OCD 68

ORDER SHEET
AP-COM/308/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

UNION OF INDIA
VS
M/S A B ENTERPRISES

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 30th July, 2025.

Appearance:

Mr. Mohit Gupta, Adv.
Mr. Sarda Sha, Adv.
...for the petitioner.

Mr. Debdutta Raha, Adv.
Mr. Dyutiman Banerjee, Adv.
...for the respondent.

1. This is an application under Section 36(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act') for unconditional stay of the award dated February 29, 2024 without deposit of any amount.

2. The affidavit in opposition is taken on record.

3. This Court proceeds on the basis of the award and not the contents of the affidavit in opposition.

4. The petitioner submits that the arbitral tribunal passed an award, which was a verbatim reproduction of another award which was set aside by a co-ordinate Bench. On this ground alone, the arbitral award should be stayed

unconditionally. It is submitted that the arbitral tribunal did not consider Clause 2.2 of the contract dated May 18, 2015 and allowed payment of service tax in favour of the claimant. This was contrary to the provisions of the contract.

5. According to Mr. Gupta, the tribunal wrongly relied on an estimate. Such reliance was also held to be contrary to the provisions of a similar contract, by a learned single Judge, in another proceeding. Mr. Gupta further submits that service tax was made applicable by the competent authority to services relating to supply of manpower to the railway authorities since 2011 and as such, no exemption could be provided by the railways. The learned tribunal, knowing fully well about such applicability, ignored the provisions of the relevant statute and held that rates quoted by a contractor would not include service tax and the railway authorities were required to pay the service tax component to the respondent/contractor.

6. Learned advocate for the claimant/respondent submits that the contract was entered into on May 18, 2015. By a notification, the Railway Board had declared that service tax would not be applicable in case of contract for providing service to the railway authorities. Although Mr. Gupta submits that the railway authority did not have any right to make service tax inapplicable, yet the railway authorities had exempted such tax. The rates were quoted by the contractor upon understanding that service tax would not be payable by the contractor.

7. In the instance case, the contract was entered into on May 18, 2025, but service tax was inapplicable at the relevant point of time as per the notification of the Railway Board.

8. The issue before this court is whether the petitioner is entitled to an unconditional stay of the award on the ground that the award was perpetuated by fraud and corruption under Section 36(2) of the said Act.

9. The short point raised by the petitioner is that the service tax component was included in rates quoted by the contractor under clause 2.2 of the contract.

10. The tribunal held that service tax was not included in the rates quoted by the contractor and as such, the service tax component should be paid to the petitioner by the railway authorities.

11. The decision relied upon by Mr. Gupta in the matter of Union of India Vs. AB Enterprise decided in AP-COM/801/2024, was passed in respect of a contract dated September 26, 2015 when the Railway Board's notification making service tax inapplicable to services provided to Railways, had been withdrawn. The difference in the dates have some context. The contractor specifically contends that rates were not quoted with the service tax component as the Railway Board's notification was applicable. In respect of the matter in which the award was set aside, such was not the case. The submissions of Mr. Gupta are on the interpretation of clause 2.2. of the contract. The arguments of Mr. Gupta are also on the merits of the findings of the Tribunal. Moreover, the mere fact that a coordinate bench had set

aside an award, inter alia, holding that service tax was included in clause 2.2. of a similar contract, cannot be a ground to hold that the arbitral tribunal had proceeded fraudulently and the award was perpetuated by fraud and corruption. The decision of His Lordship is under challenge in appeal. Moreover, the decision was given after the subject award was published. An erroneous understanding of law, an incorrect finding and a misinterpretation of the provisions of the contract, cannot be reasons enough, for this court to hold that the Tribunal had proceeded in a fraudulent manner and that the award was a creature of corruption. For the Court to hold that an award should be stayed unconditionally under the provisions of the law, the standard of proof is very high. The arguments of Mr. Gupta are on patent illegally of the award. This cannot be a ground to hold that the tribunal had passed an award in a fraudulent manner. In AP-COM/801/2024, His Lordship had come to a specific finding that the interpretation of the tribunal of clause 2.2. was wholly erroneous and contrary to the provisions of the contract. There is no finding of any corrupt practice on the part of the said tribunal in passing the award, which was the subject of challenge before His Lordship.

