

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

CRP No. 13 of 2023

Date of Decision :21.08.2023

North Eastern Electric
Power Corporation Limited

Vs. M/s Astra Construction Pvt. Ltd.

Coram:

Hon'ble Mr. Justice H.S. Thangkhiew, Judge.

Appearance:

For the Petitioner(s) : Mr. V.K. Jindal, Sr. Adv. with
Mr. S. Jindal, Adv.
Ms. B. Jyrwa, Adv.

For the Respondent(s) : Mr. P. Jain, Adv.

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| i) | Whether approved for reporting in
Law journals etc: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |

JUDGMENT AND ORDER

1. The brief facts of the case are that on 05.06.2015, an arbitral award was passed in favour of the respondent, to which the petitioner filed an application under Section 34 before the learned Commercial Court on 31.08.2015, for setting aside the said award. Seven years after the passing of the award, the respondent on

14.12.2022, filed for execution of the award before the Commercial Court. The maintainability of the petition for execution was raised by the petitioner on the ground that when the application under Section 34 had been filed on 31.08.2015, the position of law existing then, as per the un-amended A&C Act, of 1996 was that an automatic stay of the award under challenge, immediately came into operation. It was contended that though subsequent amendments had done away with the automatic stay rule, however, the same would apply only prospectively and the petitioner could not be divested of the benefit of automatic stay, which had accrued to it as far back as on 31.08.2015. The learned Commercial Court by the first impugned order dated 15.03.2023, rejected the challenge to maintainability raised by the petitioner, who then on the same day itself, filed another application under Section 34 read with Section 36 of the **A&C Act, 1996** for stay of the award. Thereafter, another petition on 23.03.2023 under Order 21 Rule 28 read with Section 47 of the CPC, was filed by the petitioner for stay of the execution proceedings in the Execution Case. Both these applications dated 15.03.2023 and 23.03.2023, were then rejected by order dated 30.05.2023 by the learned Commercial Court. As such, these two impugned orders dated 15.03.2023 and 30.05.2023 have now come to

be challenged before this Court by way of the instant application under Article 227 of the Constitution of India.

2. At the outset, the respondent counsel Mr. P. Jain, has raised preliminary objections on the ground that the present petition is premature, as the application for stay sought by the petitioner is yet to be decided finally by the learned Commercial Court, and as such there is no cause of action, let alone any grounds for interference under Article 227 of the Constitution of India. It has also been contended that the petitioner, has not established as to how the present common petition is maintainable against first, the impugned order dated 15.03.2023 passed in deciding the maintainability of the petition under Section 36 of the A&C Act, 1996 and secondly, against the order dated 30.05.2023 passed in the two applications filed under Order 21 Rule 29 read with Section 47 CPC and Section 36 read with Section 34 respectively, seeking stay of the Execution proceedings and the Arbitral Award. No pleadings are present it is asserted, or any explanation offered as to how orders passed under A&C Act could be challenged under Article 227 as in any case, orders arising out of Section 34 or related thereto, would lie exclusively under the A&C Act.

3. It has also been submitted that the application of the petitioner under Section 36 is yet to be decided, and the deposit as

directed by the learned Commercial Court, is in accordance with the law laid down by the Supreme Court mandating 100% deposit as the standard rule in case of execution of arbitral awards. In this context, reliance has been placed upon the cases of (i) ***Toyo Engineering Corporation vs. Indian Oil 2021 SCC Online SC 3455*** (ii) ***SREI Infrastructure Finance Ltd. vs. Candor Gurgaon Two Developers and Projects Pvt. Ltd, SLP (C) Nos. 20895-20897/2018*** and (iii) ***Manish vs. Godawari Marthawada Irrigation Development Corp. SLP (C) No(s). 11760-11761/2018.***

4. In reply to the question of maintainability, the learned Senior counsel for the petitioner Shri. V.K.Jindal, submits that Article 227 is sought to be invoked, as the petitioner is aggrieved with the manner in which the proceedings are being conducted by the learned Court below, where on one hand while the hearing of the main Section 34 challenge is proceeding, on the other hand the petitioner is facing demands for filing of details of assets under Order 21 Rule 41 (2) CPC, and also for deposit of the entire awarded amount. This the learned Senior counsel submits, occasioned the filing of the second petition under Section 47 CPC, to determine question arising between the parties by the Court executing the decree, which would include the question of enforceability of the award, which is also a subject matter

of the Section 34 application. As such, he submits without deciding the questions that have arisen between the parties, the executing Court could not and should not have proceeded with the execution process, such as the requirement of filing of list of assets and deposit of awarded amount.

