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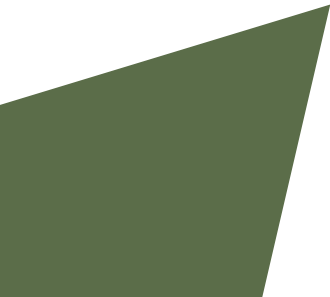
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BCCI vs. Kochi Cricket: Rise of the phoenix

Kajal Bhatia

BACKGROUND OF THE CASE

In a landmark judgment, the Supreme Court interpreted and clarified the meaning of Section 26 to pending arbitral proceedings and court proceedings in the light of the Arbitration and Conciliation (Amendment) Act, 2015 (Act). The judgment also cleared the air from its retrospective and prospective nature. After detailed discussion, arguments and based on supporting case laws, the Apex Court finally settled the perplexity concerning the date of applicability of the 2015 amendment *vis-a-vis* un-amended act and held¹:

- i) The Amendment Act, 2015 is prospective in its nature, the date of the amendment (October 23, 2015) should be taken note of.
- ii) The amendments will not apply to "arbitral proceedings" commenced before the commencement of the Arbitration Act, 2015. However, the amendments would apply to legal/court proceedings, which have commenced "in relation to arbitral proceedings", post the Amended Arbitration Act.

A batch of appeals about the same question was filed and disposed off by a common judgment and in all the appeals date of filing Section 34 application and Section 36 application is of great importance. In 4 appeals, Section 34 application was filed before coming into force of the amendment, i.e., October 23, 2015, and in the remaining 4 appeals, the application under Section 34 was filed after the amendment act came into force.

FACTS

Respondent No.1 invoking arbitration under a franchise agreement dated March 12, 2011, sent a notice dated January 18, 2012, to BCCI. A Sole Arbitrator was appointed, who delivered two arbitral awards dated June 22, 2015, against the BCCI. Aggrieved by the award, on September 16, 2015, BCCI moved an application under Section 34 before the Hon'ble High Court of Bombay, and thereafter on November 26, 2015, Respondents filed 2 execution applications in the High Court for payment, which was resisted by BCCI. As per the un-amended Section 36, there was an automatic stay of award until application under Section 34 is decided, therefore BCCI prayed for dismissal of the execution application filed by the Respondent. On the

¹ (2018) 6 SCC 287

contrary, it was dismissed on the contention that the amended Section 36 would be applicable. This is how it was appealed and tagged along with other batch matters.

The entire controversy as to the applicability of Amendment act relies upon Section 26 and Section 36 of the Act and it is apposite to carefully interpret their language, which reads as:

Section 26: Act not to apply to pending arbitral proceedings

Nothing contained in this Act shall apply *to the* arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree *but* this Act shall apply *in relation to* arbitral proceedings commenced on or after the date of commencement of this Act.

Section 36: Enforcement

Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

LEGAL THOUGHTS AND JUDICIAL INTERPRETATIONS

Senior advocates and advocates gave diverse interpretations to Section 26 and Section 36, few of them to be noted are:

- Section 26 consists of 2 parts; the first part is in the nature of proviso/exception where Section 6 of the General Clauses Act would be attracted; while the second part relates to the principal part.
- The amended Section 36 is divided into 3 parts: procedural, substantive, and procedural as well as substantive. In place of the automatic stay, now Order LXI Rule 5 Code of Civil Procedure, 1908 (CPC) would be applicable and substantial deposit of amount would have to be made between the date of award and decision in Section 34 application.
- Parties who entered into agreements with the expectation that the old regime would apply cannot be twisted with a new regime and the proceedings in both the parts of Section 26 are the same and relates only before an arbitrator.
- Section 34 and Section 36 are part of one scheme and are "appeal package".
- There is an absence of mention of court proceedings in the first part and second part sweeps in both arbitral and court proceedings. There is no difference between execution and enforcement, as enforcement under Section 26 is nothing but the execution of

award as if it were a decree under CPC. It is well settled that execution proceedings are procedural in nature, hence would be retrospective. Therefore, Section 36 would apply even in cases where Section 34 is filed before the commencement of the Amended act as on interpretation of words "has been" used in Section 36 (2), it refers to Section 34 proceedings that have already been filed.

- The word "but" in Section 26 indicates that 2 parts apply to different situations, first part applies to arbitral proceedings, i.e., from the commencement of arbitral proceedings under Section 21 up to Section 32 and the second part applies to all the proceedings that begin from the stage of Section 21 and all court proceedings in relation thereto. Further, Section 36 proceedings are entirely different and independent of Section 34 proceedings.
- The second part of Section 26 omits the word "the" as well as mention of Section 21. Thus every proceeding under the 1996 Act is a separate and distinct proceeding and it is the date of such proceedings alone which is relevant for determining whether the Amendment act applies or not.

FINDINGS OF THE APEX COURT

Based on above-stated various interpretations and submissions advanced by senior advocates, the Apex Court cleared the air from its prospective nature, its applications over proceedings and stay over the proceedings and stated²:

"Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings – arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso.

