THE CONUNDRUM UNDERLYING SECTION 26 OF THE ARBITRATION AMENDMENT ACT, 2015: PROSPECTIVE OR RETROSPECTIVE?

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Abstract

The Arbitration and Conciliation (Amendment) Act, 2015, deemed to have commenced on October 23, 2015, has transfigured the Arbitration and Conciliation Act, 1996. The recent trend of the High Courts in India has been too diverse and unclear to arrive at the correct position of law as to the interpretation of Section 26 of the Arbitration Amendment Act, 2015 and the prospective application of the Amendment Act. This piece discusses how the prospectivity of the Amendment Act is limited to the arbitral proceedings after the commencement of the Amendment Act, as well as the court proceedings in relation to the same. It further argues that Section 26 does not logically extend to include post-arbitration proceedings, for instance, where an award was passed before the commencement of the Amendment Act. Amongst the divergent views about Section 26, this piece is an attempt to highlight the relevant questions and provide clarity on the practical implementation of the old and the new regimes.

I. Introduction

The Arbitration and Conciliation (Amendment) Act, 2015[1] [the "**Amendment Act**", or the "**Arbitration Amendment Act**"] had a celebrated entry into the Indian law of arbitration with its high definition international standards. In August 2014, the Law Commission of India published its 246th Report reviewing the provisions of the Arbitration and Conciliation Act, 1996 [the "**1996 Act**" or the "**Old Regime**"]. The Law Commission provided its view over the several inadequacies observed in the functioning of the 1996 Act. Prior to the 246th Report, the Commission had recommended various amendments to the Act in its 176th Report – 'Arbitration and Conciliation (Amendment) Bill, 2001'.[2] The Government accepted most all the recommendations, and accordingly introduced the 'Arbitration and Conciliation (Amendment) Bill, 2003'.[3] Later on, in light of the report of the Justice Saraf Committee,[4] the Bill was referred to the Department Related Standing Committee on Personnel Public Grievances, Law and Justice for further consideration. It was eventually of the view that many provisions in the Bill

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1 Arbitration & Conciliation (Amendment) Act, 2015, No. 3 of 2015 (India).

2 LAW COMMISSION OF INDIA, REPORT NO. 176 - THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001 (2001), *available at* http://lawcommissionofindia.nic.in/arb.pdf.

3 The Arbitration and Conciliation (Amendment) Bill, 2001 (India).

4 MINISTRY OF LAW & JUSTICE, JUSTICE SARAF COMMITTEE REPORT ON IMPLICATIONS OF THE RECOMMENDATIONS OF THE LAW COMMISSION'S 176TH REPORT AND AMENDMENT BILL OF 2003 (2005).

were insufficient and contentious and, therefore, the Bill was withdrawn stating that it be reintroduced after considering its recommendations. The 246th Report has now morphed into the Amendment Act, 2015, which is deemed to have come into force on the October 23, 2015.[5] While the Amendment is a mould of good intentions, its practicality will only become clear in time. Besides, considering the effect of the Amendment over ongoing arbitrations, many hurdles already need to be crossed.[6]

This was also the case with the Amendment Act's predecessor, the Arbitration and Conciliation (Amendment) Ordinance, 2015[7] [the "**Ordinance**"]. The Ordinance merely stated that it "*shall come into force at once*",[8] and was imprecise about whether or not it would apply to pending arbitrations and related court proceedings. At that point, the Law Commission's recommended Section 85-A (to clarify the scope of operation of the amendments with respect to pending arbitrations) was orphaned by the Ordinance.[9] The Amendment Act, however, recognized the problem and fixed it by including Section 26. The fix, however, has been a cause of much conundrum, and this paper dwells into the very cause underlying Section 26 of the Amendment Act. It begins with an autopsy of Section 26, an examination to discover the scope and applicability of the provision. In that background, the paper appraises various decisions delivered by different by High Courts, acknowledging the existing diversity in the interpretation of Section 26. The fundamental question which arises in these discussions, all converge to – whether the Amendment Act applies to arbitration related court proceedings which commenced before October 23, 2015 and were pending as on that date, and whether it applies to such court proceedings initiated on or after October 23, 2015 which are actually in relation to arbitral proceedings commenced before October 23, 2015. The paper deals with these questions by dwelling into the scope of Section 26 and by addressing the general law on retrospective

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5 Arbitration and Conciliation (Amendment) Act, No. 37 of 2015, § 1(2) (India).

6 *See* Roger Shashoua v. Mukesh Sharma, 2015 S.C.C. OnLine Del. 13668 (India); Electrosteel Castings Ltd. v. Reacon Engineers (India) Pvt. Ltd., A.P. No. 1710 of 2015, Jan. 14, 2016 (Calcutta High Court) (India); New Tirupur Area Development Corporation Limited v. Hindustan Construction Co. Ltd., A. No. 7674 of 2015, O.P. No. 931 of 2015, Jan 27, 2016 (Madras High Court) (India); M/s. Jumbo Bags Ltd. v. M/s. The New India Assurance Co. Ltd., O.P. No. 657 of 2015, Mar. 10, 2016 (Madras High Court) (India); Sri Tufan Chaterjee v. Sri Rangas Dhar, F.M.A.T No. 47 of 2016, C.A.N 308 of 2016, Mar. 2, 2016 (Calcutta High Court) (India); Sri Nitya Rajan Jena v. Tata Capital Financial Services Ltd., G.A. No. 145 of 2016 with A.P. No. 15 of 2016, Mar 2, 2016 (Calcutta High Court) (India).

