

Present: Sri UtpalMisra (JO Code:WB00659)
Judge, Commercial Court at Alipore
Misc Case (Arb.)27/2022
Renumbered as Misc Arb (Com) 31 of 2022
CNR No. WBSP18-000069-2022

Order No. 21

Date:18.03.2024

In the matter of:

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

AND

In the matter of:

Damodar Valley Corporation.

Vs.

Mackintosh Burn Ltd.

Appearance:

Mr. Daipayan Basu Mallick...Ld. Advocate

Mr. Sarajit Dey..Ld. Advocate

Mr. Subhadeep Basak..Ld. Advocate

Mr. Sweta Chokraborty...Ld. Advocate

....for the petitioner.

Mr. Tilak Kumar Bose...Ld. Sr. Advocate

Mr. Hirak Mukherjee...Ld. Advocate

Mr. Arijit Bhowmick...Ld. Advocate

Mr. Kaushik Panja...Ld. Advocate

Ms. Pooja Agarwal... Ld. Advocate

....for the respondent.

Order

Today is fixed for passing order of the application under Section 36 of the Arbitration and Conciliation Act, 1996 being I.A. No. 02 of 2024.

Both sides have filed their respective haziras.

Now the instant case is taken up for passing necessary order.

I.A. No. 02 of 2024

1. In the instant application the petitioner/award debtor Damodar Valley Corporation (DVC) herein seeks unconditional stay of the arbitral awards both dated 21st October, 2021 under the second proviso to Section 36(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act).
2. Respondent being the claimant invoked the arbitration proceeding and the said Arbitral Tribunal passed the awards impugned. The instant arbitral award is a majority and a minority award. The majority award has allowed the claims being claim nos. 1,2,3,5,6,7,8,10,4,12,13 and 15 of the respondent to the tune of Rs. 74,01,20,303/- along with interest and rejected the counter claim of DVC.

However, the minority award has disallowed the entire claim for damages i.e. claim nos. 4 and 12 and also the claim no. 13 which is interest on delayed payment. As such the said minority award has allowed the claim of the respondent to the tune of Rs. 29,56,69,301.47/-. More so, the said minority award has allowed the counter claim of the petitioner to the tune of Rs. 48,48,08,000/-.

3. Upon bifurcation of the majority award it appears that for claim nos. 1,2,3,5,6,7,8 and 10, Rs. 34,63,84,196/- is awarded, for claim nos. 4 and 12, Rs. 38,00,09,370/- is awarded and for claim nos. 13 and 15 Rs. 34,26,737/- and Rs. 1,03,00,000/- are awarded respectively.
4. The petitioner/DVC herein prays for unconditional stay of operation of the awards impugned, if this Court is of the view that there should be some condition then only a portion of the awarded amount i.e. the sum of Rs. 34,63,84,196/- may be directed to be secured on the ground as stated follow.
5. The majority award has directed payment of compensation/damages by allowing claim nos. 4 and 12 on the ground that the delay was purportedly attributable to the petitioner. The Ld. Tribunal came to such a finding only on the basis that the petitioner had extended the time and accepted the work without levying liquidated damage (LD). The Ld. Tribunal did not consider that the letters of extension issued by the petitioner, had specifically mentioned that the extensions were given without prejudice to the rights of the petitioner to deduct LD. The petitioner also claimed LD in the arbitration proceedings but the Ld. Tribunal rejected the same since it was calculated at a later stage. Such a finding is absolutely perverse and irrational. Therefore, the amount claimed on account of damages i.e. Rs. 38,00,09,370/- should not have been allowed at all. In fact, the minority award has disallowed this entire claim on account of damages made by the claimant. Accordingly, the petitioner prays that this amount should not be directed to be secured by the petitioner. Furthermore, it is settled law that the claimant has to prove its claims. The claim nos. 4 and 12 have been allowed only on the basis of charts and statements filed by the respondent. A purported auditor's report was disclosed, however, the auditor was not examined to prove the document. It has been the consistent view of the Hon'ble Supreme Court and High Courts that mere chart or statement would not be sufficient to prove money claims.
6. On the above context, Ld. Counsel for the petitioner/DVC heavily relied on the case of the ***Pam Developments Pvt. Ltd. vs. State of West Bengal***¹ and the ***Kolkata Metropolitan Development Authority vs. South City Projects (Kolkata) Ltd.***²
7. By referring to the above cases, it is submitted by the Ld. Counsel for the petitioner that in the case of *Pam Developments (supra)* the Hon'ble Supreme Court held that the provisions of Code of Civil Procedure would be directory and not mandatory while considering an application under Section 36 of the Act. Thereby, meaning that the Court has discretion while considering an application under Section 36 of the said Act either to stay the operation of an award conditionally or unconditionally. The court also has discretion while directing on the quantum of amount to be deposited by an award debtor for

¹Reported in (2019) 8 SCC 112.

