

## Exercising Discretion in Stay of Enforcement of a Domestic Arbitration award

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### Background

1. Section 36 of the Arbitration and Conciliation Act, 1996 ("*Arbitration Act*") deals with enforcement of the arbitration award. Section 36(2), Arbitration Act also grants discretion to the Court to stay the enforcement of an award based on a separate application made for the purpose. Moreover, the Section also provides that there would not be an automatic stay merely based on the admission of an Application for setting aside the award under Section 34, Arbitration Act.
2. Further, Section 36(3), Arbitration Act states that while dealing with an application for stay of the award, the court can exercise its discretion to stay the enforcement of the award and give reasons for the same in writing. Finally, the proviso to Section 36(3), Arbitration Act provides that in case the Court is dealing with an arbitration award which includes payment of money, the Court "shall" "have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908". Order 41 of the Code of Civil Procedure, 1908 ("*CPC*") deals with stay of execution of money decrees and specifically provides for mandatorily depositing before the court, the amount awarded under the decree, to empower the executing Court to hear an application for stay of execution.
3. This paper shall discuss the dichotomy between the two conflicting provisions of the Arbitration Act and the CPC and attempt to answer the question whether in an application for stay of enforcement of an arbitral award, the enforcing court has the discretion to stay the award unconditionally or by payment of an amount less than 100% when the provisions of CPC, which needs to be followed under the section, do not give the Court such liberty.

### Evolution of Section 36 – Stay of Enforcement

4. Prior to 2015 there existed an automatic stay on the enforcement of an arbitral award as soon as the petition under Section 34 challenging the award was admitted by the Court. The Hon'ble Supreme Court in [\*National Aluminum Co. Ltd. v. Pressteel & Fabrications\*, \(2004\) 1 SCC 540](#) held that an automatic stay on the enforcement of the award was a burden on the award creditor and that such a mischief must be rectified.
5. The Law Commission in its 246<sup>th</sup> Report recommended amendment of Section 36 of the Arbitration Act. The law was amended in 2015 and post the 2015 amendment, an automatic stay is no more available when the petition for challenge of the award is admitted by the court under the Arbitration Act, rather a separate application is to be filed under Section 36(2), Arbitration Act for stay of enforcement of the award.

### Whether Special protection exists for Government instrumentalities / entities

6. In [\*PAM Developments v. State of West Bengal\* \(2019\) 8 SCC 112](#), the Hon'ble Supreme Court was dealing with the issue of whether a government entity would get the protection of not providing security or depositing the decretal amount before the court for stay of enforcement

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of an arbitral award on a combined reading of the provisions of Order 27 Rule 8-A and Order 41 of the CPC.

7. The Court while analysing the provisions held that Order 27 Rule 8-A, CPC exempts the government from furnishing any security, thus government while making an appeal against a decree is exempted from the mandatory requirements of Order 41 Rule, 5 CPC of furnishing security. The court further observed that Order 27 Rule 8-A, CPC only exempts the government from furnishing security, and the court has full power to seek deposit of full or partial decretal amount. Therefore, even if Order 27 Rule 8-A, CPC applied, it would not forbid the court from seeking deposit of money awarded.
8. The Hon'ble Supreme Court held that the Arbitration Act is a self-contained code and does not need to be bound by the Code of Civil Procedure to grant stay of execution of a money decree. It also concluded that the Arbitration Act did not grant any special treatment to government entities for protection against deposit of awarded amount or grant of security in order to stay enforcement of the arbitral award.
9. The court further held that the expression "having due regard to" the provisions of CPC in Section 36(3), Arbitration Act is only guiding or directory, had the expression been "in accordance with" the provisions of CPC, then it would have been mandatory.

#### ***Extent of effect of CPC on Arbitration Act – Stay of enforcement of money decree***

10. This dictum of the Supreme Court in PAM Development becomes relevant as the Court has held that the provisions of the CPC are not binding as long as they are inconsistent with the Arbitration and Conciliation Act. This should lead to the obvious conclusion that since the Arbitration and Conciliation Act, 1996 allows for the Court to have discretion in such matters, hence the provisions of Order 41 of the CPC which states that such matter cannot be heard without deposit of the decretal amount, would not be applicable to a court hearing an application under Section 36. However, that does not seem to be the case as the jurisprudence seems to have been muddled by conflicting opinions of the courts regarding their powers under Section 36.

