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A background image of a person's hands holding a pair of golden scales of justice. The scales are balanced, and the person is wearing a white shirt and a dark watch. The image is overlaid with a dark purple gradient.

Unconditional Stay Of Arbitral Awards

*A PRIMER TO UNDERSTAND AND RESOLVE THIS
RES-INTEGRA IN INDIAN ARBITRATION LAW*

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Arbitration has become increasingly central to the resolution of complex commercial disputes in India. With its promise of being faster, cost-effective, and less procedurally burdensome than litigation before the regular courts, arbitration has attracted increasing attention from corporations, investors, and businesses.

However, despite its many advantages, arbitration in India has been fraught with procedural challenges—chief among them involving proceedings for setting aside an arbitral award. In these proceedings, the party challenging the arbitral award invariably seeks a stay of the operation of the award pending disposal of the challenge. This piece examines the statutory and jurisprudential principles applied by the courts while granting such a stay. This examination attempts to highlight the ambiguities prevailing in this area of the law and the direction in which the law may (or ought to) evolve in the future.

Section 36, Arbitration and Conciliation Act – Enforcement

Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “**the Act**”) was substituted *vide* the Arbitration and Conciliation Amendment Act, 2015. Prior to the 2015 amendment, mere filing of a petition challenging the arbitral award under Section 34 of the Act operated as a stay of the award in terms of the unamended Section 36 of the Act. This ‘automatic stay’ was much criticized as being a great obstacle to the ease of enforcement of arbitral awards, a vision to which India had committed itself to.

To address this lacuna among others, the 2015 amendments were introduced to the Act. Under the 2015 amendment, the existing provision in Section 36 was wholly substituted. Sub-section (2) of the amended provision provided that filing of a petition to set aside the arbitral award did not by itself render the award unenforceable unless an order was passed by a court granting a stay on the award’s operation pursuant to a separate application filed to that effect. Therefore, Section 36(2) contemplated a separate application seeking stay.

Section 36(3) – Court’s power to stay operation of an arbitral award

Section 36(3) provides that upon such an application being filed, the court may grant a stay ‘subject to such conditions as it may deem fit’, for reasons to be recorded in writing. In terms of Section 36(3), the court is conferred a discretionary power to grant a stay of an

arbitral award. Such discretionary power flows from the usage of the words 'may' for grant of stay and employment of the phrase 'such conditions as it may deem fit' for the conditions that may be imposed if a stay was granted. Therefore, in terms of Section 36(3), the courts retains a discretionary power to grant a stay of an arbitral award.

First proviso to Section 36(3) – 'Due regard' to provisions of CPC while granting stay

Further, there was a proviso to Section 36(3) which provided that if the arbitral award was for payment of money, the court shall have 'due regard' to provisions for grant of stay of money decree under the Code of Civil Procedure, 1908.

Second proviso to Section 36(3) – Unconditional stay of an arbitral award

The above was the legal position for a period of six years from 2015 to 2021. In 2021, Section 36 of the Act was once again amended (with retrospective effect from 23 October 2015) vide the Arbitration and Conciliation Amendment Act, 2021. The 2021 amendment *inter alia* introduced a second proviso to Section 36(3) which provided that if a *prima facie* case is made out that either the arbitration agreement / contract which is the basis of the award or the making of the award was induced or effected by fraud or corruption, the court 'shall' stay the award 'unconditionally' pending disposal of the challenge.

As is clear from a reading of the aforesaid second proviso, it was provided that if *inter alia* the making of the award was induced or effected by fraud or corruption, then the court was mandated to stay the award, and such a stay was to be unconditional.

Whether unconditional stay of an award can be granted in cases outside second proviso?

This statutory background raised a fundamental question – Whether a court could grant an unconditional stay of an award in cases other than those covered by the second proviso to Section 36(3)? In other words, did the main part of Section 36(3) also contemplate an unconditional stay?

As will be seen below, though courts have attempted to answer these questions, but neither the principles enunciated nor the reasoning in support thereof provide a definitive answer to the aforesaid questions. As a result, there remains considerable

uncertainty about the cases in which an unconditional stay can be granted.

Supreme Court's decision in *Sepco Electric Power Corporation*

The first judgement that had the occasion to consider these questions was that of the Supreme Court in ***Sepco Electric Power Corporation v. Power Mech Projects***¹ (order dated 19 September 2022). In this decision, the Supreme Court was dealing with an appeal against a judgement of the Delhi High Court where the Single Judge had granted a stay of the arbitral award subject to deposit of 100% of the award amount. This order was made in an application filed under Section 9 of the Act which was heard together with an application under Section 36(3) of the Act in a connected petition. This decision was affirmed in appeal by the Supreme Court which held that there were no grounds made out for interfering with the judgement below.

