

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.838 OF 2019

Reliance Infrastructure Ltd.,
Rep., by its Duly Constituted Attorney
Mishank Jain

... Petitioner

V e r s u s

Government of Goa

... Respondent

Mr. J. J. Bhat, Senior Advocate, Senior Advocate with Ms. Anjali Chandurkar and Mr. Bhargav Khandeparkar, Advocates for the Petitioner.

Mr. D. J. Pangam, Advocate General with Mr. Deep Shirodkar, Additional Government Advocate for the Respondent.

Coram :- C. V. BHADANG, J.
Date : 26th September, 2019

ORAL ORDER

1. The challenge in this petition is to the order dated 12.09.2019, (below exhibit 35), passed by the learned Principal District Judge, Panaji, in Arbitration and Conciliation Petition No.9/2018. By the impugned order, the learned District Judge has granted extension of the order dated 11.01.2019, whereby the execution of the award passed by the Arbitrator was stayed pending disposal of the Arbitration Petition under Section 34 of the Arbitration and Conciliation

Act, 1996 (Act, for short). The extension has been granted for a period of six weeks in order to enable the respondents to challenge the dismissal of the petition under Section 34 of the Act before this Court.

2. The brief facts are that the learned Arbitrator by his award dated 16.02.2018 has allowed the claim of the petitioner against the respondent in the sum of Rs.278.29 crores along with interest which was challenged by the respondent before the learned Principal District Judge, under Section 34 of the Act which was registered as Arbitration and Conciliation Petition No.9/2018. It is a matter of record that by an order dated 11.01.2019, the learned Principal District Judge had stayed the execution and operation of the impugned award pending disposal of the arbitration petition and permitting the petitioner to withdraw the amount of Rs.25 crores deposited by the respondent subject to furnishing a Bank Guarantee. After the dismissal of the arbitral petition, the respondent by their application, exhibit 35, sought continuation of the order dated 11.01.2019 for a period of six weeks in order to enable the respondent to take recourse to the appropriate remedy in law.

3. The application was opposed on behalf of the petitioner on the ground that it was not maintainable. It was contended that after the dismissal of the petition under Section 34 of the Act, the Court did not have any jurisdiction to continue the interim order which was operating during the pendency of the petition. The petitioner also prayed that the respondent be directed to deposit the amount of the award along with interest and Bank Guarantee in the sum of Rs.25 crores be released.

4. The learned District Judge by the impugned order has found that the execution of the appellate order/decreed can be stayed in view of the provisions of Order XLI Rule 5(2) of the Code of Civil Procedure (CPC, for short) and in that view of the matter has continued the order dated 11.01.2019 for a period of six weeks which period would expire on or about 24.10.2019.

5. I have heard Mr. Bhat, the learned Senior Counsel for the petitioner and Mr. Pangam, the learned Advocate General for the respondent. Perused record.

6. Mr. Bhat, the learned Senior Counsel for the petitioner, has submitted that the Principal District Judge was not clothed

with jurisdiction to grant and/or continue the stay which was operating during the pendency of the petition once the petition under Section 34 of the Act was dismissed. The learned Senior Counsel has referred to Section 35 of the Act in order to submit that it attaches finality to the arbitral award. It is submitted that on dismissal of the petition under Section 34 of the Act, the award of the Arbitrator became enforceable and the learned Principal District Judge had no power to continue the interim relief which was operating during the pendency of the petition. The learned Senior Counsel has pointed out that the power to stay the operation of the award of the Arbitrator is available under sub-section (2) and (3) of Section 36 of the Act only during the pendency of the petition and not after its disposal. It is alternatively submitted that this Court may modify the impugned order directing the respondent to deposit further amount as a condition for continuation of the stay and may release the Bank Guarantee under which the petitioner has withdrawn the amount of Rs.25 crores.

7. On behalf of the petitioner, reliance is placed on the decision of the Supreme Court in the case of **Pam Developments Private Limited vs. State of West Bengal (2019) 8 SCC 112.**

8. Mr. Pangam, the learned Advocate General for the respondent, has submitted that the provisions of the CPC would be applicable and a conjoint reading of Order XLI Rule 5(2) read with Order XLII of CPC would show that the learned District Judge would not lack jurisdiction to grant stay or to continue the interim relief which was operating during the pendency of the petition in an appropriate case albeit subject to conditions. Reliance is then placed on Section 37 of the Act in order to submit that the order passed in a petition under Section 34 of the Act would only be in the nature of an original decree and the appeal under Section 37 would be in the nature of a First Appeal. On behalf of the respondent, reliance is placed on the decision of this Court in the case of **Kranti Mohan Guruprasad Mehra & anr. vs. Fatehchand Vasuram Behal 1983 Mh.L.J. 141**, in order to submit that grant of a reasonable time in order to enable a party aggrieved to approach a superior court has been held to be just and fair and a reasonable opportunity should normally be granted in that behalf to all the litigants. It is submitted that this Court has held that this principle essentially is to preserve and instil a sense of confidence in the system of administration of justice.

9. Insofar as the alternate prayer for modification of the impugned order is concerned, it is submitted that the respondent has already deposited Rs. 25 crores as a condition for grant of the interim relief which amount has been withdrawn by the petitioner after furnishing Bank Guarantee.

10. In reply, Mr. Bhat, the learned Senior Counsel for the petitioner has placed reliance on the Full Bench decision of this Court in the case of **M/s. Fountain Head Developers & etc., vs. Mrs. Maria Arcangela Sequeira AIR 2007 Bombay 149**, in order to submit that the reference to a Second Appeal under sub-section (3) of Section 37 does not mean that it is an appeal under Section 100 of the CPC.

