

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

ORIGINAL SIDE

Present:-

THE HON'BLE JUSTICE Subrata Talukdar.

-And-

THE HON'BLE JUSTICE Kesang Doma Bhutia.

A.P.O.T No. 144 of 2021

With

A.P. No. 1989 of 2014

(IA No: GA/1/2021)

West Bengal Transport Infrastructure Development Corp. Ltd.

-VS-

Shristi Infrastructure Development Corporation Limited

For the Appellant : Mr. Abhrajit Mitra, Sr. Adv. with
Mr. Anirban Ray,
Mr. Shaunak Mitra,
Mr. Sandip Dasgupta,

For the Respondent/
Award-holder : Mr. Swatarup Banerjee, with
Mr. Vikram Wadehra,
Ms. Vidushi Chokhani,
Mr. Soumava Ghosh,
Sk. Sariful Haldar,

Hearing concluded on : 08.12.2021

Judgment on : 04.02.2022

Kesang Doma Bhutia, J: -This appeal is directed against the order passed by Hon'ble Single Bench in I.A. No. G.A. 7 of 2021 in A.P. No.1989 of 2014 on 15th September, 2021 whereby the Hon'ble Single Bench has been pleased to permit Shristi Infrastructure Development Corporation/the Award Holder to encash bank guarantee of Rupees 6 Crore deposited by the petitioner/award debtor while obtaining order of stay of operation of the Arbitration Award dated September 3rd, 2014 in a petition under section 36(2) of the Arbitration and Conciliation Act and further directed the award-holder to furnish a bank guarantee for the same amount by a Public Financial Institution of the petitioner's choice within 10 days from the date of passing of the order.

In order to appreciate the appeal and determine the issues in question the facts of the case in gist are that the West Bengal Transport Infrastructure Development Corporation/ the petitioner had invited tender for construction of Vivekananda Road Fly Over project sometime in the year 2000. The respondent was successful and the contract was awarded in its favour. The petitioner failed to discharge its reciprocal obligation in the nature of condition precedent for commencing of work by the Respondent, *inter alia*, by failure to hand over possession of the site, while the Respondent after the contract was awarded in its favour had incurred huge expenses in connection with preparatory and other work related to the aforesaid agreement.

The Respondent was directed to submit performance security for the construction period by the petitioner vide letter dated 2nd July, 2002, when the petitioner has failed to handover the vacant possession of the construction site to the respondent. Challenging the letter dated 2nd July, 2002, the respondent filed a Writ Petition No. 2043 of 2002 and an interim order was passed restraining the petitioner from giving effect to such letter and Writ was finally disposed of on 02.03. 2009 directing parties to resolve their dispute through arbitration mechanism as provided in Clause 31 of the Concession Agreement.

During the pendency of the Writ Petition the Government of West Bengal handed over the entire project to KMDA and agreement between petitioner and respondent suffered a natural death.

The matter was referred to the Arbitral Tribunal which passed an Award on 3rd of September, 2014 in favour of the respondent awarding Rupees 4 Crore 32 Lakh towards principal amount along with interest at the rate of 18 per cent per annum.

Challenging the said Award dated 3rd September, 2014, the petitioner filed petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court and also filed an application under Section 36 (2) of the Arbitration Act for stay of the operation of the Arbitration Award. While granting the stay, the

Hon'ble Single Bench directed the petitioner to furnish bank guarantee of Rupees 6 Crore issued by a Nationalised Bank to the Learned Registrar, Original Side. From time to time such bank guarantee was extended.

That in A.P. No.1989 of 2014 under Section 34 of the Arbitration Act, the respondent/award holder filed the impugned application being no. GA 7 of 2021 and prayed for encashment of bank guarantee furnished by the petitioner/appellant to the tune of Rupees 6 Crore while obtaining stay of operation of the Arbitration Award, with a consequential order of permitting the respondent to furnish another Bank Guarantee of the same amount to be furnished by a Nationalised Bank with the condition the bank guarantee shall be kept alive till disposal of the application u/s 34 of the Arbitration Act/ A.P. No.1989 of 2014.

After hearing learned Counsel for both sides Hon'ble Single Bench has been pleased to allow application filed by the Award Holder permitting it to encash the bank guarantee furnished by the petitioner but on furnishing a bank guarantee for the same amount issued by a Public Financial Institution of the petitioner's choice within ten days from the date of the order.

