

Present: Smt. Suparna Ray (JO Code:WB00711)
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. 33

Date: 01.04.2025

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. Suman Dutta...Ld. Sr. Advocate

Mr. Sarajit Dey..Ld. Advocate

Mr. Subhadeep Basak..Ld. Advocate

.....for the petitioner/award debtor.

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

Mr. Hirak Mukherjee...Ld. Advocate

Mr. Arijit Bhowmick...Ld. Advocate

....for the respondent/award holder.

Order

Today is fixed for passing order of the application I.A. No. 04 of 2024.

Both sides have filed their respective haziras.

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

I.A. No. 04 of 2024

The instant application has been filed by the respondent/decreed holder namely Mackintosh Burn Limited (for the sake of brevity hereinafter it is to be referred as "Mackintosh") praying for withdrawal of a sum of Rs. 61,20,81,566/- being the cash deposit equivalent to 60% of the total deposit made by the petitioner/judgment debtor namely Damodar Valley Corporation (henceforth to be referred as "DVC") in pursuance to an Order dated 18.03.2024, in lieu of furnishing renewal bank guarantee of an equal sum till disposal of the instant Section 34 proceeding.

Before coming into the moot question delineated in the instant application, brief facts of the case need to be delved into herein.

Owing to upsurge of dispute between the parties herein, the Mackintosh being the claimant invoked the arbitration proceeding and in consequence thereof, the arbitral tribunal penned the award which became the subject matter of challenge before this Court by way of the instant Section 34 application. The award impugned is ramified into two branches one is substantiated by a majority view and another one is backed by a minority view. However, 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 Mackintosh to the tune of Rs. 29,56,69,301.47/-. More so, the said minority award has allowed the counter claim of the DVC to the tune of Rs. 48,48,08,000/-. Therefore, 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.

After filing the instant Section 34 application, DVC also filed an application being registered as I.A. No. 02 of 2024 whereby the DVC prayed for stay of operation of the award impugned. This Court by an Order dated 18.03.2024 stayed of operation of the impugned award subject to condition that the DVC is to deposit 60% of the awarded amount of Rs. 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 and 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 DVC 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, whichever is earlier. However, DVC, thereafter, prayed for extension of the said order before this Court and this Court by an Order dated 23.04.24 extended the same for another four week. DVC then, within the said time period complied

with the Order dated 18.03.2024 and accordingly, an order of stay has been made on operation of the impugned award till date.

In the instant application, Mackintosh has prayed for withdrawal of the aforesaid 60% of the awarded amount (i.e. Rs. 61,20,81,566/-) upon furnishing a renewal bank guarantee of an equal sum.

The cynosure of the contention of Mackintosh is that due to sufferance of huge financial losses in executing its various projects, details whereof are mentioned in the paragraph nos. 6(i) to (vi) of the instant application, and further due to overall negative cash flow in the aforesaid projects Mackintosh is going across with a gig condition. Therefore, in lieu of a sustainable commercial arena, the aforesaid amount as prayed for ought to be permitted to be withdrawn.

Mr. Bose, Ld. Sr. Advocate appearing for the Mackintosh has contended that it is now well settled that by furnishing bank guarantee of equivalent amount, cash deposit lying with this Court can be withdrawn and the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") and in particular Section 35 read with Section 36 of the Act contemplates such withdrawal. The Order dated 18.03.2024 records that the deposit of 60% of the awarded amount in favour of Ld. Registrar would be kept in the form of fixed deposit till disposal of the application under Section 34 of the Act or until further order of this Court. Thus, the order dated 18.03.2024 itself left a window for this Court to modify the order for deposit of 60% of the awarded amount. This is exactly what the Mackintosh has made by way of present application. As regards, Mr. Bose has relied on the decision passed by the Hon'ble High Court at Calcutta in the case of *Narsing Ispat Limited vs. The Oriental Insurance Limited*. Upon relying on the aforesaid case, Mr. Bose has submitted that the Hon'ble Court in an identical situation permitted to withdraw of the awarded amount subject to furnish bank guarantee. In the said case, the Hon'ble Court discarded the contention of the award debtor, which was that Section 34 was matured for hearing and money is already secured with Registrar.

After that, Mr. Bose has further relied on the decision of the Hon'ble Single Judge of the Hon'ble High Court at Calcutta in the case of *State of West Bengal & Ors. vs. M/S. B.B.M. Enterprises* dated 25.06.2023 and has submitted before this Court that award debtor therein resorted to three-folds submission, first one is there is no provision under the Act for allowing such a prayer, second is the Court has to come to a *prima facie* view of the award before passing such an order and third is, the application not being entertained since the application for stay of award had already been disposed of, which were rejected by the Hon'ble Court.

