



IN THE HIGH COURT AT CALCUTTA  
ORDINARY ORIGINAL CIVIL JURISDICTION  
ORIGINAL SIDE  
Commercial Division  
(Via Video Conference)

BEFORE:

**The Hon'ble Mr. Justice Ravi Krishan Kapur**

**IA No: GA/1/2020  
[Old No.GA 175/2020]  
AP/40/2020**

DAMODAR VALLEY CORPORATION

-vs-

RELIANCE INFRASTRUCTURE LTD.

|                    |                                                                                                                                                                                                                               |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| For the petitioner | : Mr. Tushar Mehta, Ld. Solicitor General,<br>Mr. Ratnanko Banerji, Sr. Adv.<br>Ms. Vineeta Meheria,<br>Mr. Amit Meheria,<br>Mr. Santanu Chatterjee,<br>Ms. Urmila Chakraborty,<br>Ms. Paramita Banerjee,<br>Ms. Subika Paul, |
| For the respondent | : Mr. Harish Salve, Senior Advocate,<br>Mr. Surajit Nath Mitra, Sr. Adv.<br>Mr. Joy Saha, Sr. Adv.<br>Mr. Prateek Sakseria,<br>Mr. Atanu Roychaudhuri,<br>Mr. Pushan Majumdar,<br>Ms. Asmita Roychaudhuri.                    |
| Heard on           | : 17.11.2021, 18.11.2021, 21.12.2021                                                                                                                                                                                          |
| Judgment on        | : 23.12.2021                                                                                                                                                                                                                  |



**Ravi Krishan Kapur, J.:**

1. This is an application under section 36(2) of the Arbitration and Conciliation Act, 1996 ('the Act'). The petitioner prays for stay of an award dated 21 December, 2019 ('the award').
2. The award has been passed in respect of disputes and differences which had arisen out of three interconnected and inter-linked contracts entered into by and between the parties for construction of two units of 600 M.W power plants each near Raghunathpur in the District of Purulia, West Bengal.
3. The award directs the petitioner to pay the respondent a sum of approximately of Rs.898 crores, particulars whereof are set out hereunder :

Cash Component of Award- Rs.898 Crores (approx.) – pending since December, 2019

|                      | INR Component |                                              | Euro Component |                                              | Euro converted to INR @ Rs.78.81 |                | Total in INR  |                                              |
|----------------------|---------------|----------------------------------------------|----------------|----------------------------------------------|----------------------------------|----------------|---------------|----------------------------------------------|
| Description of Claim | Principal     | Interest @ 10% from 21.08.2017 to 21.12.2019 | Principal      | Interest @ 10% from 21.08.2017 to 21.12.2019 | Principal                        | Interest @ 10% | Principal     | Interest @ 10% from 21.08.2017 to 21.12.2019 |
| Total Award          | 497,95,24,067 | 125,33,57,665                                | 2,83,09,443    | 66,00,167                                    | 223,10,67,183                    | 52,01,59,163   | 721,05,91,251 | 177,35,16,828                                |

4. Being aggrieved by the award, the petitioner has also filed an application under section 34 of the Act being AP 40/2020.
5. It is submitted on behalf of the petitioner that in view of an earlier order dated 8 September, 2021 passed by a Coordinate Bench, the



application filed under section 34 of the Act ought to be heard first, before the hearing of this application. It is also submitted on behalf of the petitioner that there is no question of any security being provided in terms of section 36 of the Act since the award is ex facie perverse. Significantly, the petitioner chooses not to make any submissions insofar as the mode or manner of security as a condition for grant of stay of the award is concerned.

6. On behalf of the respondent, it is submitted that in view of the amended section 36(2) of the Act, it is now obligatory on the party seeking stay to secure the award on such terms and conditions which a Court may deem fit and proper. The phrase *“have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure 1908”* mean that the relevant provisions of the Code of Civil Procedure, 1908 may be taken into consideration but the same are not mandatory. In this context, reliance is placed on the decision of ***Pam Development Private Limited vs. State of West Bengal*** reported in **(2019) 8 SCC 112** [at paragraphs 8, 9, 19, 20, 21, 22, 23 and 25].

7. I have considered the submissions made on behalf of the parties.
8. I find that the award is for a sum of approximately Rs.898 crores. Under section 36 of the unamended Act, an arbitral award became enforceable only after the objection under section 34 of the Act was dismissed. The pendency of the proceedings under section 34 thus



became an impediment for enforcement of an award which often took years if not decades. The pendency of such proceedings also effectively jettisoned the entire process for enforcement of awards making it impossible to even seek an order from the Court directing the award debtor to deposit any part of the award in Court. This was also in conflict with the object of having an expeditious alternative dispute realisation forum. It was to rectify this mischief [which had also been pointed out in ***National Aluminum Co. Ltd. vs. Pressteel & Fabrications*** reported in **(2004) 1 SCC 540**] that an amendment was incorporated to section 36 of the Act. In the said decision, the Supreme Court had criticized the then prevailing situation in the following words:

