

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO. 3642 OF 2024
WITH
INTERIM APPLICATION NO. 22009 OF 2024
IN
COMMERCIAL ARBITRATION PETITION NO.427 OF 2024

Mumbai Metropolitan Region Development

Authority

...Applicant/Petitioner

Versus

Mumbai Metro One Private Limited

...Respondent

Mr. J.P. Sen, Senior Advocate *a/w Kunal Vaishnav, Prachi Garg, Prerna Verma, Sayalee Dolas, Manav Jain, i/b DSK Legal, for the Applicant/Appellant/Petitioner.*

Mr. Prateek Seksaria, Senior Advocate *a/w. Ms. Anjali Chandurkar, Mr. Dhishan Kukreja, Ms. Vidhi Shah, Mr. Rohit Agarwal, Mr. D.J. Kakalia and Mr. Kartik Hede i/b. Mulla & Mulla and CBC, Advocates for Respondent.*

CORAM: **SOMASEKHAR SUNDARESAN, J.**

RESERVED ON: **May 6, 2025**

PRONOUNCED ON: **June 10, 2025**

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JUDGEMENT:**Context and Background:**

1. Interim Application No. 3642 of 2024 (“**Stay Application**”) is an application seeking stay of the effect and operation of an arbitral award dated August 29, 2023 read with a corrected arbitral award dated February 26, 2024 (collectively, “**Impugned Award**”). The Stay Application is filed in Commercial Arbitration Petition No. 427 of 2024 (“**Section 34 Petition**”) which is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) praying for the Impugned Award to be quashed and set aside.

2. The disputes and differences between the parties relate to the development, design, engineering, financing, procurement, construction, operation and maintenance of mass rapid transit system i.e. metro rail along the Versova-Andheri-Ghatkopar corridor under a Concession Agreement dated March 7, 2007 (“**Concession Agreement**”). The Respondent, Mumbai Metro One Private Limited (“**MMOPL**”) raised claims in the arbitration proceedings which led to the Impugned Award. The Petitioner, Mumbai Metropolitan Region Development Authority (“**MMRDA**”) is a 26% equity shareholder in MMOPL. The metro rail project started with a delay of over two years. MMOPL claimed that the project costs increased from Rs. 2,356 crores to Rs. 4,321 crores. This is hotly contested by MMRDA.

3. The Impugned Award is a majority award passed by two of the three arbitrators, the third having written a dissent. The Impugned Award has quantified claims under various heads including awards of amounts withheld in the course of paying tranches of ‘Viability Gap Funding’ (“**VGF**”) along with interest thereon; interest on delay in disbursement of VGF tranches; compensation for additional costs incurred on account of payment of rent for land along with the cost of funds on such payments; compensation for having to construct a steel bridge instead of a concrete bridge; amounts towards operations and maintenance and life cycle costs; amounts towards cost escalation; pendente lite interest; future interest and costs.

4. It is the MMRDA’s contention that the Impugned Award is patently illegal, perverse, and calls for intervention under Section 34 of the Act. The MMRDA commends the dissent award for acceptance. While these facets of the matter would be considered during the final hearing of the Section 34 Petition, the immediate consideration that is sought by the parties is to the Stay Application – the MMRDA strenuously urging that no deposit should be directed for grant of stay, and the MMOPL contending that the conventional approach of a full deposit must follow should there be any stay on execution.

5. I have heard at length, Learned Senior Counsel on behalf of the parties – Mr. J.P. Sen on behalf of the MMRDA and Mr. Prateek Seksaria on behalf of MMOPL. Each side has made submissions almost as if this were a stage of final hearing of the matter, and has presented copious notes on submissions and other materials from the record to impress upon the Court, the merits of their respective positions.

Core Issue:

6. The core issue to be answered in this case is whether a case is made out for ordering that no deposit whatsoever is warranted for a stay of execution of the Impugned Award. Towards this end, it is necessary to examine the contentions on behalf of MMRDA to consider whether an unconditional stay without deposit of any amount is warranted in the facts of the case.

7. Section 36 of the Act is clear in its terms. This Court has the discretion to impose such conditions as it deems appropriate to grant a stay of the operation of the arbitral award for reasons to be recorded in writing. The conditions on which the Court must stay the award unconditionally would be met if the Court is satisfied that the contract or agreement which is the basis of the award, or the making of the award was induced by fraud or corruption. In the matter at hand, there is not a whisper of an inducement by

fraud or corruption in either the execution of the agreement in question or the arbitral award. Therefore, one has to see if the discretion of this Court is required to be exercised in the manner sought by MMRDA – an unconditional stay of the operation of the award.

