

**Present: Sri Utpal Misra (JO Code: WB00659)**  
**Judge, Commercial Court at Alipore**  
**Misc Case (Arb) 06 of 2023**  
**Renumbered as Misc Arb (Com) 59 of 2023**  
**CNR no. WBSP18-000015-2023**

Order No. 17  
20.06.2024

**In the matter of:**

An application under  
Section 34 of the  
Arbitration and  
Conciliation Act, 1996

And

**In the matter of:**

Smt Kajal Sahana.

Vs.

Smt. Pratima Sahana and 2  
Ors.

**ORDER**

Today is fixed for passing the order of the application being I.A. No. 01 of 2023.

Both sides file their respective haziras.

Now, the instant record is taken up for passing necessary order.

**I.A. No. 01 of 2023**

1. The petitioner herein filed the instant application for stay of the arbitral award dated 01.11.2022 (hereinafter referred to as the impugned award) that was passed on a reference initiated by the petitioner herself.

2. The summarized facts of the instant case that led to initiation of the arbitral proceeding in context are that the petitioner and the respondents are daughters of Late Kalipada Bag. The said Late Kalipada Bag was a businessman and used to carrying on construction business under various Government department, undertakings etc. under his trade name of M/s. Kalipada Bag. He converted this firm M/s. Kalipada Bag into a partnership firm initially with his brother and thereafter with his nephew

and subsequent thereafter with his four daughters under the said trade name and style of M/s. Kalipada Bag. The said firm was lastly constituted on 1<sup>st</sup> April, 2004 when late Kalipada Bag had retained his 60% share in the said firm and each of the daughters being 10% share each.

3. The daughters have the shares for profit and loss of entire works on behalf of the firm used to be carried on by Late Kalipada Bag. As a matter of fact apart from the Partnership deed the daughters have issued a power of attorney in favour of the said Late Kalipada Bag giving him absolute power for and on behalf of the firm.

4. The respondents by a letter stopped the business of the firm by issuing a notice on the Bank not to operate any account of the firm. As a result whereof, all ongoing works came to a standstill. Gradually the departments closed the said contract by way of termination. Huge amount were still pending due from the said department. That apart huge materials and machineries were at the working site. Apart from other machineries remaining at the godown. Those materials were lost from the site because of complete stoppage of work, ultimately the staffs had to be paid off as the function of the firm had stopped. Due to certain *mala fide* acts of the other partners, the petitioner herein invoked the arbitration agreement being A.P. No. 771 of 2019 before the Hon'ble High Court at Calcutta for appointment of Arbitrator.

5. By an Order dated 15.01.2020 the Arbitrator was appointed to decide the disputes and claims of the petitioner herein and the Ld. Arbitrator passed the impugned award dated 01.11.2022.

6. Petitioner has challenged the said award basically on the grounds of perverse findings of the Ld. Arbitrator by way of filing an application under Section 34 and for that reason by way of filing the instant application under Section 36(2) of the Act, petitioner has prayed for an unconditional stay of operation of the impugned award till disposal of the Section 34 application.

7. Amongst the other purported grounds for challenging the impugned award by the petitioner, some of cynosure grounds as pleaded by her is that the Ld. Arbitration has wrongly alleged in the purported award that as if the claimant has to return an alleged sum of Rs. 8,11,90,980/- along with simple interest @ 6% per annum from the date of transaction till recovery

to the firm without any calculation and without any basis and according to his whims, wishes and caprices. Moreover, in the counter claim, the claim of the respondents were Rs. 1,75,19,866/- whereas the award has been made for Rs. 8,11,90,980/- without any basis, without any calculation, without any claim and without any oral and documentary evidence. Incidentally, there is no amendment to the counter claim of the respondents at all. Furthermore in the award itself the Ld. Arbitrator has stated that the purported counter claim of the respondents Rs. 1,75,19,860/- without any calculation, without any detail and without any oral and documentary proof at all the purported award has jumped unto the astronomical figure of Rs. 8,11,90,980/-. The purported award is opposed to law, opposed to public policy of India, opposed to morality and justice, perverse, shocking and cannot be sustained.

