus enforceable.
3. Prior to the amendment of 2015 to the said Act, automatic stay was applicable on the operation of the award merely on a challenge under section 34 being brought to the Court.
4. The amendment of 2015 uplifted the regime of automatic stay. A provision was made for seeking stay on the operation of the award during the pendency of the section 34 application.
5. Sections 36(2) and 36(3) were introduced which provided that filing of an application for setting aside of an award shall not by itself render an award unenforceable and separate application would have to be made praying for a stay on operation of such award.
6. Further, it was provided that Court may grant stay on the fulfilment of such conditions as it may deem fit in exchange of the stay.
7. Various decisions, including *SREI Infrastructure Finance Limited vs. Candor Gurgaon Two Developers and Projects Pvt. Ltd.*, interpreted section 36(3) to hold that furnishing of security in any form as may be directed was a discretionary power of the Court for granting stay on the award.

B. Issues

1. Pursuant to the deposit of security, the courts have been permitting the award holder to withdraw the secured amount during the pendency of the challenge. In such aspect, the issue which arises are
 - Whether the permission to withdraw the security would amount to execution of the award without the challenge under Section 34 being disposed of.
 - The impact of such withdrawal on the Section 34 application.

C. Decisions

1. In *Union of India vs. Smt. Sheela Devi AIR 1963 P&H 111*, the High Court dwelled on whether deposit of the decretal amount would mean payment to the decree holder. The court observed that such situation would only arise if the deposit was made unconditional, i.e., if the judgment-holder was allowed to withdraw the deposit at its own will. It was held that suitable security would have to be deposited to the satisfaction of the executing court in order to withdraw the amount.
2. The court relied on *Keshavlal Manilal vs. Chandulal Bal bhai AIR 1935 Bom 200* which held that the idea behind furnishing security was a deposit of security and not deposit of decretal debt which hence the decree-holder cannot claim as its own.
3. In *Kolkata Metropolitan Development Authority vs. South City Projects*, the Calcutta High Court was deciding a question under Section 36(2) of the said Act. The award-holder argued that if a stay is granted in favour of the award-debtor, the provisions of Section 36(3) must be complied with. Further, they argued in favour of furnishing cash security such that the award-holder be allowed to withdraw the cash in exchange of some other form of security.
4. The court firstly held that since the award-debtor was being granted the prayer of stay and allowed to furnish security in means other than cash, therefore the question of withdrawal does not arise at all.
5. Next, the court opined that allowing withdrawal of security would be detrimental to the rights of the award-debtor who has challenged the award and will also lead to question of restitution if the award-debtor succeeds in its challenge to the award.
6. A three-judge bench of the Supreme Court in *Nayara Energy Limited vs. The State of Gujarat* had allowed stay on the operation of the award subject to the award debtor furnishing 100% of the



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the awarded amount as security of which 25% was allowed to be withdrawn by the award-holder without furnishing any security in return.

7. These decisions reinforce the idea that allowing withdrawal of the security would not necessarily mean execution of the decree until a final decision on the decree is taken by the court before which the challenge is pending.

8. Although the decisions do not presume an authority on the subject, the decisions do give a clear assumption that the award holder may be allowed to withdraw the security amount either in part or full but only subject to certain conditions because the rights of the parties shall not be injured and the award debtor must have a fair chance of restitution if it emerges successful in the lis challenging the arbitral award.

9. It is a settled principle of law that payment is not an irreparable prejudice and hence restitution in such cases is available to the petitioner who may be secured against any amount that could accrue in his favour owing to the decision of the Court in the Section 34 application.

D. The provision of withdrawal under the MSME Act

1. The Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act) contains provisions for withdrawal of the security amount.

2. Section 18 provides for reference of disputes relating to the micro, small and medium enterprises to the Micro and Small Enterprises Facilitation Council. The Facilitation Council either by itself or through any institution providing alternate dispute resolution services may make an order, award or decree adjudicating the disputes between the parties.

3. Section 19 of the MSME Act states that an application for setting aside of such decree, order or award shall not be entertained unless the party seeking such stay deposits 75% of the amount awarded in the form of security.

4. Pending disposal, the award holder shall also have a right to receive payment of the percentage of the amount deposited subject to the satisfaction of the court on assessing the reasonableness of the circumstances of the case.

5. The Courts have given literal interpretation to the provisions under the MSME Act. In *Indian Oil Corporation Limited vs. FEPL Engineering (P) Limited* [OMP (Comm.) No. 144 of 2019], the Court granted stay on an arbitral award passed under the MSME Act primarily because the award-debtor had deposited 75% of the awarded amount with interest as security and the respondent had withdrawn a part thereof.

6. In *Bharat Heavy Electricals Limited vs. Optimal Power Synergy India Private Limited*, the Calcutta High Court had granted stay on the award passed by the West Bengal State Micro Small Enterprises Facilitation Council, in strict compliance of the provisions of the MSME Act, i.e., on the condition of the award-debtor depositing 75% of the awarded amount including the interest component.

7. The award-holder thereafter sought for withdrawal of 50% of the secured amount. The court directed the award-holder to file an affidavit disclosing the particulars of asset which the award-holder seeks to file as collateral against such withdrawal.

E. Conclusion

1. The general trend that can be seen as is observed by the courts in matters of withdrawal is that a security or collateral has to be provided against the withdrawal thus protecting the interests of both the parties to the dispute during the pendency of the adjudication process.

2. The withdrawal of the secured amount by the award-holder by permission of the court would not in essence mean execution of the award until a final decision under section 34 is made.

3. The section 34 application would thus be the determiner in such cases. The decision of the court under section 34 would lead to the final conclusion as to the rights of the parties against the amount so furnished as security and also the decision as to the award becoming enforceable or unenforceable subject to the stay being vacated or being made absolute respectively.