

ODC-3

ORDER SHEET

AP/82/2021
IA No.GA/1/2021

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

NITU SHAW
Versus
BHARAT HITECH (CEMENTS) PRIVATE LIMITED

BEFORE :
The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA
Date : 19th March, 2021

[Via video conference]

Appearance:
Mr. Mainak Bose, Adv.
Mr. Abhirup Chakraborty, Adv.
... for the petitioner.

Mr. Arik Banerjee, Adv.
Mr. Nilay Sengupta, Adv.
Mr. Sujit Banerjee, Adv.
... for the respondent.

The Court : This is an application under Section 36(3) of The Arbitration & Conciliation Act, 1996 (the Act) for the stay of an Award dated 4th March, 2019. The petitioner/award-holder before this Court was the respondent in the arbitration proceedings. The short question which arises in this application is whether Section 36(3) of the Act relating to enforcement of awards, contemplates any form of security other than cash and bank guarantee for stay of the award where the award impugned is for payment of money.

The dispute between the parties relates to supply of cement by the respondent to the petitioner where the petitioner was appointed as the clearing and forwarding agent by virtue of an understanding arrived at between the parties. The respondent alleged that it supplied the material to the petitioner for which the respondent was to get a certain sum of money. The petitioner on the other hand, disputed the aforesaid and that any amount was outstanding from the petitioner to the respondent. The claim of the respondent in the arbitration was for an amount of Rs.67,04,681/-. It is a matter of record that the sole Arbitrator was appointed by the Managing Director of the respondent and the respondent was awarded the entire amount of the claim, i.e., Rs.67,04,681/- together with an award of interest at the rate of 8% from 28th January, 2017.

Mr. Mainak Bose, learned counsel appearing for the petitioner, offers a piece of land measuring 19 cottah at Sankrail, Howrah, as security for seeking stay of the impugned award. The particulars of the security offered would appear from a supplementary affidavit affirmed by the petitioner which also indicates the present market value of the land, namely, Rs.65,00,000/-(Rupees Sixty Five Lakhs). The valuation as of 17th March, 2021 has been done by the Directorate of Registration and Stamp Revenue and the e-assessment slip pertaining to the valuation has been made a part of the supplementary affidavit. The petitioner has also stated in the affidavit that the said plot of land is free from all encumbrances, is butted and bounded on all sides and that there is no manner of encroachment whatsoever on the said land as on the date on which the affidavit has been affirmed. The petitioner has also stated that the land has not

been let out and is presently in the exclusive possession of the petitioner. Learned counsel submits that the petitioner does not presently have sufficient liquidity or financial means to offer as cash security or by way of bank guarantee and prays that the title deed of the said piece of land be deposited with the Registrar of this Court in satisfaction of the requirement under Section 36(3) of the Act.

Mr. Arik Banerjee, learned counsel appearing for the respondent/award-holder, submits that there is no scope for an applicant to furnish any other form of security besides cash security for stay of an award. Counsel relies on various decisions of the Supreme Court and the High Courts by which litigants were asked to deposit either 100% cash security or a proportion thereof for stay of an arbitral award. Counsel submits that the proviso to Section 36(3) is only a guideline given to a Court for considering the provisions of The Code of Civil Procedure in relation to grant of stay of a money decree and that the Court is not bound by the CPC.

Upon considering the submissions of counsel, the issue which is required to be adjudicated in this application is whether Section 36(3) of the 1996 Act read with the proviso thereto contemplates acceptance of any other form of security besides cash or a bank guarantee for stay of an arbitral award. For a proper understanding of the provision in question, Section 36(3) is set out :

“36(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as

it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908). ”

From the above it is clear that the section does not mention the word “security” and only indicates that the Court may impose suitable terms for stay of the award. The proviso supplements the sub-section to the extent of suggesting a statutory reference point for an order under 36(3).

The words used are that the Court may consider the statutory provisions in The Code of Civil Procedure (CPC) relating to stay of a money decree without any reference to any specific provision. What are these provisions?

Order XLI (‘Appeals from Original Decrees’) Rule1(3) provides that in cases of appeal against a decree for payment of money, the Appellate Court may allow the appellant to deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit (underlined for emphasis). Second, Order XXI (‘Execution of Decrees and Orders’) Rule 26 – “When Court may stay execution”. Sub-Rule (3) mandates that before making an order of stay of execution or for restitution of property or the discharge of the judgment-debtor, the Court shall require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit. Order XXI Rule 29 continues in the same vein to provide that the Court may on such terms, as it thinks fit, stay execution of a decree until the pending suit has been decided. The proviso to

Order XXI Rule 29 clarifies that if the decree is one for payment of money, the Court shall record its reasons for granting stay of the decree without requiring security.

