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THE DEBATE AROUND APPLICABILITY: AN ANALYSIS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

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Abstract

On 23 October, 2015, with the intention of making India more arbitration-friendly, the President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 ("Ordinance"). This Ordinance was finally enacted as The Arbitration and Conciliation (Amendment) Act, 2015 ("2015 Amendment") by the Parliament on 31 December 2015. The period between the promulgation of the Ordinance and the enactment of the 2015 Amendment was marked with uncertainty as to the applicability of the amendments to pending arbitral proceedings and arbitration related court proceedings. This continuing confusion necessitated the incorporation of Section 26 in the 2015 Amendment to clarify the applicability of the 2015 Amendment. However, even Section 26 could not yield the desired results and varied interpretations provided by High Courts painted an inconsistent picture. Finally, the Hon'ble Supreme Court of India had to intervene and put the issue to rest in the matter of BCCI vs. Kochi Cricket Pvt. Limited ("BCCI Judgement"). Meanwhile, the Government of India via a press release dated 7 March, 2018 expressed its willingness to enact a certain Section 87 to the Arbitration and Conciliation Act, 1996 ("the Principal Act") in order to clarify the issue, which was eventually incorporated in the Arbitration and Conciliation (Amendment) Bill, 2018 ("2018 Bill"). In this paper, the author seeks to discuss and analyse the issue of applicability of the 2015 Amendment. The paper has been divided into five parts - the first part provides a brief introduction to the debate; in the second part, the author discusses the conflicting interpretations of Section 26; in the third part, the author discusses the BCCI Judgement; the

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fourth part discusses the 2018 Bill and its implications and finally, in the fifth part, the author provides an in-depth analysis of the applicability provision.

I. Introduction to the debate

Disputes are inevitable. Right from evolution of human civilization, disputes and conflicts have been a part of human life. While initially disputes were resolved by war, with the passage of time, we developed sophisticated mechanisms of dispute resolution in the form of litigation, mediation, arbitration, negotiation, etc. Arbitration, which is a form of Alternative Dispute Resolution ("ADR") is one of the oldest mechanisms of resolving conflicts.[1] The Black's Law Dictionary defines arbitration as *"a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."*[2]

India introduced the Arbitration and Conciliation Act, 1940, in order to consolidate and amend the law relating to arbitration in India.[3] This was later replaced by the Arbitration and Conciliation Act, 1996.[4] The Principal Act was drafted largely along the lines of the UNCITRAL Model laws.[5] In 2014, after less than a decade of the passing of the Principal Act, the Law Commission of India *("Commission")* released its 246th report,[6] indicating the need to make the Principal Act more flexible and to further reduce the interference of judiciary in arbitral proceedings. The Commission

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1 Dhir and Dhir, *Evolution of Arbitration in India*, MONDAQ (Date Accessed Feb. 02, 2019, 8:41 PM), http://www.mondaq.com/india/x/537190/Arbitration+Dispute+Resolution/Evolution+Of+Arbitration+In+India.

2 BLACK'S LAW DICTIONARY 119 (9th ed., 2009).

3 The Arbitration and Conciliation Act 1940.

4 *Supra* note 1.

5 Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, LAW COMMISSION OF INDIA (Jul. 1, 2018, 11:50 AM), http://lawcommissionofindia.nic.in/reports/report246.pdf.

6 *Id.*

proposed amendments to the Principal Act which would facilitate and encourage ADR methods. The said amendments also sought to make arbitration in India more user-friendly, cost effective and to ensure expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.[7]

Amongst other things, the Commission, through its report, recommended a new Section 85A[8] in the Principal Act.[9] As per the proposed section, the amended act was supposed to apply prospectively, except in certain circumstances, which had been clearly mentioned in the proposed act itself.[10] However, this recommendation by the Commission was not incorporated in the Ordinance and this led to a confusion with regard to applicability of the Ordinance. There was immense conundrum and different views were given by High Courts across the country with respect to applicability, due to which, a clarification was sought by the Madras High Court from the Central Government on the applicability of the Ordinance.[11] Consequently, Section 26[12] *("Section")* was incorporated in the 2015 Amendment.