²Reported in Manu/WB/0067/2021.

obtaining stay on the execution of the award. Ld. Counsel further submitted that in this judgment, it would be seen that the entire awarded sum was not directed to be secured.

8. Ld. Counsel for the petitioner also submitted that in the *South City Projects case (supra)* the Hon'ble Calcutta High Court upon reliance on the judgment of the Hon'ble Supreme Court in *Pam Development (supra)* held that while exercising powers under Section 36(3) of the said Act, that the Court is not bound by the rigors of Order 41 Rule 5 of the CPC and the Court can require the party to furnish such security as the Court may deem appropriate. With these observations, amongst others, only the principal sum awarded in the impugned award therein was directed to the secured. It is further submitted by the Ld. Counsel that in this judgment the awarded sum on account of interest, damages and cost was not directed to be secured.
9. Ld. Counsel for the petitioner, however, further submitted that much like the *South City Projects Case (supra)* the petitioner is not claiming any exemption under Order 27 Rule 8A of the CPC by virtue of being a statutory body and even though a prayer for unconditional stay has been made, however, considering the view of this Court during the course of the hearing of the application, the petitioner submits that this Court should exercise its discretion while passing an order for furnishing security and should not pass any direction calling upon the petitioner to deposit 100% of the awarded amount as contended by the award debtor.
10. However, Ld. Counsel for the petitioner lastly submitted that in the event this Court is minded directing the petitioner to furnish security for stay of execution of the award then the said sum of Rs. 34,63,84,196/- be directed to be secured by 50% cash security or less than that and balance by bank guarantee.
11. On the contrary, respondent vehemently opposed the aforesaid contention of the petitioner and submitted that the present application has been filed by the petitioner only to stay the execution proceedings as filed by the respondent. Further there are no compelling reasons brought out in the application which will require this Court to stay operation of the award.
12. Ld. Sr. Counsel for the respondent submitted that it is stated that the award is a monetary award and the petitioner is obliged to make 100% deposit of the decretal amount before this Court, especially since the claims which have been allowed in the award are on account of the value of work done and other losses suffered by the respondent and none of the counter claims had been allowed in favour of the petitioner and simultaneously liberty should be granted to the respondent to withdraw such sum subject to furnishing appropriate security in the form of cash security. In absence of deposit of the whole awarded sum, the petitioner is not entitled to any order of stay of operation of the arbitral award.
13. In support of his submission Ld. Sr. Counsel for the respondent referred to the cases of *Manish vs. GodawariMarathawada Irrigation Development Corporation*³, *Srei Infrastructure Finance Limited vs. Candor Gurgaon Two Developers and Projects Pvt. Ltd.*⁴, *CC Construction and Ors vs.*

³Reported in 2018 SCC Online SC 3863.

⁴Arising out of SLP to Appeal (C) Nos. 20895-20897/2018.

*Union of India and Ors.*⁵, *Power Mechs Project Limited vs. Sepco Electric Power Construction Corporation*⁶, *State of Maharashtra through the Executive Engineer vs. Patel Engineering Ltd. and Ors*⁷, *Sepco Electric Power Construction Corporation vs. Power Mechs Project Limited*⁸, *Damodar Valley Corporation vs. Reliance Infrastructure Ltd.*⁹, *Siliguri Jalpaiguri Development Authoirty vs. Bengal Unitech Universal Siliguri Projects Limited*¹⁰ and *Mahanagar Telephone Nigam Limited vs. Canara Bank &Anr*¹¹.

14. In view of the facts of the case and considering the authorities relied upon hereinabove the respondent prayed for that the Court may be graciously pleased to direct the petitioner the entire principal sum along with post award interest reckoned till 27.02.2024 amounting to Rs. 123,96,80,762.81p with a minimum cash deposit of 60% of the said sum and the residual 40% in the form of bank guarantee.
15. This Court considers the application as well as the spate of decisions as cited by both sides.
16. The Hon'ble Supreme Court of India in the case of *Manish v. Godawari Marathawada Irrigation Development Corporation*¹² 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*¹³ 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".
17. In *CC Construction and Ors case (supra)* the Hon'ble Court directed J.Dr. to make 60% cash deposit and furnish bank guarantee in respect of the residual 40% amount, with liberty to the D.Hr. to withdraw the 60% cash deposit upon furnishing appropriate security.
18. In the case of *State of Maharashtra through the Executive Engineer (supra)* the Hon'ble directed to 100% deposit in case of money decree.
19. In the case of *Damodar Valley Corporation vs. Reliance Infrastructure Ltd. (supra)* the Hon'ble Court held that it was emphasized that ordinarily money decrees are best secured by way of cash deposit as this entitles the award

⁵Reported in (2022) 6 Gauhati Law Reports 687.