Rather, as submitted by Mr. Bose, the Hon'ble Court held that Section 35 read with Section 36 makes it clear that there is no requirement for a specific statutory provision to allow the award holder to withdraw the secured amount. It should be remembered that the award debtor does not stand to lose or suffer any prejudice if money lying with the Registrar, District Court is withdrawn. The money is now lying with the Learned Court and not with the award debtor and as such no inconceivable prejudice whether immediate or in future would be caused to the award debtor. A separate application is also not necessary to be filed since the application for release of secured amount is improper to the prayer for stay and is entirely different in cause and purpose.

Mr. Bose, has further referred to an Order dated 05.07.2024 passed by this Court in the case of *State of West Bengal vs. Mackintosh Burn Limited* wherein this Court allowed the Mackintosh to withdraw the money deposited with the Registrar.

Therefore, Mr. Bose concluded that the money to be withdrawn will be covered by a bank guarantee and therefore, the DVC would not be prejudiced in any manner.

Per contra, the DVC has filed its written objection to the instant application. The specific contention of the DVC is that withdrawal of the sum, deposited pursuant to the Order dated 18.03.2024 passed in the application under Section 36(2) of the Act, is not a matter of right and the Act does not provide for any such right to an award holder being the Mackintosh herein. The award holder ought to establish in its application that there are changed circumstances after the order of stay of the award has been passed which has warranted the award holder to make such an application. It has been further contended that the award debtor will suffer prejudice if the amount deposited is allowed to be withdrawn. It is also the contention of the DVC that considering the financial status of the award holder there may be serious issues of restitution in the event the award debtor is successful in getting the award set aside.

Mr. Dutta, Ld. Sr. Counsel appearing for the DVC has submitted that in the case of *B.B.M. Enterprise (supra)*, the Hon'ble Court categorically elaborated that for the purposes of permitting an award holder to withdraw the secured amount, event subsequent to the stay of the award would be material which has to be apparent from the pleading made out in the application. As regards, he has referred to the paragraph nos. 12 and 13 of the said decision. Regarding to the aforesaid, Mr. Dutta has referred to the decision of the Hon'ble High Court reported in *2020 SCC Online Cal 1777* in the case of *Satyen Construction vs. State of*

West Bengal and has submitted that in the said case the Hon'ble Court held that an order passing a conditional stay of the award under Section 36 of the Act cannot be interfered with unless subsequent events are cited and whether an order will be passed on such application would depend on the quality of the application and the grounds made therein. In this case no subsequent events after passing of the order of stay was cited and thus the prayers were rejected by the Hon'ble Court.

Mr. Dutta has further relied on the decision of the Hon'ble High Court reported in *2021 SCC Online Cal 3118* in the case of *State of West Bengal & Anr. vs. Dilip Kumar Saha* and submitted that the Hon'ble Division Bench in the said case held that whether after an order granting stay of the award on a condition to deposit an amount with the Registrar of the Court, the Court can vary or modify the order subsequently and whether such modification has to be preceded with the change in circumstances or reasonable grounds warranting such modification or variation. In the said decision, the Hon'ble Court while relying on the case of *Satyan Construction* has reiterated that since no case was made out showing change circumstances since the date of stay of the award, the Hon'ble Court refused the prayer for replacement of amount deposited.

Mr. Dutta has further submitted that it appears from a bare reading of the instant application that it contains no particulars and/or pleadings evidencing any changed circumstances and/or subsequent events after 18th March, 2024 i.e. the date of the order of stay of the award. In respect of the alleged financial condition as made out by Mackintosh in the instant application, Mr. Dutta has submitted that after filing the Section 34 application by the DVC, the Mackintosh filed their execution case almost after 18 months. Such delay caused by the Mackintosh in filing the execution case shows that there is no urgency which would warrant immediate intervention of the Court for allowing the award holder to withdraw the secured sum. Furthermore, Mackintosh has alleged that it has negative cash flow in its projects as mentioned in paragraph no. 6 of the application but a negative cash flow does not mean that Mackintosh is suffering losses. Therefore, in any event, Mackintosh has not made out any case of change circumstances after the date of order of stay of the award i.e. 18th March, 2024 which would warrant disbursal of the sum secured by the award debtor and/or DVC.

In addendum to the aforesaid, Mr. Dutta has further contended that Mackintosh urged that the DVC shall not suffer any prejudice if the secured amount is released or permitted to be withdrawn. Such argument is extremely fallacious as it is a matter of record that a sum of Rs. 61,20,81,566/- which is

lying deposited with this Court is accruing interest which is a substantial amount annually and if the Mackintosh is allowed to withdraw the cash security no interest would accrue. In the event, the award is upheld, DVC has to pay the entire 9% interest on the awarded sum, thereby leading to the DVC, which is a public sector undertaking, being prejudiced twice. Moreover, a cash security secured by way of a bank guarantee will not accrue any interest and there may be further issues of renewing the bank guarantee from time to time. Further even in the alternative, if award debtor is successful and the award is set aside then also award debtor loses on the interest if award holder is allowed to withdraw the same.