7 MINISTRY OF LAW AND JUSTICE, LEGISLATIVE DEPARTMENT, ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2015 (October 23, 2015), *available at* http://lawmin.nic.in/la/Arbitration.pdf.

8 The Arbitration and Conciliation (Amendment) Ordinance, No. 9 of 2015, §1(2) (India).

9 MINISTRY OF LAW AND JUSTICE, LEGISLATIVE DEPARTMENT, ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2015 (October 23, 2015), *available at* http://lawmin.nic.in/la/Arbitration.pdf. S*ee also*, LAW COMMISSION OF INDIA, REPORT NO. 246 – AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 58 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf [hereinafter "246th LAW COMMISSION REPORT"]; Arbitration and Conciliation Act, No. 26 of 1996 § 85(2)(a) (India).

application of a legislation where there exists no express provision on its retrospective application.

II. Taking a Step Back: The Predecessor to the Amendment Act

With the coming into effect of the Ordinance, there were many qualms as to its intended application on 'fresh arbitrations' and 'fresh applications', where '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 Ordinance", and; 'fresh applications' mean application to a court or arbitral tribunal made subsequent to the date of enforcement.[10]

How the amendments would affect pre-existing arbitral proceedings and court actions was a crucial area which had been left unaddressed, with poor choice of words in the transitory section,[11] leading to unintended ramifications.

The general presumption is that a statute cannot take away substantive rights.[12] Having such a statute, which is not expressly made prospective or retrospective, has inevitably led to a substantial amount of litigation, like the *Delphi TVS Diesel Systems Ltd. v. UOI*[13] ["***Delphi TVS***"] case. Here, the Madras High Court observed this inconsistency and expressed its opinion that considerable litigation would arise due to the non-adoption of the Law Commission's recommendations, which specified which provisions would apply prospectively and which would apply retrospectively.[14] At present, however, the Arbitration Ordinance is no more a contentious concern as to its prospectivity, by virtue of the Amendment Act coming into force. This hovering uncertainty that once existed with the Ordinance is was clarified by Section 26 of the Amendment Act, however, Section 26 itself remains ambiguous as to its effect.

III. Introducing Section 26 of The Arbitration Amendment Act

The insertion of Section 26 was, in fact, clarificatory which had best intentions of settling the issue by clarifying that unless the parties otherwise agreed, the Amendment would not apply to

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10 Id.

11 Section 1 of the Ordinance states as follows: "*Short title and commencement – (1) This ordinance may be called the Arbitration and Conciliation (Amendment) Ordinance, 2015.* ***(2) It shall come into force at once***.".

12 Hooseing Kasam Dada (India) Ltd. v. State of Madhya Pradesh, A.I.R. 1953 S.C. 221(India), ¶¶ 3-11; Garikapati Veeraya v. N. Subbiah Choudhry & Others, A.I.R. 1957 S.C. 540 (India), ¶¶ 19-20, 23, 25; State of Bombay v. Supreme General Films Ltd., A.I.R. 1960 S.C. 980 (India), ¶¶ 5-7, 12. *See* Somabhai Kacharadas Patel v. Patel Becharbhai Shambhubhai and Ors. (1980) 2 G.L.R. 1 (Gujarat High Court) (India), ¶¶ 8,17 (Even the right of review, like the right of appeal, is a substantive right and not a matter of procedure).

13 Delphi TVS Diesel Systems Ltd. & Ors. v. Union of India & Ors, W.P. No. 37355 of 2015 (Madras High Court) (India).

14 *See* 246th LAW COMMISSION REPORT, *supra* note 9.

arbitrations that were initiated prior to the commencement of the Amendment. The provision states:

"*26. 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*." (emphasis supplied)

It is interesting to cull out certain uniquely worded portions of Section 26. The first part declares that nothing contained in the Amendment Act shall apply to "*arbitral proceedings*", and then it provides that the Amendment Act shall apply "*in relation to arbitral proceedings*". The phrase "*in relation to arbitral proceedings*" only features in the second part of Section 26, and is conspicuously absent in the opening line. Therefore, determining the significance of this expression – "*in relation to arbitral proceedings*" – becomes absolutely essential to move further into the discussion.

It was in 1999 when the Supreme Court, in *Thyssen Stahlunion GmBH v. Steel Authority of India*[15] ["***Thyssen***"] defined the very same expression "*in relation to arbitration proceedings*" to include not only arbitral proceedings but also court proceedings relating to the arbitral proceedings. Accordingly, the expression would not only cover proceedings pending before the arbitrator but also proceedings before the court which are in relation to the same arbitral proceedings.

