IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.4671 of 2017
Date of Decision-01.08.2017

M/s Ishan Developers & Infrastructure Ltd. and another..
Petitioners

Versus

J&K Economic Reconstruction Agency and another ..
Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Puneet Jindal, Sr. Advocate with
Ms. Neha Anand Mahajan, Advocate for the petitioners.

Mr. Rahul Sharma-I, Advocate for the respondents.

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RAJ MOHAN SINGH, J.

[1]. Petitioners have assailed the order dated 14.07.2017, whereby, Additional District Judge, Mohali while exercising the jurisdiction under Section 36 (3) of the Arbitration and Conciliation Act has stayed the operation of the award dated 24.03.2017.

[2]. Earlier CR No.4242 of 2017 was filed by respondent No.1 against petitioner No.1 for setting aside the orders dated 26.05.2017 and 30.05.2017, attaching bank account of the judgment debtor for recovery of the decretal amount and also giving warrants of attachment *dasti*. It was pleaded in the said revision petition that J&K Economic Reconstruction Agency and M/s Ishan Developers & Infrastructure Ltd. had entered into an agreement dated 25.03.2013, whereby M/s Ishan Developers & Infrastructure Ltd. had agreed to execute and complete the rehabilitation and

channelization of existing primary drains and construction of new secondary drains in Channi Himmat at Jammu, Contract Package No.JKUSDIP Jammu/SWD-02.

[3]. As per contract agreement, particular conditions of contract and general conditions of contract were to form part and parcel of the contract agreement. According to Section 8-particular conditions of contract, in the event of any conflict, the provisions made therein shall prevail over those in the general conditions of contract. According to conditions, governing law with reference to G.C.C 1.4 was Jammu and Kashmir State, India. The particular conditions of contract were made in order to supplement the general conditions of contract. Whenever there is a conflict, particular conditions of contract shall prevail over general conditions of contract.

[4]. M/s Ishan Developers & Infrastructure Ltd. filed a petition under Section 9 of J&K Arbitration & Reconciliation Act, 1997 in the Court of Additional District Judge, Jammu. The said petition was dismissed vide order dated 30.08.2016. Thereafter, a suit for permanent injunction was filed by M/s Ishan Developers & Infrastructure Ltd., which was got dismissed as withdrawn.

[5]. M/s Ishan Developers & Infrastructure Ltd. issued a letter dated 09.01.2017 to J&K Economic Reconstruction Agency in respect of appointment of arbitrator. The said move was opposed by J&K Economic Reconstruction Agency by referring to general

conditions of contract, wherein provision was made in respect of Dispute Board. Despite the objection raised by J&K Economic Reconstruction Agency, Arbitrator was appointed, who initiated and proceeded with arbitral proceedings and passed an *ex parte* award against J&K Economic Reconstruction Agency under Arbitration and Conciliation Act, 1996.

[6]. J&K Economic Reconstruction Agency filed an application under Section 34 of the Arbitration and Conciliation Act. During currency of these proceedings before the Court, the orders dated 26.05.2017 and 30.05.2017 came to be passed, which necessitated the filing of CR No.4242 of 2017 by J&K Economic Reconstruction Agency. In the said revision petition, notice of motion was issued on 03.07.2017 for 05.07.2017.

[7]. During pendency of the aforesaid revision petition, J&K Economic Reconstruction Agency filed an application under Section 36(3) of the Arbitration and Conciliation Act, 1996 before the Additional District Judge, Mohali for staying the operation of award dated 24.03.2017 passed by the Arbitrator.

[8]. During course of arguments before this Court on 11.07.2017, both the parties agreed that without commenting upon the merits of the case, Court may direct the Additional District Judge, Mohali to decide the pending application under Section 36(3) of the Act at the earliest and in the event of such decision, the controversy arising out of revision petition would become

infructuous. It was so ordered on 11.07.2017 by this Court that the Additional District Judge, Mohali shall decide the pending application under Section 36(3) of the Act forthwith i.e. positively by 14.07.2017. In the event of deciding the application, both the parties would be having their own remedies in accordance with law.

[9]. Pursuant to the order dated 11.07.2017 passed by this Court, Additional District Judge, Mohali has decided the application vide order dated 14.07.2017, thereby staying the operation of the *ex parte* award dated 24.03.2017 till disposal of the petition under Section 34 of the Act. However, attachment of the bank account of the petitioner was ordered to remain intact till disposal of the petition under Section 34 of the Act.

[10]. I have heard learned counsel for the parties.

[11]. Learned counsel for the petitioners submitted that prior to substitution, vide Act No.3 of 2016 (w.e.f 23.10.2015) Section 36 of the Act was to the following effect:-

> *"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 (5 of 1908) in the same manner as if it were a decree of the Court".*

Now after substitution by Act No.3 of 2016, Section 36 of the Arbitration and Conciliation Act, 1996 reads as under:-

"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 award 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 render that award uneforceable, 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:

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 Code of Civil Procedure, 1908."