12. The second proviso to Section 36(3) requires a primary satisfaction on the part of the court that the making of the award as alleged by the petitioner was induced or affected by fraud or corruption. The award-debtor can seek stay of operation of the award upon discharging the burden of at least, prima facie, showing that the award was induced by fraud or corruption. Fraud and corruption have not been defined in the said Act.

13. The Oxford dictionary defines fraud as here under :-

> "/n. 1. Criminal deception; the use of the false misrepresentations to gain an unjust advantage. 2. A dishonest article or trick. 3. A person or thing not fulfilling what is claimed or expected of him, her, or it."

14. From the legal standpoint Black's law dictionary (9th Edition) defines fraud as here under :-

> "fraud, n. 1. A Knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (es.p when the conduct is willful) it may be a crime. – Also termed intentional fraud."

15. In the decision of ***SP Chengalvaraya Naidu (Dead) By LRs. Vs. Jagannath (Dead) by LRs and other*** reported in ***(1994) 1 SCC 1***, fraud was defined as here under:-

> "an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage."

16. In ***Venture Global Engineering LLP vs. Tech Mahindra Limited*** reported in ***(2018) 1 SCC 656*** deliberation on the meaning of fraud was as follows:-

> "**76.** The expression "fraud", what it means and once proved to have been committed by the party to the lis against his adversary then its effect on the judicial proceedings was succinctly explained by this Court in Ram Chandra Singh v. Savitri Devi [Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319] in the following words : (SCC p. 322b-d)
> "Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation

is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

77. Similarly, how the leading authors have dealt with the expressions "fraud", "misrepresentation", "suppression of material facts" with reference to various English cases also need to be taken note of. This is what the learned author Kerr in his book Fraud and Mistake has said on these expressions.

78. While dealing with the question as to what constitutes fraud, the learned author said, "What amounts to fraud has been settled by the decision of House of Lords in Derry v. Peek [Derry v. Peek, (1889) LR 14 AC 337 (HL)]

'… fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

79. The author has said that, Courts of Equity have from a very early period had jurisdiction to set aside awards on the ground of fraud, except where it is excluded by the statute. So also, if the award was obtained by fraud or concealment of material circumstances on the part of one of the parties so as to mislead the arbitrator or if either party be guilty of fraudulent concealment of matters which he ought to have declared, or if he wilfully mislead or deceive the arbitrator, such award may be set aside.

80. The author said that, if a man makes a representation in point of fact, whether by suppressing the truth or suggesting what is false, however innocent his motive may have been, he is equally responsible in a civil proceeding as if he had while committing these acts done so with a view to injure others or to benefit himself. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

17. Under such circumstances, the prayer for unconditional stay of the award dated February 29, 2024 passed by the arbitral tribunal, is refused. This is not a case which is covered by the situations discussed hereinabove. It does not appear that any deliberate act of cheating or deception had resulted in

the publication of the award. There shall be an unconditional stay of the award for a period of six weeks within which time the petitioner will deposit a sum of Rs.18,87,625/- with the Learned Registrar, Original Side, by demand draft. Such amount shall be deposited in an auto renewable fixed deposit. If the said deposit is made within the aforementioned period as directed, the stay shall continue till disposal of the application under Section 34 of the Arbitration and Conciliation Act, 1996. In case of default, this order shall stand automatically vacated and the award-holder may proceed with the execution.

18. The discussions and observations hereinabove are wholly prima facie and restricted to disposal of this application. The application for setting aside the award shall continue independently and this order shall not influence the proceeding. None of the points taken for setting aside the award have been decided here. All points are kept open for decision in the application under Section 34 of the said Act.

19. AP-COM/308/2025 is disposed of.

(SHAMPA SARKAR, J.)

B.Pal / S. Kumar