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

IN ITS COMMERCIAL DIVISION

I.A. (L) NO.6246 OF 2024
IN
COMM. ARBITRATION PETITION (L)NO.5565 OF 2024

1 CFM Asset Reconstruction Pvt. Ltd., a company incorporated under the provisions of Companies Act, 1956 and duly registered with Reserve Bank of India as non-banking finance company having registered office address at lst Floor, Wakefield House, Sprott Road, Ballard Estate, Mumbai- 400038.

2. Integro Finserv Pvt. Ltd., a company incorporated under the provisions of Companies Act, 1956 and duly registered with the Reserve Bank of India as non-banking Finance Company having their registered office address at Ellora Fiesta, 10th Floor, Plot No.8, sector 11, Sanpada Navi Mumbai , Maharashtra- 400 705 ... Applicants/ Petitioners.

Versus

1. M/s. SAR Parivahan Pvt. Ltd., Through its Director Mr. Rajesh Gupta, Lords 7 I , Lord Sinha Road, Suite No.204-206, Kolkata, West Bengal-700071.

2. Mr. Shiv Narayan Gupta S/o.Birdhi Chand Gupta, Resident of 47A, Shakespeare Sarani, Flat

3 Mr. Rajesh Gupta S/o.Shiv Narayan Gupta Office: Chamber No.106/3, lst Western India, Above Bombay Stores, Sir P.M. Road, Fort, Mumbai – 400001 ...Respondents

Mr. Ranjeev Carvahlo with Ms. Aaushi Doshi and Mr. Deep Dighe i/b. DS Law, for the Applicant/ Petitioner.
Mr. Aditya Shiralkar with Ms. Garima Mehrotra and Mr. Satish Desai, for Respondent Nos.1, 2 and 3.

CORAM: FIRDOSH P. POONIWALLA,J.
RESERVED ON : 6th MAY, 2024.
PRONOUNCED ON : 13th June, 2024.

JUDGEMENT:-

The present Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act"), challenging in part the Arbitral Award dated 23rd November, 2023 passed by the learned Arbitrator. By the impugned Award, the learned Arbitrator allowed the claim of Petitioner No.1 (Claimant) for a sum of Rs.59,97,210/-. At the same time, the Arbitrator allowed the Counter Claim filed by Respondent Nos. 1 to 3 for a sum of Rs.1,25,69,768/- and, accordingly, after giving credit for the claim amount, directed Petitioner No.1 to pay Respondents a sum of Rs.65,72,558/-.

2 The facts, as narrated by the Petitioner,are as under:-

(a) A Loan Agreement dated 29th January, 2010 was executed between L & T Finance Company as the lender and Respondent No.1 whereunder the lender advanced a loan of sum of Rs.2,85,70,000/-, for a term of 34 months, together with interest at

the rate of 6.26% p..a. The Loan Agreement provided that any delay in payment of loan amounts would be subject to the Delay Payment Charges. The loan facility was to be secured by hypothecation of assets for the purpose of which the facility was availed. On the occurrence any event of default, the lender was entitled to sell/ transfer/ assign the assets in such manner as the lender may deem fit by public auction or by private treaty or otherwise howsoever and appropriate the proceeds thereof towards repayment of all the outstanding amounts. If the sale proceeds were not sufficient to meet all the dues, Respondent No.1 was liable to pay for any deficiencies after appropriation.

(b) Under the said Loan Agreement, the disputes and differences between the parties in respect of the Loan Agreement were referred to Arbitration.

(c) On 29th January, 2010, a Demand Promissory Note was executed by Respondent No.1 in favour of the lender undertaking to repay R.2,85,70,000/- with interest at the rate of 6.26 % p.a.

(d) Further, a Deed of Guarantee dated 29th January, 2010 was entered into by Respondent No.2 in favour of Respondent No.1.

(e) A Deed of Guarantee dated 29th January, 2010 was also entered into by Respondent No.3.

(f) Further, a Deed of Hypothecation dated 3rd February, 2010 was executed by Respondent No.1 in favour of the lender in respect of 5 Volvo FM 400 Tippers (Assets) as security in terms of the Loan Agreement.

(g) The Respondents committed default in repaying the loan and, therefore, by its Advocate's notice dated 1st June, 2011 issued to Respondent Nos. 1 to 3, the lender demanded payment of outstanding dues of Rs.2,82,49,868/-, invoked Arbitration and appointed Respondent No.4 as Sole Arbitrator

(h) On 28th June, 2011, a Statement of Claim was filed by the Original Claimant for recovery of a sum of Rs.2,82,49,868/-.

