

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL JURISDICTION
ORIGINAL SIDE

BEFORE :-

THE HON'BLE JUSTICE SHAMPA SARKAR

Ia No. GA-COM/4/2024
In A.P - 808 of 2022

The State of West Bengal and Ors.

Vs.

M/S B B M ENTERPRISE.

For the Applicant/Award holder : Mr. Sakya Sen, Sr. Adv.
Mr. Nilanjan Adhya, Adv.

For the State Respondent : Mr. Anirban Ray, Ld. G.P.
Ms. Noelle Banerjee, Adv.
Mr. Paritosh Sinha, Adv.
Mr. Arindam Mandal, Adv.
Mr. Ritoban Sarkar, Adv.
Ms. Swagata Ghosh, Adv.

Judgment Reserved on : 04.08.2025

Judgment Delivered on : 19.08.2025

Shampa Sarkar, J.

1. GA-COM/4/2024 is an application seeking deposit of additional cash security by the award debtors for the remainder of the awarded amount together with accrued interest as on December 31, 2023. The award holder is the applicant. The dues calculated as per the award as on 31st December, 2023 stood at Rs. 5,32,80,181/-.

2. The dispute between the parties was that, the award debtor did not pay the bills raised by the applicant, despite complete execution of the work. The award holder invoked arbitration under clause 25 of the conditions of the contract. A statement of claim was filed before the learned Arbitrator and upon considering the facts and circumstances, the learned Arbitrator passed the award on July 2, 2022.
3. The award debtors filed an application for setting aside the award. The applicant filed an execution case seeking enforcement of the award vide EC No. 12 of 2023, on January 5, 2023. Immediately thereafter, the award debtors moved an application under Section 36(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) on January 17, 2023. Before a predecessor Judge, the award debtors submitted that, they were willing to deposit Rs. 9 crores within a period of six weeks before the Registrar Original Side, High Court at Calcutta. Accordingly, an order was passed, staying the enforceability of the award. However, the award debtors failed to deposit the money within time. By order dated March 14, 2023, the time for deposit of the money was extended. On March 16, 2023, the award holder was informed that the money had been deposited. Accordingly, a prayer was made for withdrawal of the money. The award holder contended that, for the purpose of execution of the subject contract, a loan had been obtained from the Punjab National Bank. The award holder failed to repay the debt as per the repayment schedule of the bank. A notice under the Securitization and Reconstruction of Financial Assets

and Enforcement of Security Interest Act, 2002 (SARFAESI Act) was issued on February 17, 2021. It was also stated that the business had suffered on account of the Covid pandemic and substantial amount of money was required for survival of the business and repayment of the bank's dues. The award holder was hoping to repay the amount from the awarded sum, but on account of the stay, the money did not pass to the award holder.

4. The application was allowed by order dated July 25, 2023. The Court allowed withdrawal of the sum deposited with a condition for securing the amount by a personal bank guarantee. Another application, i.e., G.A No. 2 of 2023 was filed on July 28, 2023, for addition of the name of the Punjab National Bank, Keyatala Branch, Kolkata. The application was allowed, and the order dated July 25, 2023 was modified on July 28, 2023. The order had to be further modified on August 9, 2023. As the bank expressed its inability to issue a consolidated bank guarantee, the Court allowed the applicant to furnish bank guarantee of the Punjab National Bank, Keyatala Branch, Kolkata for a sum of Rs. 9 crores in three tranches of 3 crores each, upon furnishing bank guarantee for each tranche of Rs. 3 crores, before the Registrar Original Side. The Registrar Original Side was directed to transfer the corresponding Rs. 3 crores against each tranche electronically, to the bank account of the applicant. The said order was issued on August 9, 2023 and further corrected on August 10, 2023. The applicant came to know that Rs. 2.97 crores against each of the three tranches of Rs. 3 crores, had been transferred by the Learned Registrar

Original Side. The applicant filed GA No. 3 of 2023 for a direction upon the Registrar Original Side to transfer the deficits to the account of the applicant. An order was passed on October 11, 2023 and the applicant preferred an appeal from the said order.

