

Misc Arbitration (Commercial) :- 05/2024
[CNR No. WBBD17-000006-2024]

COMMERCIAL COURT AT ASANSOL

**(FOR THE DISTRICTS OF MURSHIDABAD, BIRBHUM, PURBA
BARDHAMAN, PASCHIM BARDHAMAN, PURULIA AND
BANKURA)**

Present :- Shaikh Kamal Uddin.
Judge, Commercial Court at Asansol.

JO Code :- WB01311.

I.A No.02 of 2024

In

Misc. Arbitration (Commercial) :- 05/2024
[CNR No. WBBD17-000006-2024]

Union of India (CPWD),
Through The Executive Engineer,
NIT Durgapur Division,
Central Public Works Department
NIT Campus, Durgapur.

..... Petitioner.

-V E R S U S-

Sri Debasish Bhattacharya

..... Respondent.

Order No. 15

Dated 06/11/2024

1. Today stands fixed for hearing of the application under Section 36 (2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as A & C Act, 1996) being I.A No.02 of 2024 dated 06/08/2024 filed by the petitioner.
2. Hazira has been filed by both the parties. Ld. Advocate for both the parties are also present.
3. The petitioner is the Union of India, represented by the Executive Engineer, NIT, Durgapur, Division.
4. The respondent was selected through a tender process by the petitioner for the 'construction of building Jawahar Navodaya Vidalaya, Burdwan Phase B Work SH : Construction Dormitory (0.5 no boys+ 0.5 no girls) (D/S) Type-III Qtrs. (D/S) -8 Nos., Type-II Qtrs. (D/S)- 2 Nos., Type-I

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- Qtrs. (D/S)- 2 Nos. and Guest House (S/S) space including internal water supply, drainage and sanitary installation' .
5. The estimated cost of the work was Rs.3,23,79,755/- and the time for completion of the work was 15 months.
 6. Disputes and differences between the petitioner and the respondent were referred to arbitration and the arbitration culminated in an award dated 28/09/2023 for a sum of Rs.2,31,32,145/- along with interest @ 18% per annum since 03/10/2018 till realization.
 7. On 22/12/2023, the petitioner filed an application under Section 34 of the A & C Act, 1996 through E-filing for setting aside the award dated 28/09/2023 and the same was registered as Misc. Arbitration (Commercial) Case No.05 of 2024.
 8. On 06/08/2024 the petitioner filed an interim application being I.A. No.02 of 2024 in the said Misc. Arbitration Case under Section 36(2) of the A & C Act, 1996 seeking stay of the arbitral award.
 9. The said application being I.A. No.02 of 2024 is taken up for hearing.
 10. It is submitted by the Learned Advocate for the petitioner that the award passed by the Ld. Arbitrator is not maintainable in the eye of the law and that the arbitral proceedings were not in accordance with the agreement and that the award deals with dispute not contemplated within the terms of reference and that the Ld. Arbitrator has not properly evaluated the documents and has passed the impugned award and that the award is in violation of the Public Policy of India. She also submitted that the court has power and discretion under Section 36 of the A & C Act, 1996 to stay the operation of the award dated 28/09/2023 pending consideration of the application under Section 34 of the A & C Act, 1996 unconditionally. In support of her submission the Learned Advocate relied on the decision of *Kolkata Metropolitan Development Authority V/s. South City Projects*, reported in AIR OnLine 2021 Cal 139 and *CFM Asset Reconstruction Private Limited V/s Sar Parivahan Private Limited* decided by the Hon' ble Bombay High Court on 13th June, 2024 in Comm. Arbitration Petition (L) No.5565 of 2024.

11. *Per contra*, the Learned Advocate for the respondent submitted that the application of the petitioner is baseless and is not maintainable. He also submitted that no *cogent* ground has been made out by the petitioner to stay the award. He also submitted that the Learned Arbitrator has passed the award in accordance with law and the same does not require interference by this Court.
12. I have heard the Ld. Advocates for the parties and have considered their submissions.
13. Section 36 of the A & C Act, 1996 provides for enforcement of the Arbitral Award. Sub-Section 1 of Section 36 lay down that an arbitral award can be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court where the time for making an application to set aside the arbitral award under Section 34 of the A & C Act, 1996 has expired and subject to the provision of Sub-Section 2 of Section 36. Sub-Section 2 of Section 36 of the A & C Act, 1996 mandates that an application for setting aside of the arbitral award by itself shall not render the award unenforceable, unless the court grant an order of stay of the operation of the arbitral award in accordance with the provision of Sub-Section 3 of Section 36 of the A & C Act, 1996. Sub-Section 3 of Section 36 of the A & C Act, 1996 provides that the court may subject to such conditions as it may deem fit, grant stay of operation of such award for reasons to be recorded in writing. The proviso to Sub-Section 3 of Section 36 of the A & C Act, 1996 stipulates that the court while considering the application for grant of stay in the case of an arbitral award for payment of money shall have due regard to the provision for grant of stay of money decree under the provisions of the Code of Civil Procedure, 1908. The second proviso to Sub-Section 3 of Section 36 of the A & C Act, 1996 further stipulates that where the court is satisfied that a *prima facie* case is made out (a) that the arbitration agreement or contract which is the basis of the award or (b) the making of the award was induced or effected by fraud or corruption, it shall stay the award

unconditionally pending disposal of the challenge under Section 34 to the award.