IV. The Madras High Court on "Arbitral Proceedings" versus "In relation to Arbitral Proceedings"

In a matter under Section 34 of the 1996 Act,[16] in *New Tirupur Area Development Corporation Limited v. Hindustan Construction Co. Ltd.*[17] ["***NTADCL***"], the Madras High Court discussed these two distinct phrases appearing in Section 26. The question posed was concerning the effect of Section 26 on any proceedings in court (or to be taken in court), after the Amendment Act came into force. According to the Court, the intention of the legislature was explicit – that the Amendment Act was prospective to "arbitral proceedings" commenced before the Amendment, but retrospective to matters "in relation to arbitral proceedings" which commenced after the Amendment (including court proceedings, notwithstanding whether these court actions were in relation to arbitral proceedings commenced before, or after the Amendment Act). Ultimately, the Court generalized Section 26 by applying the Amendment Act even to court proceedings related

15 (1999) 9 S.C.C. 334.
16 Section 34 provides recourse against an arbitral award through an application for setting aside.
17 A. No. 7674 of 2015 in O.P No. 931 of 2015 Jan. 26, 2016 (Madras High Court) (India).

to arbitrations commenced before October 23, 2015, and court proceedings initiated on or after October 23, 2015 that are actually in relation to arbitraations commenced before October 23, 2015.[18]

At this juncture, the gap in Section 26 becomes seeming. It does not cover one specific kind of court proceedings – ones instituted after the commencement of the Amendment Act, but also the ones which branch out of arbitral proceedings initiated before the Amendment Act. Hypothetically, if the first part of Section 26 had provided that the Amendment Act would not apply "*in relation to* arbitral proceedings" commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act, the present muddle with Section 26 would have never existed.

In *NTADCL*, the Court was convinced that it could not fill in the gap by adding "*in relation to*" in the first part of the section. It firmly conformed to the view that it was for the legislature to amend or modify if it was deemed necessary.[19] A *casus omissus*, observed the Court, could in no case be supplied by a court of law, for that would be to make laws.[20] Nonetheless, the interpretation in *NTADCL* was *a sloppy job*.

In interpreting Section 26, *NTADCL* conveniently applied the Amendment Act to a category of court proceedings which are in relation to arbitral proceedings commenced before the Amendment Act, and therefore, making no difference between the said category and those court proceedings which would be in relation to arbitral proceedings that commenced (or would commence) after the Amendment Act.

This would mean that the arbitral proceedings which commenced before the new regime came into the picture, are to be governed by the old regime, and all related court actions arising from said arbitral proceedings, if instituted on or after the new regime, are to be governed by the new regime. Therefore, if an award was passed in an arbitration which commenced prior to October 23, 2015, and if a petition challenging the award is instituted after October 23, 2015, the challenge would be governed by the new regime (although the award was passed under the old regime). This is logically fallacious.

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18 *Id.* ¶¶ 79-82.

19 New Tirupur Area Development Corporation Limited v. Hindustan Construction Co. Ltd., A. No. 7674 of 2015 in O.P No. 931 of 2015 Jan. 26, 2016, ¶ 53 (Madras High Court) (India).

20 *Id.*; *see* Jones v. Smart, 1 T.R. 52 ("*Casus omissus et oblivioni datus dispositioni communis juris relinquitur— 'a casus omissus', can in no case be supplied by a court of law, for that would be to make laws.*") (Buller J.) (U.K.).

NTADCL ignored multiple complex repercussions that could emerge if an award passed under the old regime is sought to be enforced (or set aside) under the new regime. It is a given that both the regimes are immensely different from each other, and when arbitration proceedings are held under the old regime, the parties and the arbitral tribunal keep in view the provisions of that regime, particularly for the enforcement of the award. It is, therefore, apparent that an Amendment Act, while altering the principal 1996 Act (dealing with substantive rights such as the right to seek setting aside under Section 34), extensively changes the parameters, so much so that it affects the package of vested substantive rights of the parties.[21] This is extensively dealt with in the following chapters.

In an effort to solve this delinquency of prospective application of the Amendment Act, one must consider the exact scope of Section 26. As far as court proceedings relating to pre-Amendment arbitral proceedings are concerned, the question has been left unaddressed. In this case, one would have to take the default rule of prospective application of an Amendment provision, especially where such a provision affects a substantive right (particularly in the case of Section 34 of the principal Act). In simple terms, where a case is omitted or the amending statute does not provide for a situtaion, it would be governed by the old regime, with the amending statute applying prospectively.[22] On that rationale, any provision in the 1996 Act that is substantive in nature (which relates to the category of court proceedings not dealt with by Section 26) would have no retrospective impact of the Amendment Act.

V. The Substantive Nature of Section 34 Bars Any Retrospective Impact of the Amendment Act

This chapter specifically addresses the substantive nature of the right under Section 34 of the 1996 Act. Thereafter, it is argued that the Amendment Act would have no retrospective impact on court proceedings under Section 34, where the proceedings are in relation to an arbitration that commenced before the Amendment Act came into being. Therefore, in all such situations, the only question would be whether there was a substantive right (to seek setting aside of the arbitral award) vested in the appellant or applicant at the date of the enforcement of the Amendment, or was it a mere matter of procedure.