On a conjoint reading of the above provisions it is clear that the intention of the framers of the law, which is relevant for consideration in the present case, was to refrain from a strict requirement that security to be furnished for stay of a decree would only be in monetary terms. The intent of the provision relating to stay of a money decree is that the applicant who seeks stay of a decree must furnish some sort of effective cushion for the decree-holder to fall back on in the event the challenge to the decree fails. In other words, the purpose is to secure the decree-holder in a manner which would be conducive to the decree-holder enjoying the fruits of the decree in the long run. The other significant issue which is found in all the above provisions namely, Order XLI, Order XXI of the CPC and Section 36(3) of the 1996 Act is the clear discretion given to a Court for deciding the conditions which may be imposed. The words used in Order XLI are “. . . *as the Court may think fit*” which is repeated in Order XXI Rule 26 and Rule 29 as “. . . *as it thinks fit*”. The principles enshrined in the provisions relating to stay of a money decree must be imported to the proviso to Section 36(3) of the 1996 Act. The language of Section 36(3) imparts an equal amount of discretion to the Court namely “. . . *subject to such conditions as it may deem fit, grant stay of operation of such award . . .*”. The only stated requirement is that the Court must indicate its reasons in writing for granting an order of stay of the award in question.

Having regard to the relevant statutory provisions which may be understood as guidelines in the proviso to Section 36(3), this Court is of the view that there is no statutory fetter on a Court to be hemmed in by requiring cash security, bank guarantees and the like.

In the present case, the petitioner has sworn an affidavit stating that the present value of the land which is being offered as security exceeds the amount awarded to the award-holder. Photographs of the land coupled with the statements show, beyond any doubt, that the property is free of encumbrances and is in the exclusive possession of the petitioner. In short, the security offered is good, sufficient and can be monetised by the award-holder at an appropriate point of time.

Counsel appearing for the petitioner has also submitted that the petitioner does not have the required financial liquidity to offer cash security or bank guarantee. This Court must respond to such submission by taking into account the afflicted state of the economy which has affected millions in the country in the aftermath of the pandemic. This Court would have taken a different view had the petitioner requested for a total go-by of the security requirement and asked for stay of the award without offering security in any form. This is not the case. The land which is being offered has a premium location and the petitioner has offered to deposit the title deed to the Court for stay of the award.

The decisions cited by learned counsel for the respondent proceed on the particular facts of the case before the concerned Court and cannot hence

serve as the settled position in law for stay of arbitral awards under 36(3). For instance, in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal versus Dunlop India Ltd. and Ors. : (1985) 1 SCC 260*, the Supreme Court considering the facts of the case, was of the view that the Government cannot run on bank guarantees and liquid cash was hence required to be deposited by Dunlop India Limited. *Hindustan Construction Company Limited and Another versus Union of India and Others in 2019 SCC OnLine SC 1520* is not relevant for the proposition which is in issue in the present case except for a general advisory with regard to execution of awards. *Pam Developments Private Limited versus State of West Bengal : (2019)8 Supreme Court Cases 112* was for the proposition whether the Government should be exempted from furnishing security under Order XXVII Rule 8-A of the CPC. On the other hand, *Sihor Nagar Palika Bureau versus Bhabhlubhai Virabhai & Co.; (2005) 4 SCC 1* noted that security in the form of immovable property could be accepted to the satisfaction of the Trial Court.

The decision of the Delhi High Court in *Steel Authority of India vs. Tata Projects* took into account the prevailing circumstances by reason of Covid and its impact on the economy. In essence, the decisions relied upon by counsel do not establish, in clear and unequivocal terms, that furnishing of security for stay of an arbitral award must always be in cash or bank guarantee or that a Court would have no discretion in deciding as to the sufficiency of the security.

In view of the above reasons, there shall be an order of stay of the arbitral award dated 4th March, 2019 on the petitioner depositing the title deed of

the land in question as fully described in the supplementary affidavit within 22nd March, 2021 with the Registrar, Original Side of this Court. This order shall automatically stand vacated in the event of default on the part of the petitioner in respect of the aforesaid direction.

G.A. No. 1 of 2021 is accordingly allowed in terms of the above.

List A.P. No. 82 of 2021 after three weeks. The respondent will be at liberty to file its affidavit-in-opposition in the meantime. Reply to be filed within the returnable date.

(MOUSHUMI BHATTACHARYA, J.)