*“However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.”*



9. Accordingly, the Law Commission in the 246<sup>th</sup> Report had recommended to amend the section with the sole object to overcome the impediment of automatic suspension of awards. Thereafter, section 36 has been amended and incorporated by way of the 2015 Amended Act. In this connection, it is also relevant to note that Article 36(2) of UNCITRAL Model Law provides as follows:

*Article 36(2). “If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)9(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.”*

10. The amended section 36 of the Act in its new avatar, makes a significant change by incorporating the provisions which provides that filing of an application under section 34 shall not by itself render an award unenforceable, unless the Court grants an order of stay and imposes such conditions as it deemed fit and proper. Such discretion is to be exercised judicially depending upon the facts and circumstances of the case. The Court may direct the award debtor seeking stay of operation of an award to deposit the arbitral sum or part thereof or furnish such security for the amount covered under the award. In considering the application for stay, a Court may also have regard to the provisions for grant of stay of money decree under the Code of Civil Procedure, 1908.



However, the phrase “having due regard to” naturally means that the provisions of CPC may be taken into consideration but the same are mandatory. From an academic perspective, the amended section 36 has partially restored the position with respect to the enforcement of an award which was existing under the 1899 Act, since the award has once again been made enforceable as a decree of the Court, without the pre-condition of obtaining a judgment and decree from a Court which was required under the 1940 Act.

11. In ***Pam Development Private Limited vs. State of West Bengal*** reported in **(2019) 8 SCC 112** while considering the amended section 36 of the Act, the Supreme Court had categorically held that the 246<sup>th</sup> Law Commission Report makes no exception for State/Governments. In fact, it has been held that there is no special or exceptional treatment which is to be given to State/Governments whilst considering an application for stay under the Act. Thus, in my view, there is no question of granting any exceptional or special or unusual treatment to the petitioner company, which I am aware is a statutory corporation constituted under the provisions of the Damodar Valley Corporation Act, 1948.
12. One of the grounds which has been urged on behalf of the petitioner is that, in view of the order dated 8 September, 2021 a Coordinate Bench of this Court whilst hearing these matters had held that the application for setting aside of the impugned award being AP 40/2021, should be heard first. The order dated 8



September, 2021 further provided that “the other applications for execution of the award, stay and for rejection of the execution should be mentioned after AP 40/2021 is disposed of”.

13. I am of the view that the order dated 8 September, 2021 passed by a Coordinate Bench was purely procedural in nature. It is trite law that such orders by their very nature are not cast in stone. On the contrary, such orders by their very nature are interlocutory in nature and cannot in my view normally bind any Court. I also do not find any element of finality in the order dated 8 September, 2021 which makes it unalterable. In fact, I am of the view that to permit the petitioner the privilege of having the section 34 application heard first without the disposal of the application under section 36 of the Act would amount to affording special treatment to the petitioner of not having to offer any security in terms of the section, before disposal of the application under section 34. This in my view would also amount to re-writing the section and emasculating the very object and purpose of the amendment. Accordingly, the submission made on behalf of the petitioner that the hearing of this application be postponed stands rejected.
14. Both parties had also 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 the award is a unanimous award of the Arbitral Tribunal comprising of three members. It ex facie appears that the Tribunal has taken into consideration the pleadings filed by the parties. Issues had also been framed. The award is a speaking award and prima facie deals with the contentions of both the parties elaborately. The Arbitral Tribunal has gone into each of the claims and the counterclaim 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 obtained by fraud or corruption or is contrary to law. I reiterate that these are all prima facie findings on the merits of the award and for the limited purpose of adjudication of this application. Accordingly, I am of the view that the petitioner has been unable to make out an exceptional case for unconditional stay of the award.

15. The petitioner also refers to the pendency of Special Leave Petitions. However, there is nothing to demonstrate that there is any stay or embargo in the hearing of this application.
16. Insofar as the mode and the form of security is concerned, I reiterate that the petitioner has chosen not to make any submissions in respect of either the form or the mode of the security. I do find that bald allegations have been made in paragraphs 131 and 132 of the petition as to why there should be



an unconditional stay of the award. However, no arguments were made on this aspect of the matter at the time of hearing of this application. In any event, I do not find any grounds warranting an unconditional stay of the award.

17. For the foregoing reasons, I am of the view that since the award is a money award for approximately Rs.898 crores, I direct that there shall be a stay of the award subject to the condition that the petitioner deposit 50% of the awarded amount of Rs.898 crores by way of cash security or its equivalent to the satisfaction of the Registrar Original Side, High Court at Calcutta. Upon such deposit being made, the Registrar Original Side is directed to make a fixed deposit of the said amount with any nationalised bank and keep the same renewed till the disposal of the application under section 34 of the Act or until further orders of Court. The remaining 50% of the awarded amount of Rs.898 crores be secured by way of bank guarantee(s) of a nationalised bank by the petitioner to the satisfaction of the Registrar Original Side, High Court. 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 AP 40 of 2020.
18. With the aforesaid directions, IA NO.GA 1 of 2020 (Old No.GA 175 of 2020) stands disposed of.

(Ravi Krishan Kapur, J.)