[12]. Learned counsel for the petitioners by referring to the aforesaid amended provision submitted that earlier to the aforesaid substitution, there was an automatic stay of enforcement of award at the time of filing of application under Section 34 of the Act. In the new amendment, the filing of specific application in terms of Section 36(3) of the Act is required for stay of operation of the arbitral award and the Court may, subject to such conditions as it may deem fit,

grant stay of operation of such award for reasons to be recorded in writing. Learned counsel further submitted that as per proviso, the Court shall consider the application for grant of stay in case of award for payment of money after giving due regard to the provisions for grant of stay of a money decree under Code of Civil Procedure. By referring to the aforesaid provision, learned counsel submitted that the award is like a money decree and while granting stay of operation, the Additional District Judge, Amritsar was obligated to adhere to the provision of Code of Civil Procedure and was required to give reasons and formulate conditions for grant of such stay. According to learned counsel, money decree cannot be stayed in routine manner.

[13]. Learned counsel further submitted that the petitioner and its sub contractors had already completed 81.01% of physical work as per record available with the respondent in terms of Time Extension Order No.5 dated 24.12.2016. Further as per Time Extension Order No.6 dated 04.05.2017, the physical progress in respect of completed work shown by the petitioner and its sub contractors was to the tune of 95%. Despite completion of work to the aforesaid degree, the respondent proceeded to invoke advance payment security and performance security to the tune of Rs.1,50,00,000/- and Rs.65,38,6000/-, the expiry date for both the guarantees was 31.12.2016.

[14]. After invocation of bank guarantee, the petitioner is facing a very precarious situation as despite completion of 95% of the work, the bank guarantee amounted to Rs.2,15,38,600/- have been encashed by the respondent. The bank has already issued notice under Section 13(2) of SARFESI Act to the petitioners for depositing the amount of Rs.1,83,00,000/- and Rs.60,00,000/- which belonged to the petitioners. Learned counsel placed reliance upon ***Transmission Corporation of Andhra Pradesh Limited (A.P. Transco), Vidyut Soudha, Hyderabad Vs. M/s Equipment Conductors and Cables Limited 2017(1) ALT 736*** and contended that the order of staying the operation of the impugned award should not have been passed in view of award being in the form of money decree.

[15]. Per contra, learned counsel for the respondents has attacked the passing of *ex parte* award itself by submitting that order was passed despite the objections raised before appointment of arbitrator in the context of jurisdictional background of the agreement, wherein as per particular conditions of contract, governing law was Jammu and Kashmir State, India. At one point of time, a petition under Section 9 of the J&K Arbitration & Reconciliation Act, 1997 was filed before the Additional District Judge, Jammu and the same was dismissed on 30.08.2016. Thereafter, the petitioner issued a letter dated 09.01.2017 to the respondent for appointment of arbitrator. The said letter was objected to by the respondent vide letter dated 12.01.2017 and

appointment of Arbitrator was rejected as the same was against the spirit of the contract. Despite the communication received by the petitioner, arbitrator was appointed who vide letter dated 17.01.2017 proceeded with the arbitral proceedings and passed an *ex parte* award dated 24.03.2017.

[16]. Learned counsel by referring to Section 11(5) of the Arbitration and Conciliation Act, 1996 submitted that if the parties fail to agree on the arbitrator within 30 days from the receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the High Court. According to learned counsel for the respondents, the appointment of Shri Vikas Lochab, Advocate was without the consent of the respondents and therefore was null and void. Any award rendered by such arbitrator is a nullity. Section 34 of the Act is applicable to meet out such contingency. Earlier to amendment of the year 2016, grant of stay was an automatic feature, however, in terms of amendment as well, the Court is empowered to grant stay of operation of the award for reasons to be recorded in writing. The proviso to Section 36(3) of the Act does not oust the jurisdiction of the Court to grant stay on award as in most of the cases award is always in respect of money.

[17]. Learned counsel relied upon ***M/s R.S. Bajwa and Company through R.S. Bajwa Vs. State of Chhattisgarh and others, 2008 AIR (Chhattisgarh) 75, India Cements Capital***

Limited Vs. William and others, 2015(4) Ker L.J. 8, Tata Teleservices Limited and another Vs. Infrastructure Limited and another, 2016(4) RAJ 445, Oil and Natural Gas Corporation Limited Vs. SAW Pipes Ltd., 2003(2) RCR (Civil) 554, Mil Merini Gas Agencies and another Vs. TVS Finance and Services Ltd. and another, 2009(1) RAJ 10, Rash Builders India Pvt. Ltd. Vs. Hindustan Construction Co. Ltd., 2010(37) RCR (Civil) 94 and contended that the executing Court can go into the question of nullity when the award is nullity on account of lack of jurisdiction. The question with regard to award being nullity can be raised before the executing Court viz-a-viz Section 34 of the Act. The provisions relating to execution under Code of Civil Procedure are applicable to the execution of the awards. The order passed by a Court, which lacked jurisdiction is a nullity and cannot be permitted to continue in law. The award *de hors* the provisions, would be illegal on the face of it and the same is liable to be interfered with under Section 34 of the Act.