A cursory reading of the Section reveals that it has been divided into two parts, which differ significantly from each other even though they are parts of the same section. This difference emerges from the use of the phrase *"arbitral proceedings"* in the first part and the phrase *"in relation to arbitral proceeding"* in the second part.

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7 Board of Control For Cricket v. Kochi Cricket Pvt Ltd And Etc, AIR 2018 SC 1549, ¶3.

8 *Supra* note 5.

9 Litigation Team Khaitan & Co., *The Arbitration And Conciliation (Amendment) Act, 2015*, MONDAQ (Jul. 1, 2018, 12:15 AM), http://www.mondaq.com/india/x/459478/trials+appeals+compensation/The+Arbitration+And+Conciliation+Amendment+Act+2015.

10 *Supra note 5).*

11 Delphi TVS Diesel Systems Limited v. Union Of India, W.P.Nos.37355 to 37357 of 2015, ¶2, (Madras High Court) (Unreported).

12 The Arbitration and Conciliation (Amendment) Act 2015 § 26.

The distinction between the meaning of these two phrases was made evident in the case of *Thyssen Stahlunion GmBH vs. Steel Authority of India ("Thyssen Case").*[13] In this case, the Apex Court was confronted with the interpretation of the repeal clause in Section 85(2)[14] of the Principal Act. The Court gave a liberal interpretation to the phrase and defined it to include not just arbitral proceedings but also court proceedings in relation to such arbitral proceedings.[15] In addition to this, the Court said that the 1940 Act shall continue to apply in relation to arbitral proceedings that had commenced before the Principal Act was introduced. It was believed that an order to the contrary would not be in the interest of the parties who had no knowledge of the Act being repealed when they had commenced the proceedings.[16]

II. Stance of the High Courts

The intention behind introducing Section 26 in the 2015 Amendment was to resolve the incertitude that had developed around the question of the applicability of the Ordinance.[17] Instead, its inclusion fanned the confusion even further since there were disagreements among various High Courts on the question of its interpretation.[18]

In the case of *Rendezvous Sports World vs. Board of Control for Cricket in India,*[19] the Bombay High Court was confronted with a situation where proceedings under Section 34 of the Principal Act were

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[13] Thyssen Stahlunion GmBH v. Steel Authority of India, 1999 Supp (3) SCR 461.

[14] The Arbitration and Conciliation Act 1996 § 85(2).

[15] *Supra* note 13, ¶33-34.

[16] *Id.*

[17] Khaitan & Co, *Ambiguities in applicability of Arbitration Amendment Act 2015*, LEXOLOGY (Date Accessed Feb. 03, 2019, 6:47 PM), http://www.mondaq.com/india/x/537190/Arbitration+Dispute+Resolution/Evolution+Of+Arbitration+In+India.

[18] *Id.*

[19] Rendezvous Sports World v. Board of Control for Cricket in India, 2017 (2) BomCR 113.

pending in the Court as on the date of the Ordinance. The Court followed the Thyssen Case and interpreted Section 26 literally by creating a distinction between the phrases *"arbitral proceeding"* and *"in relation to arbitral proceedings."*[20] On the basis of this distinction, the Court held that the 2015 Amendment shall apply prospectively to *"arbitral proceedings"* and retrospectively to proceedings *"in relation to arbitral proceedings."*[21] This would mean that any proceeding in relation to arbitral proceeding shall be governed by the 2015 Amendment Act, even if it was commenced before the Ordinance.

