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**DOES SECTION 36 OF THE ARBITRATION ACT NEED A RE-  
CONSIDERATION: POWERS OF THE COURT TO REFUSE OR SET ASIDE  
AWARD?**- Naman<sup>1</sup>**Introduction**

The Arbitration and Conciliation Act, 1996 under Section 34 among other 6 grounds also gives specific powers to the courts to set aside an arbitral award in case the award is passed violating the principles of natural justice. Section 34(2)(a) of the Act contains 5 grounds for setting aside the arbitral award and the remaining 2 grounds are available under Section 34(2)(b). Further, the literal interpretation of the Act gives a view that the court under Section 36(2) only has the power to stay the award even if the agreement, contract or award related to arbitration is found to be compromised and induced by fraud or corruption or the principles of natural justice was not followed during the arbitration process. Therefore, an award can only be set aside by the court when a separate application is filed under Section 34 of the Act.

While any executing court under the Code of Civil Procedure, 1908 (hereafter referred to as the "Code") has the power to execute the decree as well as to set aside the decree under certain circumstances, whereas the Arbitration and Conciliation Act, of 1996 (hereinafter referred to as the 'Act') makes separate provisions for both enforcement and setting aside of the arbitral award. Therefore, under the Act, both these applications for setting aside and enforcement have to be filed separately and is not necessarily have to be filed before the same court enforcing the award as there is no mandate under the law to file these two applications before the same court.

Referring to several judgements, this article will attempt to ascertain and explain if a court under Section 36 of the Act can only grant a stay or if it can also refuse to execute or set aside the arbitral award in totality by declaring the award nullity and unenforceable in case the award is passed violating the principles of natural justice, without having any express mentions of such power under Section 36 of the Act and if so, then does the Section needs a reconsideration?

**Enforcement and Execution of an Arbitral Award**

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The Arbitration Act, of 1940 used the term 'Execution' and there was no provision under the Act which spoke of 'Enforcement' of an arbitral award. The 1940 Act primarily under Sections 16 and 30 conferred vast powers to an executing court that could be utilised to remit or even to set aside an award. Under the 1940 Act, an arbitral award could be interfered with under an application made before an executing court under Section 16 read with Section 30 or an application made under any of those Sections. Both of these applications ought to be filed before one and the same court.

The term 'Enforcement' was first introduced through UNCITRAL, in 1985 and later the term was adopted in the 1996 Act. As well as the extensive powers earlier available to the court earlier available under Section 1940. Strangely the 1996 Act continued to use the term 'Execution' but only with respect to Foreign Awards.

Under the present Act for setting aside an award an application under Section 34 read with Order 21 of the Code has to be filed by the award-debtor while in order to get a stay over the arbitral award, a separate petition must be filed by the award-debtor before the court under Section 36 of the Act, read with Order 21 of the Code.

The supreme court in **BCCI v. Kochi Cricket (P) Ltd<sup>1</sup>** has held that an award would not automatically be stayed except in case a court under Section 36(2) stays the award. The supreme court however lost the opportunity to settle the issue that whether Section 36 proceedings are independent of Section 34 proceedings despite being raised by the parties.

Here, an overview of Section 36 of the Act would be helpful. The true wording of Section 36 is as under:

*36. Enforcement.—*

- (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.*
- (2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.*
- (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:*

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*Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).]*

*Provided further that where the Court is satisfied that a Prima facie case is made out that,—*  
*(a) the arbitration agreement or contract which is the basis of the award; or*  
*(b) the making of the award,*

*was induced or affected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.*

*Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).*

Therefore, what can be generally inferred from the text of the above provision is that an executing court can only stay the award and it cannot refuse to execute or set aside the award in totality by declaring the award a nullity and unenforceable in any case. However, it is not the case how constitutional courts have interpreted the above provision and by reading it down the courts have explained the correct interpretation of the law enlarging the powers of the courts enforcing an arbitral award under Section 36 of the Act.