21 Videocon International Limited v. Securities and Exchange Board of India, (2015) 4 S.C.C. 33 (India).
22 *Id.*

A. The Scope of Challenges under Section 34 of the Old and New Regime

i. Section 34 under the 1996 Act

Section 34 of the pre-Amendment regime dealt with setting aside a domestic award, which includes a domestic award resulting from an international commercial arbitration. It provides the grounds for challenging an arbitral award which can be set aside only on the grounds mentioned in Section 34, like incapacity of parties, invalidity of the arbitration agreement under the law to which the parties have subjected it, lack of proper notice of appointment of arbitrator or of the arbitral proceedings, where the courts find that the subject matter is not capable of settlement by arbitration, etc. Section 34 also permits setting aside of an award if it is in conflict with the public policy of India. The phrase 'public policy of India' was given a wide meaning in *ONGC Ltd. v. Saw Pipes*[23] ["***Saw Pipes***"] since the concept connoted some matter which concerned public good and public interest.[24] It was held that the award could be set aside under the public policy exception if it was patently illegal.

It is interesting that Sections 34 and 36 of the pre-Amendment Act did not expressly provide for an 'automatic stay' on the execution of the award, and the same came into existence by virtue of judicial interpretation in 2004. In *National Aluminium Co. Ltd. v. Pressteel & Fabrication (P) Ltd. and Anr,*[25] the Supreme Court observed that according to the mandatory language of Section 34, when an award is challenged within the time stipulated in Section 34, it becomes inexecutable. It was interpreted that there is no discretion left to pass any interlocutory order in regard to the said award, except to adjudicate the correctness of the claim made by the Applicant therein.[26]

Despite the above holding, the Court asserted that this automatic suspension of the execution of the award (the moment an application challenging the said award is filed), leaving no discretion to the Court to put the parties on terms, defeats the very object of alternative dispute resolution. Further, the Supreme Court also stated that it was hoped that the legislature would fix this anomaly expeditiously.

ii. Section 34 under the Amendment Act, 2015 and the 'Public Policy' Exception

The Amendment Act is underlined by a simple principle that the legitimacy of judicial intervention in the case of a purely domestic award is far more than in cases where a court is

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23 (2003) 5 S.C.C. 705 (India).

24 Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr., 1986 S.C.R. (2) 278 (India).

25 (2004) 1 S.C.C. 540. *See also* Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai, 2014 (1) Arb. L.R. 512 (Bombay High Court) (India); Afcons Infrastructure Ltd. v. The Board of Trustees of the Port of Mumbai, Appeal No. 538 of 2013, Sep. 4, 2013 (Bombay High Court) (India).

26 (2004) 1 S.C.C. 540, ¶ 10 (India).

examining the correctness of a foreign or domestic award in an international commercial arbitration.[27] Take for instance, Section 34 of the 1996 Act, as amended. The Amendment Act has clarified that an award is in conflict with the 'public policy of India', only if:

"*(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or*
(ii) it is in contravention with the fundamental policy of Indian law; or
(iii) it is in conflict with the most basic notions of morality or justice. The Amendment further provides that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."[28]

Section 34(2A), as inserted by the Amendment Act, clarifies that "an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award". In order to provide a balance and to avoid excessive intervention, Section 34(2A) also states that "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence." This nullifies the unintended consequences of the decision of the Supreme Court in *Saw Pipes*, which although in the context of a purely domestic award, had the effect of being equally extended towards awards arising out of international commercial arbitrations.[29]

a. No 'automatic stay' on execution of award on the admission of challenge

In order to rectify the "mischief" of the automatic stay under the pre-Amendment regime, the amendments provide that the award will not become unenforceable merely upon the making of an application under section 34.[30] 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 that award unenforceable unless the court grants an order for stay of the operation of the said arbitral award on a separate application made for that purpose.[31]

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27 *See* 246th LAW COMMISSION REPORT, *supra* note 9.

28 Arbitration and Conciliation Act, No. 26 of 1996, § 34(2)(b) (India).

29 Shri Lal Mahal v. Progetto Grano Spa, (2014) 2 S.C.C. 433 (India) (the Supreme Court has held that the expansive construction accorded to the term "public policy" in *Saw Pipes* could not apply to the use of the same term "public policy of India" in § 48(2)(b) of the 1996 Act. However, this did not cover international commercial arbitrations seated in India).

30 *See* 246th LAW COMMISSION REPORT, *supra* note 9.

