

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

Present :

Hon'ble Justice Moushumi Bhattacharya.

A.P. 265 of 2023

Sarat Chatterjee and Co. (VSP) Private Limited

vs

Sri Munisubrata Agri International Limited
(Formerly known as LMJ International Ltd.) and Anr.

For the petitioner : Mr. S.N. Mookherjee, Sr. Adv.
Mr. Tilak Kr. Bose, Sr. Adv.
Mr. Reetobroto Kr. Mitra, Adv.
Ms. Suchismita Ghosh, Adv.
Mr. Naman Chowdhury, Adv.
Mr. Pradip Kr. Sarawagi, Adv.

For the respondents : Mr. S.N. Mitra, Sr. Adv.
Mr. D.N. Sharma, Adv.
Mr. Ankan Rai, Adv.
Mr. S.R. Saha, Adv.
Mr. S.K. Mukherjee, Adv.

Last heard on : 11.08.2023

Delivered on : 01.09.2023.

Moushumi Bhattacharya, J.

1. The petitioner seeks stay of an Award dated 14.1.2023 passed by a learned Sole Arbitrator on a reference made by the respondent no. 1. The respondent no. 1 was the claimant in the arbitration, the petitioner was the first respondent and the respondent no. 2 before this Court was in the same position in the arbitration. The names of the parties before the Court and in the arbitration are being used for understanding the facts better. The petitioner / award-debtor is Sarat Chatterjee; the respondent no. 1 / award-holder is Shri. Munisubrata and the respondent no. 2, both before this Court and in the arbitration, is Balaji Coke.

2. The impugned Award directed Sarat (award-debtor / petitioner before this Court) to pay to the claimant (respondent no. 1 Munisubrata) Rs. 18,21,74,768.50/- towards the cost of 10,000 MTs of Met Coke on the petitioner Sarat expressing its inability to deliver the Met Coke to the claimant / Munisubrata. The direction was given on the finding that the claimant Munisubrata is entitled to recover Rs. 18,21,74,768.50/- being the cost of 10,000 MTs of met coke from Sarat.

3. The present application of the petitioner / award-debtor Sarat is for an unconditional stay of the impugned Award. The petitioner's / Sarat's case is premised on the entire awarded sum of approximately Rs. 18.21 crores already being secured in favour of the respondent no. 1 /claimant Munisubrata

pursuant to an order passed by a Division Bench of this Court on 29.7.2015. According to learned counsel, the direction for security given in favour of the award-holder Munisubrata by the Division Bench was in respect of the claim which was also the subject matter of the impugned award. Hence, there is no question of the petitioner award-debtor being under an obligation to furnish any further security for stay of the impugned Award as the same would amount to unjust and double benefit to the respondent no. 1 award-holder Munisubrata.

4. Learned counsel appearing for the award-holder Munisubrata / the claimant in the arbitration, opposes the prayer for unconditional stay of the Award on the ground that the petitioner has not made any prayer for unconditional stay and the application does not also contain such pleadings. Counsel submits that the 10,000 MTs of Met Coke does not belong to the petitioner / award-debtor and that there is no certainty that the 10,000/- MTs of Met Coke can at all be sold by the Special Officer in satisfaction of the awarded amount. Counsel disputes the allegation of the award-holder stalling the sale of the goods on the ground that the goods were attempted to be sold at an under value. The submission, in essence, is that the award-holder does not have any security with regard to the awarded amount.

5. The judgment passed of the Division Bench dated 29.7.2015 was passed in an appeal filed by Dankuni Steels Ltd. from an order of the Single Bench as well as in contempt proceeding initiated by Dankuni Steels and forms the pivot

of the present controversy. The Division Bench records the stand taken on behalf of the parties including that the award-debtor Sarat which was the clearing agent of the consignment of Met Coke on behalf of Dankuni Steels and Concast. The judgment further records that the award-holder (LMJ before the Division Bench / respondent no. 1 before this Court) made a claim over 10,000 MTs of Met Coke on documents of title to the said goods.

