

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side
(Commercial Division)

Present :-

The Hon'ble Justice Moushumi Bhattacharya

AP 174 of 2022

The West Bengal Small Industries
Development Corporation Limited WBSIDC

Vs.

Kaushalya Infrastructure
Development Corporation Limited KIDCO

For the petitioner

:

Mr. Swarnendu Ghosh, Adv.

Mr. Kamal Kr. Chattopadhyay, Adv.

Ms. Suchismita Ghosh, Adv.

Mr. Tanjir Ali, Adv.

For the respondent

:

Mr. Jaydip Kar, Sr. Adv.

Ms. Manju Bhuteria, Adv.

Ms. Shreya Choudhury, Adv.

Last Heard on

:

13.07.2023

Delivered on

:

26.07.2023

Moushumi Bhattacharya, J.

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1. The petitioner seeks unconditional stay of the operation of an Award dated 22nd April, 2019. By the said Award, the learned Arbitrator directed the petitioner (respondent in the arbitration) to pay Rs. 13.06 crores (approx) to the respondent in respect of the claims made by the respondent in the arbitration.

2. The prayer for unconditional stay of the impugned Award is on the ground of the second *proviso* to section 36(3) of The Arbitration and Conciliation Act, 1996, which empowers the Court to unconditionally stay an award where the Court is satisfied, *prima facie*, that the making of the award was induced or effected by fraud or corruption.

3. According to learned counsel appearing for the petitioner, the manner in which the impugned Award was made fits in within the requirements of the second *proviso* to section 36(3) which contemplates unconditional stay of an award.

Facts urged by the petitioner for unconditional stay of the Award

4. According to counsel, two of the claims of the respondent (claimant in the arbitration) were adjudicated on the basis of an internal note-sheet which recorded inter alia that the respondent had executed approximately Rs. 87.6% of the work which translated to Rs. 18.26 crores. Counsel submits that several of the claims were awarded on the basis of the note-sheet which constitutes about 70% of the awarded sum. Counsel places documents to show that the internal note-sheet was taken on record in the arbitration proceedings in a manner which would fall under the fraud and corruption exception contained

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in the second *proviso* to section 36(3). Counsel submits that the document was disallowed from being tendered during the cross-examination of the claimant's witness but was taken on record after conclusion of arguments. Counsel submits that although the petitioner was given leave to file its written objection to the internal note, the impugned Award does not deal with such objection. Counsel submits that the document could only have been admitted as evidence after being duly proved under the provisions of the Indian Evidence Act, 1872. According to counsel, the facts in the present case would support the prayer for unconditional stay of the Award.

The respondent's/claimant's objection to the prayer for unconditional stay

5. Learned counsel appearing for the respondent/claimant in the arbitration urges that the petitioner has not made out any case for unconditional stay of the Award. Counsel submits that the petitioner had concealed the document despite the claimant making several requests to the petitioner to disclose the original document which was all along in the possession of the petitioner. Counsel submits that the question of fraud can only come in where a party had knowingly suppressed a document to the detriment of the other; whereas in the present case the petitioner (respondent in the arbitration) has suppressed the document. It is also submitted that the petitioner has not disputed the contents of the documents or alleged that the document is a manufactured document. It is further submitted that the petitioner had also been given an opportunity to file its objection to the

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documents/note-sheet which was considered by the arbitrator made the award. Counsel submits that none of the facts placed would substantiate the petitioner's claim of the Award being vitiated by either fraud or corruption.

The second proviso to section 36(3) of the 1996 Act

6. Section 36 of the Act deals with enforcement and enables an award-holder to enforce an award in accordance with the provisions of The Code of Civil Procedure, 1908 as a decree of Court. Section 36(2) requires the Court to grant an order of stay of the operation of the arbitral award on an application being made for such and clarifies that the mere filing of an application for setting aside of the award under section 34 will not render the award unenforceable. Section 36(3) empowers the Court to stay the operation of the arbitral award subject to conditions which the Court may deem fit to impose for stay of the award and for reasons which are to be recorded in writing.

7. The first *proviso* to section 36(3) requires the Court to consider the provisions of the CPC for grant of stay of a money decree where the arbitral award is for payment of money. The second *proviso*, which is relevant for the present adjudication, was inserted by the Amendment Act of 2021 but with retrospective effect from 23rd October, 2015. The second *proviso* reads as under:

“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

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(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 (Amendment) Act, 2015 (3 of 2016)."

8. The second *proviso* to section 36(3) hence requires a *prima facie* case to be made out by the award-debtor and the Court being satisfied of the case made out that the arbitration agreement/contract or the making of the award was induced or effected by fraud or corruption. The petitioner in the present case is concerned with clause (b) of the second *proviso* to section 36(3), i.e., the making of the award was induced or effected by fraud or corruption. (underlined for emphasis).