⁶Reported in 2020 SCC Online Del 2049.

⁷Reported in 2021 SCC Online Bom 12596.

⁸Reported 2022 SCC Online SC 1243.

⁹Reported in 2022 SCC Online Cal 553.

¹⁰Reported in 2022 SCC Online Cal 1754.

¹¹Reported 2023 SCC Online Del 1172.

¹²Reported in MANU/SCOR/30132/2018.

¹³Arising out of O.M.P. (I) (COMM.) 523/2017.

holder to withdraw the same upon furnishing appropriate security. Further, the Hon'ble Court in the above matter directed the award debtor to deposit a sum of Rs. 595 Cr. as cash security out of Rs. 898 cr i.e. 66% of the total awarded amount.

20. In the case of *Siliguri Jalpaiguri Development Authoirty (supra)* the Hon'ble Court relying on the Pam Development (*supra*) to the extent that in terms of Section 36 of the Act of 1996 stay of award was granted upon reasons being recorded and being satisfied *prima facie* that there is no illegality, perversity or violation of any law on the face of the award. Lastly, holds that the J. Dr. is to deposit 100% of the awarded sum 50% cash deposit and 50% upon furnishing of security.
21. In the case of Pam Development (*supra*) the Hon'ble Supreme Court held as “22. *Even otherwise a plain reading of Order 27 Rule 8A CPC would make it clear that the same is only regarding security as mentioned in Rules 5 and 6 of Order 41 CPC, which is not to be demanded from the Government while considering the stay application filed by the Government. It, however, does not provide that the decretal amount cannot be required to be deposited in the appeal against a money decree*”.
22. For proper appreciation of the facts of this case, the relevant provisions of the Arbitration and Conciliation Act,1996 are reproduced hereunder:

The arbitration and conciliation act,1996

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 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 rendered an 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:

23. I have considered the submissions made on behalf of the parties. Although, parties made submissions on the merits of the award. I am well aware that any finding or observation pertaining to the merits of the challenge under section 34 of the Act which is still pending before this Court is premature at this stage. However, on a perusal of the award it appears that in the instant matter, there is a majority award and a minority award. The majority award has allowed the claim of the respondent to the tune of Rs. 74,01,20,303/- along with interest. It *ex facie* appears that Ld. Tribunal had taken into consideration the pleadings filed by the parties and thereafter arrived at a conclusion. The award is a speaking award and *prima facie* deals with contention of both the parties. The Arbitral Tribunal has gone into each of the claims and counter claim made by the parties and has adjudicated upon the same. At least, at this *prima facie* stage, there is nothing in the award which shocks my conscience nor indicates that the award is either without jurisdiction or has been pertained by fraud or

corruption or in contrary to law. Accordingly, I am of the view that the petitioner has been unable to make out an exceptional case for unconditional stay of the award.

24. For the foregoing reasons, I am of the view that since the award is a money award for approximately rupees (Principal amount of the Majority Award of Rs. 74,01,20,003.00 +Interest upto date of Award Rs. 28,00,15,640.39p) = 102,01,35,943.39 p. So, there shall be a stay of the award subject to the condition that the petitioner deposit 60% of the awarded amount of 102,01,35,943.39p 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 directed to make a fixed deposit of the said amount with any Nationalized Bank and keep the same renewed till the disposal of the application under Section 34 of the Act or until further order of this Court.
25. The remaining 40% of the above stated amount of Rs. 102,01,35,943.39p be secured by way of bank guarantee(s) of a Nationalized Bank by the petitioner to the satisfaction of the Ld. Registrar, District Judge's Court at Alipore, South 24-Parganas. The said bank guarantee is to be renewed one month prior to its expiry and kept alive till disposal of the Section 34 application or until further order in relation to the same,which ever earlier. The aforesaid exercise is to be completed within a period of four 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 of Misc. Arbitration (COM) 31 of 2022.
26. The instant I.A. No. 02/2024 is, thus, accordingly disposed of on contest without any order as to costs.

Let a copy of this Order be sent to Ld. Registrar, District Judge's Court, Alipore, South 24- Parganas.

Fix the matter on **19.04.2024 at 10:30 a.m.** for fixing dates of hearing of the *per se* application under Section 34 of the Arbitration and Conciliation Act, 1996.

Parties to act on the basis of downloaded copy of this Order from the Website/E-courts App.

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