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BCCI v. Kochi – (Un)tangled Issues?

Anu Shrivastava · Tuesday, October 16th, 2018

The Supreme Court of India ("**Court**") in a landmark decision titled "*BCCI vs. Kochi Cricket Pvt. Ltd*. (previously covered in a blog post) clarified the applicability of the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**") to pending arbitration and court proceedings commenced under the Arbitration and Conciliation Act, 1996 ("**1996 Act**"). The Court held the following:

1. Subject to party autonomy, the amendments would not apply to "arbitral proceedings" that had commenced before the commencement of the Amendment Act.
2. The amendments would apply to court proceedings which have commenced, "in relation to arbitration proceedings", on or after the commencement of the Amendment Act.

Exception: The amendments would apply to enforcement of an award under Section 36, even if the court proceedings relating thereto have been filed before the commencement of the Amendment Act.

Section 36 of the 1996 Act provides for enforcement of an arbitral award in the same manner as if it were a decree of a court in India. The Court carved an exception to Section 36 of the 1996 Act on the ground that enforcement proceedings are entirely procedural in nature, and could be applied retrospectively since no rights are vested in the parties seeking such enforcement. This post seeks to analyse the Court's decision in carving out the exception for Section 36, and also to highlight practical problems which may arise in the aftermath of the decision.

Section 36 of the 1996 Act to apply retrospectively and no automatic stay on enforcement of the award – exception to the general rule.

The Court held that the Amendment Act was prospective in nature and would apply in relation to arbitration proceedings commenced after the commencement of the Amendment Act, i.e., 23 October 2015. In the pre-amendment scenario, Section 36 provided for an automatic stay on the enforcement of an award until the expiry of the time limit for challenging the award, or until the disposal of such a challenge. Under the Amendment Act, there was no longer a provision for automatic stay on enforcement of an award and such stay could only be granted upon a request being made to the court.

The Court held that the amended Section 36 would apply to those applications for setting aside an arbitral award under Section 34 which had been filed after the commencement of the Amendment Act. Further, the amended Section 36 would also apply retrospectively to Section 34 applications that had been filed prior to the commencement of the Amendment Act.

In declaring that Section 36 applies retrospectively, the Court analysed Section 6 of the General Clauses Act, 1897 which provides that the repeal of any enactment does not affect any right or privilege accrued or incurred under the repealed enactment. According to the Court, an automatic stay of awards could not be claimed as a vested right under Section 6 because enforcement is purely procedural and not substantive. Therefore, the provisions of the amended Section 36, being purely procedural, could apply retrospectively. The operative portion of the judgment which concludes that Section 36 is purely procedural reads as follows:

"Since it is clear 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 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act"

In concluding so, the Court seems to have only considered precedents on execution of a decree, and not on enforcement of an award under Section 36. The Court did not consider if the un-amended Section 36 was also purely procedural or if there was a change in its nature due to the Amendment Act *vis-à-vis* substance and procedure. In arriving at the conclusion that Section 36 of the 1996 Act is purely procedural, the Court only considered the post-amendment scenario which does away with automatic stay on awards.

The essential issue which escaped the Court's consideration is whether Section 36 could have been considered as purely procedural even before the amendments were introduced. Enforcement of an award, as provided for under Article 36 of the Model Law, does not only relate to procedural aspects but also contains substantive grounds of challenging an award. Similarly, the Article V of the New York Convention contains substantive objections to resist the enforcement of an award. While such objections and grounds for setting aside a domestic award are provided for under Section 34 of the 1996 Act, perhaps the Court should have considered if Section 36 of the 1996 Act could be read in isolation from Section 34 of the 1996 Act. An argument was raised before the Court that Section 36 proceedings could not be considered as a proceeding which was independent of a proceeding under Section 34 of the 1996 Act. However, the Court considered it unnecessary to go into the "by-lane of forensic argument" about Section 36 standing independent of Section 34 of the Act. Once the Court had decided that the Amendment Act was to apply prospectively, there should have been compelling reasons to the carve an exception to this general rule.

Practical considerations

The Court's decision that Section 36 of the Act applies retrospectively because it is purely procedural may lead to further litigation on retrospective application of other similarly placed provisions which concern only procedural issues. The Court did not

undertake a detailed analysis as to why the proceedings under Section 36 were not proceedings "in relation to arbitration". This leaves room for further attempts at seeking retrospective applicability of other similarly situated provisions on the basis that they are purely procedural. For instance, what would be the fate of an interim order rendered by a tribunal under Section 17 of the Act? Section 17 of the 1996 Act is modelled on Article 17 of the UNCITRAL Model Law and confers powers upon an arbitral tribunal to issue interim measures. Before the amendments, Section 17 of the Act did not provide for any court assisted measure for enforcing an interim award. The Amendment Act has led to the insertion of Section 17(2) to provide that an interim order shall be enforceable as if it were an order of the court. On the basis of the Court's decision, it may be possible to argue that enforcement of an award being procedural and "in relation to arbitration", Section 17(2) should also apply retrospectively for enforcement of an interim award made before the enactment of the Amendment Act.

To consider another instance, an arbitration commences under the 1996 Act and a challenge is made to the appointment of one of the arbitrators on the ground of independence or impartiality. The tribunal decides under the 1996 Act as it stood before amendments, rejects the challenge and delivers the final award. After the amendments are introduced, a party approaches the Court under Section 34(2)(a)(v) of the Amendment Act for setting aside the award on the ground that the composition of the tribunal was improper. The Amendment Act led to the insertion of the Fifth Schedule which lists down the grounds which give rise to justifiable doubts as to the independence or impartiality of arbitrators. The tribunal while deciding under the 1996 Act would not have considered the grounds listed in the Fifth Schedule since it was inserted subsequently. However, the court while considering the Section 34 application under the Amendment Act would scrutinize the award on the basis of the Fifth Schedule. This would lead to different grounds being considered by the tribunal and the court in deciding the same issue.

The Court's decision goes a long way in granting relief to award-debtors who have been waiting to enforce their awards, but has also caused an uncertainty in the law of arbitration. The decision also runs contrary to the recommendations made by the Srikrishna Committee that the Amendment Act should not apply retrospectively lest it would result in inconsistency and uncertainty, and would cause prejudice to the parties.

The Arbitration and Conciliation (Amendment) Bill, 2018 ("**2018 Bill**") tries to resolve these uncertainties and clarifies that the Amendment Act would *not apply* to arbitral proceedings and court proceedings (arising out of such arbitral proceedings) that have commenced before the Amendment Act. The 2018 Bill further provides that the Amendment Act would *only apply* to arbitral and court proceedings which commence after the Amendment Act. It may be important to note that the provisions of the 2018 Bill were brought to the Court's attention during the hearing for BCCI v. Kochi but the Court was not inclined to consider it. The Court had observed that the amendments in the 2018 Bill would put all the important amendments of the Amendment Act on a "back-burner". Yet, the 2018 Bill has been passed by the Lower House of the Parliament without making any substantive modifications. Once enacted, it will be interesting to see how courts interpret the 2018 Bill on the applicability of the

Amendment Act.

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