² BCCI vs. Kochi Cricket (2018) 6 SCC 287

Obviously, “arbitral proceedings” having been subsumed in the first part cannot re-appear in the second part, and the expression “in relation to arbitral proceedings” would, therefore, apply only to Court proceedings, which relate to the arbitral proceedings.”

PROSPECTIVE OPERATION OF THE PROCEEDINGS IN THE LIGHT OF AMENDMENT, 2015

Based on above-stated various interpretations and submissions advanced by senior advocates, the Court distinguished between the two branches of Section 26 by the word ‘but’ and held that the use of the phrase “*to the arbitration proceedings*” used in the first part applies to proceedings solely before the Arbitral Tribunal while the second part comprising of the phrase “*in relation to arbitral proceedings*” refers to court proceedings arising in relation to the arbitral proceedings.

Therefore, it was held that the operation of the Amended Act, 2015 to be prospective in its nature and it applied to arbitral as well as court proceedings commenced on or after the amendment date, i.e., October 23, 2015, and it can rightly be concluded that for any awards which have been rendered before this date, the application for setting aside proceedings can be filed after the said date.

RETROSPECTIVE EFFECT ON AUTOMATIC STAY ON ENFORCEMENT OF DOMESTIC AWARDS

As per the un-amended Section 36, there was an automatic stay of award until application under Section 34 is decided, which was greatly criticized in *National Aluminium Co. Ltd. v. Pressteel & Fabrications (2004)*³ (**NALCO judgment**), but the amended Section 36 did away the automatic stay and gave discretion to the court to grant a stay of the operation of the arbitral award upon the filing of an application for the same, also, the Court was been given ample powers for grant of stay of a money decree under the provisions of CPC. The main issue was whether amended Section 36 could be applied retrospectively and whether the execution proceedings to a decree gave rise to vested rights of a substantive nature.

The Court found that the award is deemed to be a decree and shall be enforced under CPC as such, which is not a procedural matter and does not give rise to any substantive right vested in a party for resisting the enforcement of the award. Therefore, all domestic arbitration awards can now be enforced in India irrespective of any pending setting aside applications.

³ (2004) 1 SCC 540

"A TWIST" WITH THE AMENDMENT ACT OF 2019

Since another amendment was on the cards of the government, the Apex Court after delivering the present verdict in the light of Amendment Act, 2015 shared the copy with the Law Ministry and the Amendment Act, 2019 replaced the old Section 26 and added a new Section 87 which provides that *unless parties otherwise agree*, the 2015 Amendments will not apply to arbitral proceedings which commenced before October 23, 2015, and any court proceedings arising from them.

The oiling of wheels with the enactment of Section 87 led to the burial of ambiguousness, as it provided clarity on the date of commencement of the arbitration, thus determining whether pre-amendment or post-amendment rules would be applicable. But did it clear the ambiguity or led to more uncertainty?

In the light of BCCI judgment, many courts had ordered the award debtor to deposit the substantial amount and if during its pendency or after disposal, the Amendment Act of 2019 came into force, will the court entertain every such case afresh in the light of new amendment?

WINDING BACK THE CLOCK - HINDUSTAN CONSTRUCTION COMPANY LIMITED & ANR. V. UNION OF INDIA⁴

Notwithstanding the fact that the new amendment tried to provide clarity but it could not last for long, the *Hindustan Construction Company Limited & Anr. v. Union of India* struck out down Section 87, which embarked on a new turning point in the Arbitration law. It rendered the insertion of Section 87 and deletion of Section 26 from Amendment Act of 2015 as manifestly arbitrary, having been enacted without adequate determining principle, and also contrary to the objective of Act and its 2015 Amendment. The court also took note of the fallacies in the report of Sri Krishna Committee about the Insolvency laws as the award holders were unable to reap benefits of the fruit due to automatic stay while on the other hand they could be dragged under the garb of insolvency proceedings, which was found highly arbitrary. Thus, the court struck down Section 87 of the Arbitration Act as violative of Article 14 of the Constitution of India.

⁴ Writ Petition (Civil) No. 1074 of 2019

ANALYSIS AND CONCLUSION

The insertion of Section 87 by the Amendment Act of 2019 and deleting of Section 26 by blatantly ignoring the findings of Apex Court is "manifestly arbitrary" and the judiciary had to step into the shoes of the Legislature to set back the clock. This is just one of the instance and on the whole, I believe, to preserve the glory of Indian Arbitration law, the judiciary needs to revisit time and again to remove the uncertainties in the Amendment Act of 2019, to name a few, the interplay between Section 9 and 17, the enforceability of orders passed under Section 17 of the Act, etc.

Thus, winding back the clock, the law set out in BCCI vs. Kochi Cricket holds good today and the Amendment Act of 2015 applies prospectively to arbitral as well as court proceedings commenced on or after the amendment date, i.e., October 23, 2015.