The Supreme Court while considering the Appellant's contention observed that a court may grant an unconditional stay if it is appropriate to do so. While so observing, the Court stated that unconditional stays were covered by the second proviso to Section 36(3). The relevant portions of the judgement are extracted below:

"The power under subsection (3) of Section 36 to grant stay of an award is coupled with the duty to impose conditions which could include the condition of securing the award by deposit in Court, of the amount of the Award. It may be true as argued by Mr. Vishwanathan that the Court may not impose condition for stay, if it deems appropriate not to do so. The power of Court to grant unconditional stay of an Award is not unfettered. The power of unconditional stay is subject to the condition in the second proviso that is:

The Court is satisfied that a prima facie case (sic) is made out that

- (i) the arbitration agreement or contract which is the basis of the award; or*
- (ii) the making of the award, was induced or effected by fraud or corruption"*

(Emphasis supplied)

While the Supreme Court acknowledged that an unconditional stay can be granted in appropriate cases, it quickly followed that up by stating that the power to grant an unconditional stay is governed by the second proviso to Section 36(3). This suggests that the Court tied the grant of an unconditional stay to the existence of the grounds mentioned in the second proviso. This would indicate

¹2022 SCC OnLine SC 1243.

that unconditional stay can be granted *only* in cases of fraud or corruption.

Notwithstanding the above, the Court in order to fortify its conclusion in the case, subsequently also noted that the Appellant was not able to show any cogent and glaring error that went to the root of the award. This observation was repeated later where the Court stated that no cogent ground had been made out even *prima facie*, for interference with the impugned award. These statements are extracted below:

"26. It is settled law that grounds for interference with an award is restricted. Even before this court, the Appellant has not been able to advert to any cogent and glaring error which goes to the root of the award. The contention of the award being opposed to the public policy of India, is devoid of any particulars whatsoever."

"35. It is not in dispute that there is an award of Rs. 142 Crores in favour of the Respondent. No cogent ground has been made out even prima facie, for interference with the impugned award."

"37. We find no ground at all to interfere. The Appeals are dismissed."

After arriving at such a finding, the Court proceeded to dismiss the appeal. Therefore, these statements formed part of the Court's reasoning in arriving at its decision.

The aforesaid statements of the Court would suggest that the Court thought it fit to consider the merits of the award at a *prima facie* level *in order to* decide whether the conditional stay of the award was justified or not. In the facts of this case, the Court felt that it was justified.

Implications of the Supreme Court's decision in *Seeco*

In light of the abovementioned statements, it is possible to state that if the second proviso to Section 36(3) was the sole source for granting an unconditional stay, there would have been no occasion for the Court to examine whether any *prima facie* cogent ground that went to the root of the award is forthcoming or not. Therefore, by relying upon the Supreme Court's observations, it could be plausibly argued that an unconditional stay can be granted even in cases not arising under the second proviso to Section 36(3). Such unconditional stay would instead be relatable to the main part of Section 36(3).

The above reading of the Supreme Court's decision would also be

in consonance with the discretionary power of the court under the main part of Section 36(3) both with respect to the power to grant stay and the power to impose conditions if a stay is granted. After all, it is not inconceivable to contend that a power to impose conditions would also include the power not to impose conditions.

Be that as it may, the aforesaid decision of the Supreme Court does not definitely answer the question whether an unconditional stay can be granted in cases not covered by the second proviso to Section 36(3). This ambiguity remains because while the Court states an unconditional stay can be granted in cases covered by the second proviso, it does not categorically exclude the possibility of an unconditional stay in cases not covered by the second proviso.

High Courts' conflicting views on whether unconditional stay can be granted in cases outside second proviso

It is in the background of the above ambiguity in the law on unconditional stays of an arbitral award that various High Courts have sought to navigate the applicable principles in order to arrive at a just outcome. These admirable attempts by the High Courts have unsurprisingly, not been without their own share of difficulties. These decisions of the High Court are examined below.

Approach of the Bombay High Court and Delhi High Court – Unconditional stay can be granted in cases outside second proviso

Bombay High Court's decisions

Alkem Laboratories v. Issar Pharmaceuticals,² (order dated 05.02.2024) was one of the first decisions after ***Sepeco*** where the court was called upon to consider the question of an unconditional stay. In this case, a Single Judge of the Bombay High Court granted an unconditional stay on the operation of the award even though no ground was pleaded under the second proviso. To do so, the Court considered the merits of the award to hold that since there was a substantial likelihood that the award would be set aside, it was fit case to grant an unconditional stay. The Court arrived at such a finding because the arbitrator *inter alia* had awarded damages without any proof of loss. The Court considered this to be patently illegal which justified an unconditional stay. Subsequently, the Supreme Court vide its order dated 6 September 2024 in SLP (C) No. 10764 / 2024 declined to interfere with the Bombay High Court's order dated 5 February 2024.

