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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO. 779 OF 2024

IN

COMMERCIAL ARBITRATION PETITION NO. 1131 OF 2018

M/s. Balmer Lawrie & Co.Ltd.

...Applicant/
Petitioner

Versus

M/s. Shilpi Engineering Pvt.Ltd.

...Respondent

Mr. Shyam Kapadia a/w Mr. Sanket Singh and Iyanah Parbhoo i/by
Meraki Chambers for the Applicant/Petitioner.

Mr. Darshit Jain A/W Neeli Sandesara, Deep Dighe i/by India Law
LLP for the Respondent.

CORAM : R.I. CHAGLA J

DATE : 1 March 2024

ORDER :

1. By this Interim Application, the Applicant/original
Petitioner has sought recall of the order dated 4th September 2019
passed by this Court disposing of the Commercial Notice of Motion
No. 2275 of 2018 filed by the Applicant. Further relief is sought for
stay on the execution, operation and effect of the impugned Award

dated 5th July 2018 passed by the Sole Arbitrator.

2. With regard to the prayer clause (a), which seeks restoration of the Commercial Notice of Motion No. 2275 of 2018, upon a perusal of the prior order dated 26th July 2019 passed by this Court, it is apparent that by the said order the time for filing pleadings was only extended. In the subsequent order dated 4th September 2019 reference has been made to the order dated 26th July 2019 and it has been recorded that, the Notice of Motion by that order was treated as disposed of. This recording is on the face of it incorrect. The Notice of Motion had not been disposed of. Accordingly, the order dated 4th September, 2019 passed in Notice of Motion No. 2275 of 2018 filed by the Applicant/original Petitioner is recalled and the Notice of Motion is restored to file.

3. Considering that there is already a prayer clause (b) in the present Interim Application which is very same prayer in Notice of Motion No. 2275 of 2018, there is a multiplicity of proceedings. In view thereof, Notice of Motion No. 2275 of 2018 is disposed of.

4. It is the contention of Mr. Shyam Kapadia, the learned

Counsel appearing for the Petitioner, that there has been a bank guarantee furnished by the Applicant/original Petitioner as directed by the Calcutta High Court for the entire awarded amount along with the accrued interest. The bank guarantee is furnished in the execution proceedings bearing EC No. 45 of 2019 filed by the Respondent herein before the Calcutta High Court. He has submitted that upon the bank guarantee being furnished, the execution proceedings were not proceeded with. He has further submitted that by the present Application, the impugned Award is sought to be stayed and this prayer is being pressed in view of the oral directions of the Calcutta High Court that since Section 34 Petition is pending before this Court, stay is also to be granted by this Court.

5. Mr. Kapadia has submitted that the Applicant/original Petitioner has raised sufficient grounds for setting aside of the arbitral Award and which has also been re-produced in the Interim Application. However, considering that the Applicant/original Petitioner has already furnished a 100% bank guarantee before the Calcutta High Court, the same may be permitted to be furnished in this Arbitration Petition.

6. Mr. Kapadia has drawn this Court's attention to the law laid down by the Supreme Court in **Pam Developments Private Limited Vs. State of West Bengal**¹ at paragraph 20 which was in relation to an Application for stay of an arbitral award. The Supreme Court has considered in Section 36(3) of the Arbitration Act, as amended vide Act No.3 of 2016 with effect from 23rd October 2016, the words "*having regard to*" and the words "*in accordance with*" the provisions of the Code of Civil Procedure, 1908. The Supreme Court has held that these words would only be directory as a guiding factor. Mere reference to Code of Civil Procedure, 1908 in Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute i.e. Arbitration Act itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of Code of Civil Procedure, 1908 are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self contained Act, the provisions of the Code of Civil Procedure, 1908 will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act.

¹ (2019) 8 SCC 112

7. Mr. Kapadia has further submitted that the Supreme Court in **Toyo Engineering Corporation & Anr. Vs. Indian Oil Corporation Limited**² was considering an order of conditional stay of the Award passed in an Appeal under Section 37 from a dismissal of the Section 34 Petition and in these circumstances, the Supreme Court held that 100% of the awarded amount is required to be deposited for stay of the Award.

8. Mr. Kapadia has also referred to decision of the Calcutta High Court in **Kolkata Metropolitan Development Authority Vs. South City Projects (Kolkata) Ltd. and Ors.**³, wherein the Calcutta High Court had referred to the decision of the Supreme Court in **Pam Developments Private Limited** (supra), and taken the view that principles for grant of stay under Section 37 of the Arbitration Act, are not attracted and cannot be applied under Section 36(3) of the Arbitration Act, 1996 as in Section 36(3), the Court is still considering a challenge under Section 34 of the Arbitration Act, 1996 to the Award while under Section 37 of the Act of 1996, the challenge had resulted in a decree of the Court. The Calcutta High

² Civil Appeal Nos. 4549-4550 of 2021

³ IA GA 1 of 2020 and A.P No. 351 of 2020

Court had in these circumstances, considered it appropriate to order furnishing of security for stay of the Award. He has submitted that the decision of Calcutta High Court has been upheld by the Supreme Court in order dated 15th July 2022, wherein the Supreme Court has held that the direction of the Calcutta High Court to the Petitioner to deposit the entire awarded amount by way of cash security or its equivalent to the satisfaction of the Registrar, Original Side is absolutely in consonance with the relevant provisions of the Code of Civil Procedure, 1908 as well as Section 36(3) of the Arbitration Act.

