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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP(COMM) 418/2020, IA 3983/2020**

STEEL AUTHORITY OF INDIA LTD, INDIA Petitioner

Through: Mr. Joy Basu, Sr. Adv. with
Ms. Rimali Batra, Mr.
Paritosh Goel & Mr. Mahip
Singh, Advs.

versus

TATA PROJECTS LTD, INDIA & ANR. Respondents

Through: Mr. Neeraj Kishan Kaul, Sr.
Adv. with Mr. Sameer
Parekh, Ms. Sonali Basu
Parekh, Mr. Lalit Chauhan,
Mr. Tanuj Agarwal,
Ms. Sonal Gupta, Ms. Swati
Bharadwaj & Ms. Chanan
Parwani, Advs. for R-1

Mr. Suhail Dutt, Sr. Adv.
with Mr. Abhixit Singh &
Ms. Devika Chopra, Advs.
for R-2

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
% **01.06.2020**

This matter is being heard through video-conferencing

IA 3983/2020 in OMP(COMM) 418/2020 (for early hearing)

This is an application filed by the petitioner seeking early hearing of the application being IA 3493/2020.

When this application was listed on the last date of hearing, Mr. Basu had sought time to take instructions on deposit of the awarded amount, pending hearing of the OMP. Today Mr. Basu states, he has instructions to state that 100% of the amount awarded by the learned Arbitral Tribunal shall be secured by the petitioner by way of Bank Guarantees on or before June 21, 2020. This submission of Mr. Basu is opposed by Mr. Kaul and Mr. Dutt, appearing for the respondents.

In view of the stand taken by the learned counsels and noting the contents of the application, the early hearing of IA 3493/2020 and the petition is allowed. The IA 3493/2020 and the petition OMP (COMM) 418/2020 are taken up for hearing. The application is disposed of.

OMP (COMM) 418/2020

Issue notice to the respondents. Mr. Sameer Parekh, Adv. accepts notice on behalf of respondent No.1 and Mr. Abhixit Singh, Adv. accepts notice on behalf of respondent No.2. Written submissions shall be filed by the parties one week before the next date of hearing i.e 15th July, 2020.

IA 3493/2020

1. It is the submission of Mr. Joy Basu, learned Senior Counsel appearing for the petitioner that the petitioner is seeking exemption from depositing money / liquid cash on account of financial stress / liquidity crunch posed by COVID-19 on account of absence of domestic and international demand, which has constrained the petitioner to increase its borrowing, with heavy interest. He states that the petitioner is praying to

this Court to exercise its discretion by staying the impugned award and permitting the petitioner to secure the respondent's interest by way of Bank Guarantees for amount awarded in the impugned award by June 21, 2020.

2. In fact, it is his submission that the Ministry of Finance vide Notification dated February 20, 2020, clarified disruption of the supply chains due to spread of Corona Virus should be considered as a case of natural calamity and *force majeure* clause may be invoked showing the gravity of the present situation. He also states that Ministry of Finance press release dated March 24, 2020 announcing several relief measures such as moratorium on loans for three months, suspension of NPAs in view of COVID-19 pandemic and suspension of Section 7, 9 and 10 of IBC showing that no coercive action be initiated against admitted debtors by any creditor.

3. According to him, this Court, has on various instances, while exercising the power and judicial discretion as provided under Section 36 of the Arbitration and Conciliation Act, 1996 ('Act', for short), granted stay of the impugned award without requiring 100% deposit in cash and in this regard, he relies upon the following judgments:-

(i) *SAIL vs. JSC Cryogenmash, OMP(COMM) 509/2018*, wherein the Court vide order dated December 17, 2018, in the facts had granted unconditional stay order on enforcement of the impugned award;

(ii) *SAIL vs. M/s Tata Projects Ltd. & Anr., OMP(COMM) 392/2018*, wherein the Court granted stay of the impugned award subject to deposit of 50% of the awarded amount;

(iii) *SAIL vs. M/s Seaspray Shipping Co. Ltd., SLP(C) 5116/2020*, wherein the Supreme Court modified the order of the High Court directing

deposit of 100% of the awarded amount by limiting it to 50% of the amount.

4. He also relies on the observations of this Court in ***Power Mech Projects Ltd. vs. Sepco Electric Power Construction Corporation in OMP(I)(COMM) 523/2017***, wherein this Court inter-alia said that it cannot be said as a principle of law that there is a mandate that in every case the Court must insist on a 100% deposit, before hearing a petition under Section 34 of the Act or before staying the enforcement of the Award, as the amount of deposit would depend on the facts of the case and is in the discretion of the Court hearing the petition.

5. According to him, even in ***Indian Oil Corporation Limited vs. Toyo Engineering Corporation & Anr., OMP (COMM) 316/2019*** decided on March 06, 2020 this Court refused to modify its order dated August 09, 2019 wherein it had directed the petitioner to make only a partial deposit of the awarded amount i.e. 20%.

