

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 8266 OF 2021

- 1) The State of Maharashtra,
Through The Collector, Osmanabad.
- 2) The District Supply Officer,
Osmanabad ... **Petitioners.**

VERSUS.

M/s. Jaykumar Fulchand Ajmera,
R/o. 2/129, Marwadi Lane,
Osmanabad, Tq. & Dist. Osmanabad. ... **Respondent.**

...

A.G.P for the Petitioners : Mr. P. K. Lakhotiya
Advocate for the Respondent: Mr. G. K. Naik-Thigle.

CORAM : MANGESH S. PATIL, J.
RESERVED ON : 11.08.2021.
PRONOUNCED ON : 23.08.2021.

JUDGMENT :

Heard. Rule. The learned advocate Mr. G.K. Naik-Thigle waives service for the respondent. On the request of the parties the matter is heard finally at the stage of admission.

2. By invoking the powers of this Court under Article 226 and 227 of the Constitution of India, the petitioners are challenging the order passed by the District Judge-2 in Civil Misc. Application No. 217/2020 a proceeding filed by them under Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter 'the Arbitration Act'), whereby the application (Exh. 11) filed by them, seeking stay to the execution and operation of the Arbitral Award dated 30.01.2019 has been stayed, however, with a condition of depositing 60% of Rs. 32,62,48,730/- with interest at the rate of 12% from the date of award and further direction to furnish security for the balance amount.

3. The parties had entered into three agreements whereby the respondent firm had undertaken the work of transportation of food grain against specified charges during the period from 01.04.2001 to 31.05.2006. The dispute occurred in respect of the incremental escalation in transportation charges from year to year. The parties went to Arbitral Tribunal which passed an Award under challenge. It appears that the contracts were then extended up to 18.06.2008.

4. The learned A.G.P. Mr. Lakhotiya vehemently submitted that a serious dispute as regards limitation crops up in the matter in as much as, the respondent has approached the Arbitral Tribunal after a lapse of several years when as per clause 31 of the agreements, it should have taken steps for commencing the arbitral proceeding within six months of completion of the contract which was 30.05.2006. He would submit that even if it is assumed that the contract was subsequently extended, such extended period had ended on 18.06.2008. In spite of such serious objection having been raised the Tribunal has clearly overlooked it and has come out with unacceptable reasons. The observations and the conclusions of the Tribunal in that regard are clearly perverse, arbitrary and capricious and provides a legitimate ground for the petitioners to seek its setting aside under Section 34 of the Arbitration Act. The Award is clearly in conflict with the basic notions of morality and justice and is opposed to and in contravention of fundamental policy of Indian law barring stale claims.

5. The learned A.G.P. would submit that though the learned Judge of the lower Court has considered this aspect, no appropriate weight is attached to these circumstances.

6. The learned A.G.P. would then submit that in fact, the whole process of arbitration has not been properly invoked. The respondent along with few other similarly placed contractors had made a joint request to the Arbitrator who is none other than the Divisional Commissioner of

Aurangabad region seeking to invoke arbitral proceedings. He would submit that the law does not contemplate any such joint arbitration application. He would submit that even that was preferred on 15.01.2009.

7. The learned A.G.P. would further submit that the Government Resolution being relied upon by the respondent and referred to and made basis by the Tribunal for arriving at the resolution and particularly the Charts A to C by referring to which the dues have been arrived at for calculating were actually rejected by the Principal Secretary. However the award has been passed by taking into account these charts which were never finalized by the Principal Secretary. He would further submit that pursuant to the Government letter dated 27.04.2006, only 5% annual increment was to be given in the rate of the transportation agreed between the parties. It was specifically mentioned in the letter that no further increase would be admissible and still the Tribunal has gone ahead and passed the award.

8. The learned A.G.P. would therefore submit that it is a clear case of the award being obtained by inducement within the meaning of second proviso which is recently inserted on 11.03.2021 to Sub Section 3 of Section 36 of the Arbitration Act. Consequently, the lower Court ought to have granted unconditional stay to the award under challenge. He would submit that in any case, there was no reason even to direct the petitioners to deposit the amount of interest at an exorbitant rate of 12% and further seeking a security for the remaining amount when by virtue of Order XXVII Rule 8A of the Code of Civil Procedure since the petitioners being the State Government.

