

(2022) 04 CAL CK 0086
In the Calcutta High Court

Case No : IA NO. G.A. 1 of 2022 In A.P. No. 698 of 2016

Future Market Networks Limited

APPELLANT

Vs

Laxmi Pat Surana & Anr.

RESPONDENT

Date of Decision : 28-04-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 41 Rule 1, Order 41 Rule 1(3), Order 41 Rule 5, Order 41 Rule 5(5)
Arbitration And Conciliation Act, 1996 — Section 31(7), 31(7)(a), 31(7)(d), 34, 36, 36(2), 36(3), 36(2)

Citation : (2022) 04 CAL CK 0086

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Rishad Medora, Pooja Chakraborty, Radhika Misra, Jishnu Chowdhury, Souradeep Banerjee, Abhidipto Tarafdar

Final Decision : Allowed

Judgement

Moushumi Bhattacharya, J

1. The issue in the present application filed by the award-debtor is whether the Award would automatically include interest and would, in turn, have a bearing on the conditions which may be imposed for grant of stay of the Award under section 36 of The Arbitration and Conciliation Act, 1996.

2. The Arbitral Award in the present case is dated 19th May, 2016. The parties to the Award have filed three separate applications including under section 34 of the Act for setting aside of the Award, which are pending before this court. The respondent no. 1 has also filed an Execution Case which is pending as on date.

3. According to the petitioner, the respondent no. 1 is already secured and hence there is no further requirement on the petitioner to provide for security for stay of the Award. The petitioner also resists the prayer of the first respondent to permit encashment of the bank guarantees furnished by the petitioner unless the

first respondent is directed to furnish counter guarantees.

4. Learned counsel appearing for the petitioner submits that the Award is for an amount of Rs. 12,90,52,379 /- carrying an interest of 18% per annum from the date of Award till realization. According to counsel, the Arbitrator did not allow pre-award interest and counsel further submits that post-award interest also does not form part of the Arbitral Award. Counsel refers to an order dated 21st March, 2012 passed by a learned Single Judge of this court and that of a Division Bench dated 25th September, 2012 by which the petitioner, being the appellant before the Division Bench, was directed to furnish bank guarantee for an amount of Rs. 6.5 crores as security and keep the same renewed. Counsel submits that the petitioner furnished such bank guarantee and has been renewing the same from time to time. Counsel also refers to an order passed by a learned Single Judge on 12th October, 2018 in an Execution Petition filed by the first respondent, by which the respondent no. 2 (Future Enterprises) was directed to furnish a bank guarantee of Rs. 5.5 crores with the Registrar, Original Side of this Court. Counsel submits that the said bank guarantee was deposited by the respondent no. 2 and has also been renewed from time to time. Counsel urges that an amount of Rs. 12 crores out of the awarded sum of Rs. 12,90,52,379/- (being the principal amount) is therefore already secured in the form of bank guarantees by the petitioner and the respondent no. 2. The thrust of the submissions advanced on behalf of the petitioner is that the entire awarded sum need not be secured while granting a stay of operation of the award under section 36(2) of the Act.

5. Learned counsel appearing for the first respondent submits that the petitioner is required to pay Rs. 12,90,52,379/- along with interest at 18% per annum from the date of the Award which translates to Rs. 26,53,74,118 /- as on 1st April, 2022. Counsel relies on section 31 (7) of the Act for urging that an arbitral award includes interest. Counsel also relies on decisions to contend that expeditious disposal of arbitral process and enforcement of the award is an essential aspect of the Amendment Act of 2015. Counsel relies on Order XLI Rule 5 of The Code of Civil Procedure, 1908, to urge that execution of a money decree is ordinarily not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury. Counsel also relies on decisions to submit that 100% deposit should be directed and part withdrawal allowed in favour of the respondent no. 1.

6. From the submissions of learned counsel appearing for the parties, the controversy in the present application is concerned with whether the petitioner should be called upon to pay security over and above Rs. 12 crores which has already been secured by the petitioner in the form of bank guarantees pursuant to orders of court. According to the petitioner, Rs. 12 crores covers the entire awarded amount of Rs. 12,90,52,379/- and hence there is no requirement of any further payment. The respondent opposes this position by reference to the statutory provisions and relevant case law.

7. Section 31(7) of the 1996 Act provides for interest where the arbitral award is

for the payment of money. Clause (a) of sub-section (7) of section 31 contemplates pre-award and pendente lite interest at the rate the arbitral tribunal deems reasonable on the whole or any part of the money awarded and for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Sub-clause (b) of section 31(7) provides for post-award interest at the rate of 2% higher than the current rate of interest prevalent on the date of the award, from the date of the award to the date of payment. Both sub-clauses (a) and (b) are subject to the parties agreeing for awarding of interest and the direction of the tribunal, respectively. The explanation to 31(7)(b) clarifies the expression "current rate of interest" as having the same meaning as assigned under the Interest Act of 1978.