14. In the case of *Pam Developments Private Limited V/s. State of West Bengal, reported in (2019) 8 SCC 112*, the Hon'ble Apex Court considered the provisions of Section 36 (3) in the context of an arbitral award against a State Government and also considered the provisions of Order 27 Rule 8 (A) of the Code of Civil Procedure as well as the provisions of Order 41 Rule 5 (3) of the Code of Civil Procedure, 1908 and held as follows:

*“19. In this back drop, we have now to consider the effect of Section 36 of the Arbitration Act, vis-a-vis the provisions of Order 27 Rule 8-A CPC. Sub-Section (3) of Section 36 of the Arbitration Act mandates that while considering an application for stay filed along with or after filing of objection under Section 34 of the Arbitration Act, if stay is to be granted then it shall be subject to such conditions as may be deemed fit. The said Sub-Section clearly mandates that the grant of stay of operation of the award is to be for reasons to be recorded in writing “subject to such conditions as it may deem fit”. The proviso makes it clear that the court has to “have due regard to the provisions for grant of stay of money decree under the provisions of the Code of Civil Procedure”. The phrase “have due regard to” would only mean that the provisions of CPC are to be taken into consideration, and not that they are mandatory. While considering the phrase “having regard to”, this court in *Shri Sitaram Sugar Co. Limited V/s. Union of India [Shri Sitaram Sugar Co. Limited V Union of India, (1919) 3 SCC 223]* has held that :(SCCp.245, para 30).*

“30. The words “having regard to” in Sub-Section are the legislative instruction for the general guidance of the Government in determining the price of sugar. They are not strictly mandatory, but in essence directory”.

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 a manner that it takes away the power conferred in the 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 a 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 in so far as the same are not inconsistent with the spirit and provisions of the arbitration act.

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29. Although we are of the firm view that the archaic Rule 8-A of Order 27 CPC has no application or reference in the present times, we may only add that even if it is assumed that the provisions of Order 27 Rule 8-A CPC are to be applied, the same would only exempt the Government from furnishing security, whereas under Order 41 Rule 5 CPC, the court has the power to direct full or part deposit and/ or to furnish security of the decretal amount. Rule 8-A only provides exemption from furnishing security, which would not restrict the court from directing deposit of the awarded amount and part thereof”.

15. The petitioner in the instant case did not rely upon Order 27 Rule 8-A of the CPC but has prayed for unconditional stay of the award. The petitioner has also submitted that being Union of India, it cannot be said that the petitioner is incapable of meeting any decretal obligations. It has also been submitted that keeping the status of the petitioner the court should exercise discretion in directing security that may be furnished with regard to the award.
16. It is the mandate of Section 36 (3) of the A & C Act, 1996 that while considering an application under Section 36 (2) of the A & C Act, 1996 for stay of operation of the arbitral award, the court may grant stay of operation of the award subject to such conditions as it may deem fit. The Court has however to give reasons for granting the order of stay on

the conditions so imposed. The first proviso to Section 36 (3) of the A & C Act, 1996 mandates that the court while considering the application for grant of stay of an arbitral award for payment of money have due regard to the provisions for grant of stay of money decree under the provisions of the CPC. The second proviso to Section 36 (3) mandates that if the court is satisfied that a *prima facie* case has been made with the arbitration agreement or the contract which is the basis of the award or that the making of the award has been induced or effected by fraud or corruption, it stay the award unconditionally pending disposal of the objection under Section 34 of the A & C Act, 1996. Thus under Section 36 (3) of the A & C Act, 1996 the court has the power to direct the party to furnish such security as the court may deem fit and proper. The court has however to record reasons for its order of security. In the present case it is not the case of the petitioner that it comes within the purview of the second proviso to Section 36 (3) of the A & C Act, 1996. Therefore there is no question of granting unconditional stay. The award which the petitioner seeks to stay is an award for payment of money. In the case Pam Development Private Limited (Supra) the Hon'ble Apex Court has held that a Government will not enjoy an automatic stay of execution of an award in view of the provisions of Order 27 Rule 8-A of the CPC, 1908. The Hon'ble Apex Court has also held that the court retains its discretion to grant stay of execution of an award on such conditions as it may deem fit. The Hon'ble Apex Court has further held that the court has the power to direct for full or part deposit and or to furnish security of the decretal amount.

17. In the present case the arbitral award dated 28/09/2023 has directed payment of money on two heads i.e. Principal and interest on the awarded amount. In the facts of the present case, since the petitioner is Union of India, I am of the considered view that it would be appropriate to direct the petitioner to secure the principal sum awarded by the award dated 28/09/2023 i.e. for a sum of Rs. 2,31,32,145/-. The judgment of Kolkata Metropolitan Development Authority (Supra),

relied upon by the petitioner does not help the petitioner. In fact in the case Kolkata Metropolitan Development Authority (Supra) the Hon'ble Court had also directed the petitioner in that case to furnish security. The judgment of CFM Asset Reconstruction Private Limited (Supra) is also not applicable to the facts and circumstances of the present case.

- 18.** The petitioner will therefore furnish security of the aforesaid sum of Rs. 2,31,32,145/- in the form of renewable Bank Guarantee in favour of the respondent within six weeks from date. There will be unconditional stay of the award dated 28/09/2023 passed by the Ld. Arbitrator for a period of six weeks from date. In the event the bank guarantee as directed is furnished, the stay granted will continue till the disposal of the application under Section 34 of the A & C Act, 1996.
- 19.** On the failure of the petitioner to furnish the Bank Guarantee as directed, the respondent will be at liberty to execute the award in accordance with law.
- 20.** I.A No.02 of 2024 dated 06/08/2024 is accordingly disposed of.
Fix **23/12/2024** for **hearing of the application under Section 34 of the A & C Act, 1996.**
D/C by Me.

Judge, Commercial Court
At Asansol

Judge, Commercial Court
At Asansol