9. Learned advocate Mr. Naik-Thigle for the respondent would raise a preliminary objection as to the maintainability of this proceeding on the ground that since the impugned order is passed by a Commercial Court constituted under the Commercial Courts Act, 1915 (hereinafter “ the C.C. Act”), by virtue of section 13 of that Act the matter would lie before a

Commercial Appellate Division of the High Court.

10. On other aspects the learned advocate would submit that the petitioners are not coming with any case of the award having been induced as is required by the second proviso to Sub Section 3 of Section 36 of the Arbitration Act so that the lower Court could have stayed the execution of the award unconditionally. He would further submit that the respondent had promptly invoked the arbitration clauses by issuing a legal notice and filing an application before the Arbitrator. It was done promptly and was not barred by limitation. He would further submit that since it is a matter of execution of a money decree no blanket stay could have been granted as held by the Supreme Court in the case of **Malwa Strips Private Limited Vs. Jyoti Limited; (2009) 2 Supreme Court Cases 426**. No unconditional stay is permissible under Section 36(2) of the Arbitration Act as has been held in the case of **Pam Developers Private Limited Vs. State of West Bengal; (2019) 8 Supreme Court 112**. No error is committed by the learned Judge in granting stay subject to deposit of money with interest and asking for security.

11. I have carefully considered the rival submissions and the papers as also the decisions cited at the Bar. So far as the preliminary objection raised by the learned advocate for the respondent as regards maintainability of the present proceeding before a Single Judge in the present form, one needs to bear in mind that the Arbitration Act is a special statute whereas the C.C. Act is a general one. Therefore, even if by virtue of the provisions of the C.C. Act the proceeding before the Lower Court has been transferred and decided by a Commercial Court at the District Court level, and even if Section 13 of the C.C. Act provides for appeals to be lodged with the Commercial Appellate Division, since the impugned order is an interlocutory order passed under Section 36 of the Arbitration Act against which no appeal is provided, there is no question of resorting to the provisions of Section 13 of the C.C. Act which is a general statute in supersession of the

provision of appeals contained in Section 37 of the Arbitration Act. In other words, when there is a specific provision contained in Section 37 of the Arbitration Act which is a special statute, there could not be any appeal and when it is trite that the right of appeal is a statutory right, it would not be governed by a general provision of appeal and forum therefor contained in Section 13 of the C.C. Act. With respect, this is what has been observed and laid down by the Supreme Court in the case of **Kandla Export Corporation and another Vs. OCI Corporation and another; 2018(4) ALL M.R. 912**. It was a matter touching a similar dispute concerning the inter play between the provision of Section 50 of the Arbitration Act and Section 13 of the C.C. Act. Section 50 provides for appeal against a Foreign Award whereas Section 37 provides a similar remedy in respect of other Awards. Therefore, the principles and the logic can clearly be pressed into service. Suffice for the purpose to refer to the observations in paragraph No. 16, 23, 24 and 27 :

“16. Thus, an order which refers parties to arbitration under Section 8, not being appealable under Section 37(1) (a), would not be appealable under Section 13(1) of the Commercial Courts Act. Similarly, an appeal rejecting a plea referred to in sub-section (2) and (3) of Section 16 of the Arbitration Act would equally not be appealable under Section 37(2)(a) and, therefore, under Section 13(1) of the Commercial Courts Act.

23. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left to the Court authorized by law to hear appeals from such orders. Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be

attracted as laying down the forum which will hear and decide such an appeal.

24. In fact, in Sumitomo Corporation vs. CDC Financial Services (Mauritius) Ltd. And Ors., (2008) 4 SCC 91, this Court adverted to Section 50 of the Arbitration Act and to Sections 10(1)(a) and 10F of the Companies Act, 1956, to hold that once an appeal is provided for in Section 50, the Court authorized by law to hear such appeals would then be found in Sections 10(1) (a) and 10F of the Companies Act. The present case is parallel instance of Section 50 of the Arbitration Act providing for an appeal, and Section 13(1) of the Commercial Courts Act providing the forum for such appeal. Only, in the present case, as no appeal lies under Section 50 of the Arbitration Act, no forum can be provided for.