5. GA No. 4 has been filed for further directions.
6. The applicant seeks variation of the order dated January 17, 2023, on the ground that the deposit made by the award debtor was not only inadequate, but also not in conformity with the principles of law laid down by the Hon'ble Apex Court in various decisions, while interpreting the 'sum' to be deposited under section 36(3) of the said Act, for stay of the award.
7. The crux of the argument of the award holder was that Section 36(2) & (3) were guided by the principle of balancing equities between the parties. It was submitted that the court retained the power to modify or vary the conditions of stay imposed by the order dated January 17, 2023. Even if, the application under Section 36(2) was disposed of, the jurisdiction of this court to modify the order was guided by the principles of Order 39 Rule 4 of the Code of Civil Procedure.
8. The applicant made the following prayers :-
 - "a) Direct the Award Debtor to deposit the balance sum of the Award of Rs.5,32,80,181/- with the Learned Registrar and thereafter allow the applicant/ Award holder/ Respondent to withdraw the said amount upon furnishing a personal guarantee for the equivalent sum with a further undertaking to embellish the same periodically to match the same as the money would be due for the award under reference and the commission charges for the

bank guarantee and renewal of the bank guarantee be borne by the State /Petitioner/Award Debtor;

b) Allow the money being Rs.5,32,80,181/- withdrawn and transferred electronically to Punjab National Bank, Keyatala Branch, Kolkata - 700029, in the Account of Award Holder/Applicant namely M/s. B.B.M Enterprises being Account No. 1667002100009684, IFSC Code - PUNB0166700.

c) Pass any such order or further orders as this Learned Court deems fit and proper.”

9. The contentions of the applicant was that the award debtors had deposited Rs. 9 crores on March 16, 2023, but the award was for Rs. 12,56,37,150. The dues of Rs.12,56,237,150 as on February 28, 2023, ought to have been deposited for complete stay of the enforcement of the award as per the law laid down by the Hon'ble Supreme Court and upon interpretation of Section 36 (3) of the said Act.
10. It was contended by Mr. Sakya Sen, learned senior Advocate that, the order dated January 17, 2023 was passed on the basis of the representation of the award debtors that the application for setting aside the award was ready for hearing and would be disposed of soon after exchange of affidavits, and as such, the award debtor offered to deposit Rs. 9 crores. There was no adjudication as such, on the “sum” to be deposited as per the award.
11. It was submitted that, enforcement of the award could be stayed upon deposit of the entire ‘sum’ awarded and the statute required the application for setting aside the award to be disposed of within a period of one year. In

the present case, the award debtors did not make any effort to expedite the disposal of application filed under section 34 of the said Act. In the meantime, the dues as per the award increased with accrual of interest, by Rs. 55,319 per day and the awarded value was calculated by the applicant to Rs. 14,23,80,181 on the date of filing of the application. Upon adjustment of the sum withdrawn by the award holder, i.e., Rs. 8,91,00,000, the amount due and payable would come to Rs. 5,32,80,181.

12. The applicant contended that the award holder had been deprived from enjoying the fruits of the award and utilize the funds in future contracts and business transactions. In the aforesaid circumstances, Mr. Sen urged that this was a fit case for a direction upon the award debtors to furnish additional cash security for the remainder of the award, i.e., Rs. 5,32,80,181. It was further submitted that the award holder should be allowed to withdraw the cash security upon furnishing a counter security, as the Court would deem fit and proper.

13. According to Mr. Sen, the Court had inherent power to direct deposit of the additional amount along with the accrued interest, by modifying the earlier order. The Court could always balance the equities. The order by which the award was stayed upon deposit of Rs. 9 crores, was not a final adjudication on the sufficiency of the deposit. On the offer made by the award debtors that Rs.9 crores would be deposited, the learned court had granted stay of the award. The law did not prevent the award holder from seeking modification of the conditions for grant of stay in the event the deposit was

either inadequate, or the condition imposed was contrary to the law laid down by the Hon'ble Apex Court. The Hon'ble Apex Court held that the expression "sum awarded", which was to be deposited by the award debtor for stay of enforcement of the award, should include the principal and the interest. Mr. Sen emphasized that the Hon'ble Apex Court had also held that the state government was not a privileged litigant and was equally bound by the terms and conditions of the said Act, like any other litigant. The requirement for deposit was to protect the right of the award holder. Such protection would include the right of the award holder to withdraw the money so deposited, upon furnishing any kind of security that the court would deem fit and proper. Otherwise, the award holder would be deprived from enjoying the fruits of the award until the application for setting aside of the award was disposed of finally. Such disposal could take years. The amendment to the said Act, was brought in only to ensure that the award holder should not be forced to postpone the enjoyment of the fruits of the award. An equitable and just reading of the provisions of section 36 of the Act would point towards upholding the right of the applicant to seek withdrawal of the amount, so that the award holder could remain commercially viable and continue profitably, as a going concern.

