



2023:CHC-OS:5117

ODC-1 to 3

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
[Via Video Conference]

IA NO: GA/1/2020 (Old No. GA/175/2020)
WITH AP/40/2020
In AP/40/2020
DAMODAR VALLEY CORPORATION
Versus
RELIANCE INFRASTRUCTURE LTD.

IA NO: GA/4/2021
In AP/40/2020
DAMODAR VALLEY CORPORATION
Versus
RELIANCE INFRASTRUCTURE LTD.

IA NO: GA/5/2021
In AP/40/2020
DAMODAR VALLEY CORPORATION
Versus
RELIANCE INFRASTRUCTURE LTD.

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR

Date : 18th November, 2021

Appearance:

Mr. Tushar Mehta, Ld. Solicitor General of India

Mr. Ratnanko Banerjee, Sr. Adv.

Ms. Vineeta Meharia, Adv.

Mr. Amit Meharia, Adv.

Mr. Santanu Chatterjee, Adv.

Ms. Urmila Chakraborty, Adv.

Ms. Tannishtha Singh, Adv.

Ms. Paramita Banerjee, Adv.

Ms. Subika Paul, Adv.

...for the petitioner

Mr. Harish Salve, Sr. Adv.

Mr. J. J. Bhatt, Sr. Adv.

Mr. S.N. Mitra, Sr. Adv.



Mr. Joy Saha, Sr. Adv.
Mr. Prateek Sakseria, Adv.
Mr. Atanu Raychaudhuri, Adv.
Mr. Pushan Majumder, Adv.
Ms. Asmita Roychowdhuri, Adv.
...for the respondent

The Court : This is an application under Section 36(2) of the Arbitration and Conciliation Act, 1996 ("the Act") wherein the petitioner has prayed for the following reliefs:-

- a) Stay of the award dated 21st December 2019 pending disposal of the application;
- b) Stay of the direction for return of the Bank Guarantees to the respondent;
- c) An order be passed directing the respondent to keep the validity periods of the bank guarantees as described in paragraph 103;
- d) Ad interim order(s) in terms of prayers above;
- e) Necessary orders as to costs;
- f) Such further or other order or orders be given and/or direction or directions be made as to this Learned Court may deem fit and proper.

The award has been passed by an Arbitral Tribunal comprising of 3(Three) Arbitrators and is a unanimous award. By the award, the Arbitral Tribunal has inter alia directed the petitioner to make payments of Rs.6,23,28,81,733/- and Euro 34909610 to the respondent. Insofar as release of the bank guarantees are concerned, the award stipulates as follows :-



“(xv) In respect of issue no.50, the respondent is directed to release all the BGs (Bank Guarantees) of the claimant within a month from the date of award. In default, simple interest at the rate of 15% (fifteen percent) per annum will have to be paid by the respondent till realisation of the entire sum.”

As far as securing the monetary claim of the respondent is concerned, Mr. Mehta, Learned Solicitor General of India, sought for time to take instructions as to the form and mode of security which would be provided by the petitioner.

Mr. Salve, Senior Advocate appearing on behalf of the respondent did not object to such accommodation. He, however, prays that insofar as the bank guarantees being provided by the respondent are concerned, there can be no question of the respondent being required to furnish the same since the counterclaim of the petitioner has been rejected in its entirety and the Arbitral Tribunal has directed release of the same.

On the aspect of non-furnishing or release of the bank guarantees, it was submitted on behalf of the petitioner that the award had not become enforceable nor executable. As such, there was no question for release of the bank guarantees. In this context, reliance was placed on an unreported decision of a coordinate Bench in *Srei Equipment Finance Limited vs. Marg Limited* (GA/1/2021 in EC/74/2021). It was further contended that in view of the orders passed by the Hon’ble Supreme Court, the time period for filing the Section 34 application had not expired and as such the award was not executable nor enforceable.



In reply, it was contended on behalf of the respondent that the decision cited by the petitioner was inapplicable to the instant case.

It is evident from the award that the entire counterclaim of the petitioner has been rejected by the Arbitral Tribunal. Accordingly, to direct the respondent to continue furnishing bank guarantees in respect of a claim for damages which has been rejected would, in my view, be inequitable and unsustainable in law. It is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated upon, and the damages assessed. A party in breach of contract does not incur *eo instante* a pecuniary liability, nor does the injured party become entitled to claim a debt. Hence, I am of the view that the petitioner cannot be secured for an unliquidated claim for damages which has moreover been dismissed by the Arbitral Tribunal.

I also do not find any merit in the contention of the petitioner that the award has not become enforceable in law. This is, in my view, a self-defeating argument keeping in mind the fact that the petitioner has filed this application for stay of the award under Section 36 of the Act and also filed an application under Section 34. The decision relied on by the petitioner is distinguishable and inapposite to the facts and circumstances of the instant case. In the said decision, no application under Section 34 had been filed and hence, the question of limitation had been considered in an execution proceeding. In the instant case, the petitioner has not only filed a section 34 application but simultaneously filed this application for securing stay of the award. Accordingly, the petitioner cannot be permitted to take inconsistent positions.



For the foregoing reasons, the prayer of the petitioner in this application for stay on the direction for the return of the bank guarantee of the respondent is rejected. Needless to mention, there will be no obligation of the respondent to furnish any bank guarantees in favour of the petitioner or keep any of the bank guarantees furnished to the petitioner alive or renewed.

The matter is fixed on 9 December 2021 for hearing of the parties on the terms and conditions on which the award ought to be stayed insofar as securing the monetary portion of the award is concerned.

(RAVI KRISHAN KAPUR, J.)

Later:

After pronouncement of the order, Ms. Meharia, Advocate appearing on behalf of the petitioner prays for stay of operation of the order. The prayer for stay is considered and rejected.

(RAVI KRISHAN KAPUR, J.)