9. Mr. Kapadia has submitted that the factors to be taken into consideration by the Court while exercising discretion under Section 36(3) of the Arbitration Act are different than in an Appeal under Section 37 of the Arbitration Act wherein the Court has already rejected the Section 34 Petition and the Award has become a decree of the Court. He has submitted that in view of the Petitioner having already furnished 100% bank guarantee before the Calcutta High Court, the same may be allowed to be furnished in these proceedings and which would secured the Award as contemplated under Section 36(3) of the Arbitration Petition.

10. Mr. Darshit Jain, the learned Counsel appearing for the Respondent has submitted that there is no distinction in the exercise of discretion of a Court considering an Application under Section 36(3) from that exercised by a Court considering a stay in an Appeal under Section 37 of the Arbitration Act. Further, this distinction finds no place in the relevant provisions of the Arbitration Act. He has submitted that in the second paragraph of the Supreme Court order dated 15th July 2022 in **Kolkata Metropolitan Development Authority** (supra), the Supreme Court has noted that the Petitioner had thereafter, in compliance, deposited the entire awarded amount and the application submitted by the Claimant for withdrawal was pending before the Court and hence the impugned order was not interfered with.

11. Mr. Jain has also relied upon the decision of the Delhi High Court in **Power Mech Projects Ltd. Vs. Sepco Electric Power Construction Corporation**⁴, wherein the Delhi High Court has referred to the Supreme Court decisions in **Srei Infrastructure Finance Limited Vs. Candor Gurgaon Two Developers and Projects**

⁴ 2020 SCC OnLine Del 2049 order dtd 17.02.2020

Pvt.Ltd.⁵ and Manish Vs. Godawari Marathwada Irrigation Development Corporation⁶, wherein the Supreme Court had directed 100% deposit of the awarded amount. The Delhi High Court has in that case held that in the view of the recent decisions of the Supreme Court, and though co-ordinate Benches of the Delhi High Court have been directing deposit of 50%, the Petitioner must deposit 100% of the awarded amount to secure the Respondent.

12. Mr. Jain has accordingly, submitted that it is in the interest of justice to direct the deposit of 100% of the awarded amount, where the Award is in the nature of money decree and stay of the impugned Award has been sought.

13. Having considered these submissions, the Court in an Application under Section 36(3) of the Arbitration Act exercises its discretion in granting a stay of the impugned Award. Whether to impose conditions and to what extent is dependent upon the facts and circumstances of each case. In the present case, this Court finds that there are no circumstances brought to the notice of this Court

⁵ SLP (C) No(s). 20895-20897/2018

⁶ Special Leave to Appeal (C) Nos. 11760-11761-2018 order dtd 16.07.2018

that the Respondent is in any manner facing financial hardship for depositing the awarded amount. The mere fact that the Petitioner had furnished a bank guarantee in the execution proceedings before Calcutta High Court, would not be a relevant factor to be taken into account whilst exercising this Court's discretion under Section 36(3) of the Arbitration Act in imposing conditions for grant of stay of the impugned Award.

14. The decisions which have been relied upon by the Counsel for both the sides and which have been adverted to, makes clear that the Supreme Court has taken a consistent stand that where the Award is in the nature of money decree, there is a requirement for deposit of 100% of the awarded amount for grant of stay. I do not find any distinction in applications for stay under Section 36(3) and under Section 37 for different parameters to be applied in exercise of discretion by the Court in imposing conditions for grant stay. There is nothing in both the provisions for taking such a view. Further, a liberal view is not contemplated under Section 36(3) of the Arbitration Act whilst imposing the conditions for stay of the Award.

15. I am not inclined to follow the reasoning of the

Calcutta High Court in **Kolkata Metropolitan Development Authority** (supra), wherein the Single Judge has drawn such distinction in the principles of grant of stay under Section 37 of the Arbitration Act which he has held is not attracted and cannot be applied under Section 36(3) of the Arbitration Act. This on the premise that in an Application under Section 36(3) of the Arbitration Act, the Court is still considering a challenge under Section 34 of the Arbitration Act, 1996 to the Award while under Section 37 of the Act of 1996, the challenge has resulted in a decree of the Court.

16. Once an Award is passed by the learned Arbitrator, till it is stayed, the Award is in the form of the decree and can be executed in that form by the Executing Court and thus, whether the Section 34 Petition has been dismissed or it is yet to be considered, the same parameters would apply for stay of the Award.

17. Thus, I do not find any merit in the submissions of Mr. Kapadia that this Court should in the present case exercise discretion liberally by allowing the Petitioner to furnish the bank guarantee rather than depositing the awarded amount.

18. Accordingly, I grant stay to the execution, operation and effect of the impugned Award dated 5th July 2018 passed by the Sole Arbitrator, subject to the Petitioner depositing the awarded amount with interest as determined by the Sole Arbitrator on the date of such determination within a period of six weeks from the date of this order.

19. The Respondent is at liberty to file an application for withdrawal of the awarded amount with interest as and when deposited and which application shall be considered on its own merits.

20. Interim Application is accordingly, disposed of.

21. Needless to state that in view of this order, the Petitioner shall apply in the Calcutta High Court where the execution proceedings have been filed for withdrawal of the bank guarantee. This would be subject to the Petitioner depositing the awarded amount with interest in this Court.

[R.I. CHAGLA J.]