

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division

Present:

The Hon'ble Justice Shekhar B. Saraf

I.A. G.A. NO. 1 of 2022

in

A.P. NO. 230 of 2022

SILIGURI JALPAIGURI DEVELOPMENT AUTHORITY

Versus

BENGAL UNITECH UNIVERSAL SILIGURI PROJECTS LIMITED

For the Plaintiff/Respondent : Mr. S.N. Mookherjee, Senior Advocate
Mr. Anirban Ray, Advocate
Mr. Raja Saha, Advocate
Mr. Chayan Gupta, Advocate
Mr. Sandip Dasgupta, Advocate
Mr. Saaqib Siddiqui, Advocate
Mr. Aviroop Mitra, Advocate

For the Respondent/Claimant : Mr. Siddharth Batra, Advocate
Mr. Ashish Shah, Advocate
Mr. Chinmay Dubey, Advocate
Ms. Moumita Chakraborti, Advocate

Heard on : June 16, 2022

Judgment on : June 22, 2022

Shekhar B. Saraf, J.:

1. The petitioner/respondent has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") along with an application under Section 36 (2) of the 1996

Act being GA No. 1 of 2022 in AP 230 of 2022 praying for stay of the award passed by the arbitral tribunal on December 27, 2021. As per the award, the respondent/claimant is entitled to a refund of Rs. 84.24 Crores which it had deposited with the petitioner on December 27, 2006. The arbitral tribunal also directed to pay the above refund with simple interest at the rate of 6% per annum for the period from the date of deposit to the date of full payment of the said amount. As per the award the petitioner was further directed to pay pendent-lite and future interest at the rate of 9% simple interest per annum from the date of award till the date of payment. However, the pendent-lite interest would apply to the awarded amount in case the same was not paid within three months commencing from the date of the award. Lastly, the Arbitral Tribunal also awarded a sum of Rs. 25,00,000/- towards reimbursement of litigation and arbitral costs.

2. The dispute between the parties arises out of an agreement to carry out a new township project for which the petitioner invited financial bids through a tender process. The financial bid of the respondent was accepted and the petitioner via letter dated December 21, 2006 issued a Letter of Award. As per the terms of the above letter the respondent was required to deposit 40% of the bid amount within 15 days. Pursuant to the deposit made by the respondent on December 27, 2006, the petitioner authority handed over the possession of 90.19 acres of land to the respondent on August 10, 2007. However, no lease deed was entered between the parties at the time of handing over of the possession of the

land. After a lapse of one year, the lease agreement for execution of work and the development agreement for the same were still not executed between the parties. Finally, in order to govern the relations between the parties a formal development agreement mentioning the terms and conditions were reduced in writing on April 25, 2008. After entering into the above development agreement several communications took place between the parties, but the agreement for lease of the land measuring 90.19 acres was not executed in favour of the respondent/claimant. Due to non-execution of the lease between the parties, the new township project was not commenced by the respondent claimant. In the meanwhile, the petitioner demanded the remaining sums required to be paid by the respondent claimant. The respondent did not pay the remaining amount due to non-execution of the lease document. Finally, the petitioner terminated the development agreement due to non-payment of the balance instalments constituting event of default by the respondent. The parties kept on holding to their respective stand and invoked the arbitration clause for settlement of the dispute. After considering the respective claims presented by both the parties during the arbitral proceedings, the tribunal awarded refund of the amount paid by the respondent towards the first instalment of Rs. 84.24 Crores.

3. Mr. S.N. Mookherjee, Senior Advocate appearing for the petitioner argues that the court has the discretion to decide the mode of security to be furnished by the petitioner. He states that the land in possession of the respondent can be accepted as a valid security for granting stay of

the arbitral award under Section 36 of the 1996 Act. Mr. Siddharth Batra, advocate appearing for the respondent highlights the default committed by the petitioner as per the development contract entered between them. He relies on Clause 3 of the agreement. Sub-clause 3 of Clause 3 highlights the obligation of the petitioner to deliver peaceful possession of the project land in favour of the respondent free from all encumbrances for which the payment was made by the respondent/claimant. Further, he relies on Clause 12 of the development agreement and avers that as per Clause 12.3 the petitioner has committed default by not handing over and granting lease of the project land to the respondent.