6. The Division Bench came to the finding that the issue whether the award-debtor had sold 10,000 MTs of Met Coke of Balaji is to be decided on trial and that there was no evidence on record to show that the award-debtor had been paid the price of the said goods. The other finding of relevance is that the award-holder had made out a strong prima facie case of lien as unpaid seller in respect of the said goods and the value of 10,000 MTs of Coke out of the entire consignment was therefore required to be set apart to secure the claim of the award-holder till disposal of the suit. A Special Officer was accordingly appointed to inspect the godowns and make an inventory of the goods lying therein and take steps for sale of the 10,000 MTs of Met Coke.

7. The award-debtor Sarat relies on the Division Bench judgment to urge that the security directed by the Division Bench in favour of the award-holder subsists and can be utilized for stay of the award; the award-holder Munisubrata (earlier LMJ) says otherwise and bases its objection on the absence of finality in the findings of the Division Bench.

8. The Court's view on the competing contention is as follows.

9. The judgment of the Division Bench dated 29.7.2015 cannot translate to a “security” within the parameters of section 36(3) of the 1996 Act or the proviso thereto by reason of the following undisputed facts :

- i) The Division Bench directed that the value of 10,000 MTs of Coke out of the entire consignment imported to be set apart to secure the claim of the award-holder Munisubrata (LMJ) till disposal of the suit.
- ii) The Division Bench was of the view that the issue whether the award-holder sold 10,000 MTs of Coke to Balaji was to be decided in trial.
- iii) The 10,000 MTs of Coke was directed to be sold to secure the claim of the award-holder Munisubrata, who was the claimant in the arbitration. The Division Bench accordingly appointed a Special Officer to take steps for sale of the 10,000 MTs of Coke.
- iv) Admittedly, 10,000 MTs Coke could not be sold from 2015 onwards and the award-holder challenged the attempts to sell the goods at an under valuation which finally succeeded before the Supreme Court. The Supreme Court by its order dated 14.12.2017 directed the Special Officer to get a fresh valuation done by a Public notice by inviting bids from the general public.

10. The Division Bench judgment of 29.7.2015 therefore shows that the apparent relief given to the award-holder in terms of sale of 10,000 MTs of Coke was only an interim measure till disposal of the suit. The Division Bench

was clearly of the view that the dispute with regard to sale of these goods by the award-holder to Balaji was an issue which was to be finally decided on trial. The Division Bench order hence clearly indicates that the title to the 10,000 MTs of Met Coke was a question which could only be finally answered after completion of trial and disposal of the suit. Whether the award-holder / respondent no. 1 can be made accountable for the sale of the goods not coming through is a separate question altogether and is not relevant to the issue of whether the award-holder stands fully secured by the order of the Division Bench.

11. Apart from the above, Dankuni Steels which is a constituent of the Concast Group of Industries, instituted a suit before this Court being CS No. 77 of 2013 challenging the very basis of the agreement which formed the subject matter of the application taken out by the respondent no. 1 / claimant Munisubrata under section 11 of the 1996 Act for appointment of arbitrator. The reliefs in the suit filed by Dankuni Steels are set out in the impugned Award and includes Dankuni's claim for a decree for delivery and cancellation of the Tripartite Agreement dated 23.3.2012 executed between petitioner / award-debtor Sarat, the award-holder Munisubrata and the respondent no. 2 Balaji Coke. The relief claimed in the suit also includes a decree for specific delivery of approximately 11,000 + 5,000 MTs of Coke part of which was lying at the Munisubrata godown at Visakhapatnam. Dankuni Steels claimed for permanent injunction restraining the defendant nos. 1 and 2 including the

parties before this Court from dealing with or disposing of the Met Coke which was imported by the award-holder Munisubrata.

12. It is further evident that the title to the 10,000 MTs of Met Coke is not only doubtful but unresolved till date. There is no resolution as to whether the 10,000 MTs of Met Coke should be seen as the property of the award-holder Munisubrata or Dankuni Steels or Concast or last of all, Balaji.

