

# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 7<sup>th</sup> October, 2021

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**DIVISION BENCH: THE HON'BLE ACTING CHIEF JUSTICE MRS. JUSTICE MEENAKSHI MADAN RAI  
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

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I.A. No.01 of 2020 in Arb. A. No.01 of 2020

**Petitioners/Appellants** : Sikkim Power Development Corporation Ltd. and Another

**versus**

**Respondent** : M/s Amalgamated Transpower (India) Ltd.

Application under Section 151 of the Code of Civil Procedure, 1908

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**Appearance**

Mr. Tarun Johri with Ms. Tamanna Chhetri, Advocates for the Petitioners/Appellants.

Mr. Prateek K. Chadha with Ms. Rachana Rai, Advocates for the Respondent.

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## O R D E R

Meenakshi Madan Rai, ACJ.

**1.(i)** Learned Counsel for the parties were heard on the Application for Stay being I.A. No.01 of 2020 in Arbitration Appeal No.01 of 2020, filed by the Petitioners/Appellants.

**(ii)** Relevantly, it may be mentioned that the Appeal in which the instant I.A. has been filed, impugns the Judgment, dated 26.12.2019, passed by the Learned Judge, Commercial Court, East Sikkim at Gangtok in Arbitration Case No.05 of 2017 [*(Sikkim Power Development Corporation Ltd.(SPDCL) and Another vs. Amalgamated Transpower (India) Ltd.(ATPIL)*], wherein the Arbitral Award, dated 30.09.2017, was partly upheld. The Appellants, under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the "Arbitration Act") had challenged the Arbitral

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Award, dated 30.09.2017, before the Learned Commercial Court, East Sikkim at Gangtok, passed by the sole Arbitrator.

**(iii)** It is pertinent to mention here that in Arbitration Appeal No.01 of 2021, the Respondent herein also assails the same Judgment being aggrieved by the setting aside of the Arbitral Award with respect to Issues No.9, 11 and 20.

**(iv)** On 22.06.2020, I.A. No.01 of 2020, dated 06.03.2020, was heard and an *ex parte ad interim* Order of Stay was granted and Notice issued to the Respondent. The Respondent entered appearance on 17.09.2020 and sought eight weeks' time to file response to the Stay Petition and the Appeal. Reply to the Stay Petition was filed by the Respondent on 22.03.2021, a year after the said I.A. was filed. The *ex parte ad interim* Order of Stay was extended vide Order, dated 24.03.2021. On 17.08.2021, the matter came to be listed before the Division Bench. This Appeal (Arbitration Appeal No.01 of 2020) was ordered to be listed for admission/final disposal along with Arbitration Appeal No.01 of 2021. On 24.09.2021, the matter was part heard and listed for further hearing on 28.09.2021. On 28.09.2021, considering that the *ex parte ad interim* Order of Stay had been granted on 22.06.2020, this Court deemed it fit to first hear the Stay Application.

**2.** Learned Counsel for the Appellants advancing his arguments contended that the Learned Commercial Court, East District, had vide the impugned Judgment, dated 26.12.2019, erroneously partly dismissed the Petition filed by the Appellants under Section 34 of the Arbitration Act challenging the impugned

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Arbitral Award, dated 30.09.2017. That, the I.A. consequently sought Stay of the operation of the impugned Judgment to the extent that it rejects the objections raised by the Appellants against the impugned Award, dated 30.09.2017, passed by the sole Arbitrator. It was further contended that a *prima facie* case, in fact, exists in favour of the Appellants and against the Respondent as the Learned Commercial Court failed to appreciate that under the peculiar facts and circumstances of the case, the Respondent neither factually nor legally, were entitled to an Award of Decree of Specific Performance against the Appellants. That, the balance of convenience and inconvenience lies in favour of the Appellants and the documents on record clearly prove that the Respondent was not willing to perform its part of the obligation and was therefore not entitled to the Award of Decree of Specific Performance in its favour. Besides, should the impugned Judgment not be stayed, the Appellants would suffer irreparable loss and injury. Moreover, the amount awarded is a large amount and should this Court ultimately arrive at a finding that the Arbitral Tribunal and the Learned Commercial Court have erroneously reached at their respective findings, it would serve no purpose for the Appellants to deposit any amount at this stage.