4. I have heard the counsels appearing for the respective parties. After perusing the relevant clauses and provisions of law cited by the advocates appearing for the parties, in my opinion, the proviso to Section 36(3) of the 1996 Act makes it clear that the Court must, while considering the stay application in proceedings under Section 34 of the Arbitration Act, have due regard to the provision for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 ("CPC"). This mandate has been construed as a guiding principle on the Court considering stay of an arbitral award. Order XLI, Rule 5(1) of the CPC grants the court discretion to stay the execution of a decree for '*sufficient cause*'. The power to exercise such discretion is subject to the court being satisfied that the following conditions, laid down in Order XLI, Rule 5(3), exist:

“Order XLI – Civil Procedure Code, 1908

Rule 5 – Stay by Appellate Court

(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.”*

5. In the case of ***Pam Developments Private Limited –v- State of West Bengal*** reported in ***(2019) 8 SCC 112*** it was held that the mandate of the amended Section 36 of the 1996 Act is such that the Court while considering an application for stay filed along with filing of quashing petitioner under Section 34 of the Arbitration Act can grant the stay subject to conditions as it deems fit. Section 36 also mandates recording of reasons for such stay being granted. It is my prima facie observation that the arbitral award passed by the Learned Arbitrator has been done after giving due regard to the contentions raised by both parties. A bare perusal of the records show that the Learned Arbitrator has duly considered the pleadings on behalf of the parties, and thereafter, framed issues and dealt with specific claims and counterclaims of the parties with reasons – hence, the award is a speaking award. Therefore, at this initial stage of the proceedings, considering that the application under Section 34 of the Act is pending adjudication, I am prima facie satisfied

that there does not appear to be any illegality, perversity or violation of any law on the face of the arbitral award. It should be noted, however, that this is my prima facie finding, and the merits to the challenge to the award shall be considered at the appropriate stage.

6. Lastly, it is my view that the amended Section 36 of the Act, provides for securing the award holder for the entirety of the award value. It should also be noted that the security must be real and not illusionary or insignificant. Thus, the argument by the senior counsel appearing for the petitioner that the land in possession of the respondent must be considered as sufficient security under Section 36 does not hold water. The land offered for the purpose of security is part of the dispute between the parties. Furthermore, no document has been placed before this court to indicate that the value of the land would cover the entirety of the award. Ergo, the same cannot be accepted for securing the interest of the award holder. While the rights of the award holder are not crystallised till the disposal of the application under Section 34 of the 1996 Act, the award holder still has the statutory safeguard under Section 36 of the 1996 Act to be secured in a fruitful manner for the entirety of the arbitral award amount unless there are reasons otherwise as contemplated under the amended Section 36 of the 1996 Act. However, this Court is also mindful of the arguments of the petitioner with regard to the liquidity crunch being faced by the petitioner for the purpose of securing the respondent for the entirety of the award so that

the challenge under Section 34 for setting aside of the award does not become otiose.

7. In light of the above discussion, I am of the view that the award holder should be secured for the entirety of the amount awarded by the Arbitral Tribunal along with interest and other costs. The petitioner shall deposit 50% of the arbitral award (including interest calculated till June, 2022) by way of cash security or its equivalent to the satisfaction of the Registrar Original Side, High Court at Calcutta. Upon such deposit being made, the Registrar Original Side is directed to make a fixed deposit of the said amount with any nationalised bank and keep the same renewed till the disposal of the application under Section 34 of the Act or until further orders of Court. The remaining 50% of the awarded amount shall be secured by way of bank guarantee(s) of a nationalised bank by the petitioner to the satisfaction of the Registrar Original Side, High Court. The above bank guarantee is to be renewed one month prior to its expiry and kept alive till the disposal of the Section 34 application or until further orders in relation to the same, whichever is earlier. The aforesaid exercise is to be completed within a period of four weeks from the date of this order. In the event security as directed above is furnished, there shall be stay of execution of the award till disposal of AP 230 of 2022. With the above directions, G.A. No. 1 of 2022 is disposed of.

8. The parties are further directed to file their affidavits in the Section 34 application being A.P. No. 230 of 2022. Affidavit in opposition to be filed within six weeks from date; reply thereto, if any, within two weeks thereafter. Liberty is granted to the parties to mention for inclusion in the list.

9. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)