²Order dated 05.02.2024 in Comm. A. P. No. 389 / 2023, Bombay High Court.

Subsequently, in **CFM Asset Reconstruction v. SAR Parivahan**³ (order dated 6 May 2024), another Single Judge of the Bombay High Court granted an unconditional stay considering the merits of the award. In this decision too, there was no plea set up under the second proviso in support of such a stay. Instead, the Court considered the fact that since the award was based on a valuation report which was not proved before the arbitrator, the award was vitiated by patent illegality. This decision went further to explicitly state (perhaps for the first time by any court) that even if a case does not fall under the second proviso, courts can still grant an unconditional stay. The relevant portions of the judgement are extracted below:

"Therefore, even in a case which does not fall under the second proviso, by relying on the first proviso, the Court can consider whether to grant unconditional stay of the award or not."

(Emphasis supplied)

Both the judgements in **Alkem Laboratories** and **CFM Asset** were subsequent to the Supreme Court decision in **Sepeco** and both involved grant of an unconditional stay upon a *prima facie* consideration of the merits of the award. In neither of these cases was a plea under the second proviso raised or considered by the court. In both the cases, the courts conducted a *prima facie* review of the merits of the award and upon finding a defect that went to the root of the award, granted an unconditional stay. Such unconditional stay was not made traceable to the second proviso but treated as part of the exercise of discretionary power by the court while hearing an application under Section 36(3).

The aforesaid decisions in **Alkem Laboratories** and **CFM Asset** of the Bombay High Court in justifying an unconditional stay appear to follow the reasoning in **Sepeco** (though only **CFM Assets** cited **Sepeco**) where the Supreme Court sought to conduct a *prima facie* review to identify any defect that went to the root of the award which would have justified such a stay. As explained earlier, **Sepeco** leaves room for and does not categorically rule out grant of an unconditional stay in cases falling outside the second proviso. Therefore, the principles enunciated in these decisions of the Bombay High Court certainly hold persuasive value.

It is pertinent to note that the Bombay High Court had previously in **Polimer Media Private Limited v. Ultra Media and Entertainment Private Limited**⁴ (order dated 31 March 2023) also recognized

³2024 SCC OnLine Bom 1659.

⁴ Order dated 31.03.2023 in Arbitration Petition (L) No. 34542 / 2022, Bombay High Court.

that an unconditional stay could be granted both in cases of fraud or corruption *or if an extraordinary case* is made out. The relevant portions of the judgement are extracted below:

"Even otherwise, Section 36(3) of the aforesaid Act clearly stipulates in the first proviso thereto, that when an Arbitral award directs payment of money, the Court must have due regard to the provision of the grant of stay for money decree under the provision of the Code of Civil Procedure, 1908. The second proviso thereto does specify that unconditional stay of an award can be granted provided the Petitioner is able to make out a strong prima facie case that either the agreement which is basis of the award or the upon making of the award itself is induced or affected by fraud of corruption. This Court aware that apart from said factor, if a Petitioner is able to indeed make (sic) out extraordinary case, indicating that the arbitral award deserves to be set aside on the parameters now available after amendment to the Act, in the year 2015, an order of unconditional stay can be passed."

(Emphasis supplied)

Therefore, in light of the above decisions, the Bombay High Court has taken a view that unconditional stay of an award can be granted even in cases not covered by the second proviso.

Delhi High Court's decisions

The above approach of the Bombay High Court has also found support from the decision of a Single Judge of the Delhi High Court in ***Aurum Ventures v. HT Media***⁵ (order dated 28 May 2024). In this decision, the Court expressly recognised the principle that unconditional stay can be granted even in cases not falling under the second proviso. The relevant portions of the judgement are extracted below:

The appellate Court may impose such conditions as it considers appropriate for grant of stay. Discretion must be exercised judicially, on the basis of the facts of the case. The appellate Court does possess discretion to grant an unconditional stay, even of a money decree, albeit one that would be exercised only in a rare case of a very strong prima facie error that goes to the root of the decree. Section 36(3) of the Act qualifies this position with the further provision that where the Court finds the contract, arbitration agreement, or the making of the award, to be tainted by fraud or corruption, an unconditional stay should follow.

(Emphasis supplied)

⁵2024 SCC OnLine Del 4061.

The Court held that an unconditional stay can be granted even on the merits of the case where a very strong prima facie error that goes to the root of the award has been established. Most significantly, the Court held that *even Sepco* reiterated adherence to the aforesaid principle. The relevant portions are extracted below:

"..... In Sepco, the Supreme court reiterated adherence to the aforesaid principles, an emphasised on the sound exercise of judicial discretion while determining the conditions to be imposed."