### **Linkage Between Sections 36 and 34 of the Act.**

The 2015 amendment to the Arbitration Act amended Sections 34 and 36 and has done away with the wrong interpretation of law expounded by the Apex court with regard to ‘Automatic Suspension’ clauses. The previous ‘Automatic Stay’ or ‘Automatic Suspension’ of the award by the mere filing of an application under Section 34 has already been done away with and now the award-debtor seeking a setting aside order must also submit a separate application for a stay of the award under Section 36(2) of the Act.

The new and amended Section 36 stipulates that the award is not automatically rendered void upon the filing of an application pursuant to Section 34 of the Arbitration Act unless a separate application is filed seeking a stay on the award granted by the court. Therefore, an award-debtor will now need to file a separate application under Section 36(2) of the Arbitration Act in order to request a stay of the award after a request to set aside the decision under Section 34 has been made

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to the court. A simple reading of Section 36 reveals that even the award-holder's right to seek enforcement of the award is subject to the requirements of 'The Code' and that 'such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court'.

This takes us to Section 47 of 'The Code', which governs the scope of judicial intervention by courts enforcing arbitral awards. The true wordings of Section 47 of the Code are reproduced below:

*Section 47. Questions to be determined by the Court executing decree.*

*(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*

*1 \* \* \* \* \**

*(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.*

*2[Explanation I.-- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.*

*Explanation II.-- (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and*

*(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]*

The interaction of Sections 34 and 36 of the Act gives the Court the authority to issue interim orders under Section 36 while the objections under Section 34 of the Act are being resolved. This is particularly important because the term "Court" used in Section 36 is not intended to refer to the 'Court' as that term is defined in Section 2(1)(e) of the Act.

The general rule regarding the granting of a stay of execution of an arbitral award under Section 36, Subsection (2) of the Act, does, however, have one exception under proviso to Section 36(3) which states that if 'a prima facie case is made out' that the arbitration agreement or contract that forms the basis of the award or the making of the award was induced or affected by fraud or corruption, the court shall 'unconditionally stay' the award pending resolution of the challenge under Section 34 of the Act. Therefore, going by the literal interpretation of the provision in any case, the court

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under Section 36 can only stay an award conditionally or unconditionally but it cannot refuse to execute it or set it aside declaring it nullity and unenforceable.

### **Effect of Non-Adherence to Principles of Natural Justice**

The Geneva Convention and the New York Convention on the execution of foreign arbitral awards contains an exception for natural justice that applies when "the party against whom the award is sought was not given notice of the arbitration proceedings in sufficient time to present his case." Under the present Act, Section 34(2)(a)(iii) allows a challenge to an award if the party was not served notice of the appointment of an arbitrator.

In **Dulal Poddar v. Executive Engineer, Dona Canal Division**<sup>ii</sup>, the supreme court has held that:

*"3... an award which have been made by the Arbitrator having been passed without giving an opportunity of hearing to the respondent herein, was illegal and void."*

In **Dharma Prathishthanam v. Madhok Construction (P) Ltd.**,<sup>iii</sup>

*"27. ... In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside de hors the provisions of Section 30 of the Act, 'in any appropriate proceedings' when sought to be enforced or acted upon."*

However, as discussed above such a power to refuse the execution of an arbitral award or setting aside an award is not expressly available under Section 36 of the Act. As Section 36 only states that in cases where the Court is satisfied that a *prima facie* case is made out, and (a) the arbitration agreement; or (b) the contract which is the basis of the award; or (c) the making of the award was induced or affected by fraud or corruption, then the court shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award.