9. The second *proviso* to section 36(3) is a significant addition made to the Act in 2021. Before the 2021 amendment, the award-debtor could seek stay of the operation of an award and pass such an order without imposing any conditions for stay of the award. Post-amendment, the award-debtor must however discharge the onerous task of showing, at least *prima facie*, that the award was induced by fraud or corruption.

10. Since the Act does not provide any clarity or explanation on the circumstances which would escalate matters to the level of fraud or corruption in the making of the award, it would be profitable to refer to a few decisions where the concepts of fraud and corruption were considered and dealt with.

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Fraud

11. Kerr on the Law of Fraud and Mistake, Seventh Edition, describes fraud as understood by Civil Courts of Justice, to include all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another or by which an undue or unconscientious advantage is taken of another. The description proceeds to include :

“All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud.

Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to.”

12. In *Venture Global Engineering vs. Satyam Computer Services Ltd; (2010) 8 SCC 660*, the Supreme Court considered a case for setting aside of an award under Explanation 1 to section 34(2)(b)(ii) which provides for the circumstances when an award would be in conflict with the public policy of India and includes the making of the award being induced or affected by fraud or corruption in one of the three sub-clauses under Explanation 1(i). The Supreme Court held that fraud cannot be put in a straitjacket as it has wide connotation in legal parlance and referred to a decision of the House of Lords in *Reddaway (Frank) & Co. Ltd. vs. George Banham & Co. Ltd.; 1896 AC 199* where “fraud” was described in the words of Lord Macnaghten as :

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“But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court.”

13. Directing the gaze to India, section 17 of the Indian Contract Act, 1872, defines fraud as-

“17.- “Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech”

The Explanation to section 17 clarifies that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that regard being had to the circumstances, it is a duty of a person keeping silence to speak.

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14. Considering the legal and factual position, the Supreme Court in *Venture Global* held that concealment of relevant and material facts, which should have been disclosed before the arbitrator, would amount to an act of fraud. Russell on Arbitration, 23rd Edition, reiterates the position that an award will be obtained by fraud if the consequence of deliberate concealment is an award in favour of the concealing party.

15. The words used in the second *proviso* to section 36(3) are that “... (b) the making of the award, was induced or effected by fraud or corruption...”.

The operative words are hence “.....*making of the award*....” which would also cover the conduct of the arbitration as well as the decision-making process culminating in the award.

16. The words “*making of the award*” was also considered by the Court in *Elektrim SA vs. Vivendi Universal SA; (2007) 2 All ER (Comm) 365*, which held that an award must be obtained by the fraud of a party to the arbitration or by the fraud of another to which the party to the arbitration was privy. The Court in *Vivendi Universal SA* elaborated the concept further in the following words :

“an award will only be obtained by fraud if the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour. The party relying on Section 68(2)(g) must therefore also prove a causative link between the deliberate concealment of the document and a decision in the award in favour of the other successful party”

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17. The definition of fraud, as settled in the decisions referred to above, substantially point to a consensus that the facts concealed or suppressed must have a causative link with the facts constituting / culminating in the award or inducing the making of the award. The Supreme Court in *Venture Global* was of the view that disclosure of the concealed facts post-award would become relevant for setting aside of the award on a causal connection being found between the concealment and the award.

Corruption

18. Stroud's Judicial Dictionary, Fourth Edition defines 'corruption' as;

"Corruption; in an arbitrator means moral obliquity: it is a false and misleading metaphor to speak of an arbitrator's honest mistake, whether it be of excess or defect as 'constructive corruption'".

19. In *Bibhuranjan Gupta vs. The King; ILR 1949 2 Cal 440*, a learned Single Judge of this Court opined that "corruptly" was different from "dishonestly" or "fraudulently" and explained that, although the user may not be dishonest or fraudulent, it may nevertheless be corrupt if the user is designed to curb or prevent the course of justice.

20. In *Emperor vs. Rama Nana Hagavne; AIR 1922 Bom 99*, a Division Bench of the Bombay High court, presided over by Chief Justice Macleod, also differentiated between the words "corruptly" and "dishonestly" as used in section 24 of the Indian Penal Code, 1860 but included the intention of causing wrongful gain or wrongful loss. The Court dwelt on using false evidence and

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defined “corrupt” as anything which has been changed so as to become putrid, vitiated, tainted and further opined that bribery is not the only cause which leads to corruption. In *M. Narasappa vs. V. Krishna Reddy*; 1984 SCC OnLine AP 5, the learned Single Bench of the High Court of Andhra Pradesh at Hyderabad explained the word “corruption” to be a wider concept which includes but is not limited to bribery and involves any conduct which is immoral, improper, blameworthy and any act of misappropriation.