5. It is also submitted that Rule 1 (iii) Chapter VII, Part-2 of the Rules of the High Court of Meghalaya, 2013 require that in an application under Article 227 of the Constitution of India, the date or dates of the decrees of the Lower Courts be specified and as such the use of the plural in respect of dates and orders reflects that a single petition is maintainable against multiple orders. It has been further contended by the learned Senior counsel that the impugned orders not being appealable under Section 37 of the A&C Act, nor under the provisions of the CPC, in view of Section 13 of the Commercial Courts Act, 2015, the only remedy is by way of revision under Article 227 of the Constitution of India.

6. On the merits of the matter, it has been submitted that though the learned lower Court had recorded and acknowledged the position of law with regard to amendment of the A&C Act, 2015 as to its being prospective nature, had instead passed impugned orders under the amended provision of the Act, by initiating execution proceedings

on an application under Section 36 of the amended A&C Act, filed by the respondents on 14.12.2022. It has been argued that prior to the amendment, the settled position of law under Section 36 was that, once a challenge had been filed under Section 34 of the A&C Act, the same acted as an automatic/deemed stay of the award under challenge and as such, when the petition under Section 34 had been filed by the petitioner on 30.08.2015, a stay of the award in question came into operation. He submits that there was no necessity then to file any petition for stay of the said award, and that it is only after the respondent filed the petition dated 14.12.2022 for execution of the award, that the petitioner then filed petition dated 15.03.2023, for stay of the award. The learned Lower Court he contends by rejecting the prayer for stay of the award has taken away the vested right which had accrued in favour of the petitioner.

7. In support of his contentions, the learned Senior counsel has relied on the following judgments:-

- i) ***Board of Control for Cricket in India vs. Kochi Cricket Pvt Ltd (2018) 6 SCC 287***
- ii) ***Hindustan Construction Company vs. Union of India (2022) 17 SCC 324***
- iii) ***Union of India vs. Vedanta Ltd. (2020) 10 SCC 1***

- iv) *Aravali Power Co. (P) Ltd. vs. Era Infra Engg. Ltd. (2017) 15 SCC*
- v) *Ssangyong Engineering and Construction Company Ltd. vs. National Highway Authority of India (2019) 15 SCC 131.*

8. It has been reiterated that the petitioner had filed two applications, one on 15.03.2023 for stay of the award under Section 36 and 34 of the A&C Act read with Section 151 of the CPC, and the other on 23.03.2023 under Order 21 Rule 29 read with Section 47 of the CPC for stay of the impugned proceedings, and though they were on two different footings, the same were disposed of by the same second impugned order dated 30.05.2023, by combining the two different prayers for stay of the award and for stay of the execution proceedings to be a single issue. It has been further urged that the learned Court below on the other minor issues has adopted unfounded and unreasonable grounds and had totally ignored the fact that the petitioner, had continued to enjoy the automatic stay by virtue of operation of the earlier law.

9. Heard learned counsels for the parties and also perused the impugned judgments dated 15.03.2023 and 30.05.2023, passed in Commercial Arbitration Execution Case No. 6 of 2022. First, it is noted as submitted that the instant application under Article 227, has been

filed seeking interference against two orders dated 15.03.2023 and 30.05.2023. Though, it has been submitted on behalf of the petitioner that the revision application would be maintainable, as it will reveal before this Court the alleged illegal and irregular manner in which the proceedings in the lower Court are being conducted, and also because the two impugned orders are inter linked and in continuation thereof, which reflects the approach being adopted by the learned Court below, this Court though having grave reservations as to the maintainability of the instant application, in view of the short question involved on merits, will not dwell on this aspect.

10. The basis of the entire challenge of the petitioner it can be seen, is on the premise that prior to the amendment by the A&C Act, 2015, once an application had been filed under Section 34 of the A&C Act, the same acted as an automatic stay of the award under challenge, which however was removed by the amendment. As observed earlier, the award had been passed in favour of the respondent on 05.06.2015, and the Section 34 application had been filed on 31.08.2015. The Section 34 application thereafter, was left for consideration for a number of years, until an application for execution of the arbitral award was filed by the respondent under Order 21 Rule 11 CPC read with Section 36 of the A&C Act, 1996. As the respondent/decreed holder had

sought execution of the award after more than two years from the date when the award was made, the learned lower Court had issued notice to the petitioner/judgment debtor to show cause as to why the award be not executed. The provisions of section 36 as it stood prior to its Amendment Act, 2015 and after its amendment by the Amendment Act 2015, being relevant is quoted below.