(Emphasis supplied)

While the Court recognized the principle, in the facts of its own case, an unconditional stay was not granted.

At this stage, it is pertinent to note that the Delhi High Court in ***Premal Singh Prop Asra Associates v. Harinder Mohan Singh***⁶ (order dated 18 December 2023) had previously granted an unconditional stay of an award that was passed in violation of the High Court's express order not to pass an award. Therefore, in light of all these decisions, the Delhi High Court too has recognized the existence of the power to grant an unconditional stay that is not traceable to the second proviso.

Approach of Calcutta High Court and Punjab and Haryana High Court – Unconditional stay cannot be granted in cases outside second proviso

Calcutta High Court's views

While the Bombay and Delhi High Courts have recognized that a power to grant an unconditional stay exists *even outside* the second proviso, the Calcutta High Court in ***NEO Metaliks Limited v. Orissa Metaliks Private Limited***⁷ (order dated 22 January 2024) has held that such a power exists *only* under the second proviso. The relevant portions of the Single Judge's reasoning are extracted below:

"Section 36(2) and (3) of The Arbitration and Conciliation Act, 1996 read with the first proviso does not contemplate unconditional stay. The Court is, however, given discretion in term of imposition of conditions for grant of stay of the operation of the arbitral Award including the form of the security. The first proviso to Section 36(3) allows the Court to look at the provisions of The Code of Civil Procedure for guidance. The only provision which contemplates unconditional stay is the second proviso to Section 36(3) on the twin planks of either the arbitration agreement or the making of the award being induced by fraud or corruption."

(Emphasis in original)

⁶ Order dated 18.12.2023 in O. M. P. (Comm) No. 516 / 2023, Delhi High Court.

⁷ Order dated 22.01.2024 in AP-COM / 35 / 2024, Calcutta High Court.

A perusal of the above reasoning reveals that the court interpreted the power vesting in the court under Section 36(3) of the Act to be discretionary so far as the conditions to be imposed while granting a stay was concerned. However, the court did not consider such discretion to extend to the question whether or not to impose conditions. In the Court's view, if a stay was to be granted under the main part of Section 36(3), conditions had to be imposed, only the nature and extent of such conditions was subject to the discretion of the court. According to this view, conditions could be waived only if the ingredients under the second proviso to Section 36(3) were satisfied. Therefore, the Court held that unconditional stay could be granted only under the second proviso.

Further, in ***Sarat Chatterjee and Co. (VSP) Private Limited v. Sri Munisubrata Agri International Limited and another***⁸ (order dated 1 September 2023), the Calcutta High Court held that the discretionary power to impose conditions under Section 36(3) is "hemmed-in" by the first proviso due to which "the court loses its discretionary space where the Award is for payment of money". Applying these principles, an unconditional stay was refused.

The Court held that while exercising its power under Section 36(3), the court is required to turn to Order XLI Rule 5 of the Code of Civil Procedure, 1908 whereunder it loses its discretionary power and has to mandatorily direct furnishing of security for granting a stay. In other words, the court has no option but to grant a conditional stay. The relevant portions of the judgement are extracted below:

"Section 36(3) of The Arbitration and Conciliation Act, 1996 provides for stay of the operation of an arbitral Award upon filing of an application under section 36(2) and allows the Court to exercise its discretion with regard to the conditions for grant of stay of the Award for reasons which are to be recorded in writing. The first proviso under section 36(3) makes it mandatory for the Court to use the provisions of The Code of Civil Procedure, 1908 as guidance with regard to the grant of stay of a money decree. Although, not spelt out in the first proviso to section 36(3), Order XLI Rule 5 of the CPC offers the template for the 36(3) Court for stay of an Award for payment of money."

"A conjoint reading of the above provisions makes it clear that the Appellate Court shall not stay the execution of the decree unless the appellant furnishes the security for the due performance of such decree or order, and which may ultimately be binding upon the appellant applicant who seeks stay of the decree."

"The first proviso to section 36(3) of the 1996 Act makes it mandatory

⁸2023 SCC OnLine Cal 2548.

for the Court to turn to Order XLI Rule 5 of the CPC; both of which - in tandem - require the award-debtor to furnish security for stay of the arbitral award. The discretion on the Court to impose conditions on the award-debtor for grant of stay of the operation of the Award under 36(3) is hemmed-in by the first proviso to 36(3) where the Court loses its discretionary space where the Award is for payment of money. In such cases, the Court has no option but to direct the award-debtor to furnish security for stay of the award."

