

**Present: Sri Utpal Misra (JO Code: WB00659)**  
**Judge, Commercial Court at Alipore**  
**Misc Case (Arb) 10 of 2023**  
**CNR no. WBSP18-000025-2023**

Order No. 09  
28.03.2023

**In the matter of:**

An application under  
Section 36 of the  
Arbitration and  
Conciliation Act, 1996

And

**In the matter of:**

Durgapur Freight  
Terminal private Limited.

Vs.

Titagarh Logistics  
Infrastructure Private  
Limited & 02 Others.

**ORDER**

Today is fixed for passing the order in respect of I.A. No. 01 of 2023.

Both sides file their respective haziras.

**I.A. No. 10 of 2023**

**The Court:** Petitioner herein filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) challenging the award dated 17<sup>th</sup> November, 2022 (hereinafter it is to be referred to as impugned award) passed by the Ld. Arbitral Tribunal in arbitration proceedings relating to disputes arising out of an Agreement dated 1<sup>st</sup> January, 2017 entered into between the parties to this present proceeding.

1. Along with the said application under Section 34 of the Act, Petitioner also filed another application under Section 36 of the Act for obtaining an unconditional stay of operation of the impugned award from this Court.
  
2. Mr. Dibesh Dwivedi, Ld. Counsel appearing on behalf of the Petitioner states that in view of the impugned award, the Petitioner herein is directed to make payment of a sum of Rs. 3,63,14,430.00/- on account of Minimum Guaranteed Amount and interest and GST thereon without receipt of the GST invoice under the West Bengal Goods and Services Tax Act, 2017. Apart from this, an order for eviction of the Petitioner was passed and further costs of Rs. 10,00,000/- was imposed.

Ld. Counsel of the Petitioner as such contends that the direction to make payment of the Rs. 3,63,14,430.00/- is contrary to the provisions of the GST Act and in conflict with the public policy of India. Resorting to the Sections 38 and 39 of the GST Act read with relevant rules provide that for inward supply of services. He further refers that the Petitioner is to submit details in Form GSTR-2 within 20 days of the succeeding month. As such if the Petitioner is made to pay the sum under the impugned award without issue of any valid GST invoice, in that case the Petitioner would not be able to furnish any detail in Form GSTR-2 as mandated by the GST Act and would be deprived of the input tax credit to the extent of GST paid to the Respondent no. 1 for the amounts under the interim award. But, Arbitral Tribunal erred in not considering that the provisions of the GST Act mandates that the Respondent no. 1 was obliged to issue invoices within the due date of payment. In the present case, such due date is 7<sup>th</sup> of each month as would be ascertainable from the agreement between the parties. In the premises, the petitioner would suffer irreparable loss and prejudice by making the payment under the interim award in absence of the GST invoice the Petitioner would not receive input credit of the GST amount for the said payment.

The further contention of the Petitioner is that in terms of the agreement dated January 1, 2017 the Petitioner had deposited a sum of Rs. 2,75,00,000.00/- towards security deposit, which amount is still lying with the Respondent no.1 and has not been refunded till date.

According to the petitioner that the impugned Award is otherwise bad in law and liable to be set aside. The petitioner would be greatly prejudiced in case operation of the impugned Award is not stayed pending disposal of the said application u/s 34 of the Arbitration & Conciliation Act, 1996 as there are fair chance of the success in the application u/s 34 of the Arbitration & Conciliation Act, 1996 and the balance of convenience and inconvenience is in their favour.

Therefore, for the aforesaid grounds Ld. Counsel appearing for the Petitioner prays for grant of stay on operation of the impugned award.

3. *Per contra*, Mr. Sabyasachi Chowdhury, Ld. Counsel appearing for the Respondent strenuously opposed the contention as raised by Ld. Counsel on behalf of the Petitioner. Mr. Chowdhury states that prior to the impugned award, an interim award dated 10<sup>th</sup> February, 2021 was passed whereby the Petitioner herein was directed to pay the Respondent no.1 a sum of Rs. 2,36,00,000/- and post award interest at the rate of 18% per annum was granted by the Arbitral Tribunal in the said interim award. The Petitioner filed an application under Section 34 of the Act to challenge the said interim award and had also filed another application under Section 36(2) of the Act seeking stay of operation of the said interim award before this Court and subsequently, this Court directed that the operation of the interim award would be stayed on the Petitioner to furnish a bank guarantee for a sum of Rs. 1,75,00,000/-. But, the Petitioner failed and/or neglected to furnish the bank guarantee in terms of the

said order, even after obtaining repeated extensions, and as such, there was and is no stay of operation of the said interim award.