**3.(i)** Learned Counsel for the Respondent, while vehemently repelling the submissions of Learned Counsel for the Appellants, contended that the Arbitral Award can only be stayed by means of a reasoned order, having due regard to the provisions of a Money Decree and hence the Court is required to be guided by the provisions of Order XLI Rules 5 and 6 of the Code of Civil

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Procedure, 1908 (for short, the "CPC"). That, the Appellants could not have sought a Stay of the Arbitral Award without satisfying the necessary legal conditions and without complying with the mandatory requirements of depositing the awarded amount in Court. That, the provisions of the Arbitration and Conciliation Act, 1996 as amended in 2015, are applicable to the present case as the proceedings before the Learned Commercial Court was initiated subsequent to 23.10.2015. Referring to the decision of the Hon'ble Supreme Court in ***Board of Control for Cricket in India vs. Kochi Cricket Private Limited and Others***<sup>1</sup> reconfirmed by a three Judge Bench of the Hon'ble Supreme Court in ***Hindustan Construction Company Limited and Another vs. Union of India and Others***<sup>2</sup>, it was urged that the Appellants must deposit the amount awarded by the Arbitral Tribunal, which was concurrently upheld by the Learned Commercial Court while dealing with the case under Section 34 of the Arbitration and Conciliation Act, 1996, as amended.

**(ii)** While walking this Court through the provisions of Section 36 of the Arbitration Act of 1996, as amended in 2015, it was contended that in view of the said provisions of the 2015 amendment and the ratiocinations of the Hon'ble Supreme Court *supra*, it is now mandatory that the entire awarded amount be deposited prior to grant of Stay by the Court. It was further urged that the Hon'ble Supreme Court, while setting aside the Order of the Hon'ble Bombay High Court in ***Manish vs. Godawari Marathwada Irrigation Development Corporation***<sup>3</sup> which had directed deposit of

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<sup>1</sup> (2018) 6 SCC 287

<sup>2</sup> 2019 SCC OnLine 1520

<sup>3</sup> SLP(C) No(s).11760-11761/2018 dated 16.07.2018 and 26.09.2018

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60% of the awarded amount prior to granting of Stay, directed that 100% of the awarded amount be deposited, keeping in mind that the Award is now in the nature of a Money Decree. That, in terms of the law laid down by the Hon'ble Supreme Court discussed *supra*, the entire amount of the Arbitral Award has to be deposited by the Appellants herein.

**(iii)** It was further contended that in the instant matter, the Arbitral Tribunal *inter alia* awarded the sums as follows;

Prayer 'G' pertaining to Bond Money: The Principal Amount awarded was Rs.47,13,53,405/- only, with interest calculated at Rs.38,29,58,499/- only.

Prayer 'I' for Cost Escalation: The Principal Amount Awarded was Rs.265,10,00,000/- only. No interest was awarded on this aspect.

Further, Rs.41.07 Lakhs only, was also awarded as Costs of Arbitration in Prayer 'K' but since no finding with regard to the Costs imposed was addressed by the Learned Commercial Court in the impugned Judgment, the Respondent does not press it at this stage. That, the alternative Award granted for Specific Relief is also not being pressed at this stage, neither is the 18% interest awarded by the Arbitral Tribunal from the date of the Award i.e. 30.09.2017, in view of the fact that the Hon'ble Supreme Court has not laid down any specific law pertaining to interest on the Arbitral Award.

**(iv)** That, the Appellants, in fact, vide their averments in the Appeal have admitted that the Arbitral Award given in terms

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of Prayer 'G' and Prayer 'I' have been upheld by the Learned Commercial Court. That, hence the Appellants be directed to deposit the amounts awarded in Prayer 'G' and Prayer 'I' for the present purposes. That, no special concessions can be extended to the Government while dealing with grant of Stay as can be culled out from the ratio in ***PAM Developments Pvt. Ltd. vs. State of West Bengal***<sup>4</sup>. Consequently, the Appellants cannot be given the benefit of Stay sans payment of the Arbitral Award.