(Emphasis supplied)

Separately, prior to the aforesaid decisions, the Calcutta High Court in **West Bengal Small Industries Development Corporation Limited WBSIDC v. Kaushalya Infrastructure Development Corporation Limited KIDCO**⁹ (order dated 26 July 2023), proceeded to decline an unconditional stay on the ground that the ingredients of the second proviso had not been satisfied. Therefore, the decisions of the Calcutta High Court have taken a consistent view that an unconditional stay can be granted only under the second proviso. It is worth noting in passing (though not relevant for the present purposes) that the decision in **Kaushalya Infrastructure** was one of the few decisions to elaborately examine the ingredients of the second proviso¹⁰.

The interpretation placed in **NEO Metaliks** and **Sarat Chatterjee** could be said to follow **Sepeco** in so far as the Supreme Court considered unconditional stay to be 'fettered' by the second proviso. However, both **NEO Metaliks** and **Sarat Chatterjee** does not reckon with or engage with the fact that the Supreme Court *also* considered the *prima facie* merits of the award to complete its justification for denying an unconditional stay. This aspect of appreciating the *prima facie* tenability of the award was correctly recognized by the Bombay and Delhi High Courts particularly in **CFM Asset** while granting an unconditional stay.

Punjab and Haryana High Court's view

Further, the Punjab and Haryana High Court in **National Collateral**

⁹ 2023 SCC OnLine Cal 2142.

¹⁰ Interestingly, in *Union of India and Ors. v. Rashmi Metaliks Limited* (order dated 08.08.2023) also, a Single Judge of the Calcutta High Court addressed the issue of fraud and corruption in detail. Here, the High Court granted an unconditional stay of an arbitral award which had directed the petitioner-award debtor to pay an amount of INR 1301 crores to the respondent-award holder. The unconditional stay was granted on grounds of suspected fraud and corruption in the making of the arbitral award.

However, this judgment of the Calcutta High Court (along with an order in appeal subsequently passed by the Division Bench) was later set aside by the Hon'ble Supreme Court. In its order dated 25.01.2024, passed in SLP (C) No. 49360 of 2023, the Supreme Court set aside the orders passed by the Single Judge and Division Bench and ordered re-arbitration of the dispute.

Management Services Limited v. The Haryana Cooperative Supply and Marketing Federation Limited¹¹ (order dated 22 December 2022) has also held that unconditional stay can only be granted in cases covered by the second proviso. In this decision, the High Court set aside the unconditional stay granted by the court hearing the Section 34 petition and remanded the matter for a fresh hearing. The relevant portions are extracted below:

"In view of settled legal position as enumerated above, it is a well-established as of now that the arbitral award cannot be stayed in routine. A due regard has to be given to the provisions for grant of stay of money decree under the Code of Civil Procedure. Unconditional stay can only be granted in case, the award is suffered with fraud or corruption."

(Emphasis supplied)

Therefore, the decisions of the Calcutta and Punjab and Haryana High Courts hold that the unconditional stay can be granted only under the second proviso.

Karnataka High Court's decision in VLCC Health Care – 100% deposit in money awards

In light of the above High Court decisions, two different answers have been thrown up to the question whether the power to grant an unconditional stay exists in cases outside the second proviso. The Bombay and Delhi High Courts have taken the view that it does exist while the Calcutta and Punjab and Haryana High Courts are of the view that it does not. At this stage, it is pertinent to refer to a decision of the Karnataka High Court in **VLCC Health Care Ltd. v. Y. Divakar**¹² (order dated 16 March 2023). In **VLCC**, the Court by holding that 100% deposit has to be directed when granting a stay of the award effectively (and by implication) held that unconditional stay cannot be granted. Since the second proviso was not in issue in **VLCC**, the approach adopted therein merits separate consideration.

Question before the Karnataka High Court in VLCC

In **VLCC**, it is important to note that the court was not called upon to decide whether there existed a power to grant an unconditional stay outside the second proviso. Instead, the Court was called upon to decide whether the court below had rightly imposed a condition of 100% deposit of the award amounts while granting a stay of the arbitral award.

The petitioner, who had approached the High Court, was the award debtor who had filed a petition seeking setting aside of the arbitral

¹¹Order dated 22.12.2022 in CR No. 1599 / 2021 (O & M), Punjab and Haryana High Court.

¹²Order dated 16.03.2023 in W. P. No. 21987 / 2022, Karnataka High Court.

award. In those proceedings, it had filed an application seeking that the award be stayed on deposit of INR 40,00,000 and deposit of the balance amount by furnishing a bank guarantee. The trial court had rejected the application and insisted on 100% deposit and granted a stay conditional on such deposit.

Aggrieved by such conditional stay order, the Petitioner had approached the writ court. Before the court, the Petitioner's contention was limited to seeking permission to furnish security by a combination of cash deposit and bank guarantee. In other words, the Petitioner sought the relief sought by it in the application before the court below. No plea of unconditional stay was ever made, much less any plea invoking the second proviso¹⁰.