14. Reference was made to the orders passed by the Hon'ble Apex Court, allowing withdrawal of deposits in various Special Leave Petitions, viz.,:

a) ***Toyo Engineering Corporation and Anr. vs Indian Oil Corporation Limited*** decided in ***Civil Appeal Nos. 4549-4550 of 2021***,

b) ***Srei Infrastructure Finance Limited vs Candor Gurgaon Two Developers and Projects Pvt. Ltd.*** decided in ***Special Leave to Appeal Nos. 20895-20897 of 2018,***

c) ***Dilip Kumar Chatterjee vs The State of West Bengal and Anr.*** decided in ***Special Leave to Appeal Nos. 6717 of 2021.***

15. Reliance was placed on ***Pam Developments Private Limited vs State of West Bengal*** reported in ***(2019) 8 SCC 112*** and ***Hyder Consulting (UK) Limited vs Governor, State of Orissa*** reported in ***(2015) 2 SCC 189***, in support of the contention that the sum awarded would mean an amount of money which would include principal and interest, and as such the sum directed to be paid by the Arbitrator would also carry the interest.

16. Further reference was made to the decision of a Co-ordinate Bench in the matter of ***Damodar Valley Corporation vs Reliance Infrastructure Ltd.*** reported in ***2022 SCC Online Cal 553***, in support of the contention that, once the court exercised jurisdiction under Section 36 of the said Act and directed security to be deposited in a particular way and manner, the court always retained jurisdiction over the matter. Any order granting stay of the award was subject to alteration, variation and modification. It was submitted that the Hon'ble Apex Court had rejected the Special Leave Petition that was filed from the said order. A decision of the Bombay High Court in ***Krishna Lifestyle Technology Ltd. v. Cotton Corporation of India Ltd.*** reported in ***2021 SCC Online Bom 12963***, was relied upon in

support of the contention that there should be 100% deposit and the respondents were entitled to withdraw the amount deposited by furnishing a solvent security to the satisfaction of the court.

17. The Bombay High Court in the matter of ***State of Maharashtra through the Executive Engineer vs Patel Engineering Ltd. & Ors.*** reported in ***2021 SCC Online Bom 12596*** , held as follows:-

“14. Having considered these submissions, it is well settled by the Supreme Court as held in Manish(supra) that in case where the awards are nothing but money decrees there should be 100% deposit, with the Respondent being entitled to withdraw the amount deposited by furnishing solvent security to the satisfaction of the Court.”

18. In light of decision in ***State of West Bengal and Anr. vs Dilip Kumar Shah*** reported in ***2021 SCC Online Cal 3118***, Mr. Sen submitted that the Hon'ble Division Bench held that provisions of Order 39 Rule 4 could be invoked, seeking variation, alteration and modification of the terms of the order granting stay.

19. Further reliance was placed on the decision of a Co-ordinate Bench, in ***The State of West Bengal & Ors. vs M/s. BBM Enterprise***, decided in ***IA No. GA 1 of 2023 in AP No. 808 of 2022***. The Court held that, while considering a prayer for withdrawal, a, prima facie, satisfaction that the award holder required the money for a particular purpose was not mandatory. It was also held that allowing withdrawal of the amount did not amount to reopening the matter for adjudication on merits.

20. Reliance was placed on decisions of Co-ordinate Benches in ***Electrosteel Castings Limited vs Union of India and Ors.*** decided in ***A.P. No. 438 of 2022***, ***Dilip Kumar Chatterjee vs State of West Bengal*** decided in ***A.P. No. 651 of 2023***, ***Hooghly River Bridge Commissioners vs MBL Infrastructure Limited*** decided in ***G.A. Com No. 5 of 2023*** and ***G.A. No.2 of 2022 in AP COM NO. 187 of 2024***, ***Future Market Networks Limited vs Laxmipat Surana and Anr.*** reported in ***2022 SCC Online Cal 919***.

21. Mr. Anirban Ray, learned senior Advocate representing the award debtors submitted that Section 5 of the said Act mandated that Courts should have a hands-off approach. There should be least judicial intervention. The said Act was a complete code and did not contain any provision by which the Court could either modify the order of a predecessor judge, or alter the terms and conditions of stay or permit withdrawal of the sum deposited. Reference was made to the decision in ***Fuerst Day Lawson Limited vs. Jindal Exports Limited*** reported in ***(2011) 8 SCC 333***. Once Rs. 9 crores was deposited by order of the said Court, the enforceability of the award was permanently stayed. The conditions for grant of stay. was found to be adequate and proper by the learned Judge upon interpretation of the provisions of Section 36(3). As the enforcement of the award had been stayed, it would not carry any interest, till the proceedings were disposed of. The interest component would be finally adjudicated in the execution

case after the application under Section 34 of the said Act and the appeal therefrom, as the case may, would be dismissed.

