

Calcutta High Court

Damodar Valley Corporation vs Reliance Infrastructure Ltd on 25 March, 2022

IN THE HIGH COURT AT CALCUTTA  
ORDINARY ORIGINAL CIVIL JURISDICTION  
ORIGINAL SIDE  
[COMMERCIAL DIVISION]  
(Via Video Conference)

BEFORE:

The Hon'ble Mr. Justice Ravi Krishan Kapur

GA No. 7 of 2022  
GA No. 6 of 2022  
AP No. 40 of 2020

DAMODAR VALLEY CORPORATION  
VS  
RELIANCE INFRASTRUCTURE LTD.

For the Petitioner : Mr. Ratnanko Banerji, Senior Advocate  
Ms. Vineeta Meharia  
Mr. Amit Meharia  
Mr. Santanu Chatterjee  
Ms. Urmila Chakraborty  
Ms. Tannishtha Singh  
Ms. Paramita Banerjee  
Ms. Subika Paul

For the Respondent : Mr. Harish Salve, Senior Advocate

Mr. Prateek Sakseria Mr. Paritosh Sinha Mr. Atanu Raychaudhuri Mr. Saubik Chowdhury Ms. Shrayashee Das Mr. Pushan Majumdar Mr. Rohit Banerjee Ms. Ayushmita Sinha Sahni Mr. Jishnujit Roy.

Heard on : 21.02.2022, 24.02.2022, 25.02.2022,  
02.03.2020, 07.03.2022  
Judgment on : 25.03.2022

Ravi Krishan Kapur, J.:

1. By an order dated 23 December, 2021 (the order), this Court while disposing an application under Section 36(2) of the Arbitration and Conciliation Act, 1996 (the Act) seeking stay of an award dated 21 December, 2019 (the award), had inter-alia directed the following:

17. For the foregoing reasons, I am of the view that since the award is a money award for approximately Rs.898 crores, I direct that there shall be a stay of the award subject to the condition that the petitioner deposit 50% of the awarded amount of Rs.898 crores by way of cash security or its equivalent to the satisfaction of the Registrar Original Side, High Court at Calcutta. Upon such deposit being made, the Registrar Original Side is directed to make a fixed deposit of the said amount with any nationalised bank and keep the same renewed till the disposal of the application under section 34 of the Act or until further orders of Court. The remaining 50% of the awarded amount of Rs.898 crores be secured by way of bank guarantee(s) of a nationalised bank by the petitioner to the satisfaction of the Registrar Original Side, High Court. The aforesaid exercise is to be completed within a period of four weeks from the date of this order. In the event security as directed above is furnished, there shall be stay of execution of the award till the disposal of AP 40 of 2020.

2. Being aggrieved by the order, both parties i.e. the award debtor and the award holder had filed separate Special Leave Petitions. By a common order dated 28 January, 2022, both the Special Leave Petitions were dismissed as follows:

SLP (C) No.505/2022:

This Special Leave Petition filed by Damodar Valley Corporation is dismissed, as we see no reason to interfere with the order passed by the High Court. Pending application(s), if any, shall stand disposed of.

However, the petitioner is at liberty to approach the High Court for alteration of the order.

SLP (C) No.935/2022:

Mr. Shyam Divan learned senior counsel for the petitioner, seeks permission to withdraw this Special Leave Petition, with liberty to pursue the applications filed before the High Court for variation/modification of the impugned order.

Permission granted.

The Special Leave Petition is, accordingly, dismissed as withdrawn.

3. In this background, the parties seek modification of the order. Admittedly, neither of the parties had argued any of the points raised in either of the applications at the time of passing of the order. Thus, all the points urged by the parties are new points both in law and on facts.

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4. In this application, the award debtor seeks modification of the order to the extent that, the award debtor be permitted to deposit only 50% of the entire awarded amount i.e. Rs.449 crores, by furnishing a bank guarantee for Rs.337 crores and the remaining amount of Rs.112 crores by way of cash security. The award debtor also prays for time to furnish the same by 31 May, 2022.