The Court's reasoning in VLCC

While dismissing the Petitioner's plea, the Court held that the court below was justified in granting a stay subject to 100% deposit (and deposit alone, not any other mode of security) of the award amounts. In order to arrive at this conclusion, the Court placed reliance on **Sepco** and two prior Supreme Court orders in **Toyo Engineering Corporation v. Indian Oil Corporation**¹³, and **Manish v. Godawari Marathawada Irrigation**¹⁴ to hold that the question was "*no longer res integra*" as the Supreme Court in various rulings had consistently imposed a condition of 100% deposit while granting stay of an arbitral award. In other words, and by necessary implication, the Court held that an unconditional stay of an award could not be granted. The relevant portions of the judgement are extracted below:

"The issue in the case at hand with regard to deposit of 100% of arbitral Award is mandatorily to be made or otherwise is no longer res integra. The Apex Court has consistently taken the view that in a challenge to arbitral Award, the award debtor must be directed to deposit 100% of the amount and not by different modes."

(Emphasis supplied)

VLCC vis-à-vis the decision in Sepco and prior Supreme Court orders

It is respectfully submitted that while it is true that the Supreme Court in its previous orders has consistently imposed or upheld a condition of 100% deposit for staying an award, these orders may not adequately support the proposition that 100% deposit has to be mandatorily ordered while granting stay or in other words, an

¹³2021 SCC OnLine SC 3455.

¹⁴2018 SCC OnLine SC 3863.

unconditional stay (for our purposes, in cases not covered by second proviso) cannot be granted. This is explained below.

The orders in **Manish** and **Toyo** were directory in nature and passed in the peculiar factual circumstances of the cases, particularly where government corporations were required to make large payments under arbitral awards. These orders did not contain any statement of legal principle or reasons either as to grant or otherwise of unconditional stay or direction for 100% deposit. Nor did these orders preclude courts from granting unconditional stays when warranted by the facts.

Further, the decision in **Seppo** as explained earlier, does not definitively answer the question whether unconditional stay can be granted even outside the second proviso. The very fact that **Seppo** refers both to the second proviso in respect of unconditional stay *and* considers whether any error goes to the root of the award has resulted in divergent interpretations between the Bombay and Delhi High Courts on the one hand and Calcutta and Punjab and Haryana High Courts on the other hand. Therefore, it may be difficult to accept the view in **VLCC** that 100% deposit is required in every case seeking a stay of a money award.

Most recently, the Supreme Court declined to interfere with **Alkem** in its order dated 6 September 2024 in SLP (C) No. 10764 of 2024. The special leave to appeal was filed against the order granting unconditional stay therein. In this background, it is hard to ignore the counter-factual argument that if unconditional stay outside the second proviso was *impermissible* as a matter of principle (as held by Calcutta and Punjab and Haryana High Courts), then the Supreme Court would have certainly interfered with the decision in **Alkem**. But it did not.

As we have seen above, the decision in **Seppo** did not provide a definitive answer to the question whether an unconditional stay can be granted in cases outside the second proviso. The interpretation of Section 36 and the decision in **Seppo** led to the diametrically opposite conclusions reached by the Bombay and Delhi High Courts on the one hand and the Calcutta, Punjab and Haryana and Karnataka High Courts on the other hand.

Interpretation of Section 36 and Seppo – Possible way out of the conflicting interpretations

Which of the opposing conclusions reached by the High Courts is correct will boil down to which appears to be the most reasonable interpretation of Section 36 and **Seppo**. In this regard, it is pertinent to note the first proviso to Section 36(3). The first proviso directs courts to have 'due regard' to the provisions for the grant of stay of money decrees under the Code of Civil Procedure.

Interpretation of first proviso

The Supreme Court in ***Pam Developments Private Limited v. State of West Bengal***¹⁵ (order dated 12 July 2019) had occasion to address generally the nature of applicability of provisions of the Code of Civil Procedure, 1908 vis-à-vis proceedings under the Arbitration Act and specifically, the interpretation of the phrase 'due regard' appearing in the first proviso.

In ***Pam Developments***, the respondent had filed an application seeking an unconditional stay of the arbitral award on the strength of Order XXVII Rule 8-A, Code of Civil Procedure, 1908 which *inter alia* exempted Government from furnishing a security while seeking stay of a decree. Aggrieved by the application being allowed by the Calcutta High Court, the appellant-award holder approached the Supreme Court.