#### ***Examples of exercise of Discretion by the Courts under Section 36(2)***

11. In December 2019, Reliance Infrastructure Limited (part of the Anil Dhirubhai Ambani Group) was awarded damages worth INR 875 Crores (excluding interest) under a contract with and in an arbitration against Damodar Valley Corporation. While the challenge of the award is still pending before the Calcutta High Court, in December 2021, the application for stay of enforcement of the award was heard by a single judge bench of the Calcutta High Court in the case of [Damodar Valley Corporation v. Reliance Infrastructure Limited](#).
12. The Hon'ble Calcutta High Court has exercised its discretion to stay the award on the condition that 50% of the award amount is to be deposited in cash before the Court and to be converted into a fixed deposit by the Registrar General of the Court. The remaining 50% to be deposited as bank guarantee before the Court and to be kept alive until the disposal of the application for setting aside the award.
13. While passing this order in the case, Court has encapsulated the entire position regarding the powers of the court hearing applications for stay of execution of the arbitral award. The Calcutta High Court in this case ([Damodar Valley Corporation v. Reliance Infrastructure Limited](#)), based on the submissions made by the parties, came to the prima facie view that

the award may be stayed on the deposit of 50% of the amount in cash and the remaining 50% to be deposited as bank guarantee. The observations which led to this decision are encapsulated in para 14 of the order which is extracted hereunder:

*14. Both parties had also made submissions on the merits of the award. I am well aware that any finding or observation pertaining to the merits of the challenge under section 34 of the Act which is still pending before this Court is premature at this stage. However, on a perusal of the award it appears that the award is a unanimous award of the Arbitral Tribunal comprising of three members. It ex facie appears that the Tribunal has taken into consideration the pleadings filed by the parties. Issues had also been framed. The award is a speaking award and prima facie deals with the contentions of both the parties elaborately. The Arbitral Tribunal has gone into each of the claims and the counterclaim made by the parties and has adjudicated upon the same. At least, at this prima facie stage, there is nothing in the award which shocks my conscience nor indicates that the award is either without jurisdiction or has been obtained by fraud or corruption or is contrary to law. I reiterate that these are all prima facie findings on the merits of the award and for the limited purpose of adjudication of this application. Accordingly, I am of the view that the petitioner has been unable to make out an exceptional case for unconditional stay of the award.*

14. The issue regarding the powers of the Court to stay enforcement of award under the Act, 1996 was also discussed by the Hon'ble Bombay High Court ("BHC") in the case of [\*PFS Shipping \(India\) Limited v V.K. Gupta and Ors.\*](#) **2016 SCC OnLine Bom 10048**. The court in this case held that Section 36(3) clearly indicates that the court has been granted discretion to consider security required to be furnished by the petitioner seeking stay or whether stay has to be granted unconditionally, or on furnishing such security so as to secure part of the claim depending on the facts and circumstances of each case.
15. The court further held that although Section 36 requires the court to give due regard to the provisions for grant of stay of money decree under the CPC, "in appropriate cases, the court can grant stay even on the petitioner furnishing security to secure part of the awarded amount or may grant unconditional stay depending upon the facts and circumstances of each case". The Court observed that if the award is prima facie perverse and contrary to law, the petitioner need not be directed to deposit the entire amount stated in the award.
16. A similar issue came up before a division bench of the BHC in the case of [\*Ecopack India Paper Cup Pvt. Ltd. v Sphere International\*](#), **2018 SCC OnLine Bom 540** wherein the BHC held that when the Court considers an application for stay of the arbitral award for payment of money, no doubt the Court would be required to consider the principles under the provisions of Order 41 Rule 5. Section 36, however, shows that the jurisdiction conferred on the court is a discretionary one, and would be required to be exercised after taking into consideration the facts and circumstances of the case. It is pertinent to note that the BHC exercised its discretion and granted an unconditional stay in execution of the interim award as they were prima facie convinced that the award was improper.
17. The prime example of the Court encountering situations to exercise its discretion in requiring parties to deposit the award amount before the court became relevant during the times of COVID-19, wherein parties suffered serious cash flow issues. It is pertinent to note that such discretion was exercised not under any extra-ordinary inherent power of the High Court but

under the powers available under Section 36 of the Act. Reference may be made to the judgment of the [Steel Authority of India Limited v. Tata Projects Limited](#).