Thus, it can be inferred that it is the burden of the award-debtor to establish the grounds for its invalidation only in accordance with Section 34, while Section 36 can only be utilised to seek a stay as there is no express mention of such power available under the Act to an executing court to refuse the execution of an arbitral award or set it aside even on justified grounds. The interaction between Sections 34 and 36 of the 1996 Act is one of the grey areas that need much clarification. Although there are no requirements for a court to grant a stay other than being emphatically convinced that one is necessary. There can be a situation wherein an award-debtor may not prefer either of the applications under Section 36(2) as well as under Section 34 of the Act and rather may choose to

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appear before the court when summon gets issued in a case instituted by the award-holder under Section 36(1) of the Act and for the first time they may raise the issue of non-service of notice regarding arbitration proceedings.

### **Enforceability of an Ex-Parte Award and Scope of Judicial Intervention**

Order 21 of the Code deals with the execution of decrees and orders passed by the civil courts. It sets out the powers of the court to enforce its decrees and orders. The courts have wide discretion to use these powers to enforce decrees and orders and ensure that justice is done.

The Supreme Court in the case of **Kiran Singh v. Chaman Paswan**<sup>iv</sup>, has held that:

*“It is a fundamental principle and well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings.”*

The Supreme Court also held in the case of **Punjab State Civil Supplies Corpn. Ltd. Vs. Atwal Rice and General Mills**<sup>v</sup> that:

*“The Executing Court cannot hold any kind of factual enquiry which may have the effect of nullifying the decree itself but it can undertake limited inquiry regarding jurisdictional issues which goes to the root of the decree and has the effect of rendering the decree nullity.”*

The apex court construed Section 36(3) in **Pam Developments (P) Ltd. v. State of W.B.**<sup>vi</sup>. According to the Supreme Court, the wording "have due regard to" in the proviso to Section 36(3) of the Arbitration Act would only suggest that the CPC's requirements should be considered and that they are just advisory and not mandatory. It further ruled that (a) the provisions of the CPC should only be used as a guide and that the provisions of the Arbitration Act should be applied first; and because the Arbitration Act is a self-contained Act, the provisions of CPC will only be applicable to the extent that they do not come in conflict with the Arbitration Act.

Contrary to the above-mentioned authority in a very recent case, the Calcutta High Court has rather held that a challenge to the unilateral appointment of an arbitrator may be made throughout the enforcement procedures because it is a fundamental issue where a party has no notice of appointment of the arbitrator. In **Cholamandalam Investment & Finance Co. Ltd. v. Amrapali Enterprises**,<sup>vii</sup> The Calcutta High Court while dealing with an application filed under Section 36 of the Act seeking execution of an award passed by a unilaterally appointed sole arbitrator by placing

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reliance on a catena of judgments has held that anything that results from a unilateral appointment of an arbitrator is also non-est in law, especially in the absence of an express written waiver as required by the proviso to Section 12(5).

The High Court went on to cite a number of previous judgements rendered by High Courts throughout India in support of its conclusion that an arbitral award passed by a single arbitrator who was unilaterally nominated would similarly be null and void. The High Court thus held:

*“17. ... the impugned award, which was passed by a de jure ineligible arbitrator, suffers from a permanent and indelible mark of bias and prejudice which cannot be washed away at any stage including the execution proceedings. In fact, as the arbitrator was de jure ineligible to perform his functions and therefore, lacked inherent jurisdiction or competence to adjudicate the disputes in hand, the impugned award cannot be accorded the privileged status of an award.”*

Later, the High Court addressed the question of whether or not objections to the enforceability of the award based on a failure to follow the statutory requirement stated in Section 12(5) of the Arbitration Act could be raised during the enforcement/execution phase of the arbitration under Section 36 of the Arbitration Act. On this point, the High Court held that:

*“There is no denying the fact that the Act is a complete code in itself and at the same time, it is equally true that Section 36 provides no scope of adverse interference with an arbitral award except executing it as a decree of the court. While Section 47 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') governs the challenge to a court decree at the execution stage, there is no such similar provision provided in the Act.”*