The Supreme Court allowed the appeal and directed deposit of the award amount as a condition for continuing the stay. The Court reasoned that the exemption from furnishing security under Order XXVII Rule 8-A that would otherwise be applicable to ordinary civil proceedings could not be strictly applied to arbitration proceedings. Therefore, the respondent-government could not cite that provision to avoid furnishing security for staying the award. The Court further held that even if the exemption from furnishing security was made applicable to the arbitration proceedings, such exemption would not extend to making deposit of the award amounts. This was based on the Court's interpretation of the difference between Order XXVII Rule 8-A which was introduced in 1937 and exempted furnishing of 'security' and Sub-Rule 5 of Rule 5 of Order XLI that was introduced in 1976 and which differentiated between 'security' and 'deposit'. The Court also referred to the implications of a provision introduced during the colonial period and its continuance in the present constitutional set-up.

The Supreme Court in ***Pam Developments*** held that the phrase 'due regard' would only mean that the provisions of CPC are to be taken into consideration and not that they are mandatory. The relevant portions of the judgement are extracted below:

"20. In our view, in the present context, the phrase used is "having regard to" the provisions of CPC and not "in accordance with" the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such manner that it takes away the power conferred in the

¹⁵ (2019) 8 SCC 112.

main statute (i.e. the Arbitration Act) itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act, the provisions of CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act."

(Emphasis supplied)

On the strength of the above reasoning, the Court held that the exemption from furnishing security could not be applied to the arbitration proceedings. The Court clarified that while courts must have due regard to the CPC, they are not rigidly bound by its provisions. The CPC serves as a guiding framework rather than a strict mandate because the Act being a self-contained Act is to be first applied by the court.

Though not explicitly stated by the Court as a reason for its decision, the Court did note the consequence of accepting the contention that Order XXVII Rule 8-A was applicable. The result would be that wherever the government was the award debtor in arbitration proceedings, it would be entitled to an unconditional stay on the mere filing of an application under Section 36(2).

Implications of the Supreme Court's decision in *Pam Developments*

While ***Pam Developments*** relied on the phrase 'due regard' appearing in the first proviso to decline the rigid application of an exemption from furnishing security provided under the Code of Civil Procedure, 1908, it could also be argued (ironically) that insisting on a conditional stay in all cases of a money award would be a rigid application of Order XLI Rule 5. This is because Rule 5 mandates the furnishing of security or deposit as a condition for granting stay. Relying on ***Pam Developments***, it can possibly be argued that 'due regard' to the provisions of CPC, especially Order XLI Rule 5, would not mean a mandatory grant of conditional stay in all cases. This is because the provisions of the Act, especially Section 36, would have to be first applied wherein a discretionary power is vested in the court.

Discretionary power to grant stay under Section 36(3)

On the question of discretionary power under Section 36, as mentioned earlier, the Calcutta High Court in ***Sarat Chatterjee*** held that the discretionary power to impose conditions under Section 36(3) is "hemmed-in" by the first proviso due to which "the court loses its discretionary space where the Award is for payment of money".

The Court's interpretation of the first proviso to make the provisions of Order XLI Rule 5 mandatorily applicable (by importing them wholesale) while exercising the power of stay is diametrically opposite to the Supreme Court's approach in **Pam Developments**. In **Pam Developments**, the Supreme Court had categorically stated that the provisions of the Code of Civil Procedure, 1908 are only for guidance and the provisions of the Act would have to be first applied. If **Sarat Chatterjee's** reasoning was adopted in **Pam Developments**, then in every case where the Government is the award-debtor, unconditional stays would have had to be granted, an undesirable consequence which the Supreme implicitly recognized as mentioned earlier.

It could be argued that **Sarat Chatterjee's** approach of stipulating that in all cases for stay of a money award, security has to be furnished, denudes the court of its discretionary power conferred by Section 36(3) of the Act. In doing so, the argument would follow, it privileges the provisions of the Code of Civil Procedure, 1908 over that of the Act. Such privileging would run directly counter to the ruling in **Pam Developments**. The net result of the decision in **Sarat Chatterjee** would be that in every case, a court would be required to grant a conditional stay of a money award. The principle that the discretionary power cannot be denuded also finds support from the decision of the Bombay High Court as explained below.

In **Ecopack India Paper Cup Private Limited v. Sphere International**¹⁶ (order dated 14 March 2018), the Bombay High Court after considering the provisions of Section 36 and Order XLI Rule 5, Code of Civil Procedure, 1908 held that the party opposing grant of a stay cannot assert a proposition that it would be mandatory for the court to impose a condition for a stay to execution proceedings because the power of stay is discretionary both as to grant of stay and as to imposition or non-imposition of conditions while granting such stay. Applying these principles, the court upheld an order of unconditional stay of an arbitral award. Subsequently, the Supreme Court vide its order dated 23 July 2018 in SLP (C) No. 16605 / 2018 declined to interfere with the Bombay High Court's order dated 14 March 2018.