MMRDA's Contentions:

8. Mr. Sen would contend that the Impugned Award is completely arbitrary, perverse and a product of such non-application of mind that the award could have never been passed by any reasonable person. Towards this end, the contentions made on behalf of MMRDA may be summarised thus:

- a) The recovery or withholding of amounts from VGF payable by MMRDA to MMOPL was by way of recovery of rent. Adjudication of the quantum of rent is not arbitrable at all in law and fall within the jurisdiction of the Small Causes Court established under The Presidency Small Causes Court Act, 1881. The specific license agreements do not contain an arbitration clause and therefore the issue falls outside the scope of arbitration. Therefore, the award of Rs. 35 crores is said to be untenable;

- b) Recovery of costs incurred towards the casting yard awarded in the sum of Rs. 13.16 crores is based on no evidence of actual cost incurred on the additional rent liability;
- c) The award of Rs. 30.48 crores towards additional costs along with cost of funds and interest at the rate of 10% per annum for one year is without proper appreciation of the technical proposal, and a misreading that there is a change in scope;
- d) A declaration that MMOPL is entitled to operations and management costs and life cycle costs is without proper appreciation of evidence;
- e) Overall, the amount of Rs.~411.70 crores awarded towards losses suffered has been made without documentary evidence to substantiate alleged payments made to sub-contractors and third parties and without any proof of losses being suffered due to delay in providing right of way. There was mutual consent for extension of time for grant of right of way and access to the site, and these were ignored; and
- f) A number of grounds in the Stay Application relate to appreciation of evidence by the Learned Arbitral Tribunal and how it erroneously

appreciated contentions and submissions, how its findings are conjectural, and the like. According to the MMRDA, amounts have been awarded without proper basis being available for award of such sums.

9. As a result, Mr. Sen would contend, a strong case has been made out for determining *prima facie*, that the Impugned Award is perverse and patently illegal. It would be convenient not to direct a deposit of the amounts awarded and directing a deposit in the backdrop of the weak *prima facie* case in MMOPL's favour would cause grave and irreparable harm to MMRDA.

10. This being the foundation of the findings, Mr. Sen would contend that the Impugned Award suffers from the vice of giving an actual assessment of damages a go-by and treating financial statements as the sole basis of determining increase in costs. The assessment of role and attribution of delays to the respective parties is vital, he would submit and contend that such an approach is perverse.

11. Mr. Sen would contend that simply comparing the original project cost with the increased project cost cannot be the basis of ascertaining increase in costs to be awarded in the arbitration. To compute damages the causal nexus

between the breaches and the losses suffered by MMOPL needs to be assessed and one cannot award damages without role attribution to the causation of the losses. Mr. Sen would contend that the confirmation of costs overruns at the Board Meetings cannot bind MMRDA. Even otherwise, he would contend, the costs attributed to foreign exchange currency losses have not been proven and have been awarded simply on the basis of excel files presented by MMOPL.

12. Mr. Sen would rely on the following judgements to buttress the point that the Court need not impose a condition of a deposit when considering a stay of execution of the arbitral award:

- a) *Ecopack India Paper Cup Pvt. Ltd. Vs. Sphere International* – 2018 SCC OnLine Bom 540;
- b) *CFM Asset Reconstruction Pvt. Ltd. & Anr. Vs. SAR Parivahan Pvt. Ltd.* – 2024 SCC OnLine Bom 1659;
- c) *Alkem Laboratories Limited vs. Issar Pharmaceuticals Pvt. Ltd.* – IA No. 377/2024 in CARBP No. 389/2023;
- d) *Ramesh Sumermal Shah vs. Bharat Kishoremal Shah* – IA(L) 13398/2023 in CARBP (L) No. 10500/2023; and

*e) Aurum Ventures Pvt. Ltd. Vs. HT Media Ltd. And Ors – 2024 SCC
OnLine Del 4061*

MMOPL's Contentions:

13. In sharp contrast Mr. Seksaria, on behalf of MMOPL would point out that audited financial statements of MMOPL cannot be treated as financial statements of just one party to the dispute – MMRDA was not only represented on the Board of Directors of MMOPL but also its nominee director chaired the Audit Committee. The Learned Arbitral Tribunal was entirely correct, he would contend, in taking note of the true and fair view of the factual position, as stated and certified by the Board of Directors and Audit Committee of MMOPL, which included MMRDA's own nominees.

