Introduction

The statute governing arbitrations in India i.e. the Arbitration and Conciliation Act 1996 ("1996 Act") has witnessed substantial amendments by way of the Arbitration and Conciliation Amendment Act 2015 ("2015 Amendments") which came into force on 23 October 2015. The 2015 Amendments led to divergence of opinion amongst various High Courts and the issue which is the subject matter of the present article is the applicability of the 2015 Amendments on arbitrations and related proceedings commenced before 23 October 2015 and arbitrations and related proceedings which commenced after 23 October 2015 (hereinafter referred to as “the Issue”).

The present Article is divided into four sections. The first section deals with the conflicting decisions rendered by various High Courts on the Issue. The second section is an attempt to analyse the reasons for such difference in opinion amongst the High Courts. The third section covers the analysis of judgements passed by the Hon’ble Supreme Court ("SC") which have bearing on the Issue. The last section contains suggestions of the Authors on the Issue.

I. First Section: Some indicative decisions of various High Courts on the Issue

a. Electro Steel Casting Limited v. Reacon (India) Private Limited

Proceeding under: Section 34 and 36 of the Act

Held: 2015 Amendments not applicable

The Calcutta High Court, speaking through Hon’ble Justice I.P Mokerji, observed that the subject award was published on 30 July 2015. The application to set aside the award was filed on 26 November 2015. The issue arose with respect to the amended provision i.e. Section 36 of the amended 1996 Act, which has done away with the automatic stay of the arbitral award pending a challenge under Section 34 of the Act. The Court held that the 2015 Amendments were not applicable to the subject arbitration, since the same commenced much prior to coming into force of the 2015 Amendments. The Court based its decision on the date of commencement of the arbitral proceedings.

1 2016 SCC Online Cal 1257
b. **New Tirupur Area Development Corporation v. Hindustan Construction Company Limited**

Proceeding under: Section 34 and 36 of the Act

Held: 2015 Amendments not applicable.

The Madras High Court, speaking through Hon’ble Justice S. Manikumar in relation to the issue whether the 2015 Amendments would apply to proceedings under Section 34 of the Act, which were filed during the operation of the Arbitration and Conciliation (Amendment) Ordinance, 2015, held that as the legislature has omitted the words “in relation to” in the first part of Section 26 of the Amendment Act, the Court had no power to add the words “in relation to” and expand the scope of the provisions to court proceedings also. The Court ruled that Section 26 of the Amendment Act cannot be extended to include post arbitration proceedings, when the award is passed before the commencement of the 2015 Amendments.

c. **Sri Nitya Ranjan Jena v. Tata Capital Financial Services Limited**

Proceedings under: Section 34 of the Act

Held: 2015 Amendments not applicable

The Calcutta High Court, speaking through Hon’ble Justice Biswanath Somadder in relation to the issue whether in view of the 2015 Amendments, the applicability of the stay of operation of the award until disposal of Section 34 application should be allowed, held that since the arbitration proceedings commenced before the 2015 Amendments came into force, the new Section 36 of the 2015 Amendments was not applicable. Like the judgement in Electro Steel Casting Limited v. Reacon (India) Private Limited (supra), the Court based its decision on the date of commencement of the arbitral proceedings.

d. **Jumbo Bags Limited v. The New India Assurance Company Limited**

Proceedings under: Section 11 of the Act

Held: 2015 Amendments not applicable

The Madras High Court, speaking through Hon’ble Justice Sanjay Kishan Kaul in relation to a question regarding the applicability of 2015 Amendments in relation to Section 11(6) of the 1996 Act for appointment of an independent arbitrator was raised, relying on the judgement of Milk Food Ltd. v. GMC Ice Cream Pvt. Ltd. held
that the arbitration proceedings having commenced prior to the 2015 Amendments coming into force, the Section 11 petition would be governed by the un-amended 1996 Act only. The Court observed that the amended Section 11 requires the Court to restrict its role to examine the matter only if there is a valid arbitration clause.

e. M/s Reliance Capital Limited v. Chandana Creations & Others\(^7\)

Proceedings under: Section 34 of the Act

Held: 2015 Amendments not applicable

The Calcutta High Court, speaking through Hon’ble Justice Harish Tandon, in relation to the issue whether the award can be enforced pending Section 34 proceeding which was filed in 2013, held that as the Section 34 proceeding was filed prior to the 2015 Amendments, therefore the enforcement cannot be proceeded with. The question in relation to prospective or retrospective applicability of Section 36 of the 2015 Amendments also arose. The Court held that retrospective applicability of the 2015 Amendments was also not the intention of the legislature, as was observed by the Division Bench in Electrosteel Casting (supra) and Shri Nitya Ranjan (supra) regarding the retrospective operation of the 2015 Amendments for proceedings which were admittedly initiated prior to 23 October 2015.