8. Section 31(7) was interpreted by a 3-judge Bench of the Supreme Court in *Hyder Consulting (UK) Limited vs Governor, State of Orissa*; (2015) 2 SCC 189 to mean that for the purpose of an award, the interest component loses the character of "interest" and takes the colour of "sum" for which the award is made. The Supreme Court opined that post-award interest is for the purpose of ensuring speedy payment in compliance of the award and is the mandate of the statute. The decision lays emphasis on the words "include in the sum" and holds that pre-award interest is not independent of the sum awarded. To quote the relevant part of the decision :-

"28. Therefore for the purposes of an award, there is no distinction between a "sum" with interest and a "sum" without interest. Once the interest is "included in the sum" for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other."

9. Although, *Hyder Consulting (UK)* interpreted the word "sum" to mean the award plus interest taken as an indivisible whole in respect of section 31(7)(a) for grant of pre-award interest, the same interpretation can be stretched to cover section 31(7)(b) for post-award interest. Expanding the interpretation to post-award or future interest would not be discordant to the context since clause (b) opens with the words "A sum directed to be paid..." and makes it mandatory for the arbitral award to carry interest at a rate higher than the prevalent rate of interest unless the award contains a contrary direction. In the present case, the Award is for a sum of Rs. 12,90,52,379/- along with interest at 18% from the date of the Award i.e. 19th May, 2016 to the date of payment. The exact direction of the learned Arbitrator is as follows:-

"108. In the premises, I award a sum of Rs. 12,90,52,379/- to be paid by the respondents to the Claimant Mahaveer Construction. The said award shall carry interest @ the rate of 18% p.a. from the date of award till total sum awarded is realized by the Claimant."

10. The Arbitral Award is hence specific and further uses the word "sum" indicating the precise amount awarded together with interest at the rate of 18% from the date of the Award till the date of payment to the claimant (respondent

no. 1). A computation handed over by counsel appearing for respondent no. 1 award-holder indicates that as on 1st April, 2022, the Award is for a sum of Rs. 26,53,74,118 /-.

11. The point raised on behalf of the petitioner in relation to the variable rate of future interest cannot be accepted since section 31(7)(b) makes award of future interest mandatory with an added stipulation that the rate should be higher than the prevailing market rate.

12. The marked difference in the language between 31(7)(a) – pre-award and pendente lite interest and 31(7)(b) – future interest reflected from the transition from ‘may’ to ‘shall’ respectively indicates that award of future/post-award interest is not advisory but a mandate of the Act and is to be given its due weightage. The object of the mandate has also been explained by the Supreme Court in Hyder Consulting (UK) as a safeguard against delayed payment of the amount awarded to the award-holder. This court also finds the direction of the learned Arbitrator to be precise and devoid of any ambiguity. Besides, the Award is of 19th May, 2016; the petitioner hence cannot take advantage of the intervening delay of six years or take the plea of proceedings pending before this court.

13. This court is in agreement with the stated position taken on behalf of the first respondent that the object of the 1996 Act as amended in 2015 is expeditious disposal of arbitral process and enforcement of the award. This was specifically stressed by the Supreme Court in Icomm Tele Limited vs Punjab State Water Supply and Sewerage Board; (2019) 4 SCC 401, where the object was enunciated as “fair, speedy and inexpensive trial by an arbitral tribunal” and unnecessary expense or delay was seen as frustrating the very purpose of arbitration. The principle of speedy and effective resolution of arbitral processes recognizes the financial investments made by a person to an arbitration agreement and the consequent need to ensure that the person is returned the value of his investment and compensated for the intervening losses suffered by him. Delayed recovery is a serious clog in this process and may also lead to obliteration of the investment and the very purpose for which money was put in the project. The person putting in money may also lose the chance to recover the investments in the event of a huge delay in realizing the amount despite a decree in his favour.

14. The above reasons would lead to the firm conclusion that the sum awarded to the respondent no. 1/award-holder is now Rs. 26,53,74,118/-which is the sum of Rs. 12,90,52,379/- + interest at 18% per annum from 19th May, 2016 till 1st April, 2022. 1st April, 2022 is taken as the end date for the sake of certainty and for making the sum specific. The contention of the petitioner that the respondent no. 1 is already secured to the extent of Rs. 12 crores by way of bank guarantees and the petitioner should not be called upon to secure further amounts is hence rejected since the sum awarded was 12.96 crores approx. as of 19th May, 2016 and six years have passed thereafter. The sum awarded to the

respondent no. 1 cannot therefore be restricted to the sum which was awarded in 2016 when the order specifically carried interest at 18% per annum from the date of making of the Award till the date of realization by the claimant/respondent no. 1/ award-holder. The petitioner cannot also take refuge in the argument that post-award interest is a variable amount when the petitioner has stalled realization of the sum awarded to the respondent no. 1 award-holder for six years.