21. The above discussion on the definition of fraud and corruption makes it evident that an award-debtor, who seeks unconditional stay of an award, must discharge the onus of establishing a case, *prima facie*, that the procedure resulting in the making of the award warrants undoing of the award altogether on grounds of fraud or corruption. The burden on the party is onerous; it is simply not enough to show that the party was kept in the dark on the appointment of the arbitrator or of the proceedings thereafter, that the party was not given adequate or effective hearing or even that there has been a breach of the principles of natural justice.

22. Section 36(3), in its present form, was brought in by the amendment of 2016 by a pro-enforcement addition to the pre-amendment position where the award-holder was entitled to enforce the award upon expiry of the time period for setting aside of the award or where such plea had been refused. The amendment of 2016 (w.e.f. 23.10.2015) made the enforcement of an award subject to the award-debtor succeeding in applying for stay of the award upon suitable conditions being imposed on the award-debtor. The recent amendment of 2021 (but w.r.e.f 23.10.2015) is an exception to the enforcement-momentum

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by giving space to the award-debtor for stay of the award without any conditions being imposed under section 36(3) read with the *proviso* thereto. The price for this must however be paid in the form of an irrefutable case of fraud or corruption.

23. The burden which must be discharged would include that the award was obtained by the award-holder by concealment of material facts, which if disclosed, would have persuaded the arbitrator not to pass the award in favour of the award-holder at all. The facts concealed must also have a causal connection with the award; namely that the disclosure of such facts would have a significant bearing on the award. The concealment on the part of the award-holder must also be deliberate, pre-meditated and with an intention to gain an advantage over the award-debtor. The concealment must also amount to deception such as the award-debtor being led to believe a certain set of facts which the award-holder knew to be false and untrue at the time of presenting the facts. The arbitrator's role in the making of the award is the other limb which must be established, *prima facie*, as an additional/alternative argument on fraud or corruption.

24. Fraud, as is commonly understood, has the potential to vitiate and undo all attendant and consequent happenings as a ripple-effect of unraveling the layers of cover and concealment of the truth. The fraud must be plain and indefensible on the face of the record so that the Court is not required to venture into the depths of the facts presented. The Court must be alarmed and taken aback, even at first blush, of the extent of deception and cunning. The

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act must be so flagrant so as to undo and upend the award on the egregiousness alone.

25. In a similar vein, the expression “corruption”, as used in the second *proviso* to section 36(3), would not only be a case of the arbitrator being dishonest. It would require something of a moral turpitude or an unjust departure from ethical standards where the purity of the decision-making is sullied resulting in an unjust advantage being given to the award-holder.

26. The admitted facts in the present case do not breach the twin benchmarks of either fraud or corruption as contemplated under the second *proviso* to section 36(3) of the Act. The reason is as follows.

27. The petitioner complains that the entire Award is based on a note-sheet which was taken on record without sufficient notice to the petitioner or giving the petitioner opportunity to deny or dispute the document. The petitioner says that a substantial part of the impugned Award is based on the note-sheet. The petitioner also says that the note-sheet was not mentioned in the statement of claim or the affidavit of evidence and the document was not put to any of the witnesses in evidence or presented in arguments by the counsel appearing for the parties. Counsel for the petitioner also submits that the respondent did not give any notice to produce the document and that the petitioner had objected to the respondent producing the note-sheet during cross-examination of the respondent’s witness which led to the document not being taken on record.

28. The other objection taken on behalf of the petitioner and indicated in the submissions impinged on the merits of the Award is hence not being

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considered since that would be a matter for adjudication under section 34 of the Act which is ready for hearing.

29. Contrary to the stand of the petitioner, the relevant part of the impugned Award however records that the respondent Award-holder (claimant in the arbitration) called upon the petitioner (respondent in the arbitration) to produce the document on several occasions including by a notice dated 20.2.2017. The questions put by the respondent/claimant on the note-sheet and the answers thereto would also show that the note-sheet was always in the possession of the petitioner before this Court. The evidence would also show that the note-sheet was a crucial document and indicated the detailed value of work done by the respondent / award-holder which had been accepted and certified by the petitioner / award-debtor. The work done amounted to approximately Rs. 18.25 crores. The answer of the claimant's witness would further show that the witness wanted to disclose a copy of the note-sheet and had made several such attempts to do so but had not been permitted on the earlier occasions. The arbitrator thus concluded that there was no dispute as to the existence of the document and that the petitioner / award-debtor was hesitant to disclose the document.