f. Tufan Chatterjee v. Rangan Dhar\(^8\)

Proceedings under: Section 9 of the Act

Held: 2015 Amendments applicable

The Division Bench of Calcutta High Court, speaking through Hon’ble Justice Indira Banarjee on the issue whether the Court has been barred by 2015 Amendments to grant reliefs under Section 9 of the 1996 Act, since an arbitral tribunal was constituted and arbitral proceedings had commenced, held that the 2015 Amendments will apply to all court proceedings on or from 23 October 2015. As the amendments have retrospective operation, the Court cannot entertain an application for interim relief under Section 9 of the 1996 Act once the tribunal has been constituted. It was held that even though an earlier application for interim relief may have been filed in Court, once arbitral tribunal is appointed, an interim relief should be sought before the arbitrator. It was observed that the Court should not grant an interim relief, unless satisfied that circumstances exist, which may not render the remedy provided under Section 17 inefficacious.

g. Unitech Developers & Projects Limited v. Sreei Infrastructure Finance Limited\(^9\)

Proceedings under: Section 9 of the Act

Held: 2015 Amendments applicable

\(^7\) 2016 SCC OnLine Cal 9558

\(^8\) 2016 SCC OnLine Cal 483

The Calcutta High Court, speaking through Hon'ble Justice Soumen Sen while dealing with an issue regarding applicability of 2015 Amendments to a Section 9 application filed prior to 23 October 2015 arose, noted that it was bound by the decision of division bench of Calcutta High Court in Tufan Chatterjee (supra), and in light of the same it held that Section 9 petition filed prior to 2015 Amendments, would be governed by amended 1996 Act.

h. **Ardee Infrastructure Private Limited v. Ms. Anuradha Bhatia**

Proceedings under: Section 36 of the Act

Held: 2015 Amendments not applicable

The Delhi High Court, speaking through Hon'ble Justice Badar Durrez Ahmed while adjudicating appeals arising out of Section 34 application for setting aside of an arbitral award and an application for grant of stay of operation of the award and deposit of the awarded amount arising from the 2015 Amendments, while disagreeing with the ratio of Tufan Chatterjee (supra) held that Section 26 of the Amendment Act of 2015 is silent on those categories of cases where the arbitral proceedings commenced prior to 23 October 2015 and where even the award was made prior to 23 October 2015, but not where either a petition under Section 34 was under contemplation or was already pending on 23 October 2015. In view of this observation, it was held that 2015 Amendments pertaining to those categories would apply only if, they were merely procedural and did not affect any right accrued. As a result, in this case, the procedure under the 1996 Act was to be followed for setting aside of an arbitral award in view of the above findings.

i. **Global Aviation Services Private Limited v. Airport Authority of India**

Proceedings under: Section 34(5) and 34 (6) of the Act

Held: 2015 Amendments not applicable

In this case the Bombay High Court, speaking through Hon'ble Justice R.D. Dhanuka, the primary issue arose that (i) whether the requirement under Section 34(5) and 34(6) of the Act (introduced post 2015 Amendments) to issue notice before filing an application to set aside an arbitral award was mandatory or directory in nature, and (ii) applicability of the 2015 Amendments to arbitrations and court proceedings in relation to arbitrations.

The Respondent contended that the Court must not entertain and dismiss the arbitration petitions due to non-issuance of prior notice under Section 34(5) of the Act. However, the Court on this point held that a vested and substantive right to challenge the award could not be taken away on failure to issue notice under Section 34(5) and 34(6) of the Act. Thus, holding that Section 34(5) is directory and not mandatory.

Further in regard to the applicability of the 2015 Amendments the Court held that the amendments would apply to those cases where the notice of arbitration has been
received by the other side after 23 October 2015, if the parties have not agreed to the contrary. The Court has observed that it was bound by the decision of the SC in

_Thyssen Stahlunion GMBH v. Steel Authority of India Limited_\(^1\) which has construed Section 85(1)(a) of the Act and held that the provisions of the Arbitration Act 1940 shall apply in relation to the arbitral proceedings which are commenced before coming into force of the 1996 Act. SC has held that it is open to the parties to agree to the applicability of the 1996 Act before the Act came into force. It was also observed that an interpretation of the phrase ‘in relation to’ which leads to unjust and inconvenient results cannot be accepted. Basis above, the Court held that the petitions which arise out of an arbitral proceeding initiated prior to 23 October 2015, will be governed by the Act as it existed prior to 2015 Amendments.

