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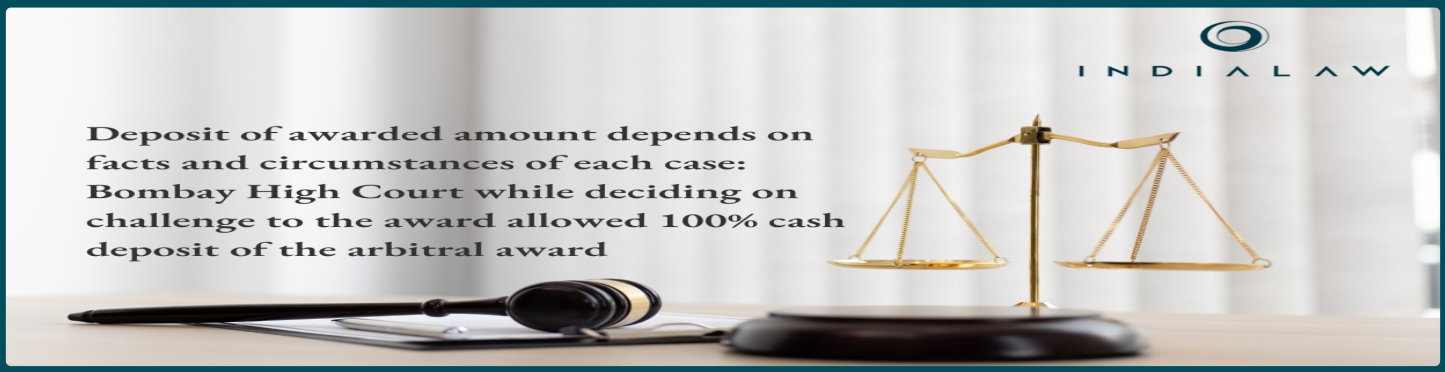

ARBITRATION AND CONCILIATION

Deposit of awarded amount depends on facts and circumstances of each case: Bombay High Court while deciding on challenge to the award allowed 100% cash deposit of the arbitral award

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PUBLISHED 21 March 2024

Introduction:

On 1st March 2024 (read with corrected order dated 13th March 2024), the Hon'ble High Court of Bombay ("**the BHC**" for short) passed an order in an interim application filed in the matter of *Balmer Lawrie & Co. Ltd. vs. Shilpi Engineering Pvt. Ltd.**[1]*** wherein the BHC granted stay on the execution, operation and effect of the arbitral award *subject* to the Petitioner depositing 100% awarded amount in cash with interest determined by the arbitrator.

Factual background:

The dispute emanates from an interim application which came to be filed in a commercial arbitration petition *inter alia* before the BHC seeking stay on execution, effect and operation of an arbitral award. Interestingly, in parallel execution proceedings between the parties pending before the Hon'ble High Court of Calcutta ("**the CHC**" for short), the Petitioner in the present case had already deposited 100% of the awarded amount by way of bank guarantee.

Further, the operation of award is sought to be stayed in view of the oral directions passed by the CHC as challenge to the award is pending before the BHC.

Points in issue

1. Can the Petitioner transfer the deposit of the awarded amount from the CHC to the BHC?
2. Can 100% cash deposit of awarded amount be made instead of the bank guarantee furnished in the instant case before CHC?

Contentions

The counsel for the Respondent vehemently contended that this being a money decree and as per the relevant provisions of the Civil Procedure Code 1908, ("**the Code**" for short) deposition of awarded amount must be made entirely in cash. In support of his contention, he also relied upon recent judgment and order passed by the Hon'ble Supreme Court in *Srei Infrastructure Finance Limited Vs. Candor Gurgaon Two Developers and Projects Pvt. Ltd.**[2]*** *and Manish Vs. Godawari Marathwada Irrigation Development Corporation**[3]**,* respectively in which the courts granted 100% cash deposit of the awarded amount.

In response to the aforesaid submissions, the counsel for the Petitioner relied upon the judgment passed in *Pam Developments Private Limited Vs. State of West Bengal**[4]*** which *inter alia* held that the words "in accordance with" the provisions of the Code would only be directory in nature. Mere reference of the Code in Section 36 of the Arbitration and Conciliation Act, 1996 ("**the Act** " for short) cannot be construed in such a manner that it takes away the power conferred in the Act itself.

