

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

946 WRIT PETITION NO.4182 OF 2022

MAHARASHTRA STATE ROAD DEVELOPMENT
CORPORATION LTD THR CHIEF ENGINEER

VERSUS

M/S SUPREME ASPHALTS PVT. LTD. AND
M/S DEEDEE INFRASTRUCTURAL ENGG PVT. LTD

...

Advocate for Petitioner : Mr S.V. Adwant
Advocate for Respondent No. 2 : Mr A.R. Nikam

CORAM : SANDEEP V. MARNE, J.
DATE : 22nd NOVEMBER, 2022

PER COURT :

1. By this petition, petitioner assails order dated 29.03.2022 passed by the District Judge-2, Aurangabad by which petitioner's application for stay of the award dated 26.03.2019 and corrected the award vide order dated 16.05.2019 is allowed subject to petitioner depositing an amount of Rs. 10.00 crores.

2. Mr Adwant, the learned counsel appearing for petitioner has taken me through the awards. He would submit that the claim of the respondent was traversed by petitioner in its entirety and therefore, it was incumbent upon respondent to lead evidence in support of its claim. Mr Adwant would submit that the respondent, however, chose not to lead any evidence in support of its claim.

3. Mr Adwant would also invite my attention to para Nos. 14 and 15 of the award in which the learned arbitrator has recorded that several claims were barred by "no claim" assurance given by respondent to petitioner. However, learned arbitrator has still proceeded to allow those claims by recording a finding that despite submission of "no claim" certificate, a contractor can always lodge claims subsequently. This prima facie appears to be erroneous.

4. Mr Adwant relied upon the provisions of Order 41 Rule 1 (3) under which this court has discretion to dispense with deposit of the awarded sum. Mr Adwant relied upon the Judgment of this Court *in ICICI Bank Limited Vs. I-Pay Clearing Services Private Limited 2019 SCC Online Bom. 13078* in support of his contention that an appropriate case, the court entertaining petition under section 34 of Arbitration & Conciliation Act 1996 can dispense with deposit of awarded amount as a pre-condition for stay to the award. He would also rely upon the Judgment of the Supreme Court in case of *Sihor Nagar Palika Bureau Vs. Bhabhlubhai Virabhai and Co. (2005) 1 CLR 637* in support of his contention that the appellate court enjoys wide discretion in a given case to permit furnishing of the security instead of insisting on deposit of awarded sum.

5. Per contra, Mr Nikam, learned counsel appearing for respondent No. 2 opposes the petition. He submits that under the provisions of sub section 3 of section 36 of The Arbitration and Conciliation Act, 1996 read with the provisions of Order I Sub Rule (3) of Code of civil Procedure, it is mandatory for petitioner to deposit the entire awarded sum while setting up challenge to the award under section 34 of the Act. He would rely upon the Judgment of the Apex Court in *Pam Developers Private Limited Vs. State of West Bengal (2019) 8 SCC 122* in support of his contention that the special provision under Order XXVII Rule AA of CPC is applicable only to the Government and that such protection cannot be extended to the petitioner-Company.

6. After having heard learned counsel appearing for the parties and having perused the award passed by the sole arbitrator, it is seen that the claim of the respondent was denied by petitioner in entirety. However, the respondent chose not to lead any evidence in support of his claim. Another *prima facie* error that seems to have been crept in the impugned award is where the arbitrator has

proceeded to allow few claims in respect of which 'no claim' certificates were issued by the respondent. *Prima facie*, it appears that such claims would be barred by principle of waiver and acquiescence.

7. I am therefore, of the view that an arguable case is made out. Petitioner is a government company. As per the law laid down by the Apex Court in ***Pam Developers Private Limited*** (supra), no special dispensation can be given to the petitioner-company. In my view, the rights of the parties can be balanced, if petitioner is granted an opportunity to submit bank guarantee of the principal amount of Rs. 4,03,67,328/- awarded by the learned sole arbitrator. I accordingly, proceed to pass the following order :-

ORDER

- (i) The order dated 29.03.2022 passed by the District Judge-2, Aurangabad is modified to the extent that the application filed by petitioner at Exh.15 shall stand allowed subject to the condition of petitioner submitting a bank guarantee for an amount of Rs. 4,03,67,328/- valid till the decision of Civil Misc. Application No. 258/2019 within a period of four weeks from today.
- (ii) In the event, petitioner fails to submit bank guarantee as directed, the award of learned sole arbitrator shall remain enforceable.
- (iii) The District Court shall proceed to decide the Petition filed by Petitioner under section 34 of the Act of 1996 without being influenced by any of the observations made in the present order.
- (iv) With the above directions, the petition is partly allowed.

[SANDEEP V. MARNE, J.]

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