The aforesaid judgement in **Ecopack** was also referred to by the Delhi High Court in **Aurum Ventures** while affirming the principle that unconditional stay can be granted in appropriate cases. The relevant portions of the order are extracted below:

"The Division Bench judgment of the Bombay High Court in Ecopack, cited

¹⁶ 2018 SCC OnLine Bom 540.

by Mr. Sethi and Mr. Gupta, clearly holds that the Court retains discretion in this regard, even under Section 36(3) of the Act. The said judgment was challenged in SLP(C) 16605/2018, but the Supreme Court declined to interfere. I have not been shown any direct authority to the contrary.”

Therefore, in light of the above judgements¹⁷, there can be no doubt that the power to grant stay under Section 36(3) is indeed discretionary and to denude the court of its discretionary power as suggested in **Sarat Chatterjee** may not be sustainable.

Further, as explained earlier, only looking at the provisions of the Code of Civil Procedure, 1908 and not considering any defect that goes to the root of the award would not only not be in consonance with the decision in **Pam Developments** but also the decision in **Sepco** where the Supreme Court sought to apply itself to consider any defects that went to the root of the award. In doing so, the Supreme Court was essentially applying the provisions of the Arbitration Act which was precisely what **Pam Developments** called upon courts to do.

If the first proviso has to be interpreted as done in **Pam Developments** and merits of the award have to be considered on a *prima facie* level as done in **Sepco**, it is difficult to rule out the existence of an unconditional stay in cases outside the second proviso. On this basis, the decisions of the Bombay and Delhi High Courts holding that an unconditional stay can be traceable even to the main part of Section 36(3) appear to carry stronger weight.

Before concluding, it is pertinent to note a recent decision of the Supreme Court in **International Seaport Dredging Private Limited v. Kamarajar Port Limited**¹⁸ (order dated 24 October 2024). In **Kamarajar Port**, the appellant had challenged an order passed by a Single Judge of the Madras High Court that had granted a stay of an arbitral award upon furnishing a bank guarantee for the principal sum of INR 21.07 Crores due under the award. The primary reason cited by the Single Judge for permitting furnishing of a bank guarantee was that the award debtor being a statutory authority was not a fly-by operator. The Supreme Court took exception to this reasoning to state that the Act being a self-contained code did not distinguish between governmental and private entities.

The Supreme Court after referring to **Pam Developments** and **Toyo**

¹⁷ It is important to note that both Aurum Ventures and Ecopack appear to draw support for their respective interpretations of Section 36(3) from the Supreme Court’s judgement in **Malwa Strips Private Limited v. Jyoti Limited**, (2009) 2 SCC 426. Ecopack goes to the extent of suggesting unconditional stays to be permissible on the strength of **Malwa Strips**. However, **Malwa Strips** merely holds that discretion in granting a stay must be exercised judicially on the facts of the case. There is no discussion in **Malwa Strips** on the grant of any unconditional stay.

¹⁸ 2024 SCC OnLine SC 3112.

Engineering took the view that instead of a bank guarantee, it was appropriate to modify the Single Judge's order by directing deposit of 75% of the principal and interest amounts due under the award as a condition for the stay.

In **Kamarajar Port**, since the award debtor had obtained a conditional stay of the award subject to furnishing of bank guarantee, the arguments of the opposing counsels were confined to whether the award amounts should be deposited (as contended by the appellant-award holder) or a security in the form of a bank guarantee sufficed (as contended by the respondent-award debtor). Neither of the parties raised any contention regarding the grant of unconditional stay. Therefore, the Supreme Court in **Kamarajar Port** did not have an occasion to answer the ambiguity (since the time of **Sepco**) about whether an unconditional stay can be granted in cases outside the second proviso.

Conclusion

An analysis of the applicable decisions above presents a complex picture of the grant of unconditional stay of arbitral awards. While the main part of Section 36(3) and the discretionary power inherent therein does not rule out unconditional stays, the rather equivocal nature of the decision in **Sepco** has led to conflicting interpretations between the Bombay and Delhi High Courts on the one hand and the Calcutta, Punjab and Haryana and Karnataka High Courts on the other hand over the existence of unconditional stay in cases outside the second proviso.

A closer analysis of the decision in **Sepco** and the Supreme Court's interpretation of the first proviso in **Pam Developments** suggests that unconditional stays can be granted even in cases outside the second proviso. Be that as it may, there is no doubt that there exists uncertainty in the law as far as unconditional stays of awards are concerned. This ambiguity is best set at rest by Parliament considering its pro-active approach in recent years in addressing lacuna in the Act by enacting suitable amendments.

Needless to state, any such uncertainty in the law has real world consequences. The Supreme Court itself has observed that despite various measures undertaken to improve the efficacy of the arbitral process, some arbitral awards leave a lot to be desired. In such cases, obtaining the relief of unconditional stay would be critical for the award debtors and any uncertainty in the law would correspondingly work great prejudice.



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