31 Arbitration and Conciliation (Amendment) Act, No. 37 of 2015 §§ 36(2), 36(3), (India); The Code of Civil Procedure, Act No. 5 of 1908, Or. 41, R. 5 (India) (A guiding factor is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay).

b. Prospective Application of the Amendment Act where a Challenge under Section 34 is in relation to Arbitral Proceedings which Commenced before the Amendment Act

In the event of a fresh challenge (with respect to an award under a pre-Amendment arbitration) being brought after the Amendment, the said challenge would be purely subject to the pre-Amendment regime. As was stated in *Thyssen,*[32] once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by an old regime, for enforcement of the award, is an inchoate right. It is certainly a right accrued. It would be illogical to suggest that for a right to accrue, i.e., to have an award enforced under the old regime, some legal proceedings for its enforcement must be pending under the old regime at the time the new regime came into force. The argument can be stated in the following three limbs.

iii. The right of Appeal is a Substantive Right

It is settled law that the right of appeal is not a mere matter of procedure but is a vested right inherited by a party from the commencement of the action in a court of first instance, and such a right cannot be taken away except by an express provision or by necessary implication.[33] This also pre-empts any counter-submissions that termination of arbitral proceedings and the setting aside of the award are two separate proceedings[34] and therefore, after the proceedings are terminated and final award is made, reference has to be made to the new regime for setting aside the award.[35]

An appeal is a continuation of suit. Not only can a right of appeal not be taken away by a procedural enactment which is not made retrospective, the right cannot be impaired or imperilled, nor can new conditions be attached to the filing of the appeal, nor can an pre-existing condition be made more onerous or more stringent so as to affect the right of appeal arising out of a suit instituted prior to the enactment.[36] Therefore, the right to set aside an award under Section 34 of the pre-Amendment 1996 Act is a substantive right.

iv. Accrual of Substantive Right under the 1996 Regime

Clearly, substantive rights would accrue when arbitration proceedings are invoked under the pre-Amendment regime. These accrued rights include, for instance, a wider ground like 'patent

32 *Thyssen*, (1999) 9 S.C.C. 334, ¶¶ 22, 28.
33 Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh, A.I.R. 1953 S.C. 221 (India).
34 Arbitration and Conciliation Act, No. 26 of 1996 (India) § 32.
35 *Thyssen*, (1999) 9 S.C.C. 334 (the submissions of Mr. F.S. Nariman, who appeared for Thyssen Stahlunion GmBH, ¶ 14).
36 *Id.*

illegality' against an arbitral award from an 'international commercial arbitration'[37] seated in India; an automatic suspension of the enforcement of the award without affecting the challenge in rendering it infructuous.[38] The Amendment Act, however, puts an embargo on the use of the wider ground of 'patent illegality' against arbitral awards in international commercial arbitrations, and besides, it makes the right under Section 34 more onerous by the amputation of automatic suspension of the enforcement of the award.[39]

v. The Amendment Act affecting an Accrued Substantive Right cannot be applied

That the Amendment has placed a restriction, or that it has had an impact on the right under Section 34 cannot be disputed. The question, therefore, is whether such a restriction or burden can be imposed on the right to seeking setting aside an award (arising from pre-Amendment arbitral proceedings). That would not be the case, going by the Judicial Committee in *Colonial Sugar Refining Co. Ltd. v. Irving*[40] which stated that any interference with the existing rights is contrary to the well-known principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested. This principle was notably applied the Supreme Court in *Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh*[41] which stated that "a pre-existing right of appeal is not destroyed by an amendment if the amendment is not made retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. The old Act continues to exist for the purpose of supporting the pre-existing right of appeal."[42] This rationale was also applied by the Calcutta High Court in *Nagendra Nath Bose v. Mon Mohan Singha*[43]. Therefore, it necessarily follows that Section 26 of the Amendment Act would be rendered illogical when applying the new regime to court proceedings (commenced after the Amendment) which are in relation to pre-Amendment arbitral, while applying the old regime to said arbitral proceedings.

It is, therefore, reasonable to infer from the above that a right to set aside under Section 34 would not be affected by an amendment in the case of pending challenges before the court. This is true even in cases where a challenge, that is connected to pre-Amendment arbitral

37 Arbitration and Conciliation Act, No. 26 of 1996, § 2(1)(e), (India); Arbitration and Conciliation (Amendment) Act, No. 37 of 2015, § 34 (India).

38 Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr., 1986 S.C.R. (2) 278 (India); National Aluminium Co. Ltd. v. Pressteel & Fabrication (P) Ltd. and Anr., (2004) 1 S.C.C. 540 (India).

39 (1999) 9 S.C.C. 334 (India).

40 1905 A.C. 369 (U.K.).

41 A.I.R. 1953 S.C. 221 (India).

42 *Id.* ¶ 9.

43 A.I.R. 1931 Cal. 100 (India).

proceedings, is made after the Amendment Act came into force. Ultimately, the date that really needs to be looked into is the date of commencement of the original arbitral proceeding (pre or post-Amendment) which, eventually culminates into a challenge under Section 34.[44]

VI. The Absurdities that may follow from the Interpretation of the Madras High Court in *NTADCL*

The vacuum under Section 26 is apparent, and on that basis, it would be incongruous to suggest a challenge to an award be instituted under the new regime, when the arbitration itself was inititated under the old regime. Section 26, therefore, raises a difficulty. When a defect appears, such as the one with Section 26, the court cannot simply fold his hands and blame the draftsman. Rather, it must set to work on the constructive task of finding the intention of the legislature and then it must supplement the written word so as to give "force and life" to the intention of the legislature.[45] The court should not alter the material of which the Act is woven, but it can and should iron out the creases.[46]

Approaching the case at hand in that sense, an interpretation that the Amendment would apply to any and all court proceedings initiated after the commencement of the Amendment Act, is a potent formula for absurdities in the operation of the law of arbitration. The following section exposes the incongruities which would emerge, if the interpretation in *NTADCL* is held to be good in law.