13. While the impugned Award arrived at the finding that Munisubrata is entitled to recover Rs. 18.21 crores on account of the cost of purchase of the 10,000 MTs of Met Coke, the Division Bench in its order dated 29.7.2015 was of the view that the final decision as to whether 10,000 MTs of Met Coke was sold by Munisubrata to Balaji was to be decided on trial. The Division Bench gave a limited protection to the award-holder Munisubrata only on the prima facie basis of Munisubrata / award-holder being an unpaid seller in respect of the said goods.

14. The web of interlocking claims on the 10,000 MTs of Met Coke made more dense by the series of litigations filed by the parties staking claim to the goods makes for a blurry landscape. Moreover, the decision on the award-debtor Sarat to pay a certain amount of money to the award-holder Munisubrata as against the Division Bench order securing the award-holder Munisubrata's interest in respect of the 10,000 MTs of Met Coke are further evidence of the criss-crossing claims of the parties and whirlpools in the

already murky waters. Therefore, the so called “security” existing in favour of the award-holder is of an uncertain and undetermined character.

15. Section 36(3) of The Arbitration and Conciliation Act, 1996 provides for stay of the operation of an arbitral Award upon filing of an application under section 36(2) and allows the Court to exercise its discretion with regard to the conditions for grant of stay of the Award for reasons which are to be recorded in writing. The first proviso under section 36(3) makes it mandatory for the Court to use the provisions of The Code of Civil Procedure, 1908 as guidance with regard to the grant of stay of a money decree. Although, not spelt out in the first proviso to section 36(3), Order XLI Rule 5 of the CPC offers the template for the 36(3) Court for stay of an Award for payment of money.

16. Order XLI Rule 5 contains the procedure for stay by the Appellate Court of a decree or order and is similar in nature and import to section 36(2) and (3) of the 1996 Act. Order 41 Rule 5 sub-Rule (3) mandates that no order for stay of execution shall be made under Order XLI Rule 5(1) unless the Court making the stay is satisfied of three conditions of which the third, i.e., Order XLI Rule 5(3)(c) is relevant., The relevant part is set out below :

“O.41, R.5.(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied –

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(the relevant part is in bold)

17. Order XLI Rule 5 begins with a non-obstante clause with regard to the preceding Sub-Rules and proceeds to stipulate that the Court shall not make an order staying the execution of the decree where the appellant fails to make the deposit or furnish the securities specified in Order XLI Rule 1(3). Order XLI Rule 5(5) is set out below followed by Order XLI Rule 1(3) :

“O.41, R.5.(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree.”

“O.41, R.1.(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.”

18. A conjoint reading of the above provisions makes it clear that the Appellate Court shall not stay the execution of the decree unless the appellant furnishes the security for the due performance of such decree or order and which may ultimately be binding upon the appellant / applicant who seeks stay of the decree.

19. The first proviso to section 36(3) of the 1996 Act makes it mandatory for the Court to turn to Order XLI Rule 5 of the CPC; both of which - in tandem - require the award-debtor to furnish security for stay of the arbitral award. The discretion on the Court to impose conditions on the award-debtor for grant of stay of the operation of the Award under 36(3) is hemmed-in by the first proviso to 36(3) where the Court loses its discretionary space where the Award is for payment of money. In such cases, the Court has no option but to direct the award-debtor to furnish security for stay of the award.

20. Although, sections 36(3) read with the first proviso simply mentions “imposition of conditions” for stay of the award, the requirement of furnishing of “security” under the provisions of the CPC under the first proviso to 36(3) unerringly points to a clean and unblemished security being offered by the award-debtor. The security to be furnished by an award-debtor who intends to halt the enforcement of the award, must necessarily be of a form and nature which persuades the Court to accept the security as a satisfactory condition for grant stay of the award.

21. In order words, the security must be such as to inspire the Court's confidence that the award-debtor will stand by the security and make good the Award if the application for setting aside of the Award is ultimately rejected. The security, simply put, must command good exchange value and cannot be such as to undermine the object of section 36(3) read with the first proviso to the 1996 Act and Order XLI Rule 5 (3) and (5) of the CPC.

