

# Dispute Resolution Hotline

February 17, 2016

## PROSPECTIVE APPLICABILITY OF ARBITRATION AND CONCILIATION AMENDMENT ACT, 2015

- Prospective applicability of Arbitration & Conciliation (Amendment) Act 2015 would be limited to arbitral proceedings and not to court proceedings;
- Section 26 of the Amendment Act cannot be extended to include post arbitration proceedings, when the award is passed before the commencement of the Amendment Act;
- Separate application needs to be filed to stay enforcement of arbitral award as court proceedings are distinct from arbitral proceedings.

### BACKGROUND

The Arbitration and Conciliation Amendment Act, 2015 ("**Amendment Act**") has introduced certain amendments to the provisions of the Arbitration and Conciliation Act, 1996 ("**Act**") and is deemed to be effective from October 23, 2015. However, Section 26<sup>1</sup> inserted in the newly enacted Amendment Act stipulates that "*nothing in the Amended Act, shall apply to 'arbitral proceedings' commenced as per Section 21 of the Act, before the commencement of the Amendment Act.*"

### INTRODUCTION AND FACTUAL MATRIX

The Madras High Court ("**Madras HC**") in its recent judgment of *New Tirupur Area Development Corporation Ltd. ("NTADCL") v. M/s Hindustan Construction Co. Ltd. ("HCC")*<sup>2</sup> has dealt with the interpretation and applicability of Section 26 of the Amendment Act. The Madras HC held that Section 26 of the Amendment Act is not applicable to post arbitral proceedings and therefore separate application needs to be filed under Section 36 (2) of the Act as required under the amended provisions to stay enforcement proceedings pending challenge of an arbitral award.

Section 36 (2) and (3) as introduced by the Arbitration Ordinance, 2015<sup>3</sup> with effect from October 23, 2015 stipulates a condition for filing a separate application along with the Section 34 petition for setting aside the arbitral award to stay the enforcement proceedings.

### CONTENTIONS OF THE PARTIES

NTADCL had filed certain applications under Section 36 (2) of the Act for stay on enforcement of arbitral awards in the on-going petitions for setting aside the arbitral awards dated August 17, 2015 before the Madras HC. The issue before the Madras HC in the present case pertains to interpretation and applicability of Section 26 of the Amendment Act to post arbitral proceedings.

NTADCL had filed its challenge to an arbitral award and contended that since Section 26 of the Amendment Act clarifies that it is not applicable to arbitration proceedings commenced under the Act, there is no requirement to file a separate stay application. By virtue of filing the challenge petition under Section 34 of the Act, the arbitral award automatically becomes unenforceable till such time the challenge petition under section 34 of the Act is disposed of.

Further relying on the Supreme Court ruling of *Thyssen Stahl Union GMBH v. Steel Authority of India Ltd.*<sup>4</sup>, NTADCL argued that the requirement of filing of separate stay application under the amended Section 36 (2) would apply only in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act. The Supreme Court in *Thyssen* held that the expression "in relation to arbitral proceedings" would also cover court proceedings within its ambit due to the usage of the words "in relation to". The judgment was rendered in the context of repeal and savings clause. Section 85(2) of the Act is applicable in two limbs which clarifies that provisions of the old act would apply to arbitral proceedings which commenced prior to the Act coming into force unless otherwise agreed by the parties and Act would apply in relation to arbitral proceedings which commenced on or after the Act came into force. The usage of the words "in relation to" cannot be interpreted in a narrow manner and would include all proceedings including court proceedings.

HCC contended that there is a difference between arbitral proceedings and court proceedings and literal interpretation needs to be given to the language of the statute. Accordingly, HCC contended that though provisions of the Amendment Act, would not apply to any arbitral proceedings initiated prior to the commencement of the Amendment Act but nothing prevents the application of the provisions of the Amendment Act to court proceedings initiated after October 23, 2015. Section 26 of the Amendment Act provides that it will not be applicable to arbitration proceedings commenced prior to coming into effect of the Amendment Act.

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Based on the comparative study of Section 26 of the Amended Act and Section 85(2) of the Act, the Madras HC held that the legislative intention under Section 85 (2) of the Act was to apply the provisions in relation to arbitral proceedings which commenced before the Act and included court proceedings within its ambit.

The court held that the legislative intent of making the provisions of the Amendment Act applicable to court proceedings was clear in view of the following:

1. In section 26, the expression “*in relation to*” before “*arbitral proceedings*” is deleted. In Thyssen, the Supreme Court interpreting the repeal and savings clause held that the usage of the words “*in relation to arbitral proceedings*” threw an ambiguity and could not be interpreted in a narrow manner to mean only pendency of the arbitration proceedings before Arbitrator but would also cover proceedings before court;
2. absence of the expression “*court proceedings*” in section 26;
3. Insertion of the Section 36(2), which in the facts of this particular case, specifically provides for filing a separate application to stay the enforcement of the award.

The Madras HC held that the interpretation of Section 26 cannot be extended to include post arbitral proceeding (including court proceedings), even where the award has been passed before the commencement of the Amendment Act. Section 36 (2) & (3) have been inserted for a specific purpose to ensure that an application challenging the award does not automatically render the award unenforceable but a separate application is required to be filed to stay enforcement proceedings.

These sections are applicable to post arbitral proceedings. The procedure to be followed during the stage of arbitral proceedings and after the award are distinct. Court proceedings are not arbitral proceedings. Therefore the Madras HC held that the applicability of the provisions of the Amendment Act should be read with the new provisions (Section 26 read with amended Section 36 (2) of the Act).

Interestingly the applicability of Amendment Act has been considered by the Calcutta High Court and contrary decision has been passed. The Calcutta High Court in the case of *Electro Steel Casting Limited v. Reacon (India) Pvt. Ltd.*<sup>1</sup> while explaining the application of Section 26 on arbitral proceedings, held that where arbitration proceedings commences before the commencement of Amendment Act, the provisions of the Act would apply, and enforcement of the award would be stayed automatically upon the filing of application for setting aside an award.

This judgment deals only with the scenario of post arbitral proceedings however the ruling may have a much wider impact in case of other types of court proceedings (interim reliefs, seeking evidence, appeals) initiated post October 23, 2015 in cases where arbitration proceedings may have commenced prior to coming into force of the Amendment Act. There will be two set of laws applicable in such cases with no clarity on the practical implementation of the different regimes to arbitral and court proceedings.

– Payel Chatterjee, Moazzam Khan & Vyapak Desai

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<sup>1</sup> **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.

<sup>2</sup> Application No. 7674 of 2015 in O.P. No. 931 of 2015

<sup>3</sup> **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 the award unenforceable, unless upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3) hereof;” Section 36 (3) “Upon filing of the separate application under subsection (2) for stay of the operation of the award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing.”

<sup>4</sup> 1999 (9) SCC 334

<sup>5</sup> Application No. 1710 of 2015 decided on January 14, 2016

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