5. The primary ground on which the award debtor seeks modification is one of financial stringency. It is contended that the award debtor is facing a liquidity crunch. It is further alleged that the award debtor has limited access to cash and most of the cash has been earmarked towards different financing activities i.e. interest on loans and repayment of loans. Furthermore, the award debtor has a very high debt ratio which has compelled the award debtor to borrow more money from the market. There are also trade receivables which are yet to be recovered. The amount lying in the sinking fund is not available in liquid form. Furthermore, any reliance based on the CARE Report for the year ending 2020-21 is misplaced since the Report for the year ending 2021-22 shows that the rating of the award debtor has fallen from AAA to A(-). The award debtor also cites COVID-19 due to which the award debtor has suffered severe financial crisis. There is also an underlying theme in the petition of the award debtor performing a socio-economic statutory obligation for which discretion ought to be exercised in its favour.

6. On behalf of the award holder, it is submitted that all the grounds alleged by the award debtor are extraneous and irrelevant for the purposes of deciding an application for stay of the award under Section 36 of the Act. The CARE Report relied on by the award debtor reflects that there are huge receivables which are to the extent of Rs.2142 crores. These receivables are identifiable and realisable in accordance with all subsisting arrangements to which the award debtor is a party and are payable by the participating State Governments and the Reserve Bank of India. In any event, the award debtor is a solvent statutory corporation and is simply procrastinating in securing the entire awarded amount.

7. Section 36 of the Act provides as follows:

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.

8. In its amended avatar, Section 36 contemplates an award debtor now being obliged to furnish security in order to obtain stay of the arbitral award. The purpose of security is to ensure and facilitate the fulfilment and enjoyment of a right or a potential right which has now vested in the award holder. There may be exceptional circumstances where an award debtor is directed to secure only a part of an awarded amount. There also may be cases where an award debtor is entitled to an unconditional stay of the award. In such matters, there cannot be any straightjacket formula. Each case is to be decided on its merits. It is true that in each and every case the Court is not bound to order security. In a given case, an award maybe so open to attack within the permissible grounds under the Act, that a Court may for reasons legitimately grant an unconditional stay. An award may also be so perverse, irrational and patently illegal that it ought to be stayed unconditionally. Moreover, in exercising the powers under Section 36, the provisions of the Code of Civil Procedure, 1908, may be taken into consideration. However, this is not mandatory. The Court must have "due regard" to the provisions of the Code. Needless to say that the discretion by a Court is to be exercised judicially and not arbitrarily and in the interests of justice depending on the facts and circumstances of the case. A Court is also obliged to furnish reasons under the section.

9. At the outset, it is important to examine the nature of an order in an application under Section 36 of the Act. There are different situations which may arise even after passing of an order under this section. The parties or any one of them may have to approach Court, in view of new facts or subsequent events. A party may wish to substitute the form of security originally directed by the Court. The security may also require to be renewed or revalidated. Hence, once a Court exercises its jurisdiction under Section 36 of the Act and directs security in a particular mode and manner, it always retains jurisdiction in respect of such security. Thus, in my view the order passed by Court at this stage of the proceeding is an interim order and is subject to alteration, variation and modification. Such orders by their very nature cannot be cast in stone nor are they unalterable. Accordingly, this Court has the power if the facts so warrant to vary, modify and alter the order.

10. I now deal with the merits of this application.

11. The award debtor is a statutory corporation constituted under the provisions of the Damodar Valley Corporation Act, 1984. It is in the business of operation of thermal and hydel power stations and distribution of electricity. It is true that there is an element of public interest involved in the

activities of the award debtor. However, it is a profit making enterprise not a charitable organisation. Accordingly, there is no question of granting any special treatment to the award debtor on the ground that it is a statutory corporation performing socio-economic obligations. In *Pam Development Pvt. Ltd. vs. State of West Bengal* (2019) 8 SCC 112 it has been held that, "in certain cases few provisions exist under the Code of Civil Procedure, 1908 which provide for differential treatment to the Government. However, no special or exceptional treatment need be given to the State, Government while considering an application under Section 36 of the Act".