A. Operation of Section 8 of the Old Regime vis-à-vis the New Regime

For the purpose of clarity, it is helpful to compare Section 8(1) under both the regimes, new and old–

44 *Id.*
45 Seaford Court Estates Ltd. v. Asher, (1949) 2 All E.R. 155, 164 (U.K.).
46 *Id.*

Amended Section 8(1)	**Originally Section 8(1)**
"The judicial authority, before which an action is brought in a matter which is the subject of an Arbitration agreement shall, if the party to the arbitration agreement or <u>any person claiming through or under him</u>, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any other court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists".	"A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration".

From this comparison, it becomes exceedingly clear under the pre-Amendment regime, a non-signatory to the arbitration agreement could not be referred to a domestic arbitration where a suit had been filed making that non-signatory a party. This was the position of law stated by the Supreme Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr.*[47] Therefore, where a suit is commenced as to a matter which lies outside the arbitration agreement, or is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8 under the old regime.

Conversely, the wording of Section 45 is wider than Section 8 of the principal Act of 1996.[48] It refers not only to a party, but also to a "person claiming through or under". This phrase was interpreted by the Supreme Court in *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*[49] ["***Chloro Controls***"] to mean that in so far as foreign seated arbitrations are concerned, some non-signatories could be subjected to arbitration without consent, but only in exceptional circumstances. It is now that the Amendment Act incorporates words from Section 45, plus the position of *Chloro Controls,* into Section 8 in relation to domestic arbitrations.

Therefore, the language of the amended Section 8 substantially varies from the language of the pre-amendment Section, which uses the expression "parties" simpliciter without any extension.

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47 (2003) 5 S.C.C. 531 (India).

48 Section 45 of the 1996 Act (as amended) provides:–

"Power of judicial authority to refer parties to arbitration. — Notwithstanding anything contained in Part I or in the CODE CIV. PROC., 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

49 (2013) 1 S.C.C. 641 (India).

In significant contradiction, the amended Section 8 uses the expression "one of the parties or any parties claiming through or under him" and "refer parties to arbitration". The expression "any persons" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatories to the arbitration agreement.[50]

Considering the above, as per the *NTADCL* decision, an arbitral tribunal (constituted pre-Amendment) governed by the old regime would lack jurisdiction over any person "claiming through or under a party".

However, where a civil suit is filed by one party before the Amendment (involving a non-signatory to the arbitration agreement) and an application under Section 8 is filed by another party to refer the said matter to arbitration, the court would have to adopt the *Chloro Controls* test, as required under the amended Section 8, and may refer the parties (including the non-signatory) to arbitration. However, the consequent arbitration would still be subject to the old regime. For this reason, the arbitral tribunal would have no jurisdiction since the arbitral proceeding would then involve not just the parties, but also any person(s) claiming through or under a party. It certainly cannot be that the intention of the Legislature was to have the arbitral tribunal and the courts apply different standards in relation to the same proceedings.