6. Similarly, he relies on the judgment of the Bombay High Court in ***Ecopack India Paper Cup Pvt. Ltd. vs. Sphere International, (2018) SCC OnLine Bom 540***, wherein the Court held that it is required to take Order XLI Rule 5 of the CPC into consideration while deciding an application for stay of an award; such an order is discretionary and the court must take into consideration the facts and circumstances of the case.

7. He also relies upon the judgment of the Supreme Court in ***Sihor Nagar Palika Bureau vs. Bhabhlubhai Virabhai & Co., (2005) 4 SCC 1*** to make a similar submission that the Court has discretion to pass an order furnishing security in place of deposit, in facts and circumstances of the case.

8. On the other hand, Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing for the respondent No.1 submits that Mr. Basu has on the last date of hearing, had sought time to take instructions on deposit, cannot now state that the petitioner shall furnish bank guarantees for the awarded amount. Such a submission is not a bonafide one and shall disentitle the petitioner any indulgence from this Court. He states, financial distress is not a recognized principle for not to deposit the decretal amount. According to him, financial distress because of COVID-19 is equally a ground available to the respondents seeking deposit of the amount, so that they can withdraw the same on furnishing a security. In other words, deposit of decretal amount is a norm and furnishing bank guarantee is an exception. If the petitioner is not ready to deposit the amount then the petitioner is not entitled to be heard on the petition under Section 34 of the Act.

9. According to Mr. Kaul, even on merit, the petitioner has not made out any case for interference. He states, the finding of the Arbitral Tribunal is not a perverse finding and interference by this Court in such an award is impermissible. That apart, he states, it is not the case of the petitioner that the award is contrary to public policy of India. It is also not the case of the petitioner that the award is patently illegal. He states that this Court has, from time to time, passed orders for deposit of the decretal amount. He relies on the following judgments in support of his submissions:-

(i) *Indian Oil Corporation Limited vs. Toyo Engineering Corporation & Anr., OMP (COMM) 316/2019 decided on March 06, 2020;*

(ii) *Pam Development Pvt. Ltd. vs. State of West Bengal and connected appeals (2019) 8 SCC 112;*

(iii) Balajee Education Pvt. Ltd. vs. Rajni Kant Pandey of Calcutta High Court bearing CO 3371/2019 decided on January 28, 2020;

(iv) Ecopack India Paper Cup Pvt. Ltd. vs. Sphere International (2018) SCC OnLine Bom 540;

(v) Associate Builders vs. DDA (2015) 3 SCC 49;

(vi) HRD Corporation(Marcus Oil and Chemical Division) vs. GAIL (India) Ltd. (2018) 12 SCC 471.

10. Mr. Suhail Dutt, learned Senior Counsel appearing for the respondent No.2 would submit that the petitioner is challenging an award passed in an International Commercial Arbitration as the respondent No. 2 is a foreign corporate entity incorporated under the laws of Netherlands and therefore the present arbitration clearly falls in the category of International Commercial Arbitration within the meaning of Section 2(1)(f)(ii) of the Act. Under Section 34(2A) of the Act, in cases of International Commercial Arbitration, the grounds to challenge the award are extremely narrow and even the ground of patent illegality is not available for challenging an award. Mr. Suhail Dutt would submit that the petitioner has also not raised any ground of patent illegality in its petition. In fact, Explanation 2 to Section 48 of the Act added by the Arbitration and Conciliation (Amendment) Act, 2015, precludes the court from reviewing the award on merits in an International Commercial Arbitration.

11. It is the submission of Mr. Suhail Dutt that even otherwise the grounds raised in the petition are purely factual and the petitioner has not even attempted to argue any public policy grounds with respect to the amounts awarded to the respondent No. 2. According to him, this ground can be attracted only in very exceptional circumstances when the

conscience of the Court is shocked by infraction of fundamental notions or principles of justice. In this regard, he relied on *Associate Builders (supra)*; *Ssangyong Engineering & Construction Co. Ltd. vs NHAI, 2019 SCC Online SC 677*; and *HRD Corporation (supra)*.

12. It is the submission of Mr. Suhail Dutt, that the objective of amendment of Section 34 and 36 of the Act is to ensure judicial interference only on limited and specific grounds and to ensure that the claimant can enjoy the fruits of the award. The Supreme Court of India in *Manish vs. Godawari Marathawada Irrigation Development Corporation, SLP (C) No. 11760-11761/2018*, has directed to deposit 100% of the decretal amount. The Supreme Court in *Malwa Strips Limited vs Jyoti Limited, (2009 2 SCC 426)* has held even if the said provision is not mandatory, the purpose for which such a provision has been inserted should be taken into consideration. An exceptional case has to be made out for stay of execution of a money decree.