A different interpretation of the Section was given by the Delhi High Court in the case of *Ardee Infrastructure Pvt. Ltd. vs. Anuradha Bhatia ("Ardee case").*[22] Following the approach of the Apex Court in the Thyssen Case, the Court included court proceedings within the meaning of the phrase *"in relation to arbitral proceeding."*[23] A narrow interpretation of the phrase would mean that the Section is silent in respect of court proceedings under Section 34 (or any other section of the Principal Act) which were pending as on the date of the promulgation of the Ordinance. However, on the question of applicability, the Court held that the 2015 Amendment was applicable prospectively to both, arbitral proceedings and proceedings in relation to such arbitral proceedings,[24] since a Court proceeding under Section 34 and Section 36 affects the accrued rights of the parties.[25]

The decision of the Delhi High Court in the Ardee Case was reiterated by the Calcutta High Court in the case of *Braithwaite Burn & Jessop Co. Ltd. vs. Indo Wagon Engineering Ltd.*[26] The Court

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[20] *Supra* note 19, ¶23.
[21] *Supra* note 19, ¶64-65.
[22] Ardee Infrastructure Pvt. Ltd. v. Anuradha Bhatia, 237 (2017) DLT 140.
[23] *Supra* note 22, ¶34.
[24] *Supra* note 22, ¶29.
[25] *Supra* note 22, ¶34.
[26] Braithwaite burn & Jessop Co. Ltd. v. Indo Wagon Engineering Ltd., AIR 2017 (NOC 923) 314, ¶130.

held that retrospective application of the 2015 Amendment to court proceedings in relation to arbitral proceedings which commenced prior to the Ordinance shall affect the vested rights of the parties. Therefore, it was held that unless agreed otherwise, the 2015 Amendment shall have prospective application with respect to court proceedings related to arbitral proceedings which commenced prior to the Ordinance.[27]

III. The Apex Court's view

After three years of confusion, the Hon'ble Supreme Court of India, in the BCCI Judgement[28], interpreted Section 26 of the 2015 Amendment to finally put the issue to rest. The Court analysed Section 26 by segregating it into two distinct parts and observed that Section 26 of the 2015 Amendment had *"departed somewhat"* from the proposed Section 85A of the Commission's report, despite retaining the bifurcation into *'arbitration'* and *'court proceedings'*[29]. The Court went on to discuss the meaning of the terms *"arbitral proceedings"* and "*in relation to arbitral proceedings"* and concluded that while the former refers to proceedings before the arbitral tribunal, the latter refers to court proceedings in relation to arbitral proceedings.[30] Thus, while the first part is controlled by the application of Section 21[31] of the Principal Act, the second part is not.[32]

On the issue of applicability, the Court held that the 2015 Amendment is prospective in nature and will apply to the arbitral proceedings and court proceedings that have commenced on or after the 2015 Amendment came into force.[33] However, Section 36 of the Principal Act as substituted by the 2015 Amendment

27 *Supra* note 26, ¶141.
28 *Supra* note 7, ¶56.
29 *Supra* note 7, ¶21.
30 *Supra* note 7, ¶25.
31 The Arbitration and Conciliation Act 1996 § 21.
32 *Supra* note 7, ¶25.
33 *Id.*

would be applicable even to the Section 34 applications that were pending on the date of commencement of the 2015 Amendment Act.[34] That said, the Court also recognized the right of the parties to agree otherwise.[35]

The Court further went on to discuss the proposed Section 87[36] of the 2018 Bill. The Cabinet seeks to incorporate the said Section in the 2018 Bill to clarify that unless it has been otherwise agreed by parties, the 2015 Amendments would not apply to (a) Arbitral proceedings that have commenced before the 2015 Amendment, (b) court proceedings arising out of or in relation to such arbitral proceedings and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act, 2015 and to Court proceedings arising out of or in relation to such Arbitral proceedings.[37] Discussing the same, the Court opined that the proposed Section 87 is likely to put all the significant amendments made by the 2015 Amendment on a *"back-burner."*[38] This was especially true for the amendments made to Section 34[39] since now, the 2015 Amendment will no longer be applicable to the Section 34 petitions filed after 23 October, 2015 but it will only be applicable to cases where the Arbitration proceedings have themselves commenced after 23 October, 2015.[40] According to the Court, this would mean that the old law would continue to apply to all matters which are in the pipeline