8. In support of the petitioner's contention Ld. Counsel for the petitioner has referred to the cases of *Union of India vs. Reshmi Metalicks*<sup>1</sup>, *S.E.P.C. Corporation vs. Power Mech Projects Ltd.*<sup>2</sup>, *S.P. Chengalvaraya Naidu (Dead) by LRS vs. Jagannath (Dead)*<sup>3</sup>.

9. On the other hand, respondents have countered all the arguments as raised by the petitioner for setting aside the impugned award. The respondents have submitted that no case of fraud or corruption on the part of the Ld. Arbitrator either in conduction of the reference or in drawing up the Award having been made out by the petitioner with any degree of reliability or conviction, the award is not against public policy. No specific instant of any decision or conclusion being arrived at by the Ld. Arbitrator which is so contrary to any provisions of law that it can be called perverse having been pointed out by the petitioner, the Award cannot be said to be contrary to fundamental policy of Indian Law. In as much as the petitioner's challenge petition seeks (i) to re-interpret the documentary and oral evidence in a different manner than has been done by the Ld. Arbitrator, and (ii) to re-appreciate the evidence which forms the basis of the findings and conclusions of the Ld. Arbitrator, the same being beyond the scope of interference in a proceedings under Section 34 is without any merit.

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<sup>1</sup> Reported in AIR 2023(NOC) CAL.

<sup>2</sup> Reported in AIR 2022 SC 4520.

<sup>3</sup> Reported in AIR 1994 SC 853.

10. The Ld. Counsel of the respondents has referred to the cases of Parsa *Kente Collieries Ltd. vs. Rajasthan Rajya Vidyut Utpadan Ltd.* and *Dyna Technologies (P) Ltd. vs. Crompton Greaves Ltd.* and *Ssangyong Engg. & Construction Co. Ltd. vs. NHAI.*

11. Citing the aforesaid cases, Ld. Counsel for the respondents has submitted that it is settled law that this Court while dealing with a challenge petition under Section 34 of the Arbitration and Conciliation Act, 1996 neither sits in appeal nor has jurisdiction to re-appreciate the evidence, and also does not have jurisdiction to scrutinize the reasonableness of the reasons given by the Ld. Arbitrator. The scope of interference of Section 34 of the said Act is extremely limited. The petitioner has failed to come up with any ground provided in Section 34 of the said Act either for setting aside the Award or for staying of operation/execution on the said award. The petition under Section 34 is devoid of the grounds for setting aside an arbitral award contained in sub-sections 2 and 2A of Section 34 of the Arbitration and Conciliation Act, 1996 that are the only grounds on which the award may be set aside, nor the petition under reply has made out any ground for staying of operation of the award. Therefore, he has prayed for that the present application is not maintainable and is liable to be dismissed in limine with costs.

12. Now, as per the mandate of The Arbitration and Conciliation Act, 1996 for obtaining a stay on operation of the Arbitral Award, the Award debtor has to file an application under Section 36 (2) of the Arbitration and Conciliation Act, 1996 and the Statute have provided that for staying the operation of an Arbitral Award for payment of money the Court shall have due regard to the provisions of stay of money decree under The Code of Civil Procedure, 1908. The relevant provisions are reproduced hereunder:

*Section 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:*

*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.*

13. More so, the Hon'ble Supreme Court of India in the case of *Seppo Electric Power Construction Corporation v. Power Mech Projects Ltd.*<sup>4</sup>, held in paragraph no. 28 states as: “*28. Once an application under sub-section (2) of Section 36 is filed for stay of operation of the arbitral award, the Court might subject to such conditions as it may deem fit, grant stay of the operation of such award, for reason to be recorded in writing. The Court is empowered to impose such conditions as it might deem fit and may grant stay of operation of the award subject to furnishing of security covering entire amount of the award including interest*”.