22. The petitioner award-debtor / Sarat is brandishing precisely a type of security which fails to clear the threshold test for stay of an award, that is, a security with a clean track record and good future prospects.

23. The second proviso to section 36(3) of the 1996 Act authorizes the Court to unconditionally stay an Award pending disposal provided the Court is satisfied that a prima facie case has been made out of either the arbitration agreement or contract which is the basis of the Award or the making of the Award being induced or effected by fraud or corruption. The second proviso was inserted by the Act of 2021, with retrospective effect from 23.10.2015.

24. Although the petitioner does not seek unconditional stay of the impugned Award under the second proviso, namely, on the ground of arbitration agreement or the making of the Award being effected by fraud or corruption, the prayer of the petitioner for utilizing the sale value of the 10,000 MTs of Met Coke as security for stay essentially amounts to that very relief. The petitioner does not intend to furnish security to the extent of the amount awarded but instead invites the Court to cause sale of the goods for realising

the awarded amount. In effect, therefore, the petitioner seeks a stay of the impugned Award without conditions as envisaged under section 36(3) read with the first proviso of the 1996 Act.

25. The framework of the Act in relation to the enforcement and stay of arbitral awards under section 36 and the various sub-sections does not contemplate the Court staying the operation of an Award by pressing into service an order directing the sale of goods of indeterminate value and title. To repeat, the Court is empowered to impose conditions on the award-debtor who seeks stay of an Award and must look to the provisions of the CPC for taking recourse to the principles for grant of stay of a decree or order. The Court must simply ensure that the security offered by the award-debtor has good currency value and is not an empty reassurance given by the award-debtor on a speculated value of unsold goods. The limited protection by the Division Bench for sale of the 10,000 MTs of Met Coke in 2015 cannot be resurrected after 7 years to urge that the award-holder stands secured to the extent of the projected sale value of the goods amounting to Rs. 45 crores. Besides the uncertainties listed above, the 10,000 MTs of Met Coke has admittedly not been sold till date and even the sale was mired in litigation.

[Confession : Like the award-holder, the Court is also a wee bit insecure on the security proposed by the award-debtor.]

26. In any event, the prayer in the application is for a stay of the impugned Award simpliciter and not for unconditional stay of the award.

27. The judgment in *Nitu Shaw vs. Bharat Hitech (Cements) Private Limited in AP 82 of 2021* was passed by this Court on the petitioner / award-debtor offering its immovable property as security as the petitioner did not have the financial means to offer cash security or bank guarantee. The Court had therefore allowed the petitioner to furnish the immovable property as the security particularly in the aftermath of the pandemic. *Future Market Networks Limited vs. Laxmipat Surana; 2022 SCC OnLine Cal 919* was concerned with the pre-award security furnished by the award-debtor which was directed to be utilized as part of the security. The award-debtor was directed to furnish further security to secure the entire claim of the award-holder. The Supreme Court in *Sepco Electric Power Construction Corporation vs. Power Mech Projects; 2022 SCC OnLine SC 1243* directed an award-debtor to furnish security on the entire awarded amount of which the cash component formed the major part. There are several other judgments of the Supreme Court and of the High Courts directing securing of the entire awarded amount.

28. This Court does not see any reason either on the facts presented or in law on the subject to stay the impugned Award dated 14.1.2023 on the strength of the Division Bench order of 29.7.2015 and the directions contained therein. The reasons for this view are indicated in the foregoing paragraphs.

29. The petitioner's prayer for un-conditional stay of the Award is hence rejected.

30. AP 265 of 2023 is disposed of by giving liberty to the petitioner to furnish security to the extent of Rs. 18,21,74,768.50/- half of which shall be by way of cash deposit and the remaining by way of a bank guarantee. The petitioner shall deposit the cash component plus bank guarantee to the Registrar Original Side within 8 weeks from the date of this judgment. The Award shall be stayed from the day following the petitioner depositing the full security in terms of the direction. The award-holder shall be at liberty to execute the Award after 8 weeks if the petitioner chooses not to comply with this direction.

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

(Moushumi Bhattacharya, J.)