Heard the Ld. Counsels for both sides and also perused the materials on record as well as the decisions as cited by both sides.

Now, the issue which is to be determined herein that whether Mackintosh is entitled to withdraw the deposited sum as deposited by DVC upon furnishing equivalent bank guarantee. Furthermore, if such entitlement is supposed to be permitted then what requirement has to be taken into consideration by this Court?

In search of above reference, the wherewithal which this Court may do is to crumb the matter into two limbs. One is, whether there is any predicament to permit the award holder to withdraw the 60% awarded money secured by the award debtor for obtaining the stay on operation of the impugned award.

As regards, this Court relies on the case of *B.B.M. Enterprise (supra)* as relied on by both the Ld. Sr. Counsels, wherein the Hon'ble Court considered the certain aspects to resolve the issue in context, one is, whether the award holder to withdraw the secured amount requires statutory sanction: The Hon'ble Court as regards viewed as "*Section 35 read with Section 36 of the Act makes it clear that there is no requirement for a specific statutory provision to allow an award holder to withdraw the secured amount. The sections themselves provide for such an order to be passed in appropriate cases. The attending circumstances would become relevant if the Court exercises its discretion for passing such an order. Events subsequent to the stay of the award would material in this respect*". Second is, whether the award holder will not face any prejudice if the award holder is permitted to withdraw the amount: In that respect the Hon'ble Court held as "*The object of the amendment in the Act in granting stay of an award cannot be to make the award holder wait for an uncertain and indefinite period of time to enjoy the fruits of the award. This is particularly so where the award holder proves its bona fides not only by way of bringing significant subsequent events to the Court but also undertakes to secure the award debtor in the event the award is set aside*". Third one is, whether allowing the award

holder to withdraw the secured amount does not require a prima facie finding: The Hon'ble Court viewed that “..the inescapable conclusion is that the award-holder is not required to make out a prima facie case for withdrawal of the security given by the award debtor. The sustainability of the award under the grounds provided under section 34 of the Act is to be trashed out only later at the time of considering the application under section 34 of the Act”. Last one is, can the award holder's application for withdrawal of the money not be made by way of a separate application? As regards, the Hon'ble Court considering the case of *State of West Bengal vs. Dilip Kumar Saha* (also relied on by the Mr. Dutta, Ld. Counsel of DVC) and *K.A. Ansari vs. Indian Airlines Limited* reported in (2009) 2 SCC 164 held as “In the case of section 36 of the 1996 Act, the Court retains jurisdiction to pass further orders while in the second instance the Court becomes functus officio. *K.A. Ansari vs. Indian Airlines Limited*; (2009) 2 SCC 164 is an example of the latter, namely, a writ petition where the Supreme Court held that it is not open to the Court to reopen the proceedings by a miscellaneous application for a fresh cause of action. Moreover, the Division Bench in its order dated 29.11.2021 in *State of West Bengal vs. Dilip Kumar Saha* held that an order may be modified on subsequent events. The principles underlying Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 where an injunction may be varied can be imported in a case, such as the present one, where the Court can exercise jurisdiction for modification of the earlier order in appropriate cases on changed circumstances”. Finally, the Hon'ble Court viewed that the award-holder is not under any obligation statutorily or otherwise to file an application for release of the money in the application filed by the award debtor for stay of the award.

Therefore, from the above, it is no doubt to come into a contemplation that the prayer for withdrawal money secured in a Section 36 application, made by the Mackintosh being the award holder herein is maintainable within the four-corners of the law. *Albeit*, such maintainability is to be based on the facet which is “changed circumstances”. Hon'ble Court in the aforesaid case strongly relegated such point i.e. “changed circumstances” and based on such “changed circumstances”, permitted the award holder to withdraw the secured money. The said “changed circumstances” as delineated in the said case is that a proceeding under Section 13(2) of the SARFAESI Act, 2002 was initiated against the award holder. There are debts which are due and payable by the award holder to the Bank. The award holder is also facing a severe shortage of working capital which is preventing the award holder to participate in any new tenders. Considering the same as “changed circumstance” the Hon'ble Court granted the permission to the award holder to withdraw the secured money.

The Court further relies on the case of the *Dilip Kumar Saha (supra)* as referred to Mr. Dutta, wherein the Hon'ble Court held that since no case was made out showing change circumstances since the date of stay of the award,

therefore, the prayer for replacement of amount deposited is refused. The relevant paragraphs of the said decision are referred to hereunder:

“9. On the conspectus of the aforesaid facts and the submission advanced by the respective Counsels, the point which emerged for consideration is whether after passing an order granting stay of the award on condition to deposit an amount with the Registrar, Original Side of this Court, the court can vary or modify the order subsequently. If the aforesaid question is answered in affirmative whether such modification has to be preceded with the change in circumstances or reasonable grounds warranting such modification or variation....”