14. In this regard, this Court also takes reliance on the decision of the Hon'ble Supreme Court of India in the case of *Manish v. Godawari Marathawada Irrigation Development Corporation*<sup>5</sup>. In the said case, the Hon'ble Apex Court set aside the order of 60% deposit given by the Hon'ble Bombay High Court and ordered as: “*We have passed orders stating that since these are money decrees there should be 100% deposit, with the respondent being entitled to withdraw the amount deposited and furnish solvent security to the satisfaction of the High Court. Accordingly, we set aside the impugned orders dated 19.03.2018 and mandate a 100% deposit be made within a period of eight weeks from today*”, the said proposition of the Hon'ble Apex Court has been recognized in the decision of the Hon'ble Delhi High Court in the case of *Power Mech Projects Ltd. v. SEPCO Electric Power Construction Corporation*<sup>6</sup> whereby the Hon'ble High Court held as: “*While it is true that in some of the orders shown by the learned senior counsel for the petitioner, coordinate Benches of this Court have been directing a deposit of 50%, but going by the recent judgments of the Supreme Court as well as the facts of the present case, I am of the opinion that the petitioner must deposit 100% of the awarded amount of Rs. 142 crores (principal amount) to secure the respondent*”.

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<sup>4</sup>Reported in 2022 SCC Online SC 1243.

<sup>5</sup>Reported in MANU/SCOR/30132/2018.

<sup>6</sup>Arising out of O.M.P. (I) (COMM.) 523/2017.

15. In the another decision as passed by the Hon'ble High Court at Calcutta in the case of *West Bengal Power Development Corporation Ltd. vs. Dongfang Electric Corporation* Hon'ble Court held as:

*By amendment of Section 36 of the Arbitration and Conciliation Act, a party challenging an award has to deposit with the registry of the court the awarded amount or secure it to the satisfaction of the court, as a condition precedent to obtain stay thereof, pending the setting aside application, which condition was absent prior to the amendment. This is certainly an alteration of the conditions under which such an application was heard prior to the amendment, when stay was automatic on filing of a valid setting aside application. Thus the substantive rights of an award debtor have been affected.*

*The Special bench judgement of our court in the case of Union of India v. Amitava Paul along with the connected matter reported in AIR 2015 89(FB) has only held that Order 41 Rule 1 (3) was directory in nature. It made no comment as to whether the provision was to be taken as procedural or substantive law.*

*I do note that this court's view in Saraf Agencies Pvt. Ltd and Ors. v. Federal Agencies for State Property Management and Ors. has been endorsed in the later case of Braithwaite Burn & Jessop Construction Co. Ltd. v. Indo Wagon Engineering Ltd. by Mr. Justice Soumen Sen. Hence, the law prevailing at the time of commencement of the arbitration will apply till the disposal of the setting aside application at the highest level. The amending Act of 2015 did not alter any vested substantive right. Therefore, the right of the petitioner in arbitration which commenced before the coming into force of the amending Act, to challenge the award without any condition is preserved by the amendment Act. All the contentions of Mr. Mookherjee fail.*

*This application (G.A. 3750 of 2015) is disposed of by declaring that no application for stay of the award is necessary to be taken out by the petitioner because there is automatic stay of the award upon filing of the setting aside application, till disposal of the same”.*

16. So, considering all, this Court is of the view that there shall be a stay of the award subject to the condition that the petitioner shall deposit 100 % of the awarded sum of Rs.8,11,90,980/- ( Eight crore eleven lakh ninety thousand nine hundred eighty) only by way of cash security or its equivalent to the satisfaction of the Ld. Registrar, District Judge's Court at Alipore, South 24-Parganas. Upon such deposit being made, the Ld. Registrar is requested to make a fixed deposit on short term auto renewal basis or mode, of the said amount with any Nationalized Bank and keep the same till the disposal of the application under Section 34 of the Act or until further order of this Court.

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<sup>7</sup> Reported in AIR 2017 Calcutta 297.

17. The aforesaid exercise is to be completed within a period of six weeks from the date of this order. In the event security as directed above is furnished, there shall be stay of execution of the award till the disposal instant Misc. Arb (COM) 59 of 2023.

18. The instant I.A. No. 01/2023 is thus, accordingly disposed of on contest without any order as to costs.

Let a copy of this order be communicated to the Ld. Registrar, District Judge's Court at Alipore, South 24-Parganas.

Fix the matter on 20.07.2024 at 10:30 a.m. for fixing dates of case management hearing of the instant misc case.

Parties to act on the basis of the downloaded copy of this Order.

Dictated and corrected by me

Sd/-  
Judge, Commercial Court at Alipore,  
For South 24 Parganas, Purba Medinipur,  
Paschim Medinipur & Jhargram

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Judge, Commercial Court at Alipore,  
For South 24 Parganas, Purba Medinipur,  
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