The High Court did point out that Section 36 of the Arbitration Act mandates that an arbitral award be enforced "in the same manner as if it were a decree a court". As a result, the High Court concluded that even while Section 47 CPC was not directly applicable, the concepts and logic it contained might be applied in the right situations to arbitral decisions reached by arbitral tribunals lacking inherent jurisdiction. The High Court even went so far as to say that a court could not turn a blind eye to a serious irregularity that would arise if the award's execution was not stopped. It thus held:

*“26 ...Accordingly, even if an award is not set aside under the procedure established in section 34 of the Act, the courts, at the stage of execution can step in and declare a 'unilateral appointment award' as non-est in law, declare the same as a nullity and direct*

*parties to re-agitate their issues before a new arbitral tribunal constituted in accordance with law.”*

As a result, the award passed by the arbitrator was set aside in the enforcement proceedings instituted by the award-holder under Section 32(1), and instead, a new arbitrator was chosen.

### **Applicability of Section 47 and OR 21 CPC**

An award is to be executed like a decree under Section 36 of the Act hence relevant provisions of the Code i.e. section 47 and O 21 fully apply to the Act. While discussing the relation between Section 36 of the Act and Section 47 of the Code the Delhi High Court in **Bijendra Kumar v. Pradeep Kumar**<sup>viii</sup>, has held:

*“7. An Award which is a nullity being against public policy can always be challenged even at the stage of execution...”*

In **Punjab State Civil Supplies Corpn. Ltd. v. Atwal Rice & General Mills**<sup>ix</sup>, it was held by the Supreme court that If the award is completely without jurisdiction or nullity then such a plea may be raised as a defence to enforcement application under Section 36. Para 20 of this authority is quoted below:

*“20. It is a well-settled principle of law that the executing Court has to execute the decree as it is and it cannot go behind the decree. Likewise, the executing Court cannot hold any kind of factual inquiry which may have the effect of nullifying the decree itself but it can undertake limited inquiry regarding jurisdictional issues which goes to the root of the decree and has the effect of rendering the decree nullity.”*

In the case titled **India Cements Capital Limited v. William**<sup>x</sup>, the Kerala High Court has explained that an award that itself is a nullity can be declared non-executable under Section 36 of the Arbitration and Conciliation Act. The brief fact of the case is that the petitioner sought to enforce the award under Section 36 of the Arbitration and Conciliation Act before the District Court after the time prescribed to take recourse against the arbitral award under Section 34 of the Act ended. Later on, one of the respondents appeared before the executing court and filed an objection invoking Section 47 Read with Section 151 of the Code of Civil Procedure seeking to declare the award a nullity. The court under Para 20 thus held:

*“20. Petitioner's contention that if an award is declared to be a nullity in execution proceedings, it will amount to adding one more ground to Section 34 of the Act is*

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*totally unacceptable. As mentioned earlier, Section 34 of the Act provides seven grounds to set aside an award. If the expression “set aside” is understood correctly, there will not be any lack of clarity or obfuscation. Ordinarily the expression “set aside” is understood as meaning abandon, abjure, abrogate, discard, dispense with, to omit, reject, repudiate, etc. The term “set aside” is defined in Black's Law Dictionary (Eighth Edition) as vb. (of a court) to annul or vacate (a judgment, order, etc.). The term “set aside” in the legal parlance means, to cancel, annul or revoke a judgment or order. It is an indisputable proposition that in order to set aside a decree or order or award, there must be one in existence. In other words, a decree or award not in existence cannot be set aside. No one can seek to set aside a decree or award which is not in existence. That exercise will be as futile, rather as impossible, as one attempting to commit feticide of an unborn foetus. Therefore, what is provided in Section 34 of the Act is the only way and means to set aside an award made in an arbitral proceedings. As succinctly stated by the Supreme Court, what is sought to be achieved by taking recourse to Section 47 of the Code is to make a declaration that the decree (here, an award) sought to be executed is a nullity. In other words, seeking a pronouncement that there is no executable decree or award at all. If the end result of an adjudication under Section 47 of the Code is entering a finding that there is no decree or award at all, there cannot be a question of setting aside such a decree or award in that proceedings. Therefore, the contention of the revision petitioner that the declaration of nullity of an award in a proceeding under Section 47 of the Code will tantamount to adding one more ground to Section 34 of the Act is legally incorrect and, therefore, not acceptable.”*

