

IN THE HIGH COURT AT CALCUTTA
(ORDINARY ORIGINAL CIVIL JURISDICTION)
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE

Present:

THE HON'BLE JUSTICE T. S. SIVAGNANAM

&

THE HON'BLE JUSTICE HARISH TANDON

**APO NO.95 OF 2021
Arising out of
IA GA NO.2 OF 2021
AP NO.89 OF 2015**

**STATE OF WEST BENGAL & ANR.
Vs.
DILIP KUMAR SAHA**

**Mr. S.N. Mookherjee, Ld. Adv.Gen
Mr. Anirban Ray, Ld. G.P
Mr. Paritosh Sinha, Ld. AOR
Mr. Arindam Mondal, Adv.
For the Appellants**

**Mr. Utpal Bose, Adv.
Mr. S. Mitra, Adv.
Ms. H. Chakraborty, Adv.
For the Respondents**

Heard On: 09.11.2021

Judgment On: 29.11.2021

Harish Tandon, J.:

The instant mandamus appeal arises from the order dated 20th July, 2021 passed by the Single Bench in I.N. No. GA/2/2021 in AP 89 of 2015 allowing an application filed by the respondent seeking

withdrawal of the amount deposited in terms of the order dated 15th January, 2021 upon furnishing a bank guarantee for Rs. 1.50 crores.

Shown of unnecessary details, the undisputed facts are adumbrated herein below in order to have a clarity on facts in pursuit of deciding the points canvassed by the respective counsels in this appeal.

A notice inviting tender no 8 of 2010-11 was published by the Superintendent Engineer, Public Works Department and Public Works Road, North Bengal construction, Circle-I, Jalpaiguri for construction of RCC Bridge over river Sanaijan at Kangratoli on Imigration Road at Mekhliganj, District Jalpaiguri under Coochbehar division PWD. The respondent herein participated in the tender process and was adjudged as the lowest bidder and a contract was awarded in his favour with clear stipulation that the work could be completed within 12 months. Later on, a formal contract was executed between the parties on September 29, 2010 followed by the work order dated November 11, 2010. Clause 25 of the said contract contained the arbitration clause in the event any dispute cropped up in relation thereto. In fact, the dispute cropped up and since the appellant failed to perform their obligation under the said arbitration clause by appointing an arbitrator, the application was moved by the respondent before this court under Section 11(4) of the Arbitration and Conciliation Act, 1996 which was eventually allowed on 3rd April, 2013 by appointing Mr. Santanu Basu Roychowdhury, a former secretary of PWD roads of the State. The sole arbitrator made and published an award dated October 29, 2014 directing a sum of Rs.

1,66,52,949/- to be paid to the respondent within 90 days from the date failing which an interest at the rate of 18 per cent would accrue till the recovery thereof.

The appellant challenged the said award under Section 34 of the said Act before this court in AP no. 89 of 2015 which was formally admitted on February 25, 2015. Subsequently, an application for stay of the award was taken out by the appellant in the said proceeding and an unconditional stay of the operation of the arbitral award was passed on December 18, 2018. The said order was challenged before the Supreme Court by way of special leave petition which was set aside and the matter was remitted back to the High Court for reconsideration. The application for stay was again listed before the Single Bench and by an order dated 15th January, 2021, the stay application was disposed of directing the appellant to deposit the sum of Rs. 1.50 crores with the Registrar, Original Side of this Court as condition precedent to such stay.

The respondent took out an application being GA no. 2 of 2021 seeking an order upon the Registrar, Original Side, High Court to accept the bank guarantee for Rs. 1.50 crore with a consequential order of permitting the respondent to withdraw the said sum of Rs. 1.50 crores deposited by the appellant in terms of the order dated 15th January, 2021. By the impugned order the application was allowed directing the Registrar, Original Side to accept the bank guarantee of Rs. 1.50 crores to be furnished by the HDFC Bank Ltd with the condition that the bank guarantee shall be kept alive till the disposal of an application under

Section 34 of the said Act(AP no 89 of 2015). Simultaneously, the respondent was also permitted to withdraw the said amount upon the furnishing such bank guarantee.

The present appeal is at the behest of the appellant assailing the said order primarily on the ground that the moment the order of stay passed by the court directing the deposit of the amount with the Registrar, Original Side of this court, such order cannot be recalled, varied, modified unless there is a change in circumstances warranting the same.