II. **Second Section: Reasons for divergence**

From the above judgements of the High Courts, it is apparent that the conflict emanates under Sections 9, 11, 34 and 36 of the 1996 Act. The following seems to weigh with the courts while reaching varying conclusions:

1. Absence of the phrase ‘in relation to’ from first part of Section 26 of the Amendment Act and thus the distinction between the arbitral proceedings and court related proceedings arising in relation to the arbitral proceedings;
2. Impact of 2015 Amendments on the substantive right versus on the procedural right of the parties;
3. Date of commencement of arbitration under Section 21 of the Act;
4. Termination of mandate of arbitral tribunal under Section 32 of the Act;
5. Passing of award before 23 October 2015.

III. **Aravali Power Company Pvt. Ltd. v. M/s. Era Infra Engineering Limited\(^2\) : Applicability of 2015 Amendments to proceedings under Section 11 and Section 12 of the 1996 Act**

On 12 September 2017, the SC, speaking through Hon’ble Justice Uday Umesh Lalit, while dealing with a challenge to appointment of the arbitrator, appointed pre-2015 Amendment on the strength of the 2015 Amendment Act to challenge the appointment of arbitrator already made as the invocation of arbitration was prior to Amendment Act coming into force. Further, the SC observed that in pre-amendment cases, the law laid down in Northern Railway Administration\(^3\), must be applied, in that the terms of the agreement ought to be adhered

---

\(^{12}\) (1999) 9 SCC 334

\(^{13}\) 2017 SCC Online SC 1072

\(^{14}\) Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd; (2008) 10 SCC 240. The SC in this case held “12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

13. The expression “due regard” means that proper attention to several circumstances have been focussed. The expression “necessary” as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

14. In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment
to and/or given effect to as closely as possible. It is thus clear that the SC has categorically held that insofar as Section 11 of the Act is concerned that the amended provisions will have no applicability if the invocation of arbitration is before 23 October 2015. The Aravali judgement upheld the finding in the Jumbo Bags (supra).

**Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. & Etc**

(“BCCI Matter”): Applicability of 2015 Amendments to proceedings under Section 34 and Section 36 of the 1996 Act

The SC, speaking through Justice Rohinton Fali Nariman, in relation to proceedings under Section 34 and Section 36 of the 1996 Act, interpreted Section 26 of the Amendment Act. The judgement disposed of some matters mentioned in Second section, against which appeals were filed before the SC, as the same were tagged along.

The SC has observed and held as under:

a. Section 26 is divided into two parts, which are separate and distinct.

b. The first part, which states, *“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...”* is that: (1) “the arbitral proceedings” and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is “to” and not “in relation to”; and (3) parties may otherwise agree.

So far as the second part of Section 26 is concerned, namely, the part which reads, “*...but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act*” makes it clear that the expression “in relation to” is used; and the expression “the” arbitral proceedings and “in accordance with the provisions of Section 21 of the principal Act” is conspicuous by its absence. Since the word “to” is used in the first part, the first would cover only arbitration proceedings i.e. proceedings before an arbitrator. Likewise, the second part will cover proceedings which arise out of arbitral proceedings before Court.

c. That the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

d. On the impact of the Amendment Act on the proceedings under Section 36 of the 1996 Act in relation to proceedings under Section 34 of the 1996 Act, which have been filed before the commencement of the Amendment Act, the SC held that:

i) Proceedings under Section 36 shall also be governed by the Amended Act as that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.”

15 Judgement dated 15 March 2018 passed in Civil Appeal Nos. 2879-2880 of 2018
36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

ii) The words “has been” used in Section 36(2) in relation to filing of petition under Section 34 of the Act will be a factor suggesting that petitions under Section 36 post the Amendment Act will also be governed by the amended provisions.

iii) From a practical point of view, it is sheer unfair for the award holder as the un-amended provision granted an automatic stay to execution of an award before the enforcement process of Section 34 was over, which court noted that stay order could last for a number of years, and when such stay orders are passed without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons.

IV. Conclusion

From the above, following is clear:

1. Applicability of 2015 Amendments will be prospective in nature unless an exception is carved out.

2. Applicability of 2015 Amendments with respect to proceedings under Section 34 and Section 36 of the 1996 Act – amendments will apply.

What is still not clear:

3. Applicability of 2015 Amendments with respect to proceedings under Section 11 of the 1996 Act, in light of the judgment passed by SC in Aravali.

4. Applicability of 2015 Amendments with respect to other provisions of the 1996 Act, where it is not decided as to whether the provision is procedural or substantive. Some issues which may arise are as under:

   Section 2(e): Whether proceedings in relation to international commercial arbitration initiated after the 2015 Amendments, though arbitration commenced before 2015 Amendments, would the same be maintainable before principal Civil Court of original jurisdiction, which could be lower courts or would be maintainable only before the High Court?

   Section 2(2): Whether the provisions of Section 9, Section 27 and Section 37(3)(1)(a) would apply to international commercial arbitrations seated outside India and an award made under Part II of the 1996 Act unless otherwise agreed by the parties?