The Jharkhand High Court in the case of **Electrosteel Steel Ltd. v. Ispat Carriers (P) Ltd.**<sup>xi</sup>, has held:

*“44. This court is of the considered view that having not challenged the arbitral award under section 34 of the Act of 1996, the law does not contemplate second opportunity to challenge the award particularly when the Act of 1996 is a self-contained code which prescribes the specific grounds and specific mode of challenge to an arbitral award. This would be the position except under the circumstances, where the award cannot be termed as an award in the eyes of law and therefore it is required to be rendered void ab initio/nullity and consequently required to be declared non-est in the eyes of law. This can be done pursuant to such objection*

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*raised under section 47 of CPC at the stage of execution of the award. Award which suffers from inherent lack of jurisdiction in the eyes of law, cannot be said to be award and therefore would fall outside the provision of Arbitration and Conciliation Act, 1996 and can certainly be declared as a nullity in an appropriate proceeding including under section 47 of CPC at the stage of execution of the award.”*

## **Conclusion**

The Indian arbitration law has made significant changes in adopting global norms of arbitration procedure. The law regarding the illegality of unilaterally appointed arbitrators made contravening the mandate of Section 12(5) of the Act is well recognized and such an illegal appointment goes to the root of the matter as well as anything that emerges out of such appointment is non-est in law. Therefore, any award that was passed violating the rule of appointment envisaged under Section 12(5) of the Act would certainly be nullity and unenforceable.

The objections regarding the enforceability of such awards passed by violating statutory rules or legal principles can be challenged under Section 34 of the Act and can also be taken up at the stage of enforcement of the arbitral award under Section 36(2) of the Act though no application under Section 34 or 36(2) has been preferred by the award-debtor.

Courts throughout the country have accepted that Arbitration Act is a self-contained code and courts have often ruled that the effectiveness of the arbitration process must always be safeguarded and that they should refrain from interfering with arbitral verdicts. Section 36(3) of the Arbitration Act expressly grants judges the authority to impose any restrictions they see fit. Obviously, the court may exercise its discretion to dismiss a stay motion or grant a conditional stay if it determines that an award is well-reasoned and free of any obvious flaws based only on the initial appearance. However, the courts under Section 36 have the power to refuse the enforcement of the award and set aside the award being a nullity without placing any restrictions on the award-debtor to file any application when dealing with an award that appears to be perverse and passed without following the principles of natural justice.

Thus, based on the preceding judgements and discussions, it is fair to conclude that, in general, the Court enforcing the award cannot go behind the decree/award; however, in terms of the enforceability of an award, if the Court finds that the judgement is non-est in law or that the award is a nullity due to a lack of inherent jurisdiction with the arbitral tribunal or passed without following the principles of natural justice, in such a case Section 47 of the Code expressly

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authorises the Court under Section 36 to declare the Award 'Not Executable being Nullity'. It is however imperative in law to bring in the necessary amendment to amend Section 36 of the Act so that this power shall not be derived from any other law outside the Act when the Act itself was enacted as a self-contained Act.

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<sup>i</sup>(2018) 6 SCC 287

<sup>ii</sup>(2004) 1 SCC 73

<sup>iii</sup>(2005) 9 SCC 686

<sup>iv</sup>(1955) 1 SCR 117

<sup>v</sup>(2017) 8 SCC 116

<sup>vi</sup>(2019), 8 SCC 112

<sup>vii</sup>2023 SCC OnLine Cal 605

<sup>viii</sup>2014 SCC OnLine Del 2042

<sup>ix</sup>(2017) 8 SCC 116

<sup>x</sup>2015 SCC OnLine Ker 24805

<sup>xi</sup>2023 SCC OnLine Jhar 1035



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