The learned Advocate General submits that Section 36 of the said act does not envisage such course to be adopted by the court the moment an application for stay was disposed of directing the deposit of the amount with this court. It is further submitted that the proviso appended to sub-Section (3) of Section 36 of the Act though contemplates the applicability of the provisions of Code of Civil Procedure, 1908 but the same is restricted at the stage of granting stay and not otherwise. It is thus submitted that in absence of any express provision under the said Act, the court cannot usurp the jurisdiction in modifying or reviewing the earlier order. He placed reliance upon the judgment of the Supreme Court rendered in case of ***Pam Developments Private Ltd vs. State of West Bengal reported in 2019, 8 SCC 112*** wherein it is held that the phrase “having regard to the provision of CPC” is directory in nature and can be used as a guiding factor but the provisions of Arbitration Act are essentially to be applied first as it is a self contained

Act. It is thus submitted that though the provisions of Code of Civil Procedure may be used as a guidance but has to be applied in juxtaposition with Section 36(3) of the Act which by no stretch of imagination be construed to supersede or whittle down the express provision of the Act. Learned Advocate General further placed reliance upon the unreported Co-ordinate Bench decision rendered in case of **M/s. Satyen Construction vs. State of West Bengal (APO 77 of 2020)** passed on 6th October, 2020 wherein it is held that the variation or modification of an order granting stay should not be varied or modified unless the ground narrated in the said application are found to be worthy, that too, based upon the subsequent events constituting change in circumstances. It is lastly submitted that the application filed by the respondent was bereft of any subsequent or change in circumstances and the impugned order does not reflect any finding returned thereupon and, therefore, the same is liable to be set aside.

Mr. Utpal Bose, the learned Senior Advocate appearing for the respondent submits that there is no fetter on the part of the court in permitting the furnishing of the bank guarantee upon withdrawal of the amount deposited by the appellant and in fact such order has been passed on several occasions. To buttress the aforesaid submission, the reliance is placed upon the order of the Supreme Court in case of **Aviation Travels private Ltd Vs. Bhavesa Suresh Goradia & Ors (SLP no. 5374-5375 of 2019)**. It is arduously submitted that the withdrawal of an amount deposited by the judgment debtor at the time of

securing the stay of the award on furnishing a security is a well settled practice as held by the Division Bench of the Gujarat High Court in ***Manibhai & Brothers vs. Birla Cellulosic (Civil Appeal no 11793 of 2015)***. According to Mr. Bose there is no impediment on the court in permitting the withdrawal of the amount so deposited discernible from the judgment of the Supreme Court in case of ***Aviation Travels Private Ltd vs. Bhavesha Suresh Goradia & Ors (in Civil Appeal no 1890-1891 of 2020)***. As per Mr. Bose, even if there is no express provision contemplating such situation, the court is not powerless in passing an appropriate order in exercise of the inherent powers conferred in Section 151 of the Code. Invariably, the court passes such order balancing the rights of the parties in securing the said amount. He is very much vocal in his submission that the paramount consideration is securing an amount in whatever form as contemplated under Order 41 Rule 5 of the Code of Civil Procedure. We thus submits that the withdrawal of an amount upon replacement with the bank guarantee, in fact, invites the same situation i.e the protection of money as well as the interest of the appellant in the event the main proceeding is allowed and, therefore, no prejudice would be caused to an appellant if the impugned order is allowed to stand.

On the conspectus of the aforesaid facts and the submission advanced by the respective Counsels, the point which emerged for consideration is whether after passing an order granting stay of the award on condition to deposit an amount with the Registrar, Original

Side of this Court, the court can vary or modify the order subsequently. If the aforesaid question is answered in affirmative whether such modification has to be preceded with the change in circumstances or reasonable grounds warranting such modification or variation.

At the time of promulgation of the Arbitration and Conciliation Act, 1996 the unamended provision of Section 36 thereof leaves no ambiguity that the moment the challenge is made to an award under Section 34 of the Act, it, ipso facto, brings stay of the executability of the award without seeking any blessings from the court. The aforesaid section undergone a see change with the Arbitration and Conciliation (Amendment) Act, 2015 and the said amended provision is quoted below:

“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 enforce 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 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 (5 of 1908)."

The radical change one would perceive from the bare reading of the amended provision that the automatic stay of the enforcement of the award is no longer available but the party has to apply for a stay of the operation of the arbitral award. Sub-section (3) of Section 36 of the Act bestowed power upon the court to grant a stay of the operation of the award on such conditions as it may deem fit upon recording the reasons in writing. The proviso appended thereto exemplifies the exercise of power on due regard to the provisions for grant of stay of money decree under the provisions of the Code of Civil Procedure. By virtue of such reference by way of incorporation in the another statute due regard to the provisions of the court relating to the grant of stay of money decree is made applicable.