(i) The Respondent's Advocate addressed a letter dated 29th November, 2012 to the Arbitrator objecting to his appointment and further calling upon him not to proceed with the matter.

(j) By a letter dated 29th April, 2013 addressed to the Arbitrator, the Respondents submitted a Valuation Report dated 8th October, 2012 in respect of the assets. It is the case of the Petitioner that this Valuation Report was furnished only to the Arbitrator and not to the Petitioner.

(k) The Original Claimant addressed a letter dated 21st November, 2014 to the Arbitrator intimating him of the sale of the assets for a sum

of Rs.1.10 Crores, and in view thereof reduced its to Rs.1,72,49,868/-.

(l) By its letter dated 24th November, 2014, the Arbitrator noted the sale of assets by the Original Claimant and fixing the next date of hearing on 19th December, 2014.

(m) On 19th December, 2014, an Arbitration Meeting was held, where the Original Claimant was present and the Respondent was absent. The Arbitrator recorded that the hearing of the disputes had concluded. However, on account of repeated letters from the Respondents, the next date of hearing was fixed on 12th June, 2015 with directions to the Respondents to remain present and it was stated that no further time would be granted on any ground.

(n) On 12th June, 2015, an Arbitration meeting was held where both the parties were present. The Original Claimant was directed to ascertain the exact amount of the claim and serve a copy on the Respondents. Pursuant thereto, the Original Claimant amended the Statement of Claims and sought recovery of Rs.59,97,210.65/- from Respondent Nos. 1 to 3. Thereafter, another Arbitration Meeting was held on 6th August, 2015 where the Original Claimant was present and the Respondents were absent. It was noted by the Arbitrator that the hearing of the dispute stood concluded for

passing an award. However, again, on account of repeated letters from the Respondents, the next date of hearing was fixed on 22nd February, 2016. Thereafter, an Arbitration meeting was held on 7th March, 2017 where both the parties were present. By consent, Respondents were permitted to file Additional Reply in three weeks and the Original Claimant to file Rejoinder in two weeks thereafter. The Compilation of Documents and draft Issues were to be filed within two weeks thereafter.

(o) The Arbitrator addressed a letter dated 12th July, 2017 to the parties, apprising them of the Arbitration Meeting dated 7th March, 2017 and fixing the next date of hearing on 31st August, 2017.

(p) On 31st August, 2017, an Arbitration Meeting was held where the Original Claimant was present and the Respondents were absent. The Original Claimant was directed to file a Rejoinder to the Reply dated 10th April 2017 of the Respondents in two weeks.

(q) A letter dated 9th October, 2017 was issued by the Arbitrator, apprising the parties of the Arbitration Meeting held on 31st August, 2017 and fixing the next date of hearing on 10th November, 2017.

(r) On 10th November, 2017, Respondent Nos. 1 to 3 were allegedly directed by the Arbitrator to file a Counter Claim in a proper legal format in two weeks.

(s) On 5th December, 2017, a Counter Claim was filed by Respondent Nos. 1 to 3, seeking compensation of Rs.2,35,43,476/- from the Original Claimant for alleged undervalued sale of the assets by them. It is the case of the Petitioner that a copy of this Counter Claim was only served on Petitioner No.1 vide an e-mail dated 23rd June, 2023 and that too without annexures.

(t) On 29th June, 2018, an Arbitration Meeting was held which was attended by the Advocates for the Original Claimant and Respondent Nos. 1 to 3. The Counter Claim was taken on record. It was noted that the Counter Claim had been served on the Original Claimant and that the reply thereto would be filed within three weeks.

(u) Letter dated 9th July, 2018 was issued by the Arbitrator apprising of the Arbitration Meeting dated 29th June, 2018 and fixing the next date of hearing on 22nd August, 2018.

(v) On 27th September, 2022, an Order was passed by the Arbitrator on an application filed by Petitioner No.1 substituting Petitioner No.1 in place of the Original Claimant and directing Petitioner No.1 to amend the Statement of Claim.

(w) By an E-mail dated 21st October, 2022 addressed to the Arbitrator, Petitioner No.2 informed the Arbitrator of the assignment of the

subject debt from Petitioner No.1 to them.