11. I have considered the circumstances and the submissions made. It is not possible to accept that the Court hearing a petition under Section 34 of the Act would lack jurisdiction to grant stay of its judgment and order and/or to continue the interim relief which was operating during the pendency of such petition, in order to enable the aggrieved party to challenge the same under Section 37 of the Act. However, I do not propose to lay down any binding principle in this regard for the reason that even otherwise, I am not inclined to interfere with the impugned order, in exercise of

the supervisory jurisdiction under Article 227 of the Constitution of India as the impugned order does not result into any manifest injustice. All that the learned District Judge has done is to grant six weeks time to the respondent to take recourse to an appropriate remedy as may be available in law which period is expiring by 24.10.2019. However, as the parties have made submissions on the point of availability or otherwise of such jurisdiction, I propose to briefly deal with the same.

12. Section 36 of the Act as substituted by Act 3 of 2016 provides that 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, in the same manner, as if, it were a Decree of the Court. Sub-section (2) of Section 36 provides that there shall not be automatic stay of the arbitral award on filing of an application under Section 34 of the Act. However, the Court can grant an order of stay of operation of the arbitral award on a separate application being filed for the said purpose. Sub-section (3) of Section 36 provides that upon filing of an application for stay, 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. If the arbitral award is for payment of money, the Court while granting stay of such award shall have “due regard to the provisions” for grant of stay of a money decree under the provisions of the Code of Civil Procedure.

Prior to the substitution of Section 36 by Act 3 of 2016, the filing of an application under Section 34 of the Act used to operate as an automatic stay of the arbitral award which has now been done away with. However, at the same time, the Court is clothed with jurisdiction to grant stay on a separate application being made in that regard, subject to conditions, as may be deemed fit.

13. In the case of **Pam Developments** (supra), the question before the Hon'ble Supreme Court, was whether the Court while granting stay can require the State to furnish security, particularly in the context of the provisions of Order XXVI Rule 8A of CPC. The Supreme Court found that the phrase “have due regard to” as used in the proviso to subsection (3) of Section 36 of the Act, would only mean that the provisions of CPC are to be taken into consideration and not that they are mandatory. It has been held that the provisions of CPC are to be followed as a guidance, whereas the

provisions of the Arbitration Act are essentially to be applied first. It has been further held that since the Arbitration Act is a self-contained Code, the provisions of CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act.

14. It would now be necessary to look into the provisions of Order XLI Rule 5(2) of CPC under which a Court which passed the decree i.e. the Trial Court, may on sufficient cause being shown, order the execution of such decree to be stayed. At one stage, it was submitted on behalf of the petitioner that the provisions of Rule 5(2) of Order XLI of CPC would only apply at the trial stage and not to the Appellate decree. However, order XLII Rule (1) of CPC would make it clear that the Rules of Order XLI shall apply insofar as may be, to appeals from appellate decrees. Thus, wherever the provisions of Order X Rule 5(2) apply, the same would apply to the appellate decree passed by the first Appellate Court as well. As noticed earlier, the Supreme Court in the case of **Pam Developments** (supra) has held that the provisions of CPC would apply, insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act. (See Para 20 of the judgment).

15. The object of amending Act 3 of 2016 was only to do away with the provision by which filing of a petition under Section 34 of the Act used to operate as an automatic stay. There is no prohibition as such for the Court granting stay of the arbitral award, which can be found in the provisions of the Arbitration Act. All that the substituted Section 36 of the Act provides is that it can be granted on an application filed in this behalf, albeit, which can be done during the pendency of the petition under Section 34 of the Act. However, in my considered view, principles akin to the one contained in Order XLI Rule 5(2) of CPC read with Order XLII of CPC would show that such a stay also can be granted or continued (in a case where the same is operating during the pendency of the petition), by the Appellate Court also. No prohibition can be found in the Act for the Court granting stay of the judgment and award and/or continuing the interim relief which was in operation during the pendency of the petition under Section 34, beyond disposal of such petition, in order to enable the party aggrieved to take recourse to the further remedy as is available in law. The principles akin to the one contained in the Order XLI Rule 5(2) read with Order XLII of CPC cannot be said to be inconsistent with the spirit and provisions of the Arbitration Act.

16. The issue involved before the Full Bench in the case of **M/s. Fountain Head Developers** (supra) was as to the non maintainability of the second appeal as is referred to in Section 37(3) of the Act. The Full Bench held that the Second Appeal referred to under Section 37(3) of the Act does not mean an appeal under Section 100 of CPC but it means an appeal under the Letters Patent which is prohibited. The issue decided in the said case has no bearing on the issue involved in this petition.

17. In such circumstances, it is not possible to accept that the Court hearing a petition under Section 34 of the Act would lack jurisdiction to stay the judgment and/or to continue the interim relief which was operating during the pendency of such petition beyond the disposal of the petition, in order to enable the party aggrieved to take recourse to the further remedy as is available in law, although the grant of such relief and the conditions on which such stay can be granted would depend upon facts and circumstances of each case.

18. This takes me to the alternate submission about the modification of the order of stay. Here again, I do not see any reason to modify the impugned order at this stage. As noticed earlier, all that the impugned order grants is a continuation of

the interim relief for a period of six weeks which is expiring on 24.10.2019. The order dated 11.01.2019 was granted subject to deposit of Rs. 25 crores which was deposited and withdrawn by the petitioner subject to Bank Guarantee. Thus no case for modification is made out at this stage.

19. In the result, the petition is dismissed with no order as to costs. The issue of grant/continuation of stay as also the conditions on which the stay, if any, is to be granted or continued in an appeal under Section 37 of the Act, is expressly left open.

C. V. BHADANG, J.

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