By the impugned final award dated 17<sup>th</sup> November, 2022 the Arbitral Tribunal awarded to the Respondent a sum of Rs. 3,63,14,430/- together with interest *pendente lite* at the rate of 15% per annum on and from 12<sup>th</sup> January, 2020 and post award interest at the rate of 15% per annum, as on 28<sup>th</sup> February, 2023 which was aggregated a sum of Rs. 5,40,29,233.98/-. Upon adding the awarded sum of interim award with the awarded sum of the final impugned award it becomes Rs. 8,61,25,233.98/- is due and payable by the Petitioner to the Respondent no. 1. Besides that, Respondent is also entitled to eviction of the Petitioner from the said property.

4. The terms of Section 36(3) of the Act provides “the Court may”, stay of the operation of the Arbitral Award”, “subject to such conditions as it may deem fit”. The proviso to the said sub-section (3) of Section 36 further stipulates that, “in the case of an Arbitral Award for payment of money”, the court shall have “regard to provisions for grant of stay of a money decree under the provisions of Code of Civil Procedure, 1908”. As such from the indoctrination *supra* the principles of Order XLI Rule 5 of the CPC become applicable and in terms of subsection (3) thereof, the security that has to be given is to satisfy the “due performance of such decree or order as my ultimately be binding”.

As already stated aforesaid the arbitral tribunal awarded a sum of Rs. 3,63,14,430/- has been held to be payable by the Petitioner to the answering Respondent along with interest pendent lite @ 15% from 12.01.2020 to the date of this award and interest on award @ 15% per annum on “the awarded sum” till payment is made.

5. In respect of above, Petitioner contended that Petitioner has been directed to be directed to pay a sum of Rs. 3,63,14,430/- to the Respondent and a further sum of Rs. 10,00,000/- as costs to the Respondent. As such total sum of Rs. 3,73,14,430/- has to be paid by the Petitioner to the Respondent including interest. Furthermore, Petitioner states that the Petitioner has deposited a sum of Rs. 2,75,00,000/- with the Respondent in order to secure due performance of its obligations and the same is recorded in Clause 3.1 of the said agreement. As such Petitioner is entitled to adjustment of the said sum of Rs. 2,75,00,000/- with the awarded sum of Rs. 3,73,14,430/- and upon deduction, only Rs. 98,14,430/- is to be secured.

Mr. S. Chowdhury, Ld. Counsel appearing for the Respondent contends that in respect of provision of Section 31(7) of the Act, in particular, to clauses (a) thereof, “the sum for which the award is made” would include the sum of Rs. 3,63,14,430/- and the *pendent lite* interest of Rs. 1,55,20,687.63/- calculated at the rate of 15% from 12<sup>th</sup> January, 2020 up to 17<sup>th</sup> November, 2022 aggregating to Rs. 5,18,35,117.63/-. Therefore, a sum of Rs. 5.18 crore is the sum for award has been made in terms of Section 31(7)(a) of the Act. In terms of Section 31(7)(b) of the Act at the rate of 15% post award interest calculated from 18<sup>th</sup> November, 2022 up to 28<sup>th</sup> February, 2023 would be a further sum of Rs. 21,94,116.35/-. Therefore, the Petitioner is entitled to secure a sum of Rs. (5,18,35,117.63 + 21,94,116.35)= Rs. 5,40,29,233.98/-

In respect of interim award made by the arbitral tribunal imposing interest at the rate of 18% Petitioner is further entitled to secure a sum of Rs. 3,22,70,575/-. Then in totaling a sum of Rs. 8.66 crore is to be secured by the Petitioner.

6. In this regard, Mr. S. Chowdhury, Ld. Counsel appearing for the Respondent refers an order of the Hon’ble Supreme Court of India in the case of Manish v. Godawari Marathawada Irrigation

Development Corporation<sup>1</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>2</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, co-ordinate 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”*

7. Mr. Dwivedi, Ld. Counsel for the Petitioner argued that the question of securing post award interest does not and cannot arise in view of the fact that post award interest does not form part of the awarded amount under the final award in as much as post award interest is a variable sum as regards he refers a decision of the Hon'ble High Court at Calcutta in the case of The Board of Trustees for the Port of Kolkata v. ABG Kolkata Container Terminal Private Limited<sup>3</sup>. In the said decision the Hon'ble Court held as: *“It is seen that the statute gives discretion to court in matter of enforcement of award, as in executing a decree under provisions of Code of Civil Procedure. By proviso to sub-section (3), discretion has also been given to the Court regarding considering application for grant of stay in case of arbitral award for payment of money*

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<sup>1</sup> Reported in MANU/SCOR/30132/2018.