22. Before the above proceedings were concluded through the mechanism of the said Act, this court should not venture into the territory of modifying the order of a predecessor judge. It was further submitted that the application itself was not maintainable as it was filed in a disposed-of proceeding under Section 36(2) of the said Act. The moment a stay was granted on the enforceability of an award, the matter rested until the entire proceeding for setting aside the award was disposed of. No further order could be passed once the stay had become permanent, by the order of Court. The prayers were barred by the principles of *res judicata* as the Court had already directed deposit of Rs. 9 crores and permitted withdrawal of the said sum. The issue had attained finality.

23. Further reliance was placed on ***Arnit Das vs. State of Bihar*** reported in **(2000) 5 SCC 488** to urge that the orders of the co-ordinate Benches could not be taken into account as they were hit by the doctrine of *sub-silentio*. The interpretations of sections 5, 36(2) and 36(3) of the said Act, were absent. The decisions were vulnerable and not binding. The points raised by Mr. Ray, had not been considered.

24. Mr. Ray further contended that the said Act did not permit withdrawal of the amount deposited by the award debtors. The intention of the legislature was not to allow withdrawal of such deposit or else, such provisions would have been incorporated in the statute. The intention of

the legislature was that a person who had suffered an award, should secure the amount. When the enforceability of the award was stayed, any review of the order and further direction to deposit money, would amount to enforcement of the award. The provisions of Code of Civil Procedure were not applicable in their strict sense. The objections of Mr. Ray can be summed up in the following manner :-

1. AP 808 of 2022 had already been disposed of, and the court had become functus officio with respect to that application.
2. There was no provision in the Act for modification of a disposed of order under Section 36.
3. The Arbitration and Conciliation Act was a special statute and a complete code, and provisions of CPC could not be applied in a manner inconsistent with the scheme of the Act.
4. The concept of "unenforceability" under Section 36(2) meant that the award could not be executed during the stay period, which would be defeated if withdrawal was allowed.
5. There was no provision in the Act for withdrawal of security deposit during the pendency of a Section 34 challenge.
6. The principle of res judicata barred re-agitation of issues already decided in the disposed of application.

25. The issue for consideration before this Court is whether the award-debtors can be directed to deposit the additional sum as a condition for continuation of the stay of enforcement of the award passed by the predecessor Judge, and whether the award holder can withdraw the amount.

26. The legal framework of the said Act is required to be discussed briefly as hereunder. Section 36(3) of the said Act provides as follows :-

“(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”

27. The proviso therefore incorporates the principles of Order 41 Rule 5 of the

Code of Civil Procedure. Order 41 Rule 5 of the CPC provides as follows :-

“Stay by Appellate Court.- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Stay by Court which passed the decree—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that 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.

(4) Subject to the provisions of sub-rule (3)], the Court may make an ex parte order for stay of execution pending the hearing of the application.

(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.”

28. The Arbitration and Conciliation (Amendment) Act, 2015, came into force on 23rd October 2015. A change was brought in to ensure that, in appropriate cases, the Court had the discretion to direct deposit of the awarded sum. Such direction for deposit of the awarded amount was not for the purpose of furnishing security for due performance of the award alone, but an equitable measure to ensure that the award was not frustrated due to the delay in disposal of the application for setting aside the award. The amendment took care of the predicament of an award holder who was deprived from enjoying fruit of the award. To hold that the court was denuded of any equitable discretion while granting stay of execution of the award would cause grave hardship to deserving award holders who, in the facts of a given case would be entitled to enjoy the fruits of the award without prejudice, by continuing to run its business and remain afloat.

29. In this case, the award debtors had offered to deposit Rs.9 crores for stay of the award. On January 17, 2023, a Co-ordinate Bench recorded as follows:-

“Counsel on behalf of the State of West Bengal/the award debtor submits that they will deposit the sum of Rs.9 crores within a period of six weeks from date. This amount is to be deposited by way of a cash deposit before the Registrar Original Side, High Court at Calcutta within six weeks.

In the event the above payment is made, the arbitration award shall remain stayed till disposal of the Section 34 application. In default, the award holder shall be at liberty to proceed with the execution application.”