14. Mr. Seksaria would contend that it would not be open to MMRDA to take one position of fact in the course of deliberations in the governance of MMOPL and another when it comes to honouring the implications of the factual position endorsed by MMOPL's instruments of governance. He would point to various heads of decisions in the governance of MMOPL where without the affirmative consent of MMRDA no decisions can be taken – thereby indicating that MMRDA was fully conscious and aware of various facets of facts that were involved in ascertaining the cost overrun and it

cannot be permitted to turn around and purport that proving admitted facts must be commenced from scratch.

15. The very chairman of the Audit Committee who is an MMRDA nominee director was also the witness who deposed on behalf of MMRDA, he would point out, and contend that the Learned Arbitral Tribunal indeed considered voluminous evidence and has returned a cogent and well-reasoned award. More importantly, Mr. Seksaria would contend that not only at this stage (when considering the Stay Application) but even at the stage of the final hearing of the Section 34 Petition, it would not be open to this Court to re-appreciate evidence and sit in appeal on the merits of findings of fact. The jurisdiction of the Section 34 Court is not that of an appellate review, he would contend, which is what MMRDA seeks from this Court at this stage too. Mr. Seksaria would submit that the matter is being re-argued on behalf of MMRDA, which is impermissible.

16. Mr. Seksaria would contend that it is now trite law that the fruits of having won the arbitration should not be denied to the award-creditor and no case has been made out for invoking the conditions on which deposit may be waived by the Court applying the principles flowing from the provisions of Order XLI, Rule 5 of the Code of Civil Procedure, 1908. In particular, if the

award is in the nature of a money decree, he would submit, the Court must direct a full deposit of the decretal amount. Mr. Seksaria would seek to rely on, among others, the following judgements:-

- a) *ITD Cementation India Ltd. Vs. Urmi Trenchless Technology Pvt. Ltd. – 2020 SCC OnLine Bom 10611;*
- b) *Sepco Electric Power Construction Corporation vs. Power Mech Projects Ltd. – 2022 SCC OnLine SC 1243;*
- c) *Sarat Chatterjee and Co. (VSP) Pvt. Ltd. Vs. Sri Munisubrata Agri International Ltd. & Anr. – 2023 SCC OnLine Cal 2548;*
- d) *Anand Rathi Share & Stock Brokers Ltd. Vs. Anish Navnitlal Mehta HUF – 2023 SCC OnLine Bom 2572;*
- e) *Manish vs. Godawari Marathwada Irrigation Development Corporation – SLP (C) No. 11760-11761/2018;*
- f) *Toyo Engineering Corporation & Anr. vs. Indian Oil Corporation Ltd. – Civil Appeal nos 4549-4550/2021;*
- g) *Balmer Lawrie & Co. Ltd. Vs. Shilpi Engineering Pvt. Ltd. – 2024 SCC OnLine Bom 758; and*
- h) *State of Maharashtra vs. Patel Engineering – 2021 SCC OnLine Bom 12596;*

Analysis and Findings:

17. I have given my anxious consideration to the respective contentions of the parties. Each side has argued the matter extensively as if this were the stage of a final hearing. It is trite law that the jurisdiction of this Court under Section 36 of the Act is a discretionary one, which would depend on the facts and circumstances of the case. Each side has copiously reproduced from case law to buttress the positions canvassed as if there would be a ratio to be discerned and applied as a matter of course. In my opinion, there can be no quarrel about the principles of law enunciated in each of the judgements – the net takeaway from the case law cited by both sides is that there can be no straightjacket formula that can be applied. The Court's discretion should be informed by the facts of the case, the nature of the award under challenge and the circumstances obtaining in the context of the challenge.

18. I have heard the Learned Senior Counsel for the parties and with their assistance and the notes tendered by them, reviewed the record from the limited perspective of whether an unconditional stay without any deposit is warranted. A few specific points would be noteworthy in determining the decision on the Stay Application. The Impugned Award is truly in the nature of a money decree. I find that MMOPL is a joint venture in which MMRDA itself is a 26% equity shareholder. The decisions taken in the Impugned

Award relies on the project cost being discussed at the meeting of the Board of Directors of MMOPL and at the Audit Committee of the MMOPL Board (a statutory sub-committee of the Board of Directors). It is a finding of the Learned Arbitral Tribunal that the increase in costs were recognized at the meetings of these forums which entailed active participation by nominee directors of MMRDA.

19. The Learned Arbitral Tribunal has indeed examined the material on record and given its reasons for arriving at the conclusions that it has arrived at. It cannot be contended that *ex facie*, the Impugned Award is perverse, palpably arbitrary and incapable of being countenanced. For example, one cannot ignore the fact that the prime witness of MMRDA in the arbitration proceedings was the nominee director deputed by MMRDA to the Board of Directors of MMOPL, and such person chaired the Audit Committee of the MMOPL Board. One cannot lose sight of the fact that MMRDA is not an outsider and a third party or counter-party to MMOPL with no insight into the functioning of MMOPL. Therefore, this is not a case that the audited financial statements of one side is being blindly relied upon for purposes of assessment and adjudication in the arbitration.

20. Needless to say, the manner of examination of such evidence by the Learned Arbitral Tribunal and whether it falls foul of the standards now

declared by the Supreme Court within the scope of Section 34 of the Act is a matter that would still need to be gone into at the stage of final hearing of the Section 34 Petition. However, at this stage, I am not convinced that reliance on the audited financial position and the admitted positions emerging from the proceedings of governance of MMOPL can *prima facie* be regarded as an approach that is *per se* manifestly arbitrary. That apart, it is true that one cannot arrive at some mathematical and clinical precision in assessment of costs and damages and some play in the joints for “guesstimating” the impact is available to the Learned Arbitral Tribunal. Whether the Learned Arbitral Tribunal did so in a completely objective manner and whether there is something perverse in how it approached the empirical evidence before it, and whether that would bring to bear an element of patent illegality or perversity is truly something that would be gone into at the stage of final hearing. However, at this stage, the case sought to be made out by MMRDA that the Impugned Award does not warrant any deposit does not appeal to me.

21. It is equally trite law that merely because the award-debtor is an agency of the State the principles to be applied would not stand diluted. That apart, a deposit is still a deposit to be made in Court and not paid over to the

award-creditor – should release of the deposit be sought, that would bring with it imposition of appropriate safeguards and conditions.

22. I have also examined the reliance placed by MMRDA on the dissenting award. It is indeed correct to state that Courts have even endorsed dissenting awards where they have formulated the outcome appropriately and the majority has not. However, all of that is not relevant at this stage when the Stay Application is being considered. The Court must ensure that when parties have agreed to submit themselves to arbitration and those proceedings have culminated in an award, the money decree in the arbitral award is not something written on water and irrelevant. There has to be deference to the findings in the arbitral award in the exercise of discretion under Section 36 of the Act, and unless the ingredients for deviation are found i.e. inducement by fraud or corruption in the making of the underlying agreement or the arbitral award, the Court must truly examine the record and exercise its jurisdiction in a reasonable manner.

23. The Act has been amended to remove the position of an automatic stay merely because an award has been challenged. Routinely granting a stay and that too without any deposit would run counter to the explicit legislative intervention that was made by Parliament to give teeth and relevance to

arbitral awards. There is indeed no allegation or insinuation of inducement by fraud or corruption in the execution of the contract and making the award. In these circumstances, I am not inclined to accept the request made on behalf of MMRDA to stay the Impugned Award without any deposit being ordered.

24. I have also considered whether the facts and circumstances would warrant any partial deposit and I find no empirical basis to easily split the amounts awarded in the scale of acceptable of *prima facie* strength to make any differentiation. On the contrary, in my opinion, it would be arbitrary to simply pick a percentage fraction of the amount awarded for direction of a deposit. Even assuming for the sake of argument that Mr. Sen's attack on each facet of the Impugned Award is to be weighed, I find that each of them has an eminently plausible counter-view and these are facets that have to be considered at the stage of final hearing on merits.

25. In these circumstances, I am of the view that no case is made out for an unconditional stay of the Impugned Award. Therefore, it is directed that if MMRDA were to fully deposit the entire amount awarded in the Impugned Award along with interest as awarded (computed as of May 31, 2025), no

later than July 15, 2025, execution of the Impugned Award shall remain stayed pending hearing and final disposal of the Section 34 Petition.

26. The Stay Application is *disposed of* accordingly. Registry shall list the Section 34 Petition under the caption “*Case Management Hearing*” on *June 17, 2025*.

27. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court’s website.

[SOMASEKHAR SUNDARESAN J.]