(x) By a letter dated 25th November, 2022 addressed by the Arbitrator to Petitioner No.2, the Arbitrator acknowledged the application filed by Petitioner No.2 for its substitution and called upon it to make payment of Rs.10,000/- as part payment of fees and arbitration costs in two weeks.

(y) On 30th November, 2022, an Arbitration Meeting was held when certain documents filed by the Respondents were taken on record and the parties were directed to file draft Issues in two weeks.

(z) On 18th April, 2023, due to the purported failure of parties to file draft issues, the Arbitrator proceeded to frame issues and directed both sides to deposit Rs.50,000/- each in two weeks. The next date was fixed on 14th June, 2023, at 5.30 p.m., and parties were directed to remain present, as, otherwise, the Arbitrator would proceed further.

(ai) On 14th June, 2023, an Arbitration Meeting was held where Respondent Nos. 1 to 3 were present and the Petitioner was absent. It was noted by the Arbitrator that Petitioner had not complied with the directions to deposit Rs.50,000/-. The arguments of Respondent Nos. 1 to 3 were heard on the Counter Claim in the absence of the Petitioner and the dispute was closed for passing

Award, with liberty to the parties to file written arguments in two weeks.

(bi) The Advocate for the Petitioners addressed an E-mail dated 22nd June, 2023 to the Arbitrator, applying for a copy of the Counter Claim of Respondent Nos. 1 to 3.

(ci) On 23rd June, 2023, an E-mail was addressed by the Advocate for Respondent Nos. 1 to 3 to the Advocate for Petitioner No.1, claiming that a copy of the Counter Claim was served on 5th December, 2017 and further forwarding an incomplete copy of the Counter Claim without annexures.

(di) On 27th June, 2023, the Advocate for Petitioner No.1 addressed an E-mail to the Advocates for Respondent Nos. 1 to 3 requesting for a complete copy of the Counter Claim with annexures to enable them to file their reply thereto. It was further informed that the subject debt had been assigned by Petitioner No.1 to Petitioner No.2, and an application for substitution would be filed for the same.

(fi) On 27th June, 2023, an application for substitution was filed by Petitioner No.2 and time was sought to file Reply to the Counter Claim and Written Arguments in view of non-receipt of annexures to the Counter Claim.

(gi) On 23rd November, 2023, the impugned Award was passed by the learned Arbitrator.

3 On the basis of these facts, the Petitioners challenge the Award on various grounds. The Petitioners submit that the Counter Claim of the Respondents filed on 5th December, 2017, in respect of a cause of action which arose on 21st November, 2014, on receipt of intimation of sale of assets by the Original Claimant, was ex-facie barred of limitation and could not have been entertained. Further, the Petitioners submitted that the Arbitrator erred by adjudicating on the validity of the sale of assets by the Original Claimant inspite of irrevocable authority granted under the Loan Agreement to sell assets on occurrence of any event of default, either by public auction or by private treaty in such manner as the Original Claimant may deem fit. Further, the Petitioners submit that, despite time being sought by Petitioner No.2 to obtain a complete copy of the Counter Claim to file its reply in respect thereof, and inspite of only an incomplete copy being served without annexures, the Arbitrator proceeded to adjudicate on the same ex-parte.

4 The Petitioners further submit that the Arbitrator erred in concluding that the Original Claimant sold the assets without following

due process, without giving reasonable opportunity to the Petitioners. It is also submitted that the Arbitrator proceeded to pass the impugned Award without concluding the hearing of the Interim Application filed for substitution. It is finally submitted that the Arbitrator proceeded to hear the disputes in the absence of the Petitioner on the one occasion when the Petitioners remained absent, without giving clear peremptory notice for such hearing, thus violating the principles of natural justice.

5 On the other hand, the Respondents have made various submissions supporting the Award passed by the learned Arbitrator.

6 Mr. Rajeev Carvalho, the learned Counsel appearing on behalf of the Petitioner, and Mr. Aditya Shiralkar, the learned Counsel appearing on behalf of the Respondents, made various submissions on various aspects of the matter. However, in my view, at this stage of admission, it is not necessary to deal with the various submissions made on behalf of the parties, as, in my view, this Petition is required to be admitted on the ground mentioned below.

7 In these circumstances, I have considered the submissions made by the parties on that ground and on the issue as to whether

unconditional stay can be granted and ought to be granted by this Court.