**4.** In rebuttal, Learned Counsel for the Appellants submitted that the Respondent has sought for payment towards Cost Escalation for construction of a Project which has not yet commenced. That, Statutory Consent and Approvals for construction of the Project have lapsed. That, the hard earned revenue of the State cannot be handed over to the Respondent, who has miserably failed to take up even preliminary steps in respect of the development of the Project. That, the finances of the Appellants would be seriously affected if the Arbitral Award, as modified by the impugned Judgment, is not unconditionally stayed during pendency of the Appeal. Further, no loss would be caused to the Respondent if the Appeal would be heard by this Court without directing deposit of the Arbitral Award. That, the proviso to Section 36 of the Arbitration Act, 1996, as amended in 2015, requires 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 CPC. The said specific words in the Proviso does not mandate that the Court shall abide by all the

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<sup>4</sup> (2019) 8 SCC 112

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terms of the CPC. Moreover, Order XLI Rule 1(3) of the CPC provides that the Appellate Court may allow deposit of the amount disputed in the Appeal or allow the concerned party to furnish Security in respect thereof giving discretion to the Court in this context. That, no precedent has been laid down by the Hon'ble Supreme Court with regard to Section 36 of the Arbitration Act as the ratiocinations relied on by the Respondent are dependent on the facts and circumstances of the particular case.

**5.(i)** The rival submissions having been heard *in extenso*, it may appropriately be mentioned that the Stay granted vide Order, dated 22.06.2020, was an *ex parte ad interim* relief and hence the matter was taken up for hearing on 28.09.2021. While considering the requirements of the provisions of Section 36 of the Arbitration Act and Order XLI Rules 5 and 6 of the CPC, it is apposite to notice that in ***Manish vs. Godawari Marathwada Irrigation Development Corporation (supra)***, the Hon'ble Supreme Court, while disagreeing with the decision of the Bombay High Court which had ordered 60% deposit, pending the Section 37 Appeal, observed *inter alia* as follows;

"..... since these are money decrees there should be 100% deposit, with the respondent being entitled to withdraw the amount deposited and furnish solvent security to the satisfaction of the High Court."

The impugned Order of the High Court was set aside.

**(ii)** In ***Pam Developments Private Limited (supra)***, the grant of unconditional Stay to Government with respect to proceedings under Section 34 of the Arbitration Act, 1996, by invoking the provisions of Order XXVII Rule 8-A of the CPC were being considered. The Hon'ble Supreme Court observed that the

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invocation of Order XXVII Rule 8-A of the CPC by the High Court for the grant of the unconditional Stay to Government with respect to Arbitral Award passed against it was not proper. It was held *inter alia* thus;

“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.

29. Although we are of the firm view that the archaic Rule 8-A of Order 27 CPC has no application or reference in the present times, we may only add that even if it is assumed that the provisions of Order 27 Rule 8-A CPC are to be applied, the same would only exempt the Government from furnishing security, whereas under Order 41 Rule 5 CPC, the Court has the power to direct for full or part deposit and/or to furnish security of the decretal amount. Rule 8-A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof.

30. For the foregoing reasons, we are of the opinion that the impugned order passed by the Calcutta High Court granting unconditional stay of the arbitration award dated 21-1-2010, cannot be sustained in the eye of the law. ....”

**(iii)** In ***Board of Control for Cricket in India (supra)***, Section 34 Applications under the Arbitration and Conciliation Act, 1996, were all filed prior to the coming into force of the Amendment Act w.e.f. 23.10.2015. In the four Appeals, the Section 34 Applications were filed after the Amendment Act came into force. The Court went into a detailed discussion about the pre-amended Section 36 and amended Section 36 of the Arbitration Act. The 246<sup>th</sup> Law Commission Report which led to the Amendment Act was also discussed in the ratio, wherein the reason for proposing to replace Section 36 of the Arbitration Act of 1996 was considered and it was observed therein that the unamended Section 36 of the Act made it clear that an Arbitral Award became enforceable as a Decree only after the time for filing a Petition



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under Section 34 had expired, or after the Section 34 Petition was dismissed. In other words, the pendency of a Section 34 Petition rendered an Arbitral Award unenforceable, hence the admission of a Section 34 Petition virtually paralysed the process for the Winning Party/Award Creditor. The Report also observed that the Hon'ble Supreme Court in ***National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.***<sup>5</sup> had criticized the said situation in the following words;

"44. ....