12. The award debtor has cited facing a cash flow problem, limited cash availability, high interest burden, an obligation to make payment towards bonds which would be redeemable in March 2025. On the other hand, the award holder submits that the award debtor is a solvent corporation and not only has funds but also the ability to secure the entire awarded amount. In this connection, the award holder inter-alia relies on the General Reserves as appearing in the Balance Sheet of the award debtor. There is also an amount of approximately Rs.7963.99 crores reflected under the head of Sundry Debtors. Without entering into any forensic analysis of the financial statements of the award debtor, it is ex facie evident inter-alia from the following items in the Balance Sheet namely, Reserves & Surplus, Current Assets and Trade Receivables that the award debtor has more than the means to secure the award but simply chooses otherwise. Accordingly, I am not convinced of the financial constraints of the award debtor.

13. In my view, to permit the award debtor to furnish security for an amount of only 50% of the awarded amount on the ground of financial stringency would not only result in defeating the very object and purpose of the section but would amount to granting exceptional and special treatment to the award debtor. Ordinarily, impecuniosity or financial inability cannot be a factor per se in permitting an award debtor any discretion in securing anything less than the entirety of the awarded amount. The financial hardship if any, of the award debtor must be weighed on the scale that the award debtor has a debt or at least a potential debt which the law now obliges the award debtor to secure. In view of the aforesaid, there is simply no reason to limit the security to any reduced amount. Hence, the prayer of the award debtor to secure only 50% of the awarded amount is rejected. Accordingly, there is no question of adjudicating upon whether the same should be secured 75% by way of bank guarantee and 25% by way of cash. The prayer to furnish such security by 31 May, 2022 is also without merit. The award was passed on 21 December, 2019. The award holder obtained a right to security within a period of 90 days or within the extended period of 120 days of the passing of the award. The matter has procrastinated on some ground or the other for more than two years. The parties have been embroiled in a bitter legal battle and have repeatedly travelled to the Division Bench and the Hon'ble Supreme Court. In such circumstances, the award holder has already succeeded in delaying furnishing of security for more than two years. Hence, there can be no reason to grant any further extension to the award holder. It is true that there is an element of public interest in the activities of the award debtor. However, there is also a corresponding element of public interest in statutory corporations like the award debtor paying and now securing their dues within time.

14. Accordingly, there is no merit in this application and the same stands dismissed. There shall be no order as to costs.

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15. This is an application filed by the award holder seeking modification of the order on three grounds. (a) The award holder be permitted to withdraw Rs.303 crores out of the awarded amount on the basis of an undertaking in an affidavit dated 20 February, 2022; (b) The award holder be permitted to withdraw the balance of Rs.595 crores upon furnishing of bank guarantees; (c) The award debtor be directed to deposit the entirety of the awarded amount i.e. Rs.898 crores by way of cash security.

16. It is submitted that an amount of Rs.303 crores had been withheld by the award debtor towards purported levy of liquidated damages under the agreement by and between the parties. The counter-claim of the award debtor filed towards the purported levy of liquidated damages and a declaration that the award debtor was entitled to a set off against retention money under the contract has been rejected in its entirety by the Arbitral Tribunal. Hence, there is no question of the award debtor retaining this amount. Thus, the award holder is entitled to unconditionally withdraw the entirety of Rs.303 crores. Nevertheless, an undertaking by way of an affidavit dated 20 February, 2022 has been filed on behalf of the award holder that the entire amount of Rs.303 crores would be paid to the lenders of the award debtor and be kept with them without any amount being retained by the award holder. In this connection, the award holder also relies on an earlier order dated 18 November, 2021 passed by this Court directing release of bank guarantee(s). The award holder also seeks leave to withdraw the balance Rs.595 crores upon furnishing of bank guarantee(s). It is also submitted on behalf of the award holder that it is normal in such cases that security be furnished by way of 100% cash security and no other mode of security ought to be permitted.

