2024 INSC 827

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 12097 of 2024
(Arising out of SLP(C) No 25369 of 2024)

International Seaport Dredging Pvt Ltd .... **Appellant**

Versus

Kamarajar Port Limited ....**Respondent**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1. Leave granted.

2. The appeal arises from an interim order dated 9 September 2024 of a Single Judge of the High Court of Judicature at Madras in A No 4236 of 2024 in Arb OP (Com Div) No 335 of 2024.

3. The respondent issued a Letter of Award for executing Capital Dredging Phase-III at Kamarajar Port to the appellant for an approximate sum of Rs 274 crores. On 12 August 2015, the parties entered into a contract for the following work to be conducted by the appellant:

a. Capital dredging of Container Berth and Multi Cargo Berths and their approaches;

b. Capital dredging of Coal Berth 3 & Coal Berth 4 and their approaches;

c. Removal of onshore boulders and transportation to the designated area;

d. Removal of offshore boulders and transportation to the designated area;

e. Removal of offshore identified debris/wrecks; and

f. Environmental monitoring.

4. These tasks were to be completed on or before 11 April 2017. Thereafter, disputes arose between the parties. The appellant invoked the arbitration agreement. The arbitral proceedings commenced and the three-member arbitral tribunal made an award on 7 March 2024 directing the respondent to:

a. Pay the appellant a sum of Rs 21,07,66,621 towards the claims that were allowed in its favour;

b. Pay the appellant interest on the amount awarded at the rate of nine per cent per annum from 15 November 2017 until the date of the award if the payment was made within three months, and, if not, at the rate of twelve per cent per annum from the date of the award till the date of payment; and

c. Pay the appellant Rs 3,20,86,405 by way of costs.

5. Both parties filed applications under Section 33 of the Arbitration and Conciliation Act 1996[1] for correction of the award and for additional arbitral awards. The arbitral tribunal dismissed the application filed by the respondent. It allowed the application filed by the appellant only to the extent of increasing the costs awarded to it by Rs 12,00,000 to reflect the fees paid to the arbitral tribunal subsequent to the parties filing their memo of costs.

6. The respondent challenged the arbitral award under Section 34 of the Arbitration Act and moved an application for stay of execution. The High Court, by its impugned judgment and order dated 9 September 2024, granted a stay on the execution of the award conditional on the respondent furnishing a bank guarantee in the sum of Rs 21,07,66,621 within a period of eight weeks.

7. The judgment of the High Court has been assailed by the original claimant of the arbitral proceeding (i.e., the appellant in this case) whose contention is that since the award operates as a money decree under Section 36 of the Arbitration Act, the High Court was not justified in directing merely the furnishing of a bank guarantee in relation to the principal amount. The appellant contends that the respondent ought to have instead been directed to deposit the amount awarded to it as a condition for the grant of a stay on the execution of the award.

8. Mr Shyam Divan, senior counsel appearing on behalf of the appellant, has urged that: (i) A body of precedent has emerged from this Court in terms of which the sanctity of arbitration must be preserved by requiring the deposit of the amount

[1] "Arbitration Act"

awarded as a condition for the stay on the enforcement of the award; (ii) The amended provisions of the Arbitration Act require that while considering an application for stay of an award for the payment of money, due regard has to be had to the provisions of the Code of Civil Procedure 1908[2]; and (iii) The award of Rs 21,07,66,621 covered ten claims of which three were awarded in full and seven in part. The High Court while ordering a stay, has essentially furnished only two reasons. The first reason pertains to the question of cess, while the only other reason is that the respondent is not "a fly by operator".

9. Mr C A Sundaram, senior counsel appearing on behalf of the respondent, submits that: (i) The amended provisions of the statute incorporate provisions of the CPC in regard to ordering a stay of an award which contains provisions for the payment of money; (ii) Under Order XLI Rule 5 of the CPC, the requirement is for furnishing of security and the deposit of money should not, therefore, be regarded as a default option; (iii) The High Court had due regard to the fact that the respondent is a statutory body and correctly held that security should be furnished in the form of a bank guarantee; (iv) As such the impugned judgment should not be interfered with under Article 136 of the Constitution; and (v) The body of precedents which Mr Divan relied on pertains to appeals under Section 37 of the Arbitration Act.

10. Section 36(2) of the Arbitration Act indicates that where an application to set aside an arbitral award has been filed under Section 34, the filing of such an application shall not, by itself, render that award unenforceable, unless the Court grants a stay

[2] "CPC"

on the enforcement of the arbitral award in terms of sub-section (3). The provision indicates that a separate application must be made for this purpose. Sub-section (3) of Section 36 stipulates that where such an application has been filed, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing. Following the amendments brought about by the Arbitration and Conciliation (Amendment) Act 2015, the first proviso to sub-section (3) stipulates that the Court shall, while considering an application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions related to the grant of stay of a money decree under the CPC. The second proviso provides for a situation in which the Court may grant unconditional stay. Section 36(3) and its provisos are reproduced below:

> "36. Enforcement –
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> …
>
> (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).
>
> Provided further that where the Court is satisfied that a Prima facie case is made out that, –

> (a) the arbitration agreement or contract which is the basis of the award; or
>
> (b) the making of the award,
>
> was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.
>
> Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016)."
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> (emphasis supplied)

11. In the present case, there is an arbitral award to the tune of approximately Rs 21 crores in favour of the appellant. The High Court, while issuing a direction for furnishing of a bank guarantee, dealt with only one of the claims which was awarded by the arbitral tribunal, namely, that which pertained to the refund of the cess under the Building and Other Construction Workers' Welfare Cess Act 1996.[3] In this regard, the High Court observed that the Deputy Chief Labour Commissioner, by its order dated 6 November 2019, held that the Cess Act was not applicable to the appellant which was therefore not required to pay cess under that statute. It noted that the arbitral tribunal had, however, rendered an award in which it directed the respondent to pay the appellant this amount, which had already been paid by the respondent to the appellant. It held that while the substance of the claims of the parties could only be determined in the proceedings under Section 34 of the Arbitration Act, it was *prima facie* satisfied that the arbitral

[3] "Cess Act"

tribunal had erred in not considering the claim of the respondent. Apart from discussing this claim, which was in the amount of approximately Rs 3 crores, the High Court did not address the other claims of the appellant which were allowed by the arbitral tribunal. The amount awarded in relation to the remaining claims is approximately Rs 18 crore.