   Section 8: Whether in a post 2015 Amendment court proceeding, the judicial authority will only form a prima facie opinion about the validity of arbitration agreement while deciding an Application under Section 8
of the 1996 Act filed after the 2015 Amendments or would be governed by the pre-amendment yardsticks?

**Section 37:** Whether in a proceeding where the arbitration commenced before the 2015 Amendments an order refusing to refer the parties to arbitration under Section 8 would be appealable?

**Section 48:** Whether in a proceeding where the arbitration commenced before the 2015, enforcement proceedings would be governed by the amended provisions

From the BCCI matter, it is clear that the Amendment Act will only be applicable to the cases where arbitral proceedings and the Court proceedings which are commenced on or after the Amendment Act came into force i.e. after 23 October 2015. Exceptionally, with regard to the pending applications under Section 34, Section 36 as amended by 2015 Amendments will be applicable. Thus, it was the Court’s conclusion that since execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act. The said view of the SC is at divergence to the views taken by the Calcutta High Court, Madras High Court, Bombay High Court and Delhi High Court in the cases covered under Second Section above.

The application of the Amendment Act has been ruled to be prospective in nature. Notably, the SC has not considered the its judgment in *Aravali* (supra), which in relation to proceedings for appointment and challenge to appointment of arbitrator holds a converse position i.e. it ruled that the amendments shall not apply to proceedings commenced after 23 October 2015. The conflicting position is explained in table below:

<table>
<thead>
<tr>
<th>Section 11 (Aravali)</th>
<th>Section 34/36 (BCCI)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue of appointment of arbitrator (tribunal already constituted)</td>
<td>Issue of automatic stay of award</td>
</tr>
<tr>
<td>Amendments came into force on 23 October 2015</td>
<td>Amendments came into force on 23 October 2015</td>
</tr>
<tr>
<td>Challenge to appointment</td>
<td>Request for automatic stay</td>
</tr>
<tr>
<td>Held: Amendment Act <strong>not applicable</strong> to appointment of arbitrator and the appointment to be done as per the pre amended Act.</td>
<td>Held: Amendment Act <strong>applicable</strong> to proceedings after 23 October 2015 and therefore automatic stay</td>
</tr>
</tbody>
</table>

From the above pictorial representation, it can be seen that SC has taken divergent views with regard to the applicability of the Amendment Act. Both the above judgments
therefore appear to be conflicting insofar as applicability of Section 11 of the 2015 Amendments are concerned.

Alternatively, it may be said that the implication of the BCCI judgment will only be in relation to Section 34 and no other provision under the 1996 Act. The question of the provisions under the 1996 Act being either substantive or procedural is also not decided, which leaves a room for exceptions to be drawn and may result in further confusion as it is not clear that if the amended provision is held to be substantive and not merely procedural, whether such a provision will be prospective or retrospective. The Court will be required to follow a two-step process whenever interpreting the applicability of amended provisions. Firstly, the Court will be required to determine the nature of the provision i.e. whether the same is substantive or procedural and secondly whether the amended provisions is to be applied prospectively or retrospectively. The Court will have benefit of the BCCI judgement and Aravali judgement to take one of the two positions. Further, the ratio of Lalji Raja and Sons v. Hansraj Nathuram16 and Narhari Shivram Shet Narvekar v. Pannalal Ummediram17 which were relied upon by the SC in the BCCI matter to conclude that rights under Section 34 are merely procedural, may not be applicable for determining the nature of other provisions.

Further, in the BCCI judgement, the SC has emphasized on the fact that parties can choose to decide to apply the amendments even when the invocation notice was sent before 23 October 2015. However, the SC has not clarified whether the arbitration agreements wherein parties have specifically provided that they shall be bound by the provision of the 1996 Act and any statutory modification thereof would amount to agreement between parties as contemplated under Section 26 of the Amending Act.

Despite a clear transitory provision18, suggested by the Law Commission in its Report No. 246 on “Amendments to the Arbitration and Conciliation Act 1996”, the legislature incorporated Section 26 of the Amending Act, which can be said to be the cause of difference of opinion and avoidable litigation before Courts. The Government will be well advised to consider the observations of the SC in the BCCI matter with regard to any amendments in future.

---

16 (1971) 1 SCC 721
17 (1976) 3 SCC 203
18 Transitory provisions. —

(1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in the following situations —

(a) the provisions of section 6-A shall apply to all pending proceedings and arbitrations.

(b) the provisions of section 16 sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.

(c) the provisions of second proviso to section 24 shall apply to all pending arbitrations.

Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.

(2) For the purposes of the instant section,—

(a) “fresh arbitrations” mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

(b) “fresh applications” mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

[NOTE: This amendment is to clarify the scope of operation of each of the proposed amendments with respect to pending arbitrations/proceedings.]