Prior to Amendment Act 2015

“Section 36. Enforcement. Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure 1908 in the same manner as if it were a decree of this court.

After Amendment Act 2015:

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 subsection (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure 1908, in the same manner as if it were a decree of a 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 render that award unenforceable unless the court grants an order of stay of the operation of said arbitral award in accordance with the provisions of subsection (3) on a separate application made for that purpose.***
- 3) Upon filing of an application under Subsection (2) for stay of the operation of the Arbitral award, the court may subject to such conditions as it may deemed fit, grant stay of the operation of such award for reasons to be recorded in writing.***

Provided that the court shall, while considering the application for grant of stay in the case of an arbitral

award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Court of Civil Procedure 1908.

Provided further that where the Court is satisfied that a prima facie case is made out that,-

(a) the arbitration agreement or contract which is the basis of the award; Or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.- For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016)”

11. By the judgment dated 15.03.2023, the learned lower Court had examined the contentions raised by the petitioner with regard to the applicability of the A&C amendment Act, 2015 to the instant case and after hearing the petitioner by the application of the settled position of law as discussed in ***Hindustan Construction Co. Ltd. vs. Union of India (2020) 17 SCC 324***, and by quoting extensively from paragraphs 33 to 41, rejected the arguments of the petitioner and directed for disclosing of the assets both moveable and immovable of the petitioner. By this judgment, it has been held by the Supreme Court that on the question of automatic stay/suspension of execution on

challenging the award, the same was never envisaged by Section 36, whether before or after its amendment, and that the amendment of Section 36 was clarificatory in nature. This judgment has gone further to record that it is incorrect, that an award when challenged under Section 34 becomes un-executable merely by virtue of such challenge being made because of the language of Section 36, inasmuch as, when read together with Section 35, all that Section 36 states is that enforcement of a final award will be under the CPC, and in the same manner as if it were a decree of the Court. This aspect had also been dealt with in the case of **BCCI vs. Kochi Cricket (P) Ltd., (2018) 6 SCC 287**, where it has been interpreted that no vested right arises, if the Section 34 application was filed prior to the 2015 amendment, and that no automatic stay of execution exists in these cases. It has also been held in the same judgment at para 63, the extract whereof is quoted below as follows:-

“Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment-debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.”

As such, there being no illegality whatsoever in the findings of the learned Commercial Court, the impugned order dated 15.03.2023 therefore, does not call for any correction or interference.

12. Coming to the second impugned order dated 30.05.2023, wherein an application dated 23.03.2023 under Order 21 Rule 29 read with Section 47 CPC, and an application dated 15.03.2023 under Section 36 read with Section 34 of the A&C Act read with Section 151 CPC was filed by the petitioner/judgment debtor for stay of the award dated 05.06.2015, the learned Lower Court, it is seen, held that as per the scheme of Section 36 of the A&C Act, an unconditional stay would be granted only if cases of fraud and corruption are established, and had observed in the impugned order dated 30.05.2023, that the petitioner/judgment debtor had not shown any sufficient cause for stay of the award. Further it is noted that in the order dated 30.05.2023, the learned Commercial Court while rejecting the prayer for unconditional stay, has however provided that in the event the petitioner/judgment debtor deposits the entire award amount in Court within a period of one month, the stay would be considered. As such, in effect the application for stay filed by the petitioner under Section 36 read with Section 34 of A&C Act, subject to fulfillment of the condition for deposit of the awarded amount, is still open for consideration. As such, no orders are

therefore necessary or any interference called for, with regard to this order dated 30.05.2023, more so, in consideration of the prevalent law as demonstrated by the respondent in the judgments cited above at Para-3 of this judgment.

13. In the circumstances therefore, there being no grounds made out, nor the orders suffering from any perversity or grave irregularity, no case has been made out for exercise of powers under Article 227 of the Constitution of India and the instant revision application accordingly stands dismissed.

14. Before parting with the records, as it has also been stated at the bar, that the hearing of Section 34 application is proceeding and is on the final lap, it is therefore expected that the same be disposed of as expeditiously as possible.

15. There shall be no order as to costs.

JUDGE

Meghalaya
21.08.2023
"V. Lyndem PS"