[18]. I have considered the submissions made at the bar.

[19]. On the one hand, learned counsel for the petitioners has pleaded that once the petitioners had already completed 95% of the work assignment, invoking of bank guarantee in the manner as suggested by the respondents was nothing but an attempt to victimize the petitioners in view of the fact that the bank has already initiated proceedings under SARFESI Act. At the same time, learned

counsel for the respondents has projected a case of award being a nullity which was passed in utter disregard to mandatory provisions of Section 11(5) of the Arbitration and Conciliation Act, 1996 and against the particular conditions of contract i.e. Section 8 where governing law was shown to be Jammu and Kashmir State, India. At one point of time, even petition under Section 9 of J&K Arbitration & Reconciliation Act, 1997 was filed by the petitioner in the Court of Additional District Judge, Jammu and the same was dismissed on 30.08.2016.

[20]. In view of aforesaid, keeping in view the amended provision under Section 36(3) of the Act and proviso thereto, this Court is to balance the equities between the parties till disposal of the petition under Section 34 of the Act. Earlier to the amendment, there was an automatic stay on filing the petition under Section 34 of the Act, but in view of the amendment, independent application is required to be moved and the same has to be decided by the Court in terms of provisions laid down in amended Section 36 of the Act.

[21]. Evidently, separate application was filed by the respondent(s) and the Court has granted stay on operation of the award in terms of Section 36(3) of the Act. Proviso attached to the aforesaid Section is explanatory inasmuch as that at the time of consideration of the application for grant of stay of arbitral award for payment of money decree, due regard has to be given to the

provision for grant of stay of a money decree under the provisions of Code of Civil Procedure.

[22]. The entirety of facts and circumstances of the case would show that both the parties are stressing upon merits of the case. Petitioner has pressed for enforcement of award as the petitioner has already done 95% of the work assignment and the respondent has illegally invoked bank guarantee of more than Rs.2 crores and hardship is being faced by the petitioner as the bank has resorted to proceed under SARFESI Act. The respondent has vehemently opposed the arguments of the petitioner on the ground that award itself is without jurisdiction and is a nullity and the same can be ignored as if the same was never passed. Respondent is a Government organization and in the event of decision of petition under Section 34 of the Act, the outcome can be implemented.

[23]. At this stage of the litigation, this Court is primarily concerned with the issue of interim order passed till conclusion of proceedings under Section 34 of the Act. In order to balance the equities between the parties, I am of the view that since the arbitral award involved huge amount i.e. Rs.1,05,00,000/- under issue No.1, Rs.3,00,000/- under issue No.2, Rs.3,00,000/- under issue No.3, Rs.48,00,000/- under issue No.5, Rs.48,00,000/- under issue No.6, Rs.20,00,000/- under issue No.7, Rs.70,00,000/- under issue No.8, Rs.43,00,000/- under issue No.9, Rs.10,00,000/- under issue No.10, Rs.60,00,000/- under issue No.11, Rs.2,15,38,600/- under issue

No.12 and interest @ 18% per annum on an amount of Rs.6,90,38,600/- for all three period i.e. pre suit: from the date of amount became due till the date of reference, *pendente lite*: from the date of reference to the date of award and further interest: from the date of award till the date of realization of the amount.

[24]. The aforesaid award was inclusive of the bank guarantee which has been invoked and encashed by the respondent. It would be just and appropriate to analyze the controversy on equitable principles so that both the parties may get their legal dues on termination of proceedings under Section 34 of the Act. The objection of the respondent with regard to award being a nullity would be taken care of by the Court in accordance with law and at the same time, hardship of the petitioner in terms of initiation of proceedings under SARFESI Act by the Bank cannot be lost sight of, particularly when as per Extension Time Order Nos.5 and 6, the petitioner is shown to have completed 95% of the work.

[25]. At this stage, this Court is not in a position to decide all these issues conclusively, but at the same time, this Court can formulate equitable mechanism, keeping in view the amended provision in terms of Section 36(3) of the Act viz-a-viz the plea of the respondent that the award was contrary to mandatory provision of Section 11(5) of the Act. It would be just and appropriate to direct respondent No.1 to pay the amount under both the securities i.e. advance payment security to the tune of Rs.1,50,00,000/- and

performance security to the tune of Rs.65,38,600/- to the petitioner subject to final decision of the objections under Section 34 of the Act.

[26]. For the reasons recorded hereinabove, this revision petition is disposed of.

(RAJ MOHAN SINGH)
JUDGE

01.08.2017
Prince

Whether reasoned/speaking **Yes/No**

Whether Reportable **Yes/No**