In Pam Developments Private Ltd (Supra) though the question involved therein relates to the applicability of the provisions contained in Order 27 Rule 8A of the Code in conjunction with Order 41 Rule 5 and

Section 36 of the Act but the phrase “having due regard to” incidentally came up for consideration and it is held that the same cannot be said to be mandatory and should be used as a guiding factor without superseding or suppressing the substantive provision of the Act which is essential to be applied first. It is further held that the Arbitration and Conciliation Act is a self contained Act and the provision of the CPC can be borrowed by such reference to the extent that the same is not inconsistent with the spirit and provision of the said Act in these words:

“18. In our view, in the present context, the phrase used is ‘having regard to’ the provisions of CPC and not ‘in accordance with’ the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. Arbitration Act) itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is 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.”

Even if it is held by the Supreme Court in the above noted decision that the provision contained under Order 41 Rule 5 of the Code is directory in nature and can only be used as a tool for guidance yet we feel that it would be prudent to recapitulate the legislative intent behind the incorporation of the aforesaid provision. The important factor one would jurisprudentially perceived from the said provision is that mere filing of an appeal does not ipso facto render the stay of the executability of a decree. Even the Appellate Court shall not pass an order of stay in absence of any sufficient cause nor without recording the satisfaction on the factors required. Therefor, including the satisfaction that the security has been given by the appellant in due performance of the decree or the order directing the security or the condition of depositing the decreetal amount has been uniformly adopted as a practice on the rule of prudence than of universal application. The aforesaid provision is intended to strike a balance between the rights of the parties as opposed to an unjust enrichment upon a successful litigant and a premium to the unsuccessful litigant. It has been a uniform practice to secure an amount either in the form of the deposit in the court or the security in protento satisfaction of a decree depending upon a varied factors and the special facts involved in the given case.

We do not find any ambiguity in adopting such practice at the time of granting stay but the moot question is what further order could be passed amounting to variation, modification of the said order. Neither Section 36 of the Act nor Order 41 Rule 5 of the Act contemplate such

situation as no express provision of such nature has been incorporated. This lead us to consider the Division Bench Judgement of the Gujarat High Court in case of Manibhai & Brothers (Supra) wherein it is categorically observed that there has been a long standing practice when the court exercises the power permitting the withdrawal of the amount deposited by the judgment debtor to secure the stay of the execution in exercise of the power under Section 151 of the Code. The Division Bench held that permitting withdrawal of the amount does not tantamount to modifying the order of stay but because of the long-standing practice such orders have passed subject to furnishing the security in this words:

“21. In the opinion of this Court, permitting withdrawal of the amount would also not amount to modifying the stay order as by virtue of this order the respondent has not been asked to pay any additional sum nor are the terms of stay order granted by the court in any manner being modified. All that is being done is that in view of a long settled practice, the applicant is being permitted to withdraw the amount deposited by the respondent in compliance with the stay order subject to the applicant furnishing security as directed by the court. By adopting this course of action, the respondent judgment-debtor is not in any manner prejudiced inasmuch as against withdrawal of the amount the applicant would be required to furnish such security as the court deems fit. The only consequence is that instead of money lying in the deposit

with the bank, the decree-holder gets to enjoy the same, subject of course, to furnishing security for withdrawal of the amount.”

With all humility and the respect to the Division Bench of the Gujarat High Court we could not persuade ourselves to accept and adopt the theory of long standing practice and the exercise of power by the Court on such ipse dixit. The proviso appended to Sub-Section 3 of Section 36 never intended to be squeezed and restricted to the provision of Order 41 Rule 5 of the Code but having expanded the horizon of the applicability of the provisions of the Code. Naturally, the Court can exercise the power if there has been an express provision in the Code which is not in contradiction with the spirit and object of the special Act as held in *PAM Developers (Supra)*. The power enshrined under Section 151 of the Code can be exercised if there is no express provision contained in the Code or the Special Act. The legislature at the time of promulgating the procedural law i.e., Code could not presume all eventualities and precisely for such reason the inherent power is retained in the Code to secure the ends of justice i.e., *ex debito justitiae*.

As held in ***Nahar Industrial Enterprises Ltd. Vs. Hong Kong & Shanghai Banking Corporation, reported in (2009) 8 SCC 646*** the power reserved under Section 151 of the Code can never be construed as the conferment of an extraordinary jurisdiction of the Court and when a specific provision dealing with a particular situation is provided therein, such inherent power should not be resorted to. It can only be applied in a grey area more particularly to fill up the gap securing the end of justice

or prevent injustice to the party. Such inherent power should be exercised with great care and caution and not in a casual or routine manner. It owes a greater responsibility upon the court while preventing injustice and advancing the justice to the litigant. We do not find any ambiguity that neither Section 36 of the Act nor Order 41 Rule 5 of the Code conferred power upon the Court to permit the withdrawal of the amount deposited in terms of the order of stay as in a deserving case the Court may pass an order in exercise of the inherent powers provided in Section 151 of the Code. The Judgment is, what has been decided on the basis of the facts involved therein. Though the Division Bench of the Gujarat High Court has augmented the theory of long standing practice but such observations must be viewed on the facts involved therein. In the said case while passing order of stay directing the deposit of decretal amount, the liberty was granted to the decree holder to apply for the withdrawal thereof and in fact, such liberty was exhausted and the Division Bench, therefore, does not find any infirmity in the order permitting the withdrawal of the case with replenishment with the bank guarantee.