B. The interplay between Section 9 of the New Regime and Section 17 of the Old Regime

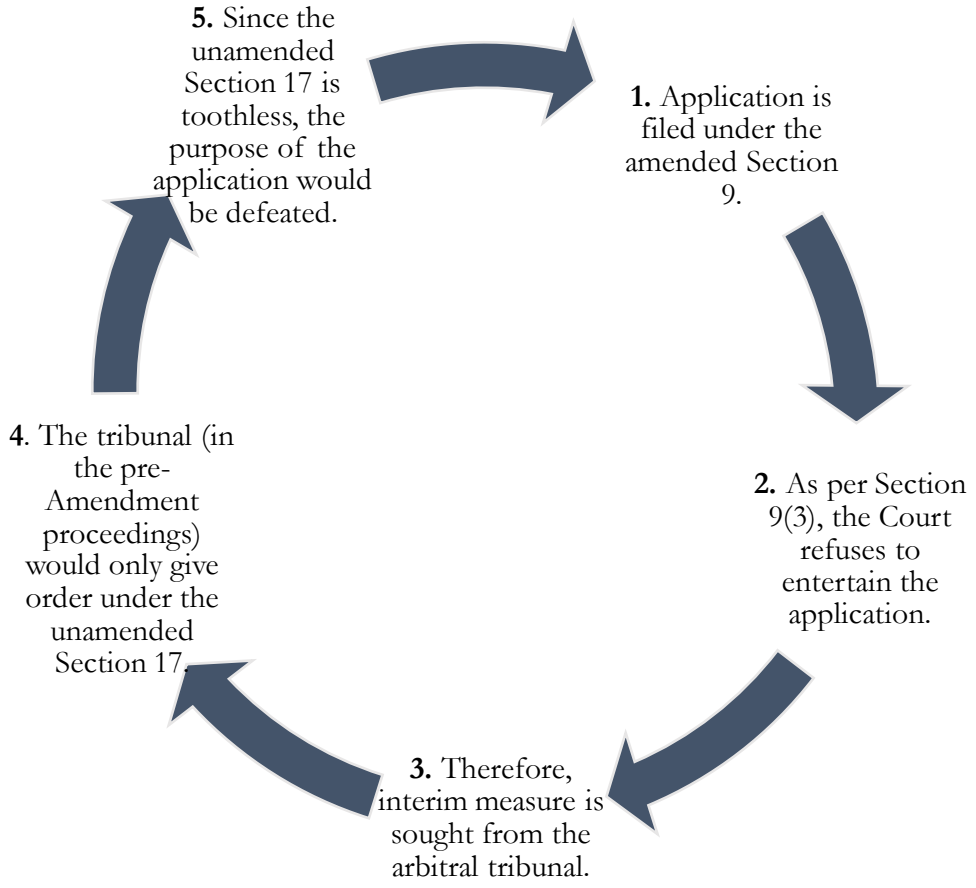
Sections 9 and 17 of the 1996 Act deal with court-ordered and tribunal-ordered interim measures, respectively. Section 17, as modified by the Amendment Act, finally gives teeth to the orders of the arbitral tribunal. Under the new regime, the interim orders of an arbitral tribunal are statutorily enforceable in the same manner as orders of a court. This was not the case under the old regime.[51] Since the arbitral tribunal is now bestowed with such privileges, Section 9(3) has also been introduced. It states that once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1) of Section 9.

If the view of the Madras High Court in *NTADCL* is considered good, serious contradictions emerge in the interplay between Sections 9 and 17, where court proceedings (in relation to arbitral proceedings commenced before the Amendment) would be under Section 9 of the new regime, and the arbitral proceedings (which commenced before the Amendment) would have to be under the old regime. Hypothetically, if a person in need of an 'enforceable' interim order

50 *See id.*

51 Sundaram Finance Ltd v. NEPC India Ltd., (1999) 2 S.C.C. 479 (India); M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd, (2004) 9 S.C.C. 619 (India).

approached the court, his application under Section 9 would not be entertained because of the restriction imposed by Section 9(3). However, an inconsistency surfaces when the party takes a recourse to Section 17, and then realizes it to be under the pre-amendment 1996 Act where no power is conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement (unlike the amended Section 17).



Section 17 under the new regime providing for enforceable interim measures is crucial for the working of the arbitration system, since it ensures that even for the purpose of interim measure, parties can approach the arbitral tribunal rather than awaiting orders from a court. However, a situation much like the above, can riddle the parties, leaving them remediless.

C. <u>The interplay between Section 17 of the New Regime and Section 17 of the Old Regime</u>

The efficacy of Section 17 under the original 1996 Act was seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the arbitral tribunal. The advent of the Amendment Act, however, changed the fate of interim measures of arbitral tribunals by giving them the sanctity of a court's decree. The variance that emerges in the interaction between the old and the new, is one that might just be pro-arbitration for some,

however, it would still count as an anomaly drastically affecting party's rights. While an interim order rendered by an arbitral tribunal in pre-Amendment arbitral proceedings may not be enforceable in nature, if the same order is brought before the execution court, it would be abruptly governed by the post-Amendment law that would deem it to be an order of the court enforce it as if it were an order of the court. What was earlier unenforceable, suddenly becomes enforceable in a way that is unfair to one party, disrupting the equilibrium of being governed by one regime.

D. Circumstances which give rise to justifiable doubts as to an arbitrator's independence or impartiality

Any party desirous of raising a challenge to appointment of an arbitrator on the ground specified under Section 12 of the 1996 Act, has to comply with the procedure under Section 13 of the said Act. Sub-section (4) of Section 13 provides that in the event a party challenging the appointment of an arbitrator is not successful, i.e. if the arbitral tribunal rejects the said challenge, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. Sub-section (5), however, provides that after an arbitral award is made under sub-section (4), the said rejection can be challenged in a petition filed under Section 34 of the 1996 Act. [52]

The old regime did not lay down any conditions to identify the circumstances that would give rise to justifiable doubts, and it is apparent that there can be many such circumstances and situations. Under the old regime, such challenges were limited; the bars were set high because the test was whether, given the circumstances, there was any "actual" bias.[53] Therefore, whether the arbitrator was biased (or if there existed a likelihood of bias) was essentially a question of fact to be proved in the court of law. For instance, the mere fact that an arbitrator was an employee of one of the parties was held not to be an *ipso facto* ground to raise a presumption of bias, partiality, or lack of independence or impartiality on his part.[54] It is well settled under the old regime that arbitration agreements in government contracts providing that an employee of the government department will be the sole arbitrator, are neither void nor unenforceable.[55]

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52 Nagpur Sical Gupta Road Terminal Ltd. v. Maharashtra Airport Development Company Ltd., (2012) 6 A.I.R. Bom. R 839 (India).

