

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 101 OF 2018

IN

NOTICE OF MOTION NO. 2059 OF 2017

Ecopack India Paper Cup Pvt. Ltd.

...Appellant

*Versus*

Sphere International

...Respondent

Mr.Aseem Naphade with Mr.A.PSingh & Mr.Kaushal Amin i/b.  
S.K.Srivastav & Co., for the Appellant.

Mr.Premalal Krishnan with Mr.Sankalp Anantwar i/b. Pan India Legal,  
for the Respondent.

.....

CORAM : NARESH H. PATIL AND  
G.S.KULKARNI, JJ.

DATE : MARCH 14, 2018

---

**ORDER: (Per G.S.Kulkarni, J.)**

1. Disputes between the appellant and the respondent are subject matter of arbitration. The appellant is the claimant against the respondent in the arbitration proceedings. The respondent filed a written statement to the statement of claim of the appellant in which the respondent is stated to have made purported admission of liability towards the respondent of an amount of Rs.47,56,388/-. On this purported admission the Arbitral Tribunal made an interim award

dated 10 April 2017 under Section 31(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') in favour of the appellant. Being aggrieved by the impugned interim award, the respondent has filed a petition under Section 34 of the Act before this Court (Arbitration Petition No.393 of 2017). By an order dated 13 December 2017 the learned Single Judge has admitted the Section 34 petition. As mere admission of the petition would not amount to stay on the execution of the interim arbitral award, the respondent filed Notice of Motion no.2039 of 2017 seeking an interim stay on the execution of the interim award. By the impugned order dated 21 December 2017, the learned Single Judge has allowed the said notice of motion thereby granting unconditional stay on the execution of the impugned interim award rendered by the arbitral tribunal. The appellant being aggrieved by the said order has filed this appeal.

2. Learned Counsel for the appellant in assailing the impugned order submits that the learned Single Judge ought to have ordered deposit of the decretal amount considering the provisions of Section 36 of the Act and more particularly sub-section 3 which mandates that the Court may subject to such conditions as it may

deem fit, grant stay of the operation of the award, and the proviso to this sub-section would stipulate that when the award is for payment of money, the Court shall have due regard in grant of stay of a money decree to the provisions of Code of Civil Procedure, 1908. It is submitted that the provisions of Order 41 Rule 5 of the Code of Civil Procedure are imperative. It is thus submitted that considering the said provisions the learned Single Judge should have directed the respondent to deposit the decretal amount. In supporting the submissions, the learned Counsel for the appellant has placed reliance on the decisions in (i) ***Sihor Nagar Palika Bureau Vs. Bhabhlubhai Virabhai & Co.***<sup>1</sup>; (ii) ***Malwa Strips Pvt.Ltd. Vs. Jyoti Limited***<sup>2</sup>; (iii) ***Times Global Broadcasting Co.Ltd. & Anr. Vs. Parshuram Babaram Sawant***<sup>3</sup>.

3. On the other hand, the learned Counsel for the respondent submits that the learned Single Judge has appropriately considered the factual matrix and correctly observed that the arbitral tribunal rendered the impugned interim award, based on a solitary paragraph in the written statement and did not at all consider the case

---

1 (2005)4 SCC 1

2 (2009)2 SCC 426

3 (2011)113(6) Bom.L.R. 3801

of the respondent as pleaded in the written statement. It is his contention that the purported admission which is recorded in the impugned interim arbitral award was required to be considered in the context of the entire defence and the situation was not such that the purported admission can be singled out so as to make an interim award on admission. In supporting this submission, learned Counsel for the respondent has taken us through the written statement as also the impugned Award.

4. We have heard the learned Counsel for the parties. We have also gone through the pleadings of the parties before the Arbitral Tribunal and the impugned interim award. We have also perused the impugned order passed by the learned Single Judge. Having so done, we are not persuaded to accept the contention as urged on behalf of the appellant. At the outset we may observe that when the Court considers an application for stay of the arbitral award for payment of money, no doubt the Court would be required to consider the principles under the provisions of Order 41 Rule 5, however, it cannot be overlooked that such an order to be passed by the Court is discretionary and would be required to be passed taking into

consideration the facts and circumstances of the case. There cannot be a straight jacket formula that in every case the Court would impose conditions and necessarily there has to be a deposit of decretal amount.

5. Coming to the facts of the case, on perusal of the interim arbitral award, we may state that the learned Single Judge has rightly observed that the interim arbitral award has merely considered the statement as made on behalf of the respondent in paragraph 3(O) of the statement of defence as the admission of liability by the respondent, and it is on this statement, the arbitral tribunal has proceeded to make the impugned interim award. It would be appropriate to extract the relevant portion of the Arbitral Award which reads thus:-

“4. The counsel for the plaintiff submits that the respondent has made an clear and unequivocal admission of liability to the tune of Rs.47,56,388/- in Para No.3(O) of the statement of defence and Para no.23 of the counter claim.

.....

13. We find that in Para No.3(O) of the statement of defense, it is very clear that the respondent has made an admission of liability of Rs.47,56,388/-.