8 In paragraph 39 of the Award, the learned Arbitrator has held that it appeared from the record that the Petitioners had not followed the due procedure for sale of the Tippers. It is further held that, before entering into such sale of the second hand Tippers, it was obligatory on the part of the Petitioners to follow due procedure to affect such sale but nothing was placed on record to show whether valuation report was obtained and if any offers to sell the Tippers were invited. It was held that the new Tippers were purchased somewhere in 2010 and the sale was affected within a period of about 2 ½ years. It was further held that, as per the records made available by the Petitioners, the value of the Tippers at the time of purchase was Rs.3,17,47,500/- and, thus, within a short period of three years, the value of the Tippers had gone down and the Petitioners had recovered only a sum of Rs.1,10,00,000/- after sale of such three year old Tippers, which is about 35% of the original value. It is further held that the Respondents had protested such arbitrary act on the part of the Petitioners and had submitted Valuation Report dated 10th August 2012. As per the said Valuation Report, the valuation of the Tippers were shown as Rs.2,35,69,788/-. There was a huge difference of price mentioned in the Valuation Report submitted by the Respondents and the sale value of

Rs.1,10,00,000/-.

9 In paragraph 40 of the Award, it is stated that the Respondents, by way of their Counter Claim, strongly objected to such arbitrary action of selling the Tippers at an undervalued price. It is further held that the Counter Claim filed by the Respondents remained unchallenged and undefended. Neither a reply was filed to the Valuation Report nor a reply was filed to the Counter Claim. Further, no written submissions were submitted by the Petitioners to defend their case. In paragraph 40 it is further held that the undefended Valuation Report justified that the said Tippers were sold at an undervalued price at the whims and fancies of the officers of the Petitioners. In these circumstances, the learned Arbitrator held that a sum of Rs.59,97,210/- was the outstanding loan to be recovered by the Petitioners from the Respondents. Further, the learned Arbitrator held that, as per the Valuation Report submitted by the Respondents, a sum of Rs.2,35,69,788/- ought to have been recovered from the sale of the Tippers and the Petitioners had recovered only a sum of Rs.1,10,00,000/- from the sale of the Tippers. On this basis, the learned Arbitrator arrived at a conclusion that the loss caused to the Respondents on account of sale of Tippers was Rs.1,25,69,678/-, and if the aforesaid sum of Rs.59,97,210/- was deducted from it, the Petitioners

were liable to pay to the Respondents a sum of Rs.65,72,558/-.

10 From the aforesaid findings of the learned Arbitrator it is clear that the learned Arbitrator has granted the claim of the Respondents by relying upon the Valuation Report furnished by the Respondents. The learned Arbitrator has come to the conclusion, on the basis of the said Valuation Report, that a sum of Rs.2,35,69,788/- would be recovered from the sale of the Tippers.

11 The learned Arbitrator has arrived at the said finding without the said Valuation Report being proved by any person. The authors of the Valuation Report have not given any oral evidence in respect of the said Valuation Report. In fact nobody has given any oral evidence in respect of the said Valuation Report. Nobody has deposed to the correctness of the contents of the said Valuation Report. The value of the Tippers mentioned in the said Valuation Report was the opinion of the Valuers making the said Valuation Report. The said Valuers were required to give oral evidence and prove the same.

12 In my view, the granting of the claim of the Respondents by the learned Arbitrator by relying upon the said Valuation Report, which had

not been proved, is perverse and amounts to a patent illegality on the face of the Award. In my view, the present Petition is required to be admitted on that ground alone.

13 In paragraph 40 of the Award, the Arbitrator has held that the Petitioners did not respond to the counter claim of the Respondents. It is the case of the Petitioners that they were not given a proper opportunity to respond to the Counter Claim. However, that apart, Section 25(b) of the Arbitration Act clearly provides that, if the Respondent fails to communicate his statement of defence, the Arbitral Tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the Claimant. In the light of the said provisions of Section 25 (b) of the Arbitration Act, even if the Petitioners had not filed a Reply to the Counter Claim, the learned Arbitrator was required to direct the Respondents to prove their Counter Claim and, especially, the Valuation Report, which was the opinion of a valuer, and could not have been accepted without the correctness thereof being deposed to by the valuer.

14 In this context, the Respondents have submitted that the Arbitrator determined the procedure of the Arbitration vide letter dated 29th

November 2012 that the hearing of the dispute shall be based on documentary evidence. This procedure was not challenged or contested by either party at any stage, and, therefore, it was not open to the Petitioners to contend otherwise.