34 *Supra* note 7, ¶39.
35 *Supra* note 7, ¶24.
36 The Arbitration and Conciliation (Amendment) Bill 2018 § *87*.
37 Shalaka Patil, *The Supreme Court on the 2015 Amendments and the Cabinet on the 2018 Arbitration Amendments - Good for India?,* CYRIL AMARCHAND BLOGS (Jul. 10, 2018, 04:30 PM), https://corporate.cyrilamarchandblogs.com/2018/03/supreme-court-2015-amendments-cabinet-2018-arbitration-amendments-good-india/.
38 *Supra* note 7, ¶57.
39 The Arbitration and Conciliation Act 1996 § 34.
40 *Supra* note 7, ¶57

and this would result in delay of disposal of arbitral proceedings by increasing the interference of Courts.[41]

It cannot be denied that one of the most debated issues of recent times has been that of the applicability of the 2015 Amendment. While the Supreme Court tried its best to put the issue to rest, the judgment itself raised a lot of questions, like, assuming a petition were filed to challenge an award prior to the 2015 amendments but was pending on the date of the amendments, by virtue of the judgment, an automatic stay that was earlier effective would no longer apply.[42] It would then be upon the award-creditor to apply for enforcement and the award-debtor would have to file a separate application for a stay (in which case a deposit of the award amount would be probable), thus taking away a benefit that a party had prior to the 2015 Amendment.[43] This would thus create an environment of confusion which would not be conducive for Arbitration in India.

IV. The 2018 Amendment

On 30 July 2017, a high level committee headed by Justice B.N. Srikrishna[44] submitted its report on the Principal Act and suggested the introduction of further changes to the same, in order to promote institutional arbitration in India.[45] As a result of these recommendations, on 7 March, 2018, the cabinet gave approval to certain amendments that were to be introduced in the Principal Act[46], with the intention of streamlining the arbitration process in India.

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41 *Id.*

42 *Supra* note 7.

43 *Id.*

44 Justice B.N. Srikrishna Committee, *High Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India,* (Jul 30, 2018).

45 *Id.*

46 Press Information Bureau, Government of India, Ministry of Law and Justice, *Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018*, PRESS BUREAU OF INDIA (Jul. 10, 2018, 3:25 PM), http://pib.nic.in/newsite/PrintRelease.aspx?relid=177128).

Among other significant changes, the 2018 Bill[47] includes the introduction of Section 87[48] which is intended to settle the debate around applicability once and for all. As per the provisions of this section, the 2015 Amendment shall not apply to arbitral proceedings or court proceedings in relation to such arbitral proceedings which had commenced before 23 October, 2015, unless the parties have agreed otherwise.[49] Meaning thereby that it shall only apply to arbitral proceedings and arbitration related court proceedings that have commenced after the enactment 2015 Amendment.[50]

It is worth noting here that Section 87 was incorporated in the 2018 Bill despite a word of caution by the Hon'ble Supreme Court of India in the BCCI Judgement.[51] Thus, it becomes rather imperative to bring about the difference between the position adopted by the Hon'ble Supreme Court in the BCCI Judgement and the position adopted by the legislature in Section 87 of the 2018 Bill. While the underlying principle in both the cases remains prospective application, the Supreme Court has carved out an exception for Section 34 applications that were pending before the Courts when the 2015 Amendment came into force.[52] As per the Hon'ble Supreme Court, the 2015 Amendment would apply to court proceedings in relation to arbitral proceedings that have commenced after 23 October 2015.[53] However, as per the 2018 Bill, the Principal Act would apply, unless otherwise agreed by the parties.[54]

47 Arbitration and Conciliation (Amendment) Bill 2018, Bill No. 100 of 2018.

48 *Supra* note 36.

49 *Id.*

50 *Supra* note 7, ¶56.

51 *Supra* note 7, ¶57.

52 Cyril Amarchand Mangaldas, *Case In Point,* CYRIL SHROFF (Date Accessed Feb. 03, 2019, 7:36 PM), http://www.cyrilshroff.com/wp-content/uploads/2018/07/Vol.-IV-X-April-2018.pdf.

53 *Id.*

54 *Id.*

V. Analysis and Suggestions

It is the Indian Government's endeavour to bring the country at par with international standards for arbitration and to ensure speedy resolution of commercial disputes in order to make India an arbitration hub and a centre of robust ADR mechanism.[55] In the light of the same, the Government of India seeks to bring about certain amendments in the Principal Act via the 2018 Bill. Amongst various other changes proposed by the 2018 Bill, the incorporation of Section 87 is debatably one of the most important ones. This is so because clarity in applicability of any act or amendment is foremost in order to achieve the objectives of the said enactment. It is clear from the discussion above that Section 87 of the 2018 Bill has been introduced with the intention of putting an end to the debate around the applicability of the 2015 Amendment, as under Section 26 of the said Amendment.

The major implications of Section 26 of the 2015 Amendment may be understood with respect to two sections of the Principal Act - that is, Section 34 and Section 36.[56] These provide for a recourse to Courts in the event of dissatisfaction with the award. The 2015 Amendment brought about significant changes in both these sections by limiting the gamut of public policy under Section 34 and by removing the provision for an automatic stay under Section 36. Since the change is considerable, the applicability or non-applicability of the amended provisions is likely to affect the rights of the parties to a great extent.

After years of debate on applicability, the Hon'ble Supreme Court of India tried to put the issue to rest in the BCCI Judgement. The Court held that the 2015 Amendment will apply to the arbitral

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[55] Press Information Bureau, Government of India, Ministry of Law and Justice, *High Level Committee on Making India Hub of Arbitration Submits Report,* PRESS BUREAU OF INDIA (Jul. 11, 2018, 11:30 PM) http://pib.nic.in/newsite/PrintRelease.aspx?relid=169621.

[56] The Arbitration and Conciliation (Amendment) Act 1996 § 36.

proceedings and court proceedings that have commenced after the 2015 Amendment came into force. The Court went on to say that the 2015 Amendment would also apply to the applications pending under Section 34 of the Principal Act. In the author's opinion, the problem with such application is that it will not only create confusion and inconvenience to the parties, but also affect their rights substantially. For instance, if the award has been passed before 23 October 2015 but the application under Section 34 is pending before the Court on the day of enforcement, and the aggrieved party has challenged the award on the basis of the rules that have been applied to substance of dispute under Section 28 of the Principal Act, claiming that the terms of the contract have not been relied on by the tribunal. While under the Principal Act, this claim of the aggrieved party could have been maintained, the 2015 Amendment has brought about a change in the aforementioned provision and relaxed the said requirement. It is worth noting here that the claim, when the application was filed, was not bad in law. However, the claim would no longer stand if the new law is applied. As a result of this, it cannot be denied that the rights of the aggrieved party would be substantially affected. It will not be equitable for the Court's to apply a certain law to the dispute that the parties did not know of at the time when the dispute arose.

Thus, in the author's opinion, the 2015 Amendments should not apply to arbitral proceedings that have commenced before the 2015 Amendment and to court proceedings arising out of or in relation to such arbitral proceedings. At the same time, however, the discretion of parties should be maintained. Such an application would not cause unnecessary confusion and inconvenience and would thereby facilitate the Government's objective of making India a hub for arbitration.

Finally, it becomes rather imperative for us to avoid such confusion in the future and in order to do the same, it is suggested that the provisions, especially the ones dealing with applicability, be drafted in a simple language and in such a way that it restricts the scope for conflicting interpretations. It is also suggested that the legislature redrafts the proposed Section 87 to provide clarification on whether arbitration agreements between the parties where it has been agreed to by the parties that they will be bound by the Principal Act *"and any statutory modification thereof"* would come under the ambit of *"unless agreed to by the parties"* or not.