By relying upon the judgment passed by the CHC in *Kolkata Metropolitan Development Authority Vs. South City Projects (Kolkata) Ltd. and Ors.**[5]***, he further contended that judgment/order relied upon by the advocate for the Respondent pertains to appeals under S. 37 of the Act and thus principles for grant of stay under Section 37 of the Act are not attracted under Section 36(3) of the Act and hence the judgment cited cannot apply. The said decision was challenged before the Hon'ble Supreme Court which upheld the decision of CHC.

Subsequent to the aforesaid submissions, the counsel for the Respondent pointed out second para of the Hon'ble Supreme Court judgment passed in *Kolkata Metropolitan Development Authority* wherein the Hon'ble SC found it prudent to not interfere with the decision of CHC.

Decision of the HC

In consideration of the aforesaid contentions and submissions made by the parties and the fact that the Petitioner is not under any financial distress, the HC, in the interest of justice granted stay on operation, effect and execution of award subject to 100% cash deposit of the awarded amount.

Furthermore, the BHC found no merits, in the contentions put forth by the counsel for the Petitioner with regards to a distinction drawn between the Sections 36(3) and 37, which enabled the BHC to exercise discretion in granting stay.

In view of the aforesaid order, the Petitioner was directed to withdraw the bank guarantee furnished to the CHC subsequent to the deposit of the awarded amount with interest in the BHC.

IndiaLaw LLP represented the Respondent in this matter.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION INTERIM APPLICATION (L) NO. 779 OF 2024 IN COMMERCIAL ARBITRATION PETITION NO. 1131 OF 2018

M/s. Balmer Lawrie & Co.Ltd. Applicant/ Petitioner

Versus

M/s. Shilpi Engineering Pvt.Ltd. Respondent

Mr. Shyam Kapadia a/w Mr. Sanket Singh and Iyanah Parbhoo i/by Meraki Chambers for the Applicant/Petitioner.

Mr. Darshit Jain A/W Neeli Sandesara, Deep Dighe i/by India Law LLP for the Respondent.

CORAM : R.I. CHAGLA J

DATE : 1 March 2024

ORDER:

1. By this Interim Application, the Applicant/original Petitioner has sought recall of the order dated 4th September 2019 passed by this Court disposing of the Commercial Notice of Motion No. 2275 of 2018 filed by the Applicant. Further relief is sought for stay on the execution, operation and effect of the impugned Award dated 5th July 2018 passed by the Sole Arbitrator.
2. With regard to the prayer clause (a), which seeks restoration of the Commercial Notice of Motion No. 2275 of 2018, upon a perusal of the prior order dated 26th July 2019 passed by this Court, it is apparent that by the said order the time for filing pleadings was only extended. In the subsequent order dated 4th September 2019 reference has been made to the order dated 26th July 2019 and it has been recorded that, the Notice of Motion by that order was treated as disposed of. This recording is on the face of it incorrect. The Notice of Motion had not been disposed of. Accordingly, the order dated 4th September, 2019 passed in Notice of Motion No. 2275 of 2018 filed by the Applicant/original Petitioner is recalled and the Notice of Motion is restored to file.
3. Considering that there is already a prayer clause (b) in the present Interim Application which is very same prayer in Notice of Motion No. 2275 of 2018, there is a multiplicity of proceedings. In view thereof, Notice of Motion No. 2275 of 2018 is disposed of.
4. It is the contention of Mr. Shyam Kapadia, the learned Counsel appearing for the Petitioner, that there has been a bank guarantee furnished by the Applicant/original Petitioner as directed by the Calcutta High Court for the entire awarded amount along with the accrued interest. The bank guarantee is furnished in the execution proceedings bearing EC No. 45 of 2019 filed by the Respondent herein before the Calcutta High Court. He has submitted that upon the bank guarantee being furnished, the execution proceedings were not proceeded with. He has further submitted that by the present Application, the impugned Award is sought to be stayed and this prayer is being pressed in view of the oral directions of the Calcutta High Court that since Section 34 Petition is pending before this Court, stay is also to be granted by this Court.
5. Mr. Kapadia has submitted that the Applicant/original Petitioner has raised sufficient grounds for setting aside of the arbitral Award and which has also been re-produced in the Interim Application. However, considering that the Applicant/original Petitioner has already furnished a 100% bank guarantee before the Calcutta High Court, the same may be permitted to be furnished in this Arbitration Petition.
6. Mr. Kapadia has drawn this Court's attention to the law laid down by the Supreme Court in Pam Developments Private Limited Vs. State of West Bengal[1] at paragraph 20 which was in relation to an Application for stay of an arbitral award. The Supreme Court has considered in Section 36(3) of the Arbitration Act, as amended vide Act No.3 of 2016 with effect from 23rd October 2016, the words "having regard to" and the words "in accordance with" the provisions of the Code of Civil Procedure, 1908. The Supreme Court has held that these words would only be directory as a guiding factor. Mere reference to Code of Civil Procedure, 1908 in Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute i.e. Arbitration Act itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of Code of Civil Procedure, 1908 are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self contained Act, the provisions of the Code of Civil Procedure, 1908 will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act.