17. On behalf of the award debtor it is contended that, there is no provision in the Act or the Code of Civil Procedure, which permits withdrawal of the money. It is further alleged that since both parties seek financial impecuniosity as a ground for modification of the order, the Court ought not to differentiate between the parties. Insofar as withdrawal of Rs.303 crores is concerned, it is submitted that until the award is upheld in its entirety there is no question of releasing the same without furnishing of security. In any event, if the award is ultimately upheld, the award holder would be entitled to interest at the rate of 10% per annum on the sum of Rs.303 crores under the award. Accordingly, the application is liable to be dismissed.

18. At the outset, a Full Bench of this Court while interpreting the provisions under Order 41 Rule 5 of the Code of Civil Procedure had in *Union of India vs. Amitava Paul* AIR 2015 Cal 89 inter alia held as follows:

"36. In order to resolve the aforesaid controversy, one must examine the legislative intent for incorporating Order 27 Rule 8-A in the Code. The aforesaid provision was engrafted to exempt the Government to furnish security as a guarantee for due performance of a decree as mentioned in Rules 5 and 6 of Order 41. Notwithstanding such exemption, discretionary power of the Court to grant stay of execution of a decree can be exercised in favour of the appellant Government only if it satisfies the Court as to the existence of clauses (a) and (b) of Rule 5(3) of Order 41. As

"substantial loss" to the appellant is a condition precedent to grant stay, execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to irreparable injury to the appellant as the remedy of restitution is available to him in the event the appeal is allowed. [Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co., (2005) 4 SCC 1], para 6). Under such circumstances, when the court chooses to exercise its discretion in favour of the appellant State to grant stay of execution of a money decree it must balance the equities between the parties and ensure that no undue hardship is caused to a decree-holder due to stay of execution of such decree.

Hence, in appropriate cases, the Court in its discretion may direct deposit of a part of the decretal sum so that the decree-holder may withdraw the same without prejudice and subject to the result of the appeal. Such direction for deposit of the decretal sum is not for the purpose of furnishing security for due performance of the decree but an equitable measure ensuring part satisfaction of the decree without prejudice to the parties and subject to the result of the appeal as a condition for stay of execution of the decree.

37. To hold that the Court is denuded of such equitable discretion while granting stay of execution of a money decree in favour of the Government, would cause grave hardship to deserving decree-holders who in the facts of a given case may be entitled to enjoy part satisfaction of the decree without prejudice and subject to the result of the appeal as a condition for stay of execution of the entire decree.

38. Hence, it is opined although Order 27 Rule 8-A may exempt the appellant Government from the mandatory obligation of furnishing security in terms of Rule 1(3) for seeking stay of execution of a money decree as under Rule 5(5) of Order 41, the said provision cannot be said to operate as an absolute clog on the discretion of the court to direct the deposit of the decretal amount as a condition for grant of stay of execution of the decree in appropriate cases more particularly when such direction is coupled with the liberty to the decree-holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal."

19. Moreover, in Sihor Nagar Palika Bureau vs. Bhabhlubhai Virabhai & Co. (2005) 4 SCC 1 while interpreting the provisions under Order 41 Rule 5 (5) it has been held as follows:

6. Order 41 Rule 1(3) CPC provides that in an appeal against a decree for payment of amount the Appellant shall, within the time permitted by the Appellate Court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Under Order 41 Rule 5(5), a deposit or security, as abovesaid, is a condition precedent for an order by the appellate court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the appellate court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the appellate court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances

of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course a discretionary power, and is meant to be exercised in appropriate cases.

Both these decisions have been affirmed in Pam Development Pvt. Ltd. vs. State of West Bengal (Supra).

