02 **Ct. No.21**
03.12.2021
A.B.

C.O. 1969 of 2021

Titagarh Logistics Infrastrcture Private Limited

Vs.

Durgapur Freight Terminal Private Limited & Ors.

(Through Video Conference)

Mr. Sabyasachi Chaudhury,
Mr. Sayantan Bose,
Ms. Anyapurba Banerjee,
Ms. Madhurima Das

... for the Petitioner

Mr. Rishad Medona,
Mr. Meghajit Mukherjee,

.... for Opposite Parties

Assailing order no. 9 and 10 passed by Ld. Judge Commercial Court, at Alipore, on 7th October,2021, and 9th November, 2021 in Miscellaneous Case (Arbitration) No. 07 of 2021, this revision has been filed by the award holder.

That there is an ongoing Arbitration Proceeding between the parties and pending final hearing, the petitioner has filed an application under Section 31 (6) of Arbitration and Conciliation Act, 1996 praying for interim award for a sum of Rs.2,36,00,000/- (Rupees Two Crore Thirty Six Lakh). However, Ld. Arbitral

Tribunal after considering such application of the petitioner has been pleased to pass an interim award of Rs.2,00,00,000/- (Rupees Two Crore) only along with GST at the applicable rate and interest at the rate of 18% per annum on the failure of the opposite parties/ Award Debtors to pay such interim award by 28.02.2021. The petitioner has put such interim award in execution by filing an application u/s 36 of the Arbitration Act.

The award debtors too filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside such interim award passed by the Arbitral Tribunal on 10.02.2021 and by filling another application under section 36(2) of the Arbitration and Conciliation Act, 1996 has prayed for stay of the interim award.

After hearing the parties the Learned Court was pleased to stay the operation of the interim order dated 10th February, 2021 as prayed by the award debtors, but on deposit of a sum of Rs.1,75,00,000/- (Rupees One Crore and Seventy Five Lakhs) by way of a bank guarantee and directed to furnish the same within 30 days from the date of passing of the order.

It appears the opposite parties have failed to comply such order passed by the learned Court below. The learned Court below instead of vacating the stay order for non-compliance granted accommodation to the opposite parties by extending time to furnish bank guarantee by passing order dated 9th November, 2021.

The contention of the petitioner is that when the interim order was for a sum of rupees Two Crores together with GST at the applicable rate along with interest at the rate of 18% per annum the bank guarantee cannot be less than the awarded interim sum with interest. The bank guarantee is not a solvent security for the purpose of the stay of the interim award.

The learned Lawyer for the petitioner contended that in view of section 36(3) of the Arbitration and Conciliation Act, 1996 the Court while considering the application of stay of the operation of the arbitral award for payment of money should give due regards to the provisions for grant of stay of a money decree under the provision of the Code of Civil Procedure, 1908.

He further submits in view of order XLI rule 5 sub-rule (3) (c) and Rule (5) of the Code of Civil Procedure, 1908 the court will not pass any order of stay of execution of a decree unless the court passing the stay order is satisfied that security has been given by applicant for due performance of such decree or order as may ultimately be binding upon him. In case the applicants fails to make the deposit or furnish the security specified in sub rule (3) of rule 1, the Court shall not make any order staying execution of the decree. The court below bypassing the mandatory provision of Order XLI Rule 5 sub-rules 3(c) CPC has passed the impugned orders.

The learned Lawyer for the petitioner also contended that opposite parties are enjoying the property of the petitioner by running a logistic hub and making profit from the business run from property without paying a farthing to the petitioner. If the opposite parties are allowed to furnish bank guarantee of a sum less than interim award then in future it would be very difficult on the part of the petitioner to realise the balance amount along with applicable GST and interest as awarded in the interim award. He also submits bank guarantee does not carry interest but at least it should cover the awarded sum including post award interest. That decreetal amount has to be secured. Therefore, he submits the impugned orders passed by the learned Court below suffers from infirmities and thereby pray for setting aside of the same. He in support referred to Hyder Consulting (UK) Limited Vs. Governor, State of Orissa, reported in (2015) SCC 189.

On the other hand the learned Lawyer for the opposite parties contended that there is no hard and fast rule that while granting stay of operation of interim arbitral award, by the court in which applications under section 34 and 36 (2) of the Arbitration and Conciliation

Act, 1996 are filed has to direct the applicant to furnish the entire amount including GST and interest. It is the discretion of the Court granting stay to decide whether to ask the award debtor to deposit awarded sum in court or furnish security bond or bank guarantee. It is not mandatory for stay of operation of the impugned interim award, the Court passing the order of stay has to secure 100% security against the awarded sum, GST and interest thereon.

He further submits while considering application under section 36 (3) of Arbitration Act, the provisions of Civil Procedure Code must be followed as guidance as Arbitration Act itself a self-contained Act and provision of C.P.C will apply only insofar as the same are not inconsistent with the spirit and provision of the Arbitration Act. He in support of his submission referred to Pam Developments Private Limited Vs. State of West Bengal, reported in (2019) 8 SCC 112.

Perused the impugned orders, cited decisions and provision of order 41 rule 5 of the Code of Civil Procedure, 1908 and section 36 of Arbitration and Conciliation Act, 1996.