15. The second issue which falls for consideration is the condition for grant of stay of an arbitral award as envisaged under section 36(2) and (3). According to the respondent no. 1, an exceptional case must be made out for an unconditional stay of a money decree. Although the proviso to section 36(3) of the Act casts an obligation on the court to have due regard to the provisions of The Code of Civil Procedure, 1908 for grant of stay of a money decree, the said mandate has been construed as a guiding principle on the Court considering stay of an arbitral award. [Ref. Pam Developments Private Limited vs State of West Bengal; (2019) 8 SCC 112]. Malwa Strips Private Limited vs Jyoti Limited; (2009) 2 SCC 426 reinforces the proposition that compelling reasons will have to be made out for stay of a money decree. The Supreme Court in Sihor Nagar Palika Bureau vs Bhabhlubhai Virabhau & Co.; (2005) 4 SCC 1 advised a judicious exercise of discretion on the facts and circumstances of the given case and held that ordinarily execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury since remedy of restitution is always available to the successful party.

16. A careful reading of section 36 of the Act indicates that the power to grant stay of an arbitral award under sub-section (3) is discretionary and may only be exercised if the Court is satisfied that conditions are conducive to passing such an order. If the Court is inclined to grant stay, the Court shall be guided by the principles under Order XLI Rules 1 and 5 of the CPC governing grant of stay of a money decree. Order XLI Rule 1(3) of the CPC requires deposit of the amount disputed in the appeal against a decree for payment of money or furnishing such security as the Court may deem fit. Order XLI Rule 5(5) contemplates a deposit or a security as condition precedent for an order by the Appellate Court staying the execution of the decree. Although it is clear from section 36(3) of the 1996 Act that there is no compulsion on a court to grant stay of an arbitral award and the Court has a clear discretion in that respect, the discretion must be exercised bearing in mind not only to imposition of conditions under section 36(3) and the proviso, but the impact of the stay on present and future events and pending proceedings.

17. In the present case, all three parties including the respondent no. 1 award-holder, have applied for setting aside of the impugned award. The hearing of the applications has already commenced before this Court. Hence discretion must be exercised in favour of the petitioner who seeks stay of the award taking into account the present fact situation. Further, on a practical assessment of the

matter if the award is not stayed and the respondent no. 1 takes steps for execution of the Award, which he already has, the applications for setting aside of the Award may become infructuous in the short run. This court therefore deems it fit to grant stay of the Arbitral Award so that the applications filed under section 34 of the Act for setting aside of the Award can be given a fair and effective consideration.

18. On the question of the petitioner being put to terms for seeking a stay of the Award, this court draws reference from the recent trend of courts directing deposit of a substantial amount by the award-debtor for grant of stay. Since the value and sum of the Award as it stood on 1st April, 2022 amounts to Rs. 26,53,74,118/- and the respondent no. 1 is already secured to the extent of Rs. 12 crores, the petitioner shall deposit 70% of the balance amount of Rs. 14,53,74,118/- (Rs. 26,53,74,118 – Rs. 12,00,00,000) i.e. Rs. 10,17,61,882/- with the Registrar, Original Side of this court within four weeks from date. The petitioner shall have the option of depositing 50% of the said amount (i.e., Rs. 5,08,80,941/-) by way of a bank guarantee and the remaining 50% (Rs. 5,08,80,941/-) in cash. If the petitioner defaults in complying with such condition within the stipulated time, the respondent no. 1 award-holder shall be free to take appropriate steps in the execution proceedings or as it may think fit.

19. The prayer of the respondent no. 1 for withdrawing the amount deposited by the petitioner cannot be entertained at this stage for two reasons. First, the respondent no. 1 has already prayed for similar relief in the execution proceeding which is not before this court and second, the prayer for withdrawal cannot be considered without the respondent no. 1 furnishing a counter bank guarantee or some form of security in aid of restitution at an appropriate stage of the proceedings.

20. In view of the above reasons, G.A. 1 of 2022 is accordingly allowed and disposed of in terms of prayer (a). There shall be stay of the operation of the Arbitral Award dated 19th May, 2016 upon the petitioner depositing the amount as directed in the preceding paragraph of this judgment with the Registrar, Original Side within four weeks from date.

21. List the petitioner's application under section 34 of the 1996 Act on 11th May, 2022.

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