20. The rationale behind an alternative dispute resolution is to provide the parties with a forum for adjudication of their disputes without recourse to civil litigation. Arbitration depends on a contract whereby the parties consciously exclude the operation of Section 9 of the Code of Civil Procedure, 1908. The scope of challenge against an award passed under the Act is confined and limited. The grounds of challenge are primarily enumerated in section 34 of the Act. Under the provisions of the Code of Civil Procedure 1908, a full-fledged appeal inter alia permits a Court to re-appreciate the entire evidence, permits production of additional evidence and ultimately also empowers the Court to pass any decree or make any order which the Court may deem fit and proper. To this extent, an appeal is in some ways, a rehearing of the original proceeding with all the powers of the Trial Court. On the other hand, in a challenge under Section 34 of the Act, the scope of interference is limited to a restricted review of the award on certain specified grounds enumerated under the Act.

21. Insofar as the merits to the challenge of the award is concerned, this Court had while passing the order inter alia also held as follows:

Both parties had also made submissions on the merits of the award. I am well aware that any finding or observation pertaining to the merits of the challenge under section 34 of the Act which is still pending before this Court is premature at this stage. However, on a perusal of the award it appears that the award is a unanimous award of the Arbitral Tribunal comprising of three members. It ex facie appears that the Tribunal has taken into consideration the pleadings filed by the parties. Issues had also been framed. The award is a speaking award and prima facie deals with the contentions of both the parties elaborately. The Arbitral Tribunal has gone into each of the claims and the counterclaim made by the parties and has adjudicated upon the same. At least, at this prima facie stage, there is nothing in the award which shocks my conscience nor indicates that the award is either without jurisdiction or has been obtained by fraud or corruption or is contrary to law. I reiterate that these are all prima facie findings on the merits of the award and for the limited purpose of adjudication of this application.

22. In this background, I now deal with the contentions of the award holder. The grounds for seeking modification of the order as pleaded are that the award holder is suffering adverse financial hardship and is in dire need of funds. Moreover, the award holder has succeeded in the arbitration proceedings and has thus, obtained a potential right to the fruits of the award.

23. 303 crores:

(a) The award holder had sought for unconditional withdrawal of the amount of Rs.303 crores. However, by an affidavit dated 20 February 2022, affirmed on behalf of the award holder, an undertaking has now been provided by the award holder that, if the amount of Rs.303 crores be released, the same would remain charged to several lenders of the award holder, and no part of the same amount would be retained by the award holder.

(b) The entire claim of Rs.303 crores is towards money withheld by the award debtor against purported levy of liquidated damages. Significantly, the counter-claim of the award debtor in respect of liquidated damages and the consequential declaration that the award debtor was entitled to set off the liquidated damages against the sum of Rs.303 crores has been rejected in its entirety by the Arbitral Tribunal. Before the Arbitral Tribunal, the award holder had prayed for release of the entire amounts retained by the award debtor (Para 3.1(iii) of the award). An issue, (Issue no.2) was also framed by the Arbitral Tribunal as to whether the respondent was entitled to withhold any amount whatsoever towards purported levy or liquidated damages and whether the respondent was liable to pay the claimant Rs.137,10,67,733/- and Euro 13,791,641 or any other amount as claimed by the claimant [Para 5(2) of the award].

(c) The Arbitral Tribunal has answered the aforesaid issue by directing the award debtor to release the entire amount withheld on account of purported liquidated damages. In fact, the Arbitral Tribunal held as follows (16.12)(ii):

Issue No.2: "We hold and direct that the claimant is entitled to a declaration that the Respondent cannot withhold any amount whatsoever towards purported levy of liquidated damages. In this regard we take note that the claimant by way of an amendment furnished a revised computation in respect of sums payable to it from the Respondent being an amount Rs.137,10,67,773/- and Euro 13,791,641. Therefore, we direct the release of Rs.137,10,67,773/- and Euro 13,791,641. This figure is borne out from the evidence of C.W.2 which is not disturbed."

(d) The entire counter-claim of the award debtor has also been dismissed by the Arbitral Tribunal. Accordingly, there is no amount due and payable by the award holder to the award debtor under the award.

