

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 7782 of 2024

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MOTHER DAIRY FRUIT AND VEGETABLE PVT. LTD.

Versus

KEVENTER AGRO LIMITED

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Appearance:

MR MEHUL S SHAH, SENIOR COUNSEL WITH MR JIGAR M PATEL(3841)
for the Petitioner(s) No. 1

MR RASHESH S SANJANWALA, SENIOR COUNSEL WITH MR KUNAL J
VYAS & MR DEVARSH TRIVEDI FOR GANDHI LAW ASSOCIATES(12275)
for the Respondent(s) No. 1

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**CORAM: HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE
SUNITA AGARWAL**

and

HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

Date : 08/05/2024

ORAL ORDER

**(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA
AGARWAL)**

1. The instant petition is directed against the judgment and order dated 18.04.2024 passed by the Commercial Court at Vadodara in Commercial Civil Misc. Application No. 70 of 2023, whereby the petitioners herein has sought for Stay of the execution of arbitral award passed by the Sole-Arbitrator for, an amount of Rs.2,93,89,575/- along with the interest at the rate of 10 % from 03.07.2006 till realization, with the cost of arbitration at Rs.6,45,000/-.
2. At the outset, it may be noted that challenging the arbitral award dated 29.09.2023, the petitioner had moved an application

under Section 34 of the Arbitration and Conciliation Act, 1996 (for short as the Act 1996 hereinafter), wherein, application for Stay of the execution of the award was filed under Section 36 (3), with the prayer that the execution of the award be stayed against furnishing bank guarantee of equivalent amount awarded to the respondent along with interest calculated till the date of deposit.

3. The Commercial Court, while dismissing the said application, has recorded that no arguments had been advanced on merits or demerits of the award. Only this much was argued before us that it was well within the power of the Commercial Court to grant conditional stay on the enforcement of arbitral award once challenged under Section 34 and the discretion is to the extent that the Court may grant interim order staying the execution of the award subject to the permission to deposit the security. It was urged that the discretion conferred upon the Court has not been exercised judiciously and the petitioner has been directed to deposit 100 % of the decretal amount and the prayer to accept the bank guarantee as security has not been acceded to, merely holding that the bank guarantee cannot be utilized by the decree holder to compensate its losses and that the contention of the applicant for furnishing the bank guarantee in place of the deposits cannot be accepted without a sufficient cause. It was submitted that a categorical statement has been made in the application seeking for stay of the execution of the award that the applicant has a strong prima facie case, inasmuch as, chances of success of the applicant in the present proceeding under Section 34 of the Act 1996 are exorbitantly high. The balance of convenience also lies in favour of the petitioner.

4. Reference has been made to the language employed in Order XLI Rule 1 (3) of the Code of Civil Procedure to submit that as per the procedure prescribed therein the Appellate Court is competent to allow deposit of the amount disputed in the appeal or to furnish such security in respect thereof, as it may think fit. By virtue of the first proviso to Sub-Section (3) of Section 36 of the Act 1996, about the enforcement of the award, any application for the grant of stay in the case of arbitral award for payment of money is to be dealt with in accordance with the provisions pertaining to the grant of stay of a money decree under the Code of Civil Procedure. The Court is to be prima facie satisfied with the case of the applicant.

5. Reliance is placed on the decisions of the Apex Court in the case of **SIHOR NAGAR PALIKA BUREAU VS. BHABHLUBHAI VIRABHAI AND CO.** reported in **(2005) 4 SCC 1**, **K. VENKATARAMAN VS. THE DIRECTOR OF INDUSTRIES AND COMMERCE** reported in **AIR On-line 1982 SC 29**, **CENTRAL BANK OF INDIA VS STATE OF GUJARAT AND ORS** reported in **(1987) 1 GLR 437** to substantiate the above submissions.

6. The learned counsel for the Respondent, in rebuttal, has relied upon the decisions of the Apex Court dated **16.07.2018** in **Special Leave to Appeal (C) No. 11760 – 11761 of 2018** in **MANISH VS GODAWARI MARATHAWADA IRRIGATION DEVELOPMENT**; the Judgment of the Bombay High Court in the **Interim Application (L) No. 779 of 2024** in **Commercial Arbitration Petition No. 1131 of 2018** in **M/S BALMER LAWRIE & CO. LTD. VS. M/S. SHILPI ENGINEERING**

PVT. LTD.; MANIBHAI AND BROTHER VS. BIRLA CELLULOSIC reported in **2016 SCC Online GUJ 1084** and **PAM DEVELOPMENTS PRIVATE LIMITED VS. STATE OF WEST BENGAL** reported in **(2019) 8 SCC 112** to submit that there has been a consistent stand of the Apex Court that wherever Stay of the execution of the money decree is sought, there should be a requirement of 100 % deposit or else there is likelihood that the claim of the decree holder, in whose favour award has been passed, may be frustrated. The submission is that in all the cases relied by him, the Court has passed directions to deposit the entire amount under the award, on an application for Stay moved by the judgment debtor.

7. Noticing the submissions of the learned counsel for the parties and perused the record, we may go through the relevant provisions of Section 36, for enforcement of arbitral award, 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)]”

A bare reading of the aforesaid provision indicates that an arbitral award is to be enforced in accordance with the provisions of the Code of Civil Procedure, in the same manner as if it was a decree of the Court. Mere filing of an application under Section 34 of the Act 1996 does not render the award unenforceable. Upon filing of an application seeking for an order to stay the operation of the arbitral award in accordance with Sub-Section (2) of Section 36, the Court may grant a stay subject to the conditions, as it may deems fit, for reasons to be recorded in writing.