15 In my view, even if the learned Arbitrator has determined that the hearing of the dispute shall be based on documentary evidence, when such a Valuation Report was filed before the learned Arbitrator, which was an opinion of a valuer, the learned Arbitrator was required to demand that the valuer should give oral evidence to justify his opinion. The learned Arbitrator, in not doing so, has acted in a perverse manner and therefore there is patent illegality on the face of the Award.

16 The Respondents have referred to the judgement of this Court in ***Larsen and Toubro Limited vs. Hindustan Petroleum Corporation Limited***[1] and in particular to paragraph 69 thereof, which reads as under:

> *"69. Most of the claims of L&T, in the present case in hand, are for the extra/additional work, than the work awarded. The amount so claimed by L&T is for the costs of additional work so completed, under the supervision of HPCL. The additional work as done is not in dispute. The Arbitrator, therefore, based upon*

1 (2016) SCC OnLine Bom 8341

> *his experience and knowledge of the nature of the work, awarded the lump sum amount for such extra work. The main contention of HPCL throughout was, as recorded by the learned Arbitral Tribunal and the learned Judge, and even as per the submission made before this Division Bench, that though extra/additional works was done, but same was within the ssm 53 app14.06gp-16.9.16.sxw scope and conditions of the main contract and therefore, there was no question of extra payment, L&T was under obligation to perform these additional part even if any, to complete the project in time. The finding given by the learned Arbitrator with regard to the additional/extra work based upon the material and the documents placed on record, though no oral evidence was lead by the parties, as agreed, the same ought not to have been interfered with by the learned Judge, HPCL was aware of the fact of additional/extra work, but to deny the payment for the same, in our view, was wrong."*

17 Relying on this judgement, the Respondents contend that, though no oral evidence was led by the Respondents in respect of the Valuation Report, the learned Arbitrator was justified in accepting the Valuation Report. I am unable to accept the said submission of the Respondents. A perusal of paragraph 69 of the said judgement, which is set out above, shows that, in that case, the Court was dealing with a case where most of the claims were for extra / additional work than the work awarded. It is in this context that the Court held that the finding given by the learned Arbitrator with regard to the additional / extra work, based upon the material and documents placed on record, ought not to have been

interfered with by the learned Judge, though no oral evidence was laid by the parties, as HPCL was aware of the fact of additional / extra work but had wrongly denied payment of the same. These facts are very different from the facts in our case where the learned Arbitrator has relied upon the Valuation Report, which is the opinion of the valuers, and that opinion could not have been accepted by the learned Arbitrator unless the valuer gave oral evidence deposing to the correctness of his opinion given in the Valuation Report.

18 For all the aforesaid reasons, the reliance by the learned Arbitrator on the Valuation Report, without the same being proved, is perverse and amounts to a patent illegality on the face of the Award. For these reasons, the Petition is required to be admitted.

19 As far as the question of stay is concerned, the Respondents submit that the settled legal position is that an unconditional stay on a monetary award may be granted only in cases where the party satisfies the Court that the contract or the making of the award was induced by fraud or corruption as per the second proviso to Section 36(3) of the Arbitration Act. In support of this submission, the Respondents have placed reliance on the following judgements:

(i) *Sepco v. Power Mech,*

2022 SCC OnLine SC 1243

(ii) *State of Maharashtra v. Jaykumar Ajmera,*

2022(2) Mh.LJ 511

(iii) *Anand Rathi v. Anish Navnitlal Mehta,*

2023 SCC OnLine Bom 2572

(iv) *Balmer Lawrie v. Shilpi Engineering,*

2024 SCC OnLine Bom 758

19 Whilst considering this contention, it would be appropriate to set out Section 36 of the Arbitration Act which reads as under:

> *"[**36. Enforcement**--(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.*
>
> *(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for*

that purpose.

(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).]"

20 On a reading of Section 36 of the Act, it can be seen that sub section (3) of Section 36 has two provisos. The judgements cited by the Respondents are in respect of the second proviso which provides that where the Court is satisfied that a prima facie case is made out that the

arbitration agreement or contract which is the basis of the Award or 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 of the Award. The words used in the second proviso are "it shall stay the award unconditionally" which shows that, if the case falls within the second proviso, then the Court has no discretion, and it is mandatory for the Court to stay the award unconditionally pending disposal of the challenge under Section 34 to the Award.