12. The High Court granted a stay on the operation of the award subject to the respondent furnishing a bank guarantee for the principal amount awarded to the appellant, i.e. Rs 21,07,66,621. It held that it was not inclined to issue orders in relation to the interest and the costs awarded to the appellant because "*the petitioner is not a fly-by operator and is a statutory undertaking*." The law *qua* arbitration proceedings, in our view, cannot be any different merely because of the status of the respondent as a statutory undertaking.

13. In this regard, it is necessary to advert to a decision of a two-Judge Bench of this Court in **Pam Developments Private Limited** v **State of West Bengal**[4] where it was observed:

> "20. In our view, in the present context, the phrase used is "having regard to" the provisions of CPC and not "in accordance with" the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. the 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

[4](2019) 8 SCC 112

provisions of CPC 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 CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act."

14. The Court also observed:

"26. Arbitration proceedings are essentially alternate dispute redressal system meant for early/quick resolution of disputes and in case a money decree — award as passed by the arbitrator against the Government is allowed to be automatically stayed, the very purpose of quick resolution of dispute through arbitration would be defeated as the decree-holder would be fully deprived of the fruits of the award on mere filing of objection under Section 34 of the Arbitration Act. The Arbitration Act is a special Act which provides for quick resolution of disputes between the parties and **Section 18 of the Act makes it clear that the parties shall be treated with equality. Once the Act mandates so, there cannot be any special treatment given to the Government as a party. As such, under the scheme of the Arbitration Act, no distinction is made nor any differential treatment is to be given to the Government, while considering an application for grant of stay of a money decree in proceedings under Section 34 of the Arbitration Act.** As we have already mentioned above, the reference to CPC in Section 36 of the Arbitration Act is only to guide the court as to what conditions can be imposed, and the same have to be consistent with the provisions of the Arbitration Act.

…

28. Section 36 of the Arbitration Act also does not provide for any special treatment to the Government while dealing with grant of stay in an application under proceedings of Section 34 of the Arbitration Act. Keeping the aforesaid in consideration and also the provisions of Section 18 providing for equal treatment of parties, it would, in our view, make it clear that **there is no exceptional treatment to be given to the Government while considering the application for**

> **stay under Section 36 filed by the Government in proceedings under Section 34 of the Arbitration Act.**"
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> (emphasis supplied)

15. Bearing in mind the above principles, we are of the view that the High Court was in error in not even *prima facie* considering the fact that apart from the issue of cess, there was an arbitral award in favour of the appellant in regard to other claims as well. Further, the High Court ought not to have based its decision on the condition for the grant of stay on the status of the respondent as a statutory authority. The Arbitration Act is a self-contained code – it does not distinguish between governmental and private entities. Hence, the decision of the Court cannot be influenced by the position of the party before it and whether it is a fly-by-night operator. Moreover, an assessment as to whether a party is reliable or trustworthy is subjective. Many private entities, too, may rely on the size of their undertaking, its success, public image, or other factors to argue that they are not fly-by-night operators. In the absence of any provision of law in this regard, it would be inappropriate for courts to apply this standard while adjudicating the conditions upon which a stay of an award may be granted. Similarly, the form of security required to be furnished should not depend on whether a party is a statutory or other governmental body or a private entity. Governmental entities must be treated in a similar fashion to private parties insofar as proceedings under the Arbitration Act are concerned, except where otherwise indicated by law. This is because the parties have entered into commercial transactions with full awareness of the implications of compliance and non-compliance with the concerned contracts and

the consequences which will visit them in law. Hence, the argument that the High Court was correct in directing the respondent to furnish bank guarantees in relation to the amount awarded because it is a statutory body is rejected.

16. In **Toyo Engineering Corpn.** v. **Indian Oil Corpn. Ltd.**,[5] this Court reiterated the same principle in the following terms:

> "3. This Court repeatedly having held that Order XLI Rule 5 principles are to be followed in these cases, we find that largely because public corporations are involved, discretion continues to be exercised not on principles under Order XLI Rule 5 but only because large amounts exist and that Government Corporations have to pay these amounts under Arbitral Awards. Both these considerations are irrelevant, as has been pointed out by us earlier."

17. Under Order XLI Rule 5 of the CPC, the Court has the power to direct full or part deposit and/or the furnishing of security in respect of the decretal amount. Bearing in mind the principles which must guide the Court, we are of the view that the order of the High Court requires modification. In modification of the direction of the High Court in the impugned judgment dated 9 September 2024, we direct that:

(i) The respondent shall deposit an amount quantified at 75% of the decretal amount, inclusive of interest, on or before 30 November 2024 before the High Court; and

(ii) Conditional on the deposit of the aforesaid amount within the period stipulated above, there shall be a stay on the enforcement of the arbitral award.

[5] 2021 SCC OnLine SC 3455

18. The impugned judgment of the High Court shall stand modified in the above terms. The appeal is allowed accordingly.

19. Pending applications, if any, stand disposed of.

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[Dr Dhananjaya Y Chandrachud]

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[J B Pardiwala]

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[Manoj Misra]

New Delhi;
October 24, 2024
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