18. The Calcutta High Court (“CHC”) in [Kolkata Metropolitan Development Authority v. South City Projects](#) held that the proviso to Section 36(3) of the Arbitration Act stipulates that the court shall, while considering the application for grant of stay in the case of an arbitral award for the payment of money, have due regard to the provisions of the CPC. It also held that while exercising powers under Section 36(3) of the Arbitration Act, the court is not bound by the provisions of order 41 Rule 5 of the CPC. It further held that under Section 36(3) of the Arbitration Act, the court can require a party to furnish such security as it deems appropriate. However, the court must give reasons for such orders.<sup>3</sup>
19. The Court also made an interesting note that Order 41 Rule 5 would be applicable in principle to an appeal preferred under Section 37 of the Arbitration Act i.e. when a Section 34 challenge has been dismissed. In this case the respondent not only prayed for deposit of money in accordance with CPC but also sought relief for withdrawal of amount out of such deposit. The Court rejecting this contention held that such withdrawal can be permissible at Section 37 of the Arbitration Act, appeal stage but not when a section 34 challenge is pending. The CHC while referring to the dictum of Allahabad HC in [Kanpur Jal Sansthan v. M/s Bapu Construction](#) wherein the withdrawal of 50% out of the deposit money at the stage of Section 37 of the Arbitration Act, was permitted held that once a challenge under section 34 of the Arbitration Act fails, the award becomes enforceable as decree. Appeals against order rejecting Section 34 of the Arbitration Act application lies to appellate Court under Order 41 CPC and therefore withdrawal out of deposit amount may be permitted at Section 37 stage but not at Section 34 stage. The Court further held that while considering an application under Section 36(3) of Arbitration Act, the court is still examining challenge to the award under Section 34 of the Arbitration Act. However, under Section 37 of the Arbitration Act, the award has already become a decree of Court.
20. It is pertinent to note that the Delhi High Court even at the stage of hearing the application under Section 34, allows the award creditor to withdraw the amount deposited by the award debtor on the submission of a bank guarantee to the equivalent amount. This is a common practice allowed by the Delhi High Court and reference may be made to the judgment of the DHC in [Steel Authority of India Limited v. Tata Projects Limited](#) and also has been recognized by the Hon’ble Supreme Court in the case of [SAIL vs. M/s Seaspray Shipping Co. Ltd.](#)

***Examples of Court not exercising discretion under Section 36 since the same is a money decree***

21. The Supreme Court in [Manish v. Godawari Marathawada Irrigation Development Corporation](#) (“*Godawari case*”) stated that in cases of money decrees, orders for 100% deposit of awarded amount has to be passed and hence the order of BHC for deposit of 60% of the awarded amount, pending an appeal under Section 37, Arbitration Act was set aside. The dictum of SC in Godawari Case has been relied upon by Delhi High Court to order 100% deposit in [Power Mech Projects Ltd. v. Sepco Electric Power Construction Corporation](#).
22. The Sikkim High Court in [Sikkim Power Development Corporation Ltd. and Ors. V. Amalgamated Transpower \(India\) Ltd.](#) held that in view of Section 36(2) and (3), Arbitration Act, in order to put stay on operation of the Arbitral Award, a party may file a separate

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<sup>3</sup> Nihal Shaikh, ‘Conditional or Unconditional Stay in Enforcement of an Arbitral Award?’ (Lexology, 3 August 2021) <<https://www.lexology.com/commentary/litigation/india/clasis-law/conditional-or-unconditional-stay-in-enforcement-of-an-arbitral-award>> accessed 12 January 2022.

application. The court in turn has discretion to grant such stay subject to conditions. Further the court observed that in light of section 36(3), Arbitration Act in cases of money decree, the court has to consider the provision under Order 41 CPC. While negating the argument of discretion of court in following the principles of Order 41 CPC, the court while relying on Godawari case ordered deposit of entire award money.

