



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 17.11.2023

+ **O.M.P. (COMM) 343/2022**

**IN THE MATTER OF:**

ITALIAN THAI DEVELOPMENT ..... Petitioner  
Through: Mr. Narender Hooda, Sr. Advocate with  
Mr. Aditya Mishra, Mr. S. Lamba and Ms. Rashi  
C., Advocates

versus

NTPC LTD ..... Respondent  
Through: Mr. S.B. Upadhyay, Sr. Advocate with  
Mr Tarkeshwar Nath, Mr. Lalit Mohan, Mr.  
Harshit Singh and Mr. Akash Kumar, Advocates

**CORAM:  
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**JUDGMENT (ORAL)**

**I.A. 18268/2023 (stay)**

1. Petitioner, by way of present application filed under Section 36(3) of the Arbitration and Conciliation Act (hereafter, referred to as 'A&C Act'), seeks unconditional stay of the arbitral award dated 16.03.2022 whereby it has been asked to refund a sum of Rs.1,69,43,54,488 to the respondent.
2. Facts relevant for consideration of the captioned application are that disputes arose between the parties in the context of work relating to contract for Main Civil Works Package-1: Dam, Spillway and Power Intake of Kol Dam Hydro Electric Project located in Bilaspur District. The disputes were



referred to the Arbitral Tribunal resulting in passing of the impugned award.

3. The Petitioner raised a claim for Rs.3,66,34,27,582.45/- but was awarded only a sum of Rs.1,30,23,45,512/-. However, the said sum was directed to be set off against the sum of Rs.299.67 Crores paid to the petitioner by the respondent towards advance. Since the sum awarded to the petitioner is less than the advance in its possession, the Arbitral Tribunal directed refund of the excess advance of Rs.1,69,43,54,488/- by the petitioner to the respondent. The petitioner has challenged the said set off and refund awarded by the Arbitral Tribunal by filing objections under Section 34 alleging that the Arbitral Tribunal travelled outside the limits of reference in granting the refund when no specific relief of set off was claimed by the respondent from the Arbitral Tribunal in its statement of defense.

4. Petitioner has challenged the impugned award by way of the captioned petition which is pending consideration. Pending disposal of objections under Section 34, the petitioner is seeking unconditional stay of the impugned arbitral award and has contended that this court is empowered to pass such unconditional stay under Section 36(3) of the A&C Act.

5. Petitioner has referred to Malwa Strips Pvt. Ltd. v. Jyoti Ltd.<sup>1</sup>, Polimer Media Pvt. Ltd. v. Ultra Media & Entertainment Pvt. Ltd.<sup>2</sup>, Damodar Valley Corporation v. Reliance Infrastructure Ltd.<sup>3</sup> and Future Market Networks Ltd. v. Laxmi Pat Surana and Ors.<sup>4</sup> to contend that even under Order XLI Rule 5 of CPC, which is the guiding provision referred to in Section 36(3) of

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<sup>1</sup> (2009) 2 SCC 426

<sup>2</sup> Arbitration Petition (L) No. 34542 of 2022

<sup>3</sup> 2022 SCC OnLine Cal 553

<sup>4</sup> I.A. No. G.A. 1 of 2022 in A.P. 698 of 2016



the A&C Act, the courts are conferred with discretionary powers to grant unconditional stay of execution of the impugned decrees.

6. On the contrary, the respondent has cited Mahanagar Telephone Nigam Limited v. Canara Bank and Anr.<sup>5</sup>, Power Mech Projects Ltd. v. Sepco Electric Power Construction Corporation<sup>6</sup>, Pam Developments Pvt. Ltd. v. State of West Bengal<sup>7</sup> and National Highway Authority of India v. Transstroy (India) Ltd.<sup>8</sup> to contend that power to grant unconditional stay of the decrees is confined to cases where the making of the Arbitral Award is induced by fraud and none else.