27. In this view of the case, it is unnecessary to advert to Shri. Giri's arguments based on Section 21 of the Commercial Courts Act. Section 21 would only apply if Section 13(1) were to apply in the first place, which, as has been found, cannot be held to apply for the reasons given hereinabove. Equally, it is unnecessary to advert to the arguments of the learned counsel for the Appellants based on Section 11 of the Commercial Courts Act."

12. Bearing in mind these principles, when this is not an appeal under Section 13 of the C.C. Act when the Arbitration Act does not provide for any appeal against the order impugned in the present matter which is passed under Section 36 of that Act, one need not referring to the provisions of the C.C. Act decide the forum to challenge the order of the kind challenged in the present matter. Therefore, in my considered view there is no substance

in the submission of the learned advocate for the respondent either as regards the nature of the present proceeding as it is styled or competence of the Single Judge to decide the matter in view of the provisions of the Bombay High Court Appellate Side Rules contained in Chapter XVII Rule 18.

13. Now reverting back to the core issues, by virtue of the recent amendment which has come into force with effect from 11.03.2021 a second proviso is added to Sub Section (3) of Section 36 of the Arbitration Act which empowers the Court to stay execution and operation of the award unconditionally pending disposal of the challenge under Section 34 of the Arbitration Act. However, it is applicable only where a challenge to the order is based on the ground that the arbitration agreement or the contract which is the basis of the award or the making of the award is alleged to have been induced or effected by fraud or corruption. Though such grounds have been sought to be made out in the present Writ Petition, the learned Judge in the impugned order has specifically observed that no such stand/ground is taken by the petitioners while challenging the Award under Section 34 of the Arbitration Act. If this be so, the submission of the learned A.G.P. that the award has been 'induced' cannot be accepted. In fact, as can be understood from the wording of that proviso mere allegations regarding inducement is not sufficient but such inducement must be on the basis of some fraud practised or corruption made. No such allegations can be found and consequently no exception can be taken to the observations and conclusions of the learned Judge of the lower Court holding that the petitioners are not entitled to unconditional stay to the execution of the award by resorting to this proviso.

14. Having thus concluded that the petitioners are not entitled to seek any unconditional stay, the only thing that remains to be considered is as to if at all the learned Judge of the lower Court was justified in granting stay subject to the conditions as are imposed.

15. Though several issues touching the aspect of limitation and maintainability of the arbitral proceeding have been raised, those being the mixed questions of facts and law, this Court at this juncture cannot go into all these aspects. It is for the lower Court to decide these issues. Suffice for the purpose to observe that by virtue of the provisions of Section 36, since it is a money decree and the Code of Civil Procedure in Order XLI Rule 1(3) mandates imposition of the terms and conditions for even lodging of a proceeding challenging the award, no fault can be found with the learned Judge of the lower Court in expecting the petitioners to deposit 60% of the amount of award.

16. However, simultaneously, no justification can be found for issuing a direction for depositing the interest at the rate of 12% as well. The agreements between the parties do not stipulate for any such interest however, still, since it is arising out of a commercial transaction, by virtue of the provisions of the Interest Act, there could be a justification for grant of some interest commensurate with the current rate of interest being granted by the Nationalized Banks.

17. Similarly, though the provision of Order XXVII Rule 8A of the Code of Civil Procedure granting immunity to the government from furnishing security is held to be archaic by the Supreme Court in the case of **Pam Developers Private Limited (supra)** it has not struck it down as can be seen from paragraph No. 29 which reads thus :

“29. Although we are of the firm view that the archaic Rule 8-A of Order 27 CPC has no application or reference in the present times, we may only add that even if it is assumed that the provisions of Order 27 Rule 8-A CPC are to be applied, the same would only exempt the Government from furnishing security, whereas under Order 41 Rule 5 CPC, the Court has the power to direct for full or

part deposit and/or to furnish security of the decretal amount. Rule 8-A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof.”

18. If this be so, even the impugned order to the extent of directing the petitioner to furnish security for the remainder amount of the award (40%) cannot be said to be legal and proper.

19. The Writ Petition is partly allowed.

20. The impugned order to the extent it directs deposit of amount together with 12% interest and further directing a security to be furnished is quashed and set aside. The order directing the petitioners to deposit 60% of amount of Rs. 32,62,48,730/- stands confirmed with a further condition that the petitioners shall deposit this amount together with interest at the rate of 6% p.a.

21. The Rule is accordingly made absolute.

(MANGESH S. PATIL, J.)

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