23. The Supreme Court in [Toyo Engineering Corporation & Anr. v. Indian Oil Corporation Ltd.](#) held that Order 41 Rule 5 CPC has to be followed in application for stay of award involving money. The court further held that because large public corporations have obligation to pay large amount awarded, therefore discretion of the court is limited to determination of amount of money to be deposited for the stay on execution of award. However, the court in this case raised the deposit amount to a 100% of award against 20% as ordered by the Delhi High Court.
24. In this case the court negated the exercise of discretion by the court for application of principles of Order 41 CPC rather made it mandatory by implication and the court limited the scope of discretion to quantum of the deposit amount.
25. It is interesting to note that the before the Toyo Engineering case reached the Supreme Court the orders of High Court were in stark contrast to the judgment and were more on lines of the exercise of discretion as discussed in the other cases above. In the DHC, the Toyo Engineering case then titled as [Indian Oil Corporation v. Toyo Engineering Corporation](#), the DHC ordered deposit of 20% of the awarded amount taking into consideration the allegation of Petitioner that the Arbitral Tribunal did not take into account a letter issued by the Petitioner whereby extension of time was granted subject to 10% price reduction of Contract Value as per one of the clauses of Contract. The court found this contention prima facie valid and ordered 20% deposit.
26. Subsequently an application was filed by Toyo Engineering for modification of the order for deposit of only 20% of the amount. The Court in [Indian Oil Corporation Ltd. v. Toyo Engineering Corporation](#) held that it has the discretion to determine the quantum of deposit in view of the facts and circumstances prevailing. The court further held that there being no change in circumstances from the time of passing of the earlier order, no modification can be allowed in deposit amount. Since the court has already exercised its discretion on the facts and circumstances of case, the discretion on the same facts and circumstances cannot be applied.

### ***Analysis and Conclusion***

27. The conflicting decisions have created a gray area in the law regarding deposit of award amount for stay of execution of an arbitration award. The authors are of the opinion that the correct law in this regard is that the Courts under the Arbitration Act do have the discretion to decide the amount of deposit for stay of execution of the award as opposed to the position under the CPC. Under the CPC, the Courts do not have any discretion while hearing an appeal under a civil suit to allow stay of execution of the decree if the appellant has not made a deposit of the decretal sum or furnished security as the case maybe. However, under Section 36, of Arbitration Act the Court has the discretion to even allow an unconditional stay of execution i.e. without the requirement of furnishing a security or depositing the awarded amount before the Court. Even in **PAM Developments** it was held that the provisions of CPC will apply only insofar as they are inconsistent with the spirit of the provisions of the Arbitration Act, 1996.

28. The reason for apparent conflict is because of passing of non-speaking orders by the Hon'ble Supreme Court in the case of ***Toyo Engineering*** and ***Godawari*** and the lower courts being bound by such judgments following them without due application of mind. Whereas the true import of the powers and functions of the Court under Section 36 of the Arbitration Act was discussed by the Supreme Court in ***PAM Developments*** case and has rightfully been applied by the Court of Bombay, Calcutta and Delhi.
29. The authors are of the opinion that while hearing an application for stay of arbitral award, it is the duty of the Court to exercise their discretion and apply their mind before ordering the applicant to deposit the entire amount of the award before the Court as a pre-condition for grant of stay of award. Further, the Courts cannot without application of mind order the entire amount awarded to be deposited as a matter of principle. The discretion needs to be exercised based on the facts and circumstances of each case. The parameters as discussed in the [\*\*\*Damodar Valley Corporation v. Reliance Infrastructure\*\*\*](#) should serve as a guideline as to the aspects to be taken into consideration while exercising such discretion. Further, it is also pertinent to note that in the process of exercising discretion, the Bombay High Court in [\*\*\*Ecopack India Paper Cup Pvt. Ltd. v Sphere International\*\*\*](#), **2018 SCC OnLine Bom 540** granted unconditional stay of the award as prima facie the interim award did not seem valid.
30. The court may prima facie examine the validity of award before granting a stay on the execution of award, and once the validity or invalidity of award is ascertained then conditional or unconditional stay can be granted. Therefore, so far as an award on the face of it is not perverse and prima facie appears valid, the deposit of awarded amount becomes significant so as to not deprive the award holder of fruits of award once a Section 34 application is dismissed. However, in case a prima facie view is taken that the award is patently erroneous or prima facie suffers from any other infirmities covered under Section 34 of the Arbitration Act, such an award should be stayed either unconditionally or by deposit of a lesser amount based on a prima facie analysis of the award and application of mind by the judge.