<sup>2</sup> Arising out of O.M.P. (I) (COMM.) 523/2017.

<sup>3</sup> Arising out of G.A. 589 of 2019 with A.P. No. 590 of 2011.

*having due regard, again, to provisions of Code of Civil Procedure. Executing Court has exercised discretion in directing creation of further fixed deposit.....”* The Hon’ble Court further held that “*...This statutory provision came into play only if the award did not otherwise direct payment of post award interest. In any event, post award interest being a variable sum depending on date of payment, where award debtor has not paid but challenged the award, direction for future interest cannot be taken to be a ‘sum’ included in the award. Furthermore, award holder has recourse to execution proceeding as per provisions in Code of Civil Procedure, to be resorted to post success by causing challenge to the award being dismissed. As such, this Court does not see orders of Supreme Court passed under article 136 of the Constitution of India as declaration of law negating exercise of discretion, provided to be exercised by executing and arbitration Courts in matters of enforcement of arbitral awards for money. In **Atma Ram Properties (supra)** Supreme Court declared the law on exercise of discretion by courts, in this regard. Exercise of discretion would be to put the party to such terms as would **reasonable compensate the party successful at the end of the appeal**. Court in its discretion **may direct the appellant to make payment of the decretal amount with interest as a condition precedent. In this case that has been directed by executing Court**”.* He further refers that the in aforesaid decision the Hon’ble High Court at Calcutta also considered the ratio of the case of **Hyder Consulting [UK] Limited v. Governor, State of Orissa**<sup>4</sup>.

On the contrary, Mr. Chowdhury appearing for the Respondents contends that for the purposes of an award “there is no distinction between a sum with interest and a sum without interest. Once the interest included in the sum for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other. To give buttress to his argument he relied upon a decision of the Hon’ble Supreme Court of India in **Hyder Consulting [UK] Limited v. Governor,**

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<sup>4</sup> Reported in (2015) 2 SCC 189.

State of Orissa, (*supra*). Resorting strong reliance upon paragraph nos. 26 and 27 he states, interpretation was given to sub-section (7) in Section 31, on pre-award interest to ensure arbitral proceedings are concluded without unnecessary delay and post award interest to ensure speedy payment in compliance with the award. Furthermore, interest is not independent of sum awarded but included in it.

8. In respect of alleged adjustment of non-refundable security deposit Mr. Chowdhury states that it is a case made out from the bar and such case was not made out before the Arbitral Tribunal in the counter statement nor does it have any basis. Moreover, he states that in an application under Section 36(3) of the Act, the Court shall not go behind the award and shall take the award as it is. There is no scope for modifying or altering the award.
9. The award is also for eviction of the Petitioner in terms of prayer (d) of the SoC regarding that Mr. Chowdhury states that it is now settled law in view of several judgments of the Hon'ble Supreme Court of India that once an award or decree for eviction is made the award debtor has to pay compensation at the market rate for obtaining stay of the award/decree for eviction passed. He further states that said land if put to use by the Respondent would earn the Respondent reasonable profit from the use of the said property at the rate of Rs. 25,00,000/- per month. To substantiate his argument he takes fulcrum of the ratio of the Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd<sup>5</sup>. case wherein the Hon'ble Supreme Court of India said in sub-paragraph nos. (1), (2) and (3) of paragraph no. 19:

*(1) While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate court does have jurisdiction to pay the applicant on such reasonable terms as would in its opinion reasonably compensate the decree holder for loss occasioned by delay in execution of decree by the grant of stay order, in*

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<sup>5</sup> Reported in (2005) 1 SCC 705

*the event of the appeal being dismissed and in so far as those proceeding are concerned. Such terms, needless to say, shall be reasonable.*

- (2) *In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not sand terminated merely by is termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits orcompensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.*
- (3) *The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a later dated.*