(e) Nevertheless, in my view, to permit the award holder to withdraw the sum of Rs.303 crores unconditionally or even on the basis of the undertaking dated 20 February, 2022 would tantamount to unconditional enforcement of the award notwithstanding the pendency of the application under Section 34 of the Act. Accordingly, the prayer for withdrawal of the amount of Rs.303 crores on the basis of the undertaking in the affidavit dated 20 February, 2022 is rejected.

(f) In Kanpur Jal Sansthan & Another vs. Bapu Construction (2015) 5 SCC 267 the Supreme Court had, set aside a direction for withdrawal of money without furnishing of security. I find from paragraph 32 of the judgment, that the Supreme Court had interfered with that direction on the

ground that no reasons had been given in the impugned order. This decision is distinguishable.

(g) By an order dated 18 November, 2021, this Court while considering the application under Section 36(2) of the Act filed by the award debtor had directed return of the bank guarantees which the award holder had kept valid and subsisting notwithstanding the passing of the award. It is true that one of the reasons for directing non- furnishing of the bank guarantees was that the entire counter- claim of the award debtor has been rejected by the Tribunal. However, this aspect of the matter was considered in view of prayer

(c) in the application filed by the award debtor seeking an order directing the award holder to keep the validity of the bank guarantees alive contrary to the directions in the award. In my view, insofar as the question of withdrawal of Rs.303 crores is concerned, there is a significant difference with the direction for non-furnishing of the bank guarantees as directed in the order dated 18 November, 2021. The factual scenarios in both situations are different and inapposite. Hence, I am unable to ascribe the same logic so far as prayer for withdrawal of Rs.303 crores is concerned.

24. 595 crores with bank guarantee(s):

(a) In *Amitava Paul (Supra)* the Full Bench of this Court had held that in granting a stay of execution of a money decree, the Court must balance the equities between the parties and ensure that no undue hardship is caused to the decree holder due to stay of execution of the decree. Hence, in appropriate cases, the Court in its discretion may direct deposit of a part of the decretal sum so that the decree holder may withdraw the same without prejudice and subject to the result of the appeal.

(b) Once the question of the Court having the power to direct deposit of the awarded amount as security has been answered, the next question is whether the award holder be permitted to withdraw the same upon furnishing of a bank guarantee? In balancing the equities, a Court can always at this stage and in an appropriate case permit the decree holder to withdraw the whole or a portion of the awarded amount upon furnishing a bank guarantee without prejudice to the rights and contentions of the parties and subject to the result of the application. This is an equitable measure in balancing the competing rights of the parties and ensuring that there is no undue hardship on the award holder.

(c) Insofar as the decision rendered in *State of West Bengal vs. Dilip Kumar Saha* reported in AIR 2022 Cal 1, I am of the view that the decision is not an authority for the proposition that there can never be an order permitting withdrawal under any circumstances whatsoever. In fact, at paragraph 16 of the judgment the Division Bench held that there were no grounds warranting an order of withdrawal in the particular facts of that case. Insofar as the unreported decision in *West Bengal Transport Infrastructure Development vs. Shristi Infrastructure Development Corporation (APOT No.144 of 2021 with AP 1989/2014 dated 04.02.2022 High Court at Calcutta)*, both parties fairly submitted that the said decision is distinguishable, since the said decision was passed in an application under Section 9 of the Act. Similarly, in *M/s. Satyen Construction vs. State of West Bengal & Ors.* reported in 2022 SCC OnLine (Cal) 1777, the question involved pertained to whether as an interim measure under Section 9 of the Act an order for withdrawal could be passed or not. I

am of the view that the facts of all these cases are distinguishable.

(d) There are now numerous instances whereby, award holders have been permitted to withdraw sums directed to be deposited by the award debtor upon furnishing of appropriate security. (See *Manish vs. Godawari Marthawada Irrigation Development Corporation* (SLP No.11760-11761 of 2018 dt.16/07/2018), *Dilip Kumar Chatterjee vs. State of West Bengal* (SLP No.6717 of 2021 dt.18/09/2020), *Toyo Engineering Corporation & Anr. vs. Indian Oil Corporation Limited* (SLP No.11766-11767 of 2020 dated 2 August, 2021).