7. On merits, the respondent has refuted the contention of the petitioner that the Arbitral Tribunal strayed beyond the limits of its reference in awarding set-off and the consequential refund of the excess advance in favour of the respondent. Respondent has referred to an application dated 27.10.2015, filed by it whereby a specific relief of set-off and consequential refund of excess advance was sought from the AT. Respondent would contend that the Arbitral Tribunal has adjudicated the claim of set off, which it was empowered to do under Section 23(2A) of the A&C Act.

8. The question of power of courts to grant unconditional stay on the enforcement of arbitral award challenged under Section 34, is beyond debate given the rulings of various courts passed from time to time. The decision of Co-ordinate bench of this Court in Power Mech Projects (Supra) was assailed upto Supreme Court, where the Supreme Court vide judgment dated 19.09.2022 in SLP (C) 4511/2021 has observed the following:

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<sup>5</sup> 2023 SCC OnLine Del 1172

<sup>6</sup> 2020 SCC OnLine Del 2049

<sup>7</sup> (2019) 8 SCC 112

<sup>8</sup> 2022 SCC OnLine SC 832



“xxx

*28. Once an application under sub-section (2) of Section 36 is filed for stay of operation of the arbitral award, the Court might subject to such conditions as it may deem fit, grant stay of the operation of such award, for reasons to be recorded in writing. The Court is empowered to impose such conditions as it might deem fit and may grant stay of operation of the award subject to furnishing of security covering entire amount of the award including interest.*

*29. The proviso to Section 36(3) of the Arbitration Act, makes it clear that while considering an application for grant of stay in the case of an arbitral award for payment of money, due regard has to be given to the provisions for grant of stay of a money decree under the provisions of the CPC.*

*30. The proviso to Section 36(3) further stipulates that where the Court is satisfied that a prima facie case is made out that (a) the arbitration agreement or contract which is the basis of the award or, (b) the making of the award was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 of the award.*

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9. The issue at hand is not about the power of court under Section 36(3) of the A&C Act to unconditionally stay the arbitral award under challenge, but if a case is made out on the facts of this case, to exercise its discretion in favour of the petitioner.

10. Petitioner’s main ground for seeking unconditional stay of the enforcement of the Arbitral Award is that the order dated 27.08.2021 passed by the Arbitral Tribunal for refund of excess advance to the respondent is



legally perverse, for the reasons stated above. The challenge to the award under Section 34 is already pending adjudication before this court. It will not be appropriate for the court to comment on the correctness of the award in this application for stay under Section 36(3). The parties have rival contentions on the impugned award. While the respondent's contention that the order dated 27.08.2021 is in the nature of interim arbitral award which was never challenged by the petitioner under Section 34 within the limitation period and thus cannot be faulted now is *prima facie* countered by the argument that the said order dated 27.08.2021 has been merged with the final award dated 16.03.2022 which has been challenged under Section 34 by way of the captioned petition. However, all these contentions are yet to be heard in detail and discussed by this court in the pending Section 34 petition.

11. In view of the aforesaid, the petitioner is not entitled to take advantage of any findings in the arbitral award or the order dated 27.08.2021, for the purposes of this application for unconditional stay against the enforcement of the arbitral award. The challenge is not on the ground that the making of the award is marred by fraud, for this court to be persuaded to stay such an award.

12. Furthermore, the court cannot lose sight of the fact that the petitioner is a foreign entity with no roots in India. Apparently, it has no assets that can be offered as security for securing stay on enforcement of the arbitral award. Petitioner is not willing to deposit even part of the arbitral award and is insisting on an unconditional stay. The petitioner could have offered cash security in the form of deposit in court to show its bonafide. Petitioner has suffered an arbitral award after due process of adjudication. The arbitral



award can be interfered with on the limited grounds available under Section 34 and the same cannot be done lightly.

13. In view thereof, no case is made out for unconditional stay against the enforcement of arbitral award. The application is consequently dismissed.

**MANOJ KUMAR OHRI**  
**(JUDGE)**

**NOVEMBER 17, 2023**

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