53 *Id.*

54 Indian Oil Corporation Limited and Ors. v. Raja Transport Private Limited, (2009) 9 S.C.C. 520 (India).

55 Executive Engineer v. Gangaram Chhapolia, (1984) 3 S.C.C. 627 (India); Eckersley v. Mersey Docks and Harbour Board, (1894) 2 Q.B. 667 (India); Secy. to Govt., Transport Dept. v. Munuswamy Mudaliar, 1988 Supp. S.C.C. 651(India); S. Rajan v. State of Kerala, (1992) 3 S.C.C. 608 (India); Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem. Mfg. Co. Ltd., (1996) 1 S.C.C. 54 (India); Union of India v. M. P. Gupta, (2004) 10 S.C.C. 504 (India); Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. (2007) 5 S.C.C. 304 (India); Koneru Venkataratnam v. Union of India, Ministry of Law & Justice, (2001) 3 Arb. L.R. 6 (A.P.) (India).

The Amendment Act has paid a lot of attention to the issue of 'neutrality of arbitrators', viz. their independence and impartiality. Under the 1996 regime, certain minor exceptions[56] were carved out. However, these did not suffice and were far from satisfactory. Now, the new regime contemplates certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. The concept of party autonomy can no longer be protracted to such an extent that defeats the very fundamentals of having impartial and independent adjudicators.

The new regime requires specific disclosures by the arbitrator, at the stage of his possible appointment. It now incorporates the Fourth Schedule, which has been drawn from Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration[57], and which would be treated as a guide to determine whether circumstances exist which give rise to such justifiable doubts. Further, under the Fifth Schedule,[58] which incorporates the categories from the Red list of the IBA Guidelines, the person proposed to be appointed as an arbitrator shall be ineligible, notwithstanding any prior agreement to the contrary.

Looking at the situation through the lens of the *NTADCL* decision, another inconsistency surfaces when the arbitrator appointments have followed the old regime, but face a potentially successful challenge under Section 13(5) in the new regime. These two regimes are radically different, so much so that it would be as good as creating a new ground for challenge on the basis of the strict rule of independence and impartiality of arbitrators as provided for by the Amendment Act.[59] An appointment which is a completely accepted practice under the old regime could turn out to be a fatal blow to the award post-Amendment, if two different regimes are to govern pre-Amendment arbitral proceedings and post-Amendment court proceedings in relation to said arbitral proceedings.

VII. Conclusion

There is no doubt that the Amendment Act raises some difficulty. However, the court must set to work on the constructive task of giving 'force and life' to the application of the Amendment Act, and in that process, it must not alter the material of which the Act is woven, but it can and

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56 Where the arbitrator was the controlling or dealing authority in regard to the subject contract, or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. *Also see,* Castrol India Limited v. Apex Tooling Solution, (2015) 1 LW 961, ¶ 34 (India).

57 Adopted by resolution of the IBA Council on October 23. 2014.

58 Amendment Act, Schedule V.

59 *Thyssen,* (1999) 9 S.C.C. 334 (India).

should iron out the creases.[60] It is hoped that the view of the Madras High Court in *NTADCL* would be overruled for the atrocious effects that it might cause in the operation of law.

As regards the general principles applicable to the present hypothesis, there is no controversy. The category of court proceedings unaddressed by Section 26 of the Amendment would have to be resolved by the general rule that a particular case, not provided for, must be disposed-off according to the law as it existed before such amending statute.[61] Where the amending law, dealing with substantive rights, is being applied retrospectively, it must stand the test of fairness.[62] There is no reason why the Madras High Court in *NTADCL* should have extended a retrospective application of the Amendment to a category of court proceedings which related to pre-Amendment arbitral proceedings, especially if it touches a substantive right in existence. It is a well-settled principle that a new law dealing with substantive rights is ordinarily prospective in operation unless the language of the statute indicates otherwise.[63] It cannot be disputed that if the matter in question was a matter of procedure only, the retrospective applicability of the Amendment would have been well founded. On the other hand, if it be more than a matter of procedure, if it touches a substantive right in existence as the passing of the Act, it may be conceded that, in accordance with a long line of authorities extending to the present day, the Amendment would be purely prospective.[64] The conclusion that may be drawn is that the unamended 1996 Act would apply to the whole gambit of arbitration proceedings which commenced before the Amendment Act, right upto the culmination of the proceedings into a challenge or an enforcement of the award.

60 Seaford Court Estates Ltd. v. Asher, [1949] 2 K.B. 481 (U.K.).

61 Jones v Smart, (1785) 99 Eng. Rep. 963 (Eng.). *See,* Maulavi Hussein Haji Abraham Umarji v. State of Gujarat and Another, (2004) 6 S.C.C. 672 (India).

62 Hitendra Vishnu Thakur v. State of Maharashtra, 1994 (4) S.C.C. 602 (India).

63 *Id.*

64 *Thyssen,* (1999) 9 S.C.C. 334; 246th LAW COMMISSION OF INDIA, *supra* note 9.