Having regard to the submission made by the learned Advocate for the parties let me see whether the Court below has committed wrong in directing award debtor to furnish security in the form of bank guarantee of an amount less than what has been awarded in the interim award by the arbitral tribunal?

In order to decide such issue I find it necessary to reproduced section 36 of Arbitration and Conciliation Act, 1996 and order 41 rule 5 of Civil Procedure Code, 1908.

Section 36 read as follows 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, 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 unenforceable, 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."

Order 41 rule 5 Civil Procedure Code, provides stay by Appellate Court.- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; [C] but the Appellate Court may for sufficient cause order stay of execution of such decree.

[Explanation .- An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for stay of execution or any order contrary, be acted upon by the Court of first instance.]

Stay by Court which passed the decree .- (2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay ; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) [Subject to the provision of sub-rule (3),] the Court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.]

On plain reading of Section 36 of the Arbitration Act, it is seen for enforcement or execution of the Arbitral Decree, the executing court has to act in accordance with the Provisions of the Code of Civil Procedure. That while considering the application for grant of stay against award for payment of money due regards has to be given to the provisions laid down in the Code of Civil Procedure for grant of stay of a money decree. It also provides while granting stay of the operation of the arbitral award, the court may impose such conditions as it may deem fit.

While Order 41 Rule 5 sub-rule 3(c) provides that court granting an order of stay has to see that applicant/award debtor has furnished sufficient security which may ultimately binds the award debtor for due satisfaction of the decree or order.

The Hon'ble Supreme Court in Pam Developments (supra) has been pleased to discuss the extent of applicability of provisions of CPC in respect of execution of Arbitration Award and power of the court granting stay of operation of award under section 36(2) of the Arbitration Act.

The Hon'ble Supreme Court has held that by virtue of the amendment made vide Act 3 of 2016, Section 36(3) of the Arbitration Act mandates while considering an application for stay filed along with or after filing of objection u/s 34 of the Arbitration Act, if stay is to be granted then it shall be subject to such conditions as may be deemed fit. The grant of stay of the operation of the award is to be for reasons to be recorded in writing "subject to such conditions as the court may deem fit".

Further, been pleased to discuss the expression " have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure" and held the phrase "have due regard to" would only mean that provisions of the Civil Procedure Code are to be taken into consideration and not they are mandatory. Had the phrase "having regard" to the provisions of CPC been "in accordance with" the provisions of the CPC, then for granting stay of operation of money decree the court concerned is bound to follow the provisions of the CPC. Therefore held mere reference to CPC in the section 36 of the Arbitration Act cannot be construed in such manner that it takes away the power conferred in the Arbitration Act itself. The provisions of the CPC are to be followed as guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Arbitration Act being a self-contained Act, the provisions of the CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act.

Therefore, in view of the Hon'ble Supreme Court, the court granting stay in operation of an award in the nature of money decree is bound to follow the provisions of the Arbitration Act and not the provision of CPC and court granting stay under Section 36(2) of the Arbitration Act may grant the stay subject to such conditions which the court may deem fit as stipulated by section 36 (3) of the Arbitration Act. The court granting stay has discretion power to demand full or part deposit and/or to furnish security of the decreetal amount.

In the present case Learned court below while granting stay of operation of the interim award of Rupees two crores with interest and GST at applicable rate has directed the award debtor to furnish bank guarantee of rupees one crore and seventy five lakhs in favour of the court within thirty days of passing of the order on 07.10.21. Thus this court does not find orders impugned to be illegal with material irregularity.

For the sake of argument, even if we assume while granting stay of arbitral money award the concerned court has to follow the provisions as laid down in Order 41 Rule 5 sub rule 3(c) CPC, then I think this provision comes into operation in respect of execution of such decree means final award as the court before granting order of stay of execution has to be satisfied that security has been given by the applicant for the due performance of such final decree or final order as may ultimately, be binding upon him.

In the present case the award in question is an interim award passed in an application under section 31(6) of the Arbitration Act, and not a final award as arbitration proceeding is yet to be disposed of. Had the award for payment of money been final, then executing court or the court who has the power to grant stay ought to have asked the award debtor seeking stay of the execution of the final decree in the nature of money decree to furnish security covering not only principal amount, but also interest as awarded may be both pendente lite and future and also other monetary liabilities imposed by the arbitral tribunal on the award debtor and which the award debtor in due performance of the final decree or final order is ultimately liable to pay. In the present case what would be the ultimate binding liability of the Award debtor is yet to be decided.

In view of the above discussion this court holds present revisional application is not maintainable.

C.O. 1969 of 2021 is accordingly dismissed and connected application, if any, shall stand disposed of. Interim order, if any, stands vacated.

The learned Court below is requested to see that the order impugned which it has passed while granting stay is carried out by award debtor and it should not be a paper tiger. The learned Court below is further requested not to give any further extension of time for furnishing bank guarantee by the award debtor and directed to see the bank guarantee is furnished within Fifteen days and in default to set aside the stay order.

There will be no order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent Xerox certified photocopies of this judgment, if applied for be given to the parties upon compliance of the requisite formalities.

(Kesang Doma Bhutia, J.)