30. It appears from the said order that, the award debtors had volunteered to deposit Rs. 9 crores. The learned Judge directed the amount to be deposited by cash deposit before the Registrar Original Side, High Court at Calcutta. It was directed that, in the event the amount was deposited, the award shall remain stayed till disposal of the application under Section 34 of the said Act.

31. In ***Pam Developers (Supra)***, the Apex Court held that section 36(3) must align with the principles of CPC and the court had the discretion over the nature and extent of deposit / security. It was observed that, arbitration proceeding is essentially an alternate dispute redressal system, meant for early and or quick resolution of the dispute. In case an award for payment of money was passed by the arbitrator against the government, and the same was allowed to be automatically stayed, the very purpose of quick resolution of the dispute by arbitration, would be defeated. The award holder would be fully deprived of the fruits of the award on mere filing of an objection under Section 34 of the said Act. It was held that, the said Act was a special statute which provided for speedy resolution of the dispute between the parties and Section 18 of the said Act made it clear that the

parties should be treated with equality. Once the act mandated so, there could not be any special treatment to the government. If a differential treatment was to be given to government while considering the prayer for grant of stay of a money award in proceedings under Section 34 of the said Act, the provision of section 18 of the said Act would stand violated. The Code of Civil Procedure was a guiding factor and the conditions to be imposed should be consistent with the provisions of the Code. No exceptional treatment should be given to the government while considering the application for stay, filed by the government. Under Order 41 Rule 5 of the CPC, the court had the power to direct full or part deposit. Similarly, the Court could not be restricted from directing deposit of the awarded amount and part thereof.

32. Thus, stay of an award for payment of money was not automatic. The amendment of the provision of section 36 had clearly demonstrated the intention of the legislature in support of such principle. The same was elaborately discussed by the Hon'ble Apex Court in ***Pam Developers (Supra)*** the Hon'ble Apex Court held as follows:-

16. In essence, the Law Commission has categorically recommended that there should be no automatic stay of the arbitral award. While so recommending, the Law Commission report makes no exception for the Government. On the basis of the said report of the Law Commission, the old Section 36 was substituted in 2016, with retrospective effect from 23-10-2015.

17. The amended Section 36 of the Arbitration Act provides for:

(a) after expiry of making an application to set aside the arbitral award (i.e. 90 days from the award) the award shall be enforced as if it was a decree of the Court;

- (b) filing of an application under Section 34 shall not by itself render the award unenforceable;
- (c) upon an application for grant of stay of the award, the Court has the discretion to grant stay, which may be subject to such conditions as it may deem fit;
- (d) while passing any stay order the Court is to “have due regard” to the provisions of CPC for grant of stay of money decree.

18. The backbone of the submissions on behalf of the respondent State of West Bengal is that under the provisions of Order 27 Rule 8-A CPC, no security shall be required from the Government in case of there being a money decree passed against the Government, and the execution of which is prayed for. If such submission of the respondent is accepted then the same would mean that mere filing of an objection under Section 34 of the Arbitration Act by a Government shall render the award unenforceable as the stay order would be passed in a mechanical manner and as a matter of course, without imposing any condition against the Government, judgment-debtor. If the contention is accepted, the effect would be that insofar as the Government is concerned, the unamended provision of Section 36 of the Arbitration Act would automatically come into force.

19. In this backdrop, we have now to consider the effect of Section 36 of the Arbitration Act, vis-à-vis the provisions of Order 27 Rule 8-A CPC. Sub-section (3) of Section 36 of the Arbitration Act mandates that while considering an application for stay filed along with or after filing of objection under Section 34 of the Arbitration Act, if stay is to be granted then it shall be subject to such conditions as may be deemed fit. The said sub-section clearly mandates that the grant of stay of the operation of the award is to be for reasons to be recorded in writing “subject to such conditions as it may deem fit”. The proviso makes it clear that the Court has to “have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure”. The phrase “have due regard to” would only mean that the provisions of CPC are to be taken into consideration, and not that they are mandatory. While considering the phrase “having regard to”, this Court in Shri Sitaram Sugar Co. Ltd. v. Union of India [Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223] has held that: (SCC p. 245, para 30)

“30. The words “having regard to” in sub-section are the legislative instruction for the general guidance of the Government in determining the price of sugar. They are not strictly mandatory, but in essence directory.

“26. Arbitration proceedings are essentially alternate dispute redressal system meant for early/quick resolution of disputes and in case a

money decree — award as passed by the arbitrator against the Government is allowed to be automatically stayed, the very purpose of quick resolution of dispute through arbