

**IN THE HIGH COURT AT CALCUTTA**  
**Ordinary Original Civil Jurisdiction**  
**Original Side**  
**(Commercial Division)**

**Present :-**

**The Hon'ble Justice Moushumi Bhattacharya**

IA No. GA 1 of 2023

in

AP 808 of 2022

The State of West Bengal & Ors.

Vs.

M/s. BBM Enterprise

For the State	:	Mr. Priyankar Saha, Adv. Mr. Paritosh Sinha, Adv. Mr. Arindam Mandal, Adv. Mr. Shourya Samanta, Adv.
For the respondent	:	Mr. Sakya Sen, Adv. Ms. N. Adhya, Adv.
Last Heard on	:	20.07.2023
Delivered on	:	25.07.2023

**Moushumi Bhattacharya, J.**

1. The present application has been made by the award-holder/ respondent in AP no. 808 of 2022. The award-holder seeks to withdraw an amount of Rs. 9 crores which was directed to be secured by the award-debtor / petitioner in AP No. 808 of 2022. The AP was filed by the award-debtor for stay of the arbitral award dated 2.7.2022

2. The award-debtor also applied for setting aside of the arbitral award in A.P. 746 of 2022 and by an order dated 17.1.2023 the Court recorded the award-debtor's submission that it will deposit Rs. 9 crores within 6 weeks from the date of the order and that the award would be stayed consequent to such deposit being made. The award-debtor made the deposit on 16<sup>th</sup> March, 2023.

3. The respondent / award-debtor resists the prayer of the award-holder for withdrawing the amount of Rs. 9 crores on primarily two grounds. First, that there is no provision under The Arbitration and Conciliation Act, 1996 for allowing such a prayer and second, the Court has to come to a *prima facie* view of the award before passing such an order. The award-debtor also says that the present application cannot be entertained since the application for stay of the award was disposed of by the order dated 17.1.2023.

4. Learned counsel appearing for the applicant / award-holder and the respondent / award-debtor in the present application (GA 1 of 2023) have argued in support of their respective contentions and relied on decisions.

5. The decision of the Court is as follows.

Whether permitting an award-holder to withdraw the secured amount requires statutory sanction:

6. Under the present statutory position, the status of an award-holder is that of a decree holder [Section 36(1)]. Section 36 of The Arbitration and Conciliation Act, 1996, makes an arbitral award final and binding on the parties and persons claiming under them subject to the provisions of Part I of the Act. The exception is contained in section 36(2) where the Court has discretion to grant an order of stay of the operation of the arbitral award in accordance with the guidelines provided under section 36(3) subject to a separate application being made by the award-debtor for stay of operation of the arbitral award.

7. The clog in the wheels of enforcement of arbitral awards was brought into the Act w.e.f 23.10.2015. The position pre-amendment for enforcement of an arbitral award under section 36 is reproduced below :

*“Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”*

8. After the amendment of 2016, section 36(1) and (2) was transformed as under :

*“36. (1). Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.*

*(2). Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.”*

9. A comparison of the positions before and after the amendment of 2016 (w.e.f. 23.10.2015) would show that an arbitral award was presumed to be enforceable subject to the filing and fate of an application for setting aside of the award. The amendment brought in two significant changes. First, it decoupled enforcement and setting aside of an award by the opening words of section 36(2). Second, it gave a temporary leg-room to the award-debtor to apply for stay of the award subject to the discretion exercised by the Court.

10. The discretionary space of the Court would be apparent from section 36 (2) which sets the tone of the departure from the pre-amendment position in the clarification that mere filing of an application for stay shall not by itself render the award unenforceable unless the Court grants an order of stay of the Arbitral award (underlined for emphasis).

11. Therefore, the effect of the amendment is not far to seek; the march of the award towards enforcement continues un-deterred unless brakes are put in

that movement by the award-debtor who applies for stay and the Court grants that stay upon on suitable conditions. The sub-text is that the award-holder must be given the fruits of the victory unless the Court finds that the enjoyment may be deferred subject to the award-debtor securing the award pending a shot at having the award set aside. The construction of section 36(2) as it stands today is in step with the power of the Court to permit an award-holder to withdraw the money secured by the award-debtor. It is a step in aid of and in keeping with the statutory intention of giving primacy to the finality of an arbitral award.

12. Thus, section 35 read with section 36 of the Act make it clear that there is no requirement for a specific statutory provision to allow an award-holder to withdraw the secured amount. The sections themselves provide for such an order to be passed in appropriate cases. The attending circumstances would become relevant if the Court exercises its discretion for passing such an order. Events subsequent to the stay of the award would be material in this respect.

13. In the present case, the subsequent events pleaded in the application constituting a change in circumstances after the order of stay of the award are as follows. Proceedings were initiated against the award-holder under section 13(2) of the SARFAESI Act, 2002. There are debts which are due and payable by the award-holder to the Bank. The award-holder is also facing a severe shortage of working capital which is preventing the award-holder to participate in any new tenders. These circumstances are sufficient to justify release of the amount secured by the award-debtor; Ref : unreported judgment in *State of*

*West Bengal vs. Dilip Kumar Saha in APO No. 95 of 2021 and in State of West Bengal vs. Dilip Kumar Chatterjee in AP 557 of 2012.*

The award-debtor will not face any prejudice if the award-holder is permitted to withdraw the amount :

14. The prayer for withdrawal of the money deposited as security by the award-debtor is in consonance with the object of the amendment to the Act which has been stated above. Such an order will of course be refused if it would render the award-debtor without a remedy. This can only be where the award-holder departs with the money without ensuring a security-cover for the award-debtor in case the latter succeeds in having the award set aside.

15. The object of the amendment in the Act in granting stay of an award cannot be to make the award-holder wait for an uncertain and indefinite period of time to enjoy the fruits of the award. This is particularly so where the award-holder proves its bona fides not only by way of bringing significant subsequent events to the Court but also undertakes to secure the award-debtor in the event the award is set aside. In the present case, the award-holder undertakes to replace the amount to be withdrawn by way of a bank guarantee of an equivalent amount. The award-debtor will hence be completely secured in the event it succeeds in the application for setting aside of the award. No inconceivable prejudice, whether immediate or in the future, will hence be caused to the award-debtor if the Award-debtor succeeds in setting aside of the Award.

Allowing the award-holder to withdraw the secured amount does not require a *prima facie* finding :

16. Section 36(2) which gives discretion to a Court to stay an award does not require a *prima facie* case to be made out by the award-debtor. The absence of such a requirement in section 36(2), assumes significance when compared to the language of the second *proviso* to section 36(3) which requires the Court to come to a *prima facie* finding that the making of the award or the arbitration agreement which is the basis of the award was induced or effected by fraud or corruption before granting the unconditional stay of the award.

17. The award-debtor's argument on the *prima facie* case to be made out by the award-holder for the release of the money also impinges on the strict boundaries of a section 34 application for setting aside of an award. The legality of the award can only be gone into in an application for setting aside of an award under section 34 of the Act. The Court is not required to go into the merits of the award for granting stay of the award under section 36(2), as opposed to a *prima facie* finding on the award under the second *proviso* to section 36(3) of the Act.

18. A *prima facie* finding, by its very definition means a first-blush-look at the factual context of the matter for consideration whether an award may be stayed under section 36(2). The Court simply looks at the bona fides of the award-debtor in having a way to secure the award. Hence, the inescapable conclusion is that the award-holder is not required to make out a *prima facie*

case for withdrawal of the security given by the award-debtor. The sustainability of the award under the grounds provided under section 34 of the Act is to be thrashed out only later at the time of considering the application under section 34 of the Act.

Can the award-holder's application for withdrawal of the money not be made by way of a separate application?

19. Learned counsel appearing for the award-debtor argues that the award-holder's application for withdrawal of the money could only have been made in the application for stay of the award. It is further submitted that since that application was disposed of by the order dated 17.1.2023, the present application cannot be made by way of a fresh application.

20. The argument is fallacious since the application for stay of the award is only filed for a limited purpose of the Court to consider whether the award needs to be stayed pending hearing of the application for setting aside of the award. The application is disposed of on a Court coming to a decision as to whether the award is required to be stayed on the conditions to be imposed by the Court under section 36(2) and (3) of the Act.

21. The application for release of the secured amount to the award-holder is unconnected to a prayer for stay and is entirely different in cause and purpose. The award-holder must also show that intervention of events subsequent to the stay of the award calls for a decision as to whether the award-holder could be given some sort of interim relief in the form of withdrawing the secured



amount. Thus, there must be a time gap between the two applications to allow the intervening facts to come in.

22. It is also relevant to point out that a Court considering an application for stay of an award under section 36(2) does not lose hold over the question of enforcement of award since the question of stay is only an issue to be decided on a temporary basis - on the road to setting aside / enforcement of the award. The *lis* between the award-holder and the award-debtor continues until the award is given finality or is set aside by the Court. The continuation of the *lis* is substantially different, for instance, from a suit or a writ petition being disposed of by a Court and one of the parties thereafter coming to the Court with a fresh cause of action.

23. In the case of section 36 of the 1996 Act, the Court retains jurisdiction to pass further orders while in the second instance the Court becomes *functus officio*. *K.A. Ansari vs. Indian Airlines Limited; (2009) 2 SCC 164* is an example of the latter, namely, a writ petition where the Supreme Court held that it is not open to the Court to reopen the proceedings by a miscellaneous application for a fresh cause of action. Moreover, the Division Bench in its order dated 29.11.2021 in *State of West Bengal vs. Dilip Kumar Saha* held that an order may be modified on subsequent events. The principles underlying Order XXXIX Rule 4 of The Code of Civil Procedure, 1908 where an injunction may be varied can be imported in a case, such as the present one, where the Court can exercise jurisdiction for modification of the earlier order in appropriate cases on

changed circumstances. (Ref : *State of West Bengal vs. Dilip Kumar Saha in APO 95 of 2021*).

24. The present application is hence found to be maintainable for the above reasons. This Court is of the view that the award-holder is not under any obligation statutorily or otherwise to file an application for release of the money in the application filed by the award-debtor for stay of the award.

25. GA 1 of 2023 is accordingly allowed for these reasons. The award-holder is permitted to withdraw the amount of Rs. 9 crores upon furnishing a bank guarantee of an equivalent amount with the Registrar, Original Side. The award-holder shall furnish the bank guarantee before withdrawing the money which shall be from a Bank which is a constituent of the RBI. The award-holder shall be at liberty of taking steps within such time as is found to be reasonable. The award-debtor shall be at liberty to take steps for listing of the application for setting aside of the award. GA 1 of 2023 is disposed of in terms of the above. The Bank guarantee shall be kept renewed till disposal.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

**(Moushumi Bhattacharya, J.)**