*19. Reverting banc to the facts, the only ground shown in the said application is that one of the partners was infected with the Corona Virus twice and has to incur huge expenditure for his treatment. It is further stated that the wife is terminally ill and liquidity has been lost. In order to have working capital in successful running of the business, the money is needed and, therefore, he should be permitted to withdraw the said sum of Rs. 1.50 crores. There is no corroborative material in support of the aforesaid contention whether the said partner suffered illness prior to the order dated 15th January, 2021. As held by the Co-ordinate Bench of this Court in *Satyen Construction (supra)* if the grounds set forth in the application are not satisfactory, it is not obligatory on the part of the Court to replenish the amount so deposited in the Court”.*

Further this Court relies on the case of the *Satyen Construction (supra)*. In the said case, the Hon’ble Court held that a conditional stay of the award under Section 36 of the Act of 1996 cannot be interfered with unless subsequent events are cited and whether an order will be passed on such application would depend on the quality of the application and the grounds made therein. In the said case, finding no such grounds the Hon’ble Court rejected the prayer for withdrawal. The relevant paragraphs of the said decision are as follows:

“8. Ordinarily, when a prayer for stay of the operation of the award is taken up for consideration under Section 36 of the Act, the Court would hear both sides and would the rival cases before passing an order for a conditional or unconditional order of stay. Once such exercise is completed, the same cannot be interfered with unless subsequent events are cited. Thus, when a conditional or unconditional order is made staying the operation of an arbitral award under Section 36 of the Act, the award holder cannot seek to have the order modified unless the award holder invokes Section 9 of the Act on the basis of such material that could not have been placed before the Section 36 Court earlier, or had not been placed because of some insurmountable difficulty or the like.....”

9. In the present case, the subsequent application made by the award-holder may, charitably, be treated as a post award and a post stay order application for interim measures, which is permitted under Section 9 of the Act. However, inasmuch as no event subsequent to the passing of the order of stay of the arbitral award was cited, the order impugned cannot be faulted. But nothing prevents the award holder to apply again under Section 9 of the Act to carry any subsequent event or development to the Arbitration Court for which an interim protection is necessary and which interim protection may have the effect of modifying the order of conditional or unconditional stay already granted under Section 36 of the Act. To such extent, there is no conflict between the rights conferred by Section 9 of the Act and those under Section 36 thereof.

10. Once the application carried at the post stay order stage is treated as an application for interim measures under Section 9 of the Act, the order impugned becomes appealable since Section 37 of the Act permits an order granting or refusing to grant any interim measure to be the subject-matter of an appeal. Thus, the appeal is found to be maintainable. However, since the grounds carried in the application are not found to be worthy, the order impugned is not interfered with. It now appears that certain subsequent events may have arisen which may not have been brought to the notice of the Arbitration Court. If such is the case, there is nothing stopping the award holder from invoking Section 9 of the Act afresh....”

Therefore, from the above ratios of the cases, it is churned that withdrawal of the sum secured in a Section 36 application is permissible subject to showing and/or establishing the change in circumstances. The case in hand, Mackintosh has tried to show the same in the paragraph no. 6 of the instant application which needs to be considered herein whether the same is at all be regarded as changed circumstances or not.

Mackintosh stated in the instant application that it is running in a huge financial loss in executing the subject work as referred to therein. However, upon deliberation of the said application, this Court is in consonance of the contention of DVC that all the purported projects as cited by Mackintosh therein is prior to the date of passing of the order of stay i.e. on 18th March, 2024. Therefore, the same cannot be drawn any conclusion at all that after the order of stay any such circumstance has yet been befallen so that Mackintosh has to hurriedly approach before this Court to withdraw the secured sum impugned. Furthermore, it is stated that Mackintosh took refuge of execution of the said award by filing the execution application before this Court on 3rd August, 2023 almost after 18 months from the date of filing of the Section 34 application. Therefore, the delay caused by Mackintosh in filing the execution application is further revealed that there is no urgency which would warrant immediate intervention of this Court for allowing the award holder/Mackintosh to withdraw the said secured sum.

Therefore, considering the aforesaid, it is opined that the material disclosed by Mackintosh/award holder does not constitute any change in circumstance nor the contention advanced by the Ld. Counsel of the award holder thinks it fit to consider the same as a “changed circumstance”.

Hence, the instant application being I.A. No. 04 of 2024 is hereby considered and rejected on contest. There is no order as to costs.

Accordingly, I.A. No. 04 of 2024 is disposed of.

Fix the matter on **16.04.2025 at 11:00 a.m.** for fixing dates of hearing of the *per se* Section 34 application.

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

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For South 24 Parganas, Purba Midnapore,
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