21 As stated hereinabove, the judgements referred to by the Respondents are in respect of this second proviso. However, apart from the second proviso, there is the first proviso to sub-section (3) of Section Section 36 which provides 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. This first proviso is also required to be given effect to. If the submission of the Respondents is accepted, then this first proviso would be rendered completely otiose. Therefore, even in a case which does not fall under the second proviso, by relying on the first proviso, the Court can consider whether to grant unconditional stay of the award or not.

22 It has been held by this Court in the case of ***Ecopack India Paper Cup Pvt.Ltd. vs. Sphere International***[2] that, under this first proviso, the Court has a discretion whether to grant unconditional stay or not, and it cannot be insisted that it is mandatory in all cases for the Court to direct the deposit of the decretal amount. Paragraphs 9 and 10 of the said judgement are relevant and read as under:

> *"9. As regards the decisions as relied on behalf of the appellant, there cannot be any doubt on the proposition of law as these decisions lay down. However, in the facts and circumstances of the case, as noted above, this is not a case where the respondent could be saddled with an order to deposit the amounts under the interim award. Section 36 of the Act deals with enforcement of an arbitral award. Section 36 of the Act was amended by the Arbitration and Conciliation Act, 2015 with effect from 23 October 2015. Sub-Section (2) of Section 36 now provides that mere filing of an application in the Court to set aside the arbitral award shall not by itself render the award unenforceable, unless the Court grants an order of stay of the operation of the arbitral award in accordance with the provisions of Sub-Section (3) of Section 36, on a separate application made for that purpose. Sub-section (3) provides that 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". Proviso to sub-section (3) stipulates that the Court while considering the*

2 (2018) SCC OnLine Bom 540

application for grant of stay of an arbitral award for payment of money shall have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

10. A bare perusal of the provisions of Section 36 shows that the jurisdiction so conferred on the Court is a discretionary jurisdiction. The proviso to Sub-section (3) further makes it implicit that the provisions of Order 41 Rule 1 Sub-Rule 3 and Rule 5 would become relevant. In exercising powers under Order 41 Rule 5 the Court exercises its discretion and may grant a stay to the execution of a decree if "sufficient cause" is made out and the party seeking stay satisfies the Court that it will sustain substantial loss and inter-alia satisfies the condition as stipulated in sub-Rule 3 of Rule 5. Thus, the under scheme of the provisions of Section 36 read with Order 41 Rules 1 and 5 of the C.P.C., the party opposing grant of a stay cannot assert a proposition that it would be mandatory for the Court to impose a condition for a stay to the execution proceedings. It is for the Court to consider the facts and circumstances of the case and exercise its discretion either to grant a stay to the execution of the decree or impose or not impose any other condition, as the Court may deem appropriate. The above position in law has been clearly recognized by the Supreme Court in Malwa Strips Private Limited Versus Jyoti Limited. The discretion so vested in the Court is required to be exercised judicially and not arbitrarily and in the interest of justice. (see Sihor Nagar Palika Bureau Versus Bhabhlubhai Virabhai & Co. (supra). Adverting to these principles of law, the learned Single Judge in the facts of the case, has appropriately exercised discretion as vested with the court under the provisions of Section 36(3) of the Act read with provisions of Order 41 Rule 5 in passing the impugned order."

23 For these reasons, it is within the discretion of this Court to consider whether to grant a conditional stay or an unconditional stay, even in the case of a monetary decree. In the present case, as already held hereinabove by me, the entire claim which has been granted by the Arbitrator is on the basis of a Valuation Report which has not been proved before the learned Arbitrator. As held by me, no oral evidence, whatsoever, has been given for proving the said Valuation Report. Nobody has deposed to the correctness of the contents of the said Valuation Report which is the opinion of the valuers. In these circumstances, granting of the claim by the learned Arbitrator by relying upon the said Valuation Report is, in my view, perverse and amounts to a patent illegality on the face of the Award. Therefore, there is sufficient cause for granting an unconditional stay of the Award at this stage. If an unconditional stay is not granted then the Petitioner would suffer substantial loss as it would have to make payment in respect of a claim which has been perversely granted by the learned Arbitrator for the reasons mentioned above.

24 For these reasons, in my view, the Petitioners are entitled to an unconditional stay of the Award.

25 In the light of the aforesaid discussion and for the aforesaid reasons,

the following order is passed:

a. This Petition is admitted.

b. The Arbitral Award dated 23rd November 2023 is unconditionally stayed.

(FIRDOSH P. POONIWALLA,J.)