The first proviso to Sub-Section (3) of Section 36 stated that while considering the application for grant of stay in

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

The second proviso further states that the Court is to be satisfied that a prima facie case is made out that (a) the arbitral agreement of the contract which is the basis of the award or (b) the making of the award, was induced or effective by fraud or corruption and that in such cases, the award shall be stayed unconditionally pending disposal of the challenge under Section 34 of the Act 1996.

The present is one of such cases where the award has not been challenged on any of the grounds indicated in the second proviso to Sub-Section (3) of Section 36. The challenge to the award is on various grounds and the application only states that the applicant has a reasonable belief that he has a sound prima facie case, having high chances of success in the proceeding under Section 34 of the Act 1996.

8. Coming to the provisions of the execution of a money decree, we may note the provisions of Order XXI Rule 1, which provides for execution of a money decree by deposit of the money payable under the decree into the Court whose duty is to execute the decree. Order XLI Rule 1, which provides for appeal from original decree contains the provision in Sub-Rule (3) of Rule (1) as also in Sub-Rule (5) of Rule (5) as under:

“1. (3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate

Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.”

“5. (5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.”

9. The reading of Rule 1(3) of Order XLI shows that where appeal is against the money decree, the Appellate Court may grant an interim order, by issuing directions to deposit the disputed amount in the appeal or furnish such security in respect thereof, as it may think fit. Order XLI Sub-Rule (5) says that filing of appeal shall not operate as a stay of the proceeding under a decree or order appealed from except where the Appellate Court by order stay the execution of a decree, however, the Appellate Court has to pass an order showing sufficient cause for stay of execution of such decree.
10. Sub-Rule (3) of Rule 5 Order XLI, however, provides that there shall be no stay of execution under Sub-Rule (1) or (2) unless a court is satisfied that “(a) substantial loss may result to the party applying for stay of execution unless stay order is made; (b) the application has been made without unreasonable delay; and (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.”
11. Sub-Rule (5), however, states that in a case where appellant fails to make a deposit or furnish a security specified in Sub-Rule (3)

of Rule 1, the Court shall not make an order staying the execution of the decree.

12. Taking note of the aforesaid provisions, when we have gone through the Order impugned passed by the Commercial Court, as noted hereinbefore, the learned counsel appearing for the petitioners before the Commercial Court did not make any arguments on the merits or demerits of the award. Mere request made by the petitioners for stay of the execution of the decree on furnishing of bank guarantee was not tenable, without contending anything more on the merits of the award, i.e. demonstrably making out a prima facie case that the petitioners have fair chance of success in the proceedings under Section 34 of the Act 1996.
13. As regards the discretion conferred on the Commercial Court either to direct for deposit of the awarded amount or to permit furnishing of bank guarantee, no straight jacket formula can be prescribed. Apart from the insistence made by the learned counsel for the petitioner that the Commercial Court has not exercised its discretion judiciously in refusing to accept the bank guarantee, nothing much could be argued. The submissions of the learned counsel for the petitioners based on the decision of the Apex Court in **Sihor Nagar Palika (supra)** that instead of insisting for deposit of the awarded amount in cash, the Commercial Court ought to have accepted the bank guarantee furnished, cannot be accepted, inasmuch as, the said opinion was drawn by the Apex Court in the facts and circumstances in that particular case.

14. Even otherwise, it was well within the discretion of the concerned Court to put any condition while dealing with the application seeking for stay of execution of the arbitral award. It was open for the Commercial Court to issue direction either to make deposits or accept bank guarantee furnished by the petitioners. The scope of scrutiny under Article 227 of the Constitution of India, is not to interfere in the discretion exercised by the Commercial Court on the mere assertion that the discretion was not exercised judiciously, without saying anything more. The insistence of the learned counsel appearing for the petitioners to issue directions to the Commercial Court to accept bank guarantee instead of asking to deposit the decretal amount, is without any force. No benefit can be derived from the decisions relied upon by the learned counsel for the petitioners.
15. Moreover, arbitration proceedings are essentially alternate dispute resolution method for early / quick resolution of disputes and in case of a money decree, if automatic stay is granted, the very purpose of quick resolution of dispute through arbitration would stand defeated, inasmuch as, the decree holder would be fully deprived of the fruits of the award on mere filing of the application under Section 34 of the Arbitration Act.
16. Furthermore, the Arbitration Act is a special Act, which has been framed by the legislature with the idea of minimal intervention of the Courts. The interference within the scope of Section 34 by the court is limited to the conditions prescribed under Sub-Section (2) of Section 34 of the Act, 1996. No prima facie case has been made out by the learned counsel for the petitioners either before us or before

the Commercial Court to grant stay of the execution of the arbitration award wherein money is to be paid to the decree holder. No interference is, therefore, called for. Any order passed in a blanket manner to permit the petitioner to furnish bank guarantee instead of depositing the awarded amount would result in granting a stay order on the mere asking by filing of the application under Section 34 of the Act 1996, wherein the scope of interference is quite restricted.

17. For the above discussion, the instant petition under Article 227 of the Constitution of India is found devoid of merits and hence, **DISMISSED.**

(SUNITA AGARWAL, CJ)



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(ANIRUDDHA P. MAYEE, J.)

SAHIL S. RANGER