**"11. However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the Ministry concerned to Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."**

**[Emphasis supplied]**

That, the Amendment in Section 36 was to ensure that mere filing of an Application under Section 34 does not operate as an automatic Stay on the enforcement of the Award. It was held *inter alia* as follows;

**"60. This brings us to the manner of enforcement of a decree under CPC. A decree is enforced under CPC only through the execution process (see Order 21 of the Code of Civil Procedure). Also, Section 36(3), as amended, refers to the provisions of the Code of Civil Procedure for grant of stay of a money decree. This, in turn, has reference to Order 41 Rule 5 of the Code of Civil Procedure, which appears under the Chapter heading, "Stay of Proceedings and of Execution". This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order 21 and Order 41 Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards. ...."**

**6.** In light of the ratiocinations referred to hereinabove, it is evident that in terms of Section 36(2) and (3) of

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<sup>5</sup> (2004) 1 SCC 540

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the Arbitration Act, which came into effect from 23.10.2015, in order to obtain a Stay of operation of the Arbitral Award, the party assailing the Award may file an application seeking such relief from the Court. The Court, in turn, has the discretion to consider the prayer and grant Stay of operation of the Arbitral Award, subject to conditions that it may impose as deemed fit. As per Section 36(3) of the Arbitration Act, however, when the party seeks Stay of the operation of the Arbitral Award for payment of money, the Court is to consider the provisions for grant of Stay of a Money Decree under the provisions of Order XLI of the CPC. The argument of Learned Counsel for the Appellants that the Court is only to be guided by the provisions of the CPC and there is no mandate that the Code is to be complied with cannot be countenanced, in view of the specific direction of the Hon'ble Supreme Court as laid down in ***Manish vs. Godawari Marathwada Irrigation Development Corporation supra*** and the discussions that have emanated in ***Board of Control for Cricket in India supra***. Thus, while considering the prayer of the Appellants for grant of Stay of the operation of the Arbitral Award made against them for payment of money, this Court is required to follow the provisions of Order XLI Rule 5 of the CPC.

**7.** In consideration of the discussions that have emanated *supra* and the law laid down by the Hon'ble Supreme Court, it is not necessary to delve into a prolix discussion of the provisions of Section 36 of the Arbitration Act and Order XLI Rules 5 and 6 of the CPC. Suffice it to state that when Stay is to be granted, a deposit is to be made by the party seeking Stay of the operation of the Arbitral Award.

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**8.(i)** In view of the rival contentions put forth, we are of the considered opinion that Learned Counsel for the Appellants has made out a case for grant of Stay of the operation of the Arbitral Award till further orders of this Court.

**(ii)** Consequently, the *ex parte ad interim* Order of Stay granted by this Court vide Order, dated 22.06.2020, stands confirmed until further orders.

**(iii)** However, considering the submissions of Learned Counsel for the Respondent as reflected *supra*, whereby his specific prayer is for deposit of the amounts as granted in Prayer 'G' and Prayer 'I,' the Appellants are directed to deposit two Bank Drafts, one for a sum of Rs.85,43,11,904/- (Rupees eighty five crores, forty three lakhs, eleven thousand, nine hundred and four) only, (i.e. Rs.47,13,53,405/- + Rs.38,29,58,499/-) and another for a sum of Rs.265,10,00,000/- (Rupees two hundred and sixty five crores and ten lakhs) only, within sixteen weeks from today.

**(iv)** The aforestated sum shall be held by the Registry by opening a separate Account or if deposited in any Account of the High Court, separation of the amounts be maintained till further Orders of this Court.

**9.** I.A. No.01 of 2020 stands disposed of accordingly.

**( Bhaskar Raj Pradhan )**  
**Judge**  
07.10.2021

**( Meenakshi Madan Rai )**  
**Acting Chief Justice**  
07.10.2021