Learned counsel for the petitioner submits that while disposing of the application of the petitioner u/36 of the Arbitration Act, the

Hon'ble Single Bench was pleased to direct the petitioner to furnish a bank guarantee of Rupees 6 Crore vide order dated 07.12.2018 and granted stay of operation of Award till the disposal of A.P.no.1989/14 without any reference to the Court. Such order has attained its finality as no revision or appeal has been preferred against the same. Such order dated 07.12.2018 cannot be modified and rendered nugatory by the conflicting order impugned herein.

In support of such submission Learned Counsel has referred to *Satyen Construction vs. State of West Bengal (2020) SCC Online CAL 1777* wherein it has been observed, "Ordinarily, when a prayer for stay of the operation of the Award is taken up for consideration under Section 36 of the Act, the Court would hear both sides and would weigh the rival cases before passing an order for a conditional or unconditional order of stay. Once such exercise is completed, the same cannot be interfered with unless subsequent events are cited. Thus, when a conditional or unconditional order is made staying the operation of an Arbitral Award under Section 36 of the Act, the award-holder cannot seek to have the order modified unless the award-holder invokes Section 9 of the Act on the basis of such material that could not have been placed before the Section 36 Court earlier, or had not been placed because of some insurmountable difficulty or the like. Section 9 of the Act, particularly in clause (e) of Sub-section (1) is wide enough to allow an application for interim measures to be made to the

Arbitration Court even after an order for stay of the operation of the award, conditionally or unconditionally, has already been made. As to whether an order would be passed on such application, would depend on the merits of the application and the grounds which are cited.”

Learned Counsel for the petitioner has also referred to *State of West Bengal &Anr, Vs. Dilip Kumar Saha, judgement passed by Hon’ble Co-ordinate Bench of this High Court in APO No. 95 of 2021* and where similar matter was in issue and the Hon’ble Division Bench has been pleased to reject the withdrawal of sum of Rupees 1.50 Crore deposited by the award debtor while obtaining order of stay of operation of Arbitral Award and held neither Section 36 of the Arbitration Act nor Order 41 Rule 5 of the CPC contemplates variation or modification of the order of Stay. The Court may permit withdrawal of the deposited amount in exercise of inherent power u/s 151 of CPC provided it can be shown that post stay order certain changed circumstance have taken place and to secure ends of justice.

To such submission of learned counsel for petitioner, learned counsel for the respondent submits that by filing G.A. 07 of 2021 the respondent never sought for modification of the order of stay granted while disposing the application u/s 36 of the Arbitration Act on 01.12.18. Such facts have been reflected in the impugned order itself. The application is an independent application seeking interim relief

under the Arbitration Act. If the impugned order is considered to be a modification of the order passed earlier under section 36(2) of the Act, as contended by the petitioner's counsel, then no appeal lies under section 37 of the Arbitration Act and as such the present Appeal is not maintainable. Learned Advocate in support of his such contention referred to *Hindustan Copper Ltd. Vs Nicco Corporation reported in (2009) 6 SCC 69* and *Kandala Export Reported in (2008) 14 SCC 715*.

To such submission, learned counsel for the petitioner submitted that impugned order can be Appealable under clause 15 of the Letters Patent or impugned order can be treated to have been passed under Section 9 of the Arbitration Act. Learned Counsel referred to *Fair Deal Supplies Ltd. Vs R. Pyarilal Iron and Steel Pvt.Ltd.* and where Hon'ble Co-ordinate Bench has been pleased to hold if any order passed in Arbitration Proceeding does not fall within any of the provisions of the Arbitration and Conciliation Act, 1996, then an Appeal lies under Clause 15 of the Letters Patent. Otherwise a litigant would be remedy-less.

Further, Learned Counsel for the respondent submitted that if adequate cause has been shown for encashment of security upon an application being filed by the respondent before the Learned Trial Court, then encashment can be allowed upon furnishing a security of equivalent amount as may be directed by the learned Trial Court as no

prejudice would be caused even if the petitioner succeeds in the proceeding under section 34 of the Act. Then the petitioner can encash the bank guarantee furnished by the Respondent and can get back the entire amount with interest. There is no illegality in passing the order impugned as such practice is being followed by different High Courts and as well by the Hon'ble Supreme Court. The Application No. G.A. 7 of 2021 may be treated as an interim petition under section 9 of the Arbitration Act. In support of such submission reference is made to *M/S MehataTeja Singh and Company vs Grindlays Bank Ltd. reported in (1982) 2 SCC 199* where Grindlays Bank was directed to deposit the entire decretal amount and Appellant Company was given liberty to withdraw the entire amount on furnishing Bank Guarantee to the satisfaction of the Pothonotary of the High Court.