7. Mr. Kapadia has further submitted that the Supreme Court in Toyo Engineering Corporation & Anr. Vs. Indian Oil Corporation Limited[1] was considering an order of conditional stay of the Award passed in an Appeal under Section 37 from a dismissal of the Section 34 Petition and in these circumstances, the Supreme Court held that 100% of the awarded amount is required to be deposited for stay of the Award.
8. Mr. Kapadia has also referred to decision of the Calcutta High Court in Kolkata Metropolitan Development Authority Vs. South City Projects (Kolkata) Ltd. and Ors.[1], wherein the Calcutta High Court had referred to the decision of the Supreme Court in Pam Developments Private Limited (supra), and taken the view that principles for grant of stay under Section 37 of the Arbitration Act, are not attracted and cannot be applied under Section 36(3) of the Arbitration Act, 1996 as in Section 36(3), the Court is still considering a challenge under Section 34 of the Arbitration Act, 1996 to the Award while under Section 37 of the Act of 1996, the challenge had resulted in a decree of the Court. The Calcutta High Court had in these circumstances, considered it appropriate to order furnishing of security for stay of the Award. He has submitted that the decision of Calcutta High Court has been upheld by the Supreme Court in order dated 15th July 2022, wherein the Supreme Court has held that the direction of the Calcutta High Court to the Petitioner to deposit the entire awarded amount by way of cash security or its equivalent to the satisfaction of the Registrar, Original Side is absolutely in consonance with the relevant provisions of the Code of Civil Procedure, 1908 as well as Section 36(3) of the Arbitration Act.
9. Mr. Kapadia has submitted that the factors to be considered by the Court while exercising discretion under Section 36(3) of the Arbitration Act are different than in an Appeal under Section 37 of the Arbitration Act wherein the Court has already rejected the Section 34 Petition and the Award has become a decree of the Court. He has submitted that in view of the Petitioner having already furnished 100% bank guarantee before the Calcutta High Court, the same may be allowed to be furnished in these proceedings and which would secured the Award as contemplated under Section 36(3) of the Arbitration Petition.
10. Mr. Darshit Jain, the learned Counsel appearing for the Respondent has submitted that there is no distinction in the exercise of discretion of a Court considering an Application under Section 36(3) from that exercised by a Court considering a stay in an Appeal under Section 37 of the Arbitration Act. Further, this distinction finds no place in the relevant provisions of the Arbitration Act. He has submitted that in the second paragraph of the Supreme Court order dated 15th July 2022 in Kolkata Metropolitan Development Authority (supra), the Supreme Court has noted that the Petitioner had thereafter, in compliance, deposited the entire awarded amount and the application submitted by the Claimant for withdrawal was pending before the Court and hence the impugned order was not interfered with.
11. Mr. Jain has also relied upon the decision of the Delhi High Court in Power Mech Projects Ltd. Vs. Sepco Electric Power Construction Corporation[4], wherein the Delhi High Court has referred to the Supreme Court decisions in Srei Infrastructure Finance Limited Vs. Candor Gurgaon Two Developers and Projects Pvt.Ltd.[1] and Manish Vs. Godawari Marathwada Irrigation Development Corporation[2], wherein the Supreme Court had directed 100% deposit of the awarded amount. The Delhi High Court has in that case held that in the view of the recent decisions of the Supreme Court, and though co-ordinate Benches of the Delhi High Court have been directing deposit of 50%, the Petitioner must deposit 100% of the awarded amount to secure the Respondent
12. Mr. Jain has accordingly, submitted that it is in the interest of justice to direct the deposit of 100% of the awarded amount, where the Award is in the nature of money decree and stay of the impugned Award has been sought.
13. Having considered these submissions, the Court in an Application under Section 36(3) of the Arbitration Act exercises its discretion in granting a stay of the impugned Award. Whether to impose conditions and to what extent is dependent upon the facts and circumstances of each case. In the present case, this Court finds that there are no circumstances brought to the notice of this Court that the Respondent is in any manner facing financial hardship for depositing the awarded amount. The mere fact that the Petitioner had furnished a bank guarantee in the execution proceedings before Calcutta High Court, would not be a relevant factor to be taken into account whilst exercising this Court's discretion under Section 36(3) of the Arbitration Act in imposing conditions for grant of stay of the impugned Award.
14. The decisions which have been relied upon by the Counsel for both the sides and which have been adverted to, makes clear that the Supreme Court has taken a consistent stand that where the Award is in the nature of money decree, there is a requirement for deposit of 100% of the awarded amount for grant of stay. I do not find any distinction in applications for stay under Section 36(3) and under Section 37 for different parameters to be applied in exercise of discretion by the Court in imposing conditions for grant stay. There is nothing in both the provisions for taking such a view. Further, a liberal view is not contemplated under Section 36(3) of the Arbitration Act whilst imposing the conditions for stay of the Award.
15. I am not inclined to follow the reasoning of the Calcutta High Court in Kolkata Metropolitan Development Authority (supra), wherein the Single Judge has drawn such distinction in the principles of grant of stay under Section 37 of the Arbitration Act which he has held is not attracted and cannot be applied under Section 36(3) of the Arbitration Act. This on the premise that in