14. Since the respondent has made an admission of liability, we find that the Delhi High Court Judgment is applicable to the facts of the present case. Thus, the Plaintiff is entitled to an Interim Award in respect of the

admitted liability of the respondent, i.e. for a sum of Rs.47,56,388/-.”

6. As to whether the arbitral tribunal could at all have made such an interim award, is a subject matter of consideration in the arbitration petition which already stands admitted by the learned Single Judge. We are also informed that now de hors the interim award, the arbitration proceedings are in progress and the arbitral tribunal would proceed to finally adjudicate the rival claims of the parties.

7. Apart from the above situation, in regard to the controversy in hand, before the arbitral tribunal the respondent in opposing the appellant's prayer for an interim award on admission, had filed its reply asserting that, there was an amount of Rs.2,74,07,448/- which was payable by the appellant to the respondent after adjustment of an amount of Rs.47,57,389/- stated to the liability of the appellant on the part of the respondent. This contention can be seen in paragraph 8 of the reply which reads thus:-

“8. The Respondent further states that in fact, an amount of Rs.3,21,64,837/- is due and payable by the Claimants to the Respondent. By adjusting the said amount payable by the Claimants against the amount receivable by

the Claimants, an amount of Rs.2,74,07,448/- is balance and payable by the Claimants to the Respondent and its representatives jointly. In addition to this, the Respondent is also liable to pay an amount of Rs.6.37,44,606/- towards damages.”

8. A perusal of the impugned interim award would clearly show that there is no reference whatsoever interalia of the above contention as urged on behalf of the respondent. The case of the respondent in the written statement undoubtedly was required to be considered by the arbitral tribunal in its entirety and due consideration of the pleas as asserted by the respondent in the written statement. There is no reasoning whatsoever in the impugned interim award in rejecting the respondent's case as made out in the reply opposing the interim award. The learned Single Judge is thus correct in his observation that the Arbitral Tribunal has not considered the entire case as pleaded by the applicant in the written statement and that the respondents were entitled to explain the alleged admission as made in the written statement. Considering the facts and circumstances of the case, we are in agreement with the learned Single Judge when it is observed that prima facie the Arbitral Tribunal ought to have rendered a final award after giving an opportunity to both the parties to lead evidence.

9. As regards the decisions as relied on behalf of the appellant, there cannot be any doubt on the proposition of law as these decisions lay down. However, in the facts and circumstances of the case, as noted above, this is not a case where the respondent could be saddled with an order to deposit the amounts under the interim award. Section 36 of the Act deals with enforcement of an arbitral award. Section 36 of the Act was amended by the Arbitration and Conciliation Act, 2015 with effect from 23 October 2015. Sub-Section (2) of Section 36 now provides that mere filing of an application in the Court to set aside the arbitral award shall not by itself render the award unenforceable, unless the Court grants an order of stay of the operation of the arbitral award in accordance with the provisions of Sub-Section (3) of Section 36, on a separate application made for that purpose. Sub-section (3) provides that 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”*.



Proviso to sub-section (3) stipulates that the Court while considering the application for grant of stay of an arbitral award for payment of money, shall have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure 1908.

10. A bare perusal of the provisions of Section 36 shows that the jurisdiction so conferred on the Court is a discretionary jurisdiction. The proviso to Sub-section (3) further makes it implicit that the provisions of Order 41 Rule 1 Sub-Rule 3 and Rule 5 would become relevant. In exercising powers under Order 41 Rule 5 the Court exercises its discretion and may grant a stay to the execution of a decree if “sufficient cause” is made out and the party seeking stay satisfies the Court that it will sustain substantial loss and inter-alia satisfies the condition as stipulated in sub-Rule 3 of Rule 5. Thus, the under scheme of the provisions of Section 36 read with Order 41 Rules 1 and 5 of the C.P.C., the party opposing grant of a stay cannot assert a proposition that it would be mandatory for the Court to impose a condition for a

stay to the execution proceedings. It is for the Court to consider the facts and circumstances of the case and exercise its discretion either to grant a stay to the execution of the decree or impose or not impose any other condition, as the Court may deem appropriate. The above position in law has been clearly recognized by the Supreme Court in *Malwa Strips Private Limited Versus Jyoti Limited*<sup>4</sup>. The discretion so vested in the Court is required to be exercised judicially and not arbitrarily and in the interest of justice. (see *Sihor Nagar Palika Bureau Versus Bhabhlubhai Virabhai & Co.* (supra). Adverting to these principles of law, the learned Single Judge in the facts of the case, has appropriately exercised discretion as vested with the court under the provisions of Section 36(3) of the Act read with provisions of Order 41 Rule 5 in passing the impugned order.

11. The appeal lacks merit. We are accordingly not inclined to interfere with the impugned order. It is dismissed. No costs.

(G.S.KULKARNI, J.)

(NARESH H. PATIL, J.)

<sup>4</sup> (2009) 2 Supreme Court Cases 426