In Aviation Travels Private Ltd. (Supra) the suit for damages was decreed ex parte and an application for setting aside the ex parte judgment was also dismissed so also the application for review. Subsequently, the order was carried to the Supreme Court and a plea was taken that the summons were never served and, therefore, there was no occasion to file a written statement to contest the case. A plea was

taken that the rule applicable to the Original Side of the Bombay High Court provides for waiver of the summon if the lawyer appears and filed the vokalatnama. In such backdrop, it was held that nobody would be benefited by an ex parte order as it was a simplicitor case for damages and a direction was passed to deposit certain amount as condition precedent for filing the written statement and contesting the suit in accordance with law. However, the decree holder being a trust and there were a number of beneficiaries of the trust, the Apex Court directed the disbursement of certain amount subject to the condition that those withdrawals would not create any special equity and shall be subject to the outcome of the suit. Our endeavour has failed to find out any ratio touching upon the point involved herein above. As indicated above, the Court is not powerless to pass an order permitting the withdrawal of the deposited amount upon replacement with the security but while exercising such power other mitigating factors are also required to be seen.

Since the provision of the Code is held to be a guiding factor and there is no express provision preserved in the Court in contemplation to a situation as has arisen herein, one can borrow the principles of the other provisions as guidance in exercise of the inherent power. Order 39 Rule 4 though restricted to the injunction contained a provision relating to modification, variation of the said order in the changed circumstances. Such principle can be borrowed while permitting the withdrawal of the deposited amount in exercise of the inherent power. The Co-ordinate

Bench of this Court in case of M/s. Satyen Construction (supra) has somewhat followed the aforesaid principle though not expressly which would be evident from the following excerpts as under:

“(5) Once the application carried at the post-stay order stage is treated as an application for interim measures under Section 9 of the Act, the order impugned becomes appellable since Section 37 of the Act permits an order granting or refusing to grant any interim measure to be the subject matter of an appeal. Thus, the appeal is found to be maintainable. However, since the grounds carried in the application are not found to be worthy, the order impugned is not interfered with. It now appears that certain subsequent events may have arisen which may not have been brought to the notice of the Arbitration Court. If such is the case, there is nothing stopping the award-holder from invoking Section 9 of the Act afresh.

Reverting back to the facts, the only ground shown in the said application is that one of the partners was infected with the Corona Virus twice and has to incur huge expenditure for his treatment. It is further stated that the wife is terminally ill and the liquidity has been lost. In order to have working capital in successful running of the business, the money is needed and, therefore, he should be permitted to withdraw the said sum of Rs. 1.50 crores. There is no corroborative material in support of the aforesaid contention whether the said partner suffered illness prior to the order dated 15th January, 2021. As held by the Co-

ordinate Bench of this Court in M/s. Satyen Construction (supra) if the grounds set forth in the application is not satisfactory, it is not obligatory on the part of the court to replenish the amount so deposited with the bank guarantee. Furthermore, there is no material disclosed constituting a changed circumstances nor we find any findings returned in the impugned order on facts. We, thus, cannot concur with the impugned order. The same is hereby set aside. Appeal is allowed.

No costs.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(T. S. Sivagnanam, J.)

(Harish Tandon, J.)

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CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APO/95/2021
WITH
AP/89/2015
STATE OF WEST BENGAL AND ANR.
VS.
DILIP KUMAR SAHA

BEFORE :
THE HON'BLE JUSTICE T.S.SIVAGNANAM
A N D
THE HON'BLE JUSTICE HARISH TANDON
DATED : NOVEMBER 29, 2021.
[Via Video Conference]

Appearance :
Mr. S.N. Mookherji, Learned A.G.
Mr. Anirban Ray, Ld. G.P.
Mr. Paritosh Sinha, Ld. AOR.
Mr. Arindam Mandal, Advocate
...for State/appellant
Ms. Hashnuhana Chakraborty, Advocate
...for respondent

The Court :- After delivery of the judgement the learned Counsel on behalf of the respondent prays for stay of the operation of the impugned order.

We do not find any ground to stay the operation of the impugned order and, therefore, prayer for stay is rejected.

(T.S. SIVAGNANAM, J.)

(HARISH TANDON, J.)

GH/pa.