an Application under Section 36(3) of the Arbitration Act, the Court is still considering a challenge under Section 34 of the Arbitration Act, 1996 to the Award while under Section 37 of the Act of 1996, the challenge has resulted in a decree of the Court.

16. Once an Award is passed by the learned Arbitrator, till it is stayed, the Award is in the form of the decree and can be executed in that form by the Executing Court and thus, whether the Section 34 Petition has been dismissed or it is yet to be considered, the same parameters would apply for stay of the Award.
17. Thus, I do not find any merit in the submissions of Mr. Kapadia that this Court should in the present case exercise discretion liberally by allowing the Petitioner to furnish the bank guarantee rather than depositing the awarded amount.
18. Accordingly, I grant stay to the execution, operation and effect of the impugned Award dated 5th July 2018 passed by the Sole Arbitrator, subject to the Petitioner depositing the awarded amount with interest as determined by the Sole Arbitrator on the date of such determination within a period of six weeks from the date of this order.
19. The Respondent is at liberty to file an application for withdrawal of the awarded amount with interest as and when deposited and which application shall be considered on its own merits.
20. Interim Application is accordingly, disposed of.
21. Needless to state that in view of this order, the Petitioner shall apply in the Calcutta High Court where the execution proceedings have been filed for withdrawal of the bank guarantee. This would be subject to the Petitioner depositing the awarded amount with interest in this Court.

[R.I. CHAGLA J.]

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO.779 OF 2024 IN COM ARBITRATION PETITION NO.1131 OF 2018

M/s. Balmer Lawrie and Co. Ltd. ….Applicant/ Petitioner

Versus

M/s. Shilpi Engineering Pvt. Ltd. …Respondent

Anaaya Dalvie i/b. Meraki Chambers for the Applicant / Petitioner.

Darshit Jain with Neeli Sandesara i/b. India Law LLP for the Respondent.

CORAM : R.I. CHAGLA J.

DATE: 13TH MARCH, 2024.

ORDER:

1. Mentioned. Not on board. Taken on board.
2. By praecipe bearing today's date, the Advocate for the Respondent has sought speaking to the minutes of the order dated 1st March, 2024.
3. In the third sentence of paragraph 13 of the said Order,the word, "Respondent" is to be replaced with "Petitioner".
4. Further, in paragraph 18 of the said Order, after the words "the Petitioner depositing the awarded amount with interest as determined by the sole Arbitrator on the date of such determination" shall be corrected to read as "the Petitioner depositing the awarded amount with interest as determined by the Sole Arbitrator on the date of this Order".
5. The order dated 1st March, 2024 shall be corrected accordingly.

[R.I. CHAGLA J.]

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[1] Interim Application (L) No. 779 of 2024

[2] SLP (C) No (s). 20897/208

[3] Special Leave to Appeal (C) Nos. 11760-11761-2018 order dated 16th July 2018

[4] (2019) 8 SCC 112

[5] IA GA 1 of 2020 and A.P. No. 351 of 2020

[1] (2019) 8 SCC 112

[1] Civil Appeal Nos. 4549-4550 of 2021

[1] IA GA 1 of 2020 and A.P. No. 351 of 2020

[1] SLP (C) No(s). 20895-20897/2018

[2] Special Leave to Appeal (C) Nos. 11760-11761-2018 order dtd 16.07.2018