He has also referred to *Steel Authority of India Ltd. vs. Seaspray Shipping Co.Ltd.* and where Hon'ble Supreme Court in Appeal C No. 5116/2020 was pleased to pass an order "without prejudice to the contentions of both the parties, the petitioner SAIL is directed to deposit lump sum amount of Rupees 50 Crore before High Court of Delhi within a period of six weeks from today. On such deposit, the money shall be disbursed to the respondent on furnishing the necessary Bank Guarantee. In the meantime no coercive steps in the execution proceedings shall be taken by the respondent against the petitioner SAIL until further order."

He has also referred to *SREI Infrastructure Finance Ltd. vs. Candor Gurgaon Two Developers and Projects Pvt. Ltd.* and where Hon'ble Supreme Court has been pleased to pass an interim order during pendency of proceedings under section 34 of the Arbitration and Conciliation Act to the effect "there shall be interim stay of award subject to the petitioner's depositing 60% of the amount of decree. The remaining 40% of the amount shall be secured by way of Bank guarantees of the nationalized bank within eight weeks. The respondent shall be at liberty to withdraw the said amount on furnishing appropriate security".

He has also referred to another order passed by the Hon'ble Supreme Court in *Manish vs Godwari Marathwada Irrigation Development Corporation* and where the Hon'ble Supreme Court was pleased to set aside the order passed by Hon'ble Bombay High Court, permitting the petitioner to make 60% deposit, pending Appeal u/s 37 of the Arbitration Act and directed the petitioner to make 100% deposit of the decretal amount and permitted the respondent to withdraw the amount deposited on furnishing solvency security to the satisfaction of the High Court.

He has also referred to another order passed by the Hon'ble Supreme Court in *Dilip Kumar Chatterjee vs the State of West Bengal &Anr.* on 09.12.2021 and where the Respondent State was directed to

deposit Rupees Five Crore before this High Court and liberty was granted to the petitioner to withdraw the said amount after furnishing bank guarantee to the satisfaction of the learned Registrar, Original Side, Calcutta High Court and after securing formal orders from the High Court.

In view of the orders that have been passed by the Hon'ble Supreme Court in different cases and discussed above it appears to this Court Hon'ble Single Bench has not committed any illegality or error in passing the impugned order.

In *Satyen Construction (Supra)* and in *Dilip Kumar Saha (Supra)* co-ordinate bench of this High Court have held that no award holder can seek modification of order staying operation of award passed under Section 36 of the Act unless the award holder invokes section 9 of the Act or Section 151 CPC for interim measures disclosing events subsequent to the passing of the order of Arbitral Award which necessitated the Award-holder to seek for encashment of the bank guarantee furnished by the Award-debtor/ the petitioner. However, in the orders that have been passed by the Hon'ble Supreme Court there the encashment of bank guarantee furnished by the Award-debtor during pendency of hearing of application under section 34 of the Arbitration Act, stands permissible in the light of subsequent development cited by the parties.

In the present case the respondent has stated that it has been adversely impacted due to pandemic and unable to meet the expenses towards its employees' salaries, payment of statutory liabilities, interest due to financial institutions and to rescue its accounts being classified as NPA and has also filed copies of email sent by different financial institutions, showing its need for encashment of the bank guarantee furnished by the award-debtor and replacing the same by another bank guarantee of the same amount furnished by a Nationalised Bank/ Public Sector Bank.

In the light of the above discussion this Court restrains itself from interfering with the findings of the Hon'ble Single Bench and thus finds no merit in the Present Appeal.

Accordingly, **A.P.O.T. No. 144 of 2021** with **A.P. No. 1989 of 2014 (IA No. GA/1/2021)** stand dismissed.

There will be no order as to costs.

Interim order, if any, stands vacated.

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.

I Agree.

(Subrata Talukdar, J.)

(Kesang Doma Bhutia, J.)

Later

Ld. Senior Counsel for the Appellants prayed for Stay of the order.

Stay of the order prayed for considered and rejected.

(Subrata Talukdar, J.)

(Kesang Doma Bhutia, J.)