30. Significantly, the impugned Award records that the Arbitrator allowed the claimant / respondent award-holder to disclose the photocopy of the document subject to the petitioners verifying the Progress Report from the copy disclosed and that the petitioner also filed a set of objections with regard to the relevance of the document which have been dealt with in the impugned Award.

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The Arbitrator has come to a specific finding with regard to the evidentiary value of the document.

31. This Court refrains from any further reference to the impugned Award since that would be a matter to be considered for setting aside of the Award.

32. The only question which arises from the above is whether the petitioner / award-holder was kept in the dark as to the note-sheet being taken on record. Admittedly, this is not so, as the petitioner's advocate-on-record was present on the date when a copy of the note sheet was taken on record. It is also incorrect to even suggest that the petitioner did not get an opportunity to respond to this document or did not have a chance to dispute the contents of the document.

33. The undisputed facts are also of significance. The original document was always in the possession of the petitioner and the petitioner refused to disclose the document by alleging that the document was not traceable. The respondent / claimant was hence compelled to make over a copy of the said document in the arbitration. The petitioner has also not disputed the document as would also be evident from the pleadings on record. It is also not the case of the petitioner that the document is manufactured or procured or has been relied upon by the Arbitrator to give an undue and unfair advantage to the respondent Award-holder.

34. The complaint of the petitioner with regard to the note-sheet being admitted as part of records by no means touches (or even brushes) the threshold of the award being liable to be unconditionally stayed on the ground of fraud or corruption (or more likely being dragged down to the depths) as

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envisaged under the second *proviso* to section 36(3) of the Act. Granting stay of an award without imposing conditions on the award-debtor is a departure from the scheme of the Act and must be established within the strict vocabulary used in the second *proviso*. Any act which falls short of a certain kind of conduct on the part of the arbitrator or of the proceedings will not amount to fraud or corruption. The failing must be brought within the sharpness and intensity of the parameters as decided in the case-law together with the causal nexus with the award.

35. This Court is not satisfied, *prima facie*, as to the existence of facts which warrant unconditional stay of the operation of the Award dated 22nd April, 2019. The above discussion accounts for the view of the Court.

36. AP 174 of 2022 is accordingly disposed of by directing the petitioner award-debtor to secure the awarded amount of Rs. 13,06,16,243.00/- with the Registrar, Original Side within a period of 4 weeks from date. 50% of the said amount shall be provided by way of cash deposit which shall be invested by the Registrar in an interest-bearing account with a reputed Bank and the remaining 50% by way of a Bank guarantee which the petitioner will furnish within the time directed. The Award shall be stayed from the date on which the award-debtor complies with these directions. In the event of default the award-holder shall be at liberty to take steps for enforcement of the Award.

Later

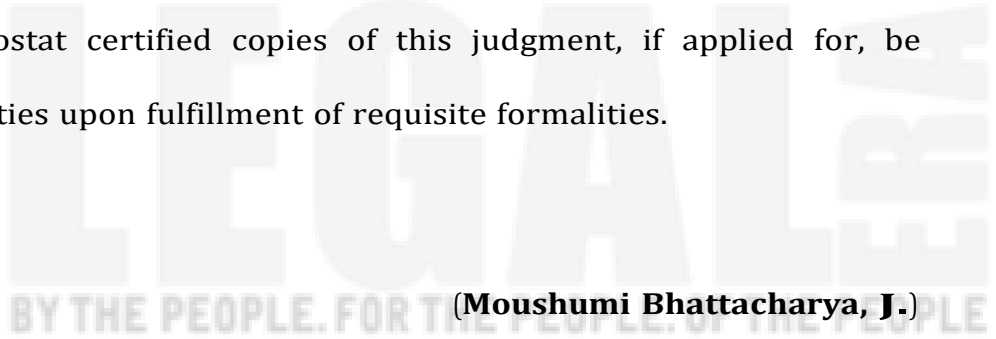
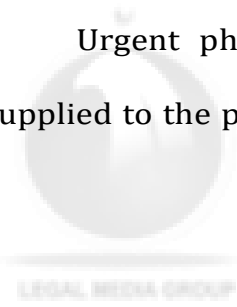
Learned counsel appearing for the award-debtor prays for some more time to comply with the directions passed in the judgment.

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Learned counsel appearing for the award-holder submits that the award was stayed some time in 2019 but that the award-holder was unable to take any steps for enforcement of the award due to the change in law at that time. Counsel further submits that the award was with 10% interest and the amount would hence come to about Rs.18 crores as on date.

Since there is a dispute between counsel as to the time and manner in which the interest has been calculated, the directions in the judgment shall remain and the award-debtor will pay the principal amount as indicated in the preceding paragraphs of this judgment within the time directed.

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



(Moushumi Bhattacharya, J.)