In the said ***Atam Ram case*** (*supra*) the Hon'ble Supreme Court of India upheld the earlier view in the case of **Marshall Sons & Co. (I) (LTD). v. Sahi Oretrans (P) Ltd. and another**<sup>6</sup>. In the said case the Hon'ble Court held that reasonable mesne profits which may be equivalent to the market rent should be awarded to prevent parties in wrongful possession from taking undue advantage of lengthy delays in proceedings and execution. Mr. Chowdhury further refers that the said proposition of law remains unchanged as would be evident from the latest judgment of the Hon'ble Supreme Court of dated 6<sup>th</sup> July, 2022 in the case of **M/s. Martin & Harris Private Limited & Anr. v. Rajendra Mehta & Ors**<sup>7</sup>. wherein the Hon'ble Apex Court indoctrinating the decisions of the ***Marshall Sons & Co.'s case*** (*supra*) and ***Atam Ram's case*** (*supra*) held as: “Now, reverting on the issue of determination of the amount of

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<sup>6</sup> Reported in (1999) 2 SCC 325.

<sup>7</sup> Arising out a civil appeal nos. 4656-47 of 2022

mesne profits @ Rs. 2,50,000/- per month is concerned, the guidance may be taken from the judgment of Marshall Sons & Co. (I) (LTD). v. Sahi Oretrans (P) Ltd. and another<sup>8</sup>In which this Court held that once a decree for possession has been passed and the execution is delayed depriving the decree holder to reap the fruits, it is necessary for the Appellate Court to pass appropriate orders fixing reasonable mesne profits which may be equivalent to the market rent required to be paid by a person who is holding over the property. In the case of Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd this Court held that Appellate Court does have jurisdiction to put reasonable terms and conditions as would in its opinion reasonable to compensate the decree holder for loss occasioned by delay in execution of the decree while granting the stay. The Court relying upon the provisions of the Delhi Rent Control Act, observed that on passing the decree for eviction by a competent Court, the tenant is liable to pay mesne profit or compensation for use and occupation of the premises at the same rate at which the landlord would have able to let out the premises in present and earn the profit if the tenant would have able to let out the premises in present and earn the profit if the tenant would have vacated the premises. The Court has explained that because of pendency of the appeal, which may be in continuation of suit, the doctrine of merger does not have effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a later date. 11. Thus, after passing the decree of eviction the tenancy terminates and from the said date the landlord is entitled for mesne profits or compensation depriving him from the use of the premises.....”

In view of above ratio, Mr. Chowdhury stated that Petitioner in order to retain possession is to pay a further sum at the rate of Rs. 25,00,000/- per month, being the market rent on and from November, 2022 as per ratio of *Atma Ram's case* (supra).

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<sup>8</sup> Reported in (1999) 2 SCC 325.

Ld. Counsel appearing for the Petitioner has contended that the Respondent has not shown any documentary evidence in support of its allegation/contention that the market value rent is more than Rs. 25 lakh. He further stated that Petitioner is willing to pay the agreed sum of Rs. 10 lakh per month plus enhancement of Rs. 10% subject to the Respondent no. 1 raising invoices prior to payment and/or simultaneous to payment in as much as the same is the agreed contractual rate between the parties and in fact, is higher than the prevailing market value rent.

10. Keeping in view of the rival contentions as well as discussions made in the foregoing paragraphs, this court is of considered view that the present application under section 36(2) of the Arbitration and Conciliation Act, 1996 is allowed on contest and the impugned Award dated 17<sup>th</sup> November, 2022 is hereby stayed during pendency of the application under section 34 of the Act, subject to deposit of sum of Rs. 3,73,14,430/- by the Petitioner in the form of Bank Guarantee in favour of the Respondent within four weeks and since, an order of eviction has been passed by the Ld. Arbitral Tribunal, hence, in order to retain possession, the Petitioner is also further directed to pay Rs. 11 lakh per month to the respondent within 7<sup>th</sup> day of each succeeding month according to the English Calendar month with immediate effect.

This order shall automatically stand vacated in the event of default on the part of the petitioner in respect of the aforesaid direction.

Accordingly, the instant I.A. No. 01/2023 stands **disposed of**.

Fix 11.05.2023 at 11:00 a.m. for filing affidavits by both sides in respect of compliance of this Order and also for filing opposition

by the Respondent to the *per se* application under Section 34 of the Act.

Both the parties are to act forthwith 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 Midnapore,  
Paschim Midnapore & Jhargram

Sd/-

Judge, Commercial Court at Alipore,  
For South 24 Parganas, Purba Midnapore,  
Paschim Midnapore & Jhargram