13. It is the submission of Mr. Suhail Dutt, that this Court, in a catena of judgments, has also directed 100% deposit of awarded amounts to be submitted with the Court. [Ref: *National Highway Authority of India vs West Haryana Highways Projects Private Limited (O.M.P. (COMM) 3 of 2020)* and *Power Mech Projects Limited (supra)*].

14. Mr. Suhail Dutt would submit that the petitioner has relied on few orders to contend that 100% deposit is not mandatory for securing a stay under section 36 of the Act. It is not respondent No. 2's case that 100% deposit is mandated by law. He would submit that this is the thrust of recent judgments and orders taking into account the recent amendments made to the Act. However, the discretion has to be in accordance with well settled

principles. According to him, in the present case apart from the fact that no ground of public policy has been advanced in the oral arguments, no oral arguments were made by learned Senior Counsel for the petitioner in respect of the unanimous award passed in favour of respondent No. 2. Hence there should be 100% deposit.

15. It is also the submission of Mr. Suhail Dutt that financial hardship is not a ground available to the petitioner to seek an exemption from depositing the amount of the award. According to him, Covid-19 pandemic has impacted the respondents in greater measure as unlike the petitioner they do not have the backing of the Government of India to tide over their financial hardships. The petitioner has sought to project in its oral arguments as if by the money going out of its coffers in lieu of deposit will cause a financial loss to it. This projection by the petitioner is wholly untenable. Money is due to respondent No. 2 only upon the determination unanimously arrived at by the Arbitral Tribunal of the contractual price due and payable to the respondent No. 2, owing to wrongful withholding of the same by the petitioner since 2016-17.

16. It is the submission of Mr. Suhail Dutt, the petitioner has argued that it should be permitted to file a bank guarantee in lieu of liquid cash to be deposited with the Court Registry. According to him, the said request of the petitioner is untenable and cannot be allowed. In this regard, he drew the attention of this court to the Judgment *Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs Dunlop India Limited & others*, AIR 1985 SC 330, wherein the Supreme Court held that Governments or private companies cannot run on mere Bank Guarantees. The Apex Court pointed out that very often some courts act as if furnishing a bank guarantee

would meet the ends of justice but observed that no governmental business or for that matter no business of any kind can run on mere bank guarantees. The Supreme Court has also observed, if liquid cash is necessary for the running of a Government, it is equally required for any private enterprise. It is a settled law that for a stay under section 36(2) of the Act, the court can direct to deposit the awarded amount as it amounts to a money decree. The Courts have time and again upheld this principle.

17. Mr. Suhail Dutt would submit, without prejudice to the above, Niti Aayog, Government of India has also on November 28, 2019 issued a Circular recognizing that in case of construction contracts when a government entity challenges the arbitral award, the government entity shall pay 75% of such awarded amount to the contractor against a bank guarantee.

18. It is the submission of Mr. Suhail Dutt, that a Government enterprise cannot claim a special treatment merely because they are a public sector undertaking and the government is a major stakeholder. The petitioner being a 'Maharatna Enterprise' must certainly not be provided any special treatment. The Supreme Court in *Pam Developments Private Ltd. (supra)* has categorically held that section 36 of the Act does not provide for any exceptional treatment to the Government while dealing with grant of stay in a stay application under section 36 of the Act. As held by the Supreme Court in *Pam Developments case (supra)*, the purpose of deposit is not to secure the amount due under decree but to ensure that the decree holder also gets benefits of the decree. In the end, it is the submission of Mr. Suhail Dutt that the petitioner must be directed to deposit 100% of the amount awarded to respondent No. 2.

19. In rejoinder to the submissions made by Mr. Kaul and Mr. Dutt, Mr. Basu submits that the Supreme Court in Para 29 of the *Pam Developments (Supra)* has stated that under Order XLI Rule 5 CPC, the Court has the power to direct full or part deposit and / or to furnish security of the decretal amount showing that, even a full security by way of a Bank guarantee without any cash deposit, conforms to the Arbitration Act as well as CPC. According to him, in Para 20 at Page 69, that the words “have regard to in CPC” are only directory in nature and further that in case of conflict between the Arbitration Act and the CPC, then the Arbitration Act would prevail. Therefore, the discretion given to the Court to impose conditions, it deems fit under Section 36 of the Arbitration Act, would prevail over the provisions of the CPC requiring mandatory condition to be imposed for grant of stay. He states, the reliance placed by Mr. Dutt on Niti Ayog circulars dated September 5, 2016 and November 28, 2019 is completely misplaced. According to him the same are not applicable for the following reasons:

- a) the circular of 2019 is based upon and applies to, only those cases which are covered by the earlier circular of September 5, 2016. It is evident that, the circulars dealt with only with those cases which were governed by the pre 2015 Arbitration regime when an automatic stay was granted upon filing of a petition under Section 34. Once the 2015 amendments came about, the court was vested with the requisite powers under Section 36 (3) to grant stay / restraint orders based on conditions, which were the exclusive discretion of the court. Therefore, the said circular became non-applicable post

2015, otherwise these circulars would be overriding and overreaching the powers of the Court.

b) The Supreme Court in *Hindustan Construction Company Ltd. (Supra)* while dealing with the Niti Ayog Circular dated September 5, 2016 has recognized that the scheme is in order that the hardship felt by the construction sector, thanks to the automatic stay regime under Section 36 as originally enacted be mitigated, i.e., cases where an automatic stay operated. Since there is no question of an automatic stay in the current arbitration regime applicable to the present facts there arises, no question of countering such mischief through Niti Ayog circular, which would therefore be inapplicable.

c) Both the circulars are on similar lines and despite the existence of the said circulars this court had on every occasion post 2015 amendment has been exercising its discretion in order to grant stay with any conditionality attached thereto. Further both the circulars are issued before the onset of COVID-19 Pandemic and therefore ought to be viewed from this unprecedented perspective.

d) Despite the circulars, which ostensibly effects the mode of challenge and execution of an arbitral award, no such provisions have been incorporated in the amendments to Arbitration Act which was amended as recently in 2019.

20. In so far as the reliance placed by the respondents on the news report dated May 18, 2013, Mr. Basu states that the same is misconceived since the very same circular itself clearly states that the petitioner is facing severe cash crunch due to the borrowings, which the petitioner will be constrained

to take, which will weigh heavily, since the petitioner has to service the interest on such borrowings. Mr. Basu states that the reliance placed by the respondents on the judgment of the Supreme Court in *Assistant Collector of Central Excise (Supra)* inasmuch as the stay is to be granted only in exceptional circumstances is concerned, the principles laid down in the said judgment are not applicable to the facts of the present case. He states, the judgments so far relied upon by the respondents makes it clear that the Arbitration Act is a special statute and does not stipulate any fixed percentage in respect of security deposit to be made by a party opposing the execution of the arbitral award. So, the judgments are in the peculiar facts of the said case which do not take into consideration the unprecedented situation of COVID-19 and therefore inapplicable to the present case.

21. Having heard the learned counsel for the parties, at the outset I may state that the counsels are at *ad idem* that under the provisions of Section 36 of the Act read with Order XLI Rule 5 CPC it is for the court to consider the facts and circumstances of the case and exercise its discretion in accordance with the well settled principles and pass appropriate orders, which may include full deposit / part deposit and / or directing furnish of security.

22. It is the submission of Mr. Kaul and Mr. Dutt that the finding in the award is a factual one which is not a perverse finding. Further, there is no challenge to the award on the ground that the award is contrary to the public policy of India or on the ground of patent illegality. According to them as the respondents are bound to succeed, 100% of the awarded amount should be directed to be deposited. In fact, they have also relied on the orders

where the court directed such deposit. On the other hand, Mr. Basu has primarily urged financial distress because of COVID-19 and as such insisted upon furnishing bank guarantees.

23. No doubt, the counsel for the both the parties have referred to Judgments which are in their favour inasmuch as the courts have either passed orders for full deposit of awarded amount or no deposit at all, but the said orders passed are in the facts of each case and also, when circumstances as prevailing now because of COVID-19 were not there. Surely, COVID-19 has impacted the economy, affecting the production, consumption demand, revenues etc. The courts cannot be oblivious of such a situation. At the same time the plea of COVID-19 as canvassed by Mr. Basu, if true for the petitioner is equally true for the respondents. So, it follows no direction can be given for the deposit of 100% of the awarded amount. The plea of Mr. Basu that the petitioner shall furnish the bank guarantees of the total amount awarded, does not appeal to the court, more so when the respondents have award in their favour which is a money decree and may also need money because of prevailing situation. Mr. Kaul and Mr. Dutt during their submissions have relied upon instructions by Niti Ayog to contend that decision has been taken to release 75% of the awarded amount to the contractors. Suffice it would be to state that the said decision is before onset of COVID-19 and shall not be applicable.

24. This court accordingly direct the petitioner to deposit 50% of the awarded amount with the Registrar General of this Court and furnish a bank guarantee for the balance 50% in favour of the Registrar General within three weeks. On such deposit there shall be stay of the operation of the impugned award dated November 20, 2019. Needless to state

respondents shall be within their rights to file an application for withdrawal of the deposited amount for the consideration of the Court. The matter shall be listed before the Registrar General for the verification of the bank guarantee on July 3, 2020.

25. Till further orders, the deposited amount shall be kept in interest bearing FDRs with periodical renewals.

Application stands disposed of.

V. KAMESWAR RAO, J

JUNE 01, 2020/ak/jg