(e) There is also a flip side to the argument. In *Union of India vs. Ajit Mehta and Associates*, Pune AIR 1990 Bom 45, the Division Bench of the Bombay High Court had expressed legitimate concerns of large scale fraud practised in many Departments of the Central and State Governments resulting in procured awards. Then again, there is the practice where an Arbitrator's machinery has been described as a factory of evil to throw awards at the dictates of finance companies (Unreported decision dated 2 December, 2015 passed in AP No.1280 of 2014 by the High Court at Calcutta). Moreover, there is the pernicious practice of permitting counter bank guarantees to deliberately lapse. In my view, the Court has the discretion and jurisdiction to appropriately deal with such circumstances even at the stage of Section 36 of the Act. In other exceptional circumstances, restitution is always a remedy available to the award holder. However, exceptions ought not to stultify or thwart the interpretation of the law. Accordingly, the prayer of the award holder to permit withdrawal of the sum of Rs.595 crores upon furnishing of bank guarantee(s) stands allowed.

#### 25. 100% Cash Security:

Ordinarily, money decrees are best secured by cash. This is naturally the best form of solvent security. A party may be directed to furnish a bank guarantee or furnish cash security. It is true that there is no statutory fetter on this being the only form of security permissible under the section. However, the security directed by a Court should be real and realisable. It ought not to be illusory, unrealisable or enforcement which may lead to protracted litigation. From the perspective of an award debtor, the mode of security would always have an impact on the finances and working capital of the award debtor. By the order, this Court had directed 50% of the awarded amount to be secured by way of cash security and 50% to be secured by way of bank guarantee. However, if the credit ratings of the award debtor has fallen in a short span, from AAA to A(-), it is anybody's guess as to what the financial position of the award debtor would be by the time the application under Section 34 of the Act attains finality. In my view, this is the contingency which Section 36 of the Act seeks to ameliorate. Consequently and in view of the aforesaid, the order is modified by directing the award debtor to furnish an amount of Rs.595 crores by way of cash security or its equivalent to the satisfaction of the Registrar, Original Side, High Court at Calcutta.

26. For the aforesaid reasons, I am of the view that the award holder is entitled to a limited modification of the order as prayed for. I am satisfied that the grounds of suffering adverse financial hardship, financial indebtedness and having a potential right to the fruits of the award are sufficient grounds warranting modification of the order.

27. Conclusions:

In view of the aforesaid, I direct as follows:

- a) The order dated 23 December, 2021 stands modified to the extent that the award debtor be directed to deposit a sum of Rs.595 crores by way of cash security or its equivalent to the satisfaction of the Registrar, Original Side, High Court at Calcutta. The balance of Rs.303 crores shall be secured by the award debtor by way of bank guarantee(s) of a nationalised bank to the satisfaction of the Registrar, Original Side, High Court at Calcutta.
- b) If the deposit of Rs.595 crores as directed above is made, the award debtor shall be entitled to withdraw the whole or a portion of the amount deposit upon furnishing a similar unconditional bank guarantee to the satisfaction of the Registrar, Original Side, High Court covering the amount withdrawn.
- c) All such bank guarantees as directed above should be kept alive until further orders of Court. The bank guarantees shall also be renewed at least one month before the schedule date of expiry.
- d) The aforesaid exercise is to be completed within a period of four weeks from the date of this order.
- e) In the event, security as directed is furnished, there shall be a stay of enforcement of the award.
- f) In case the award holder does not withdraw the sum of Rs.595 crores or any portion thereof the Registrar, Original Side is directed to make a fixed deposit of the said amount with any nationalised bank and keep the same renewed till disposal of AP No.40 of 2020 or until further orders of the Court.
- g) With the aforesaid modifications, GA 6 of 2021 stands disposed of.
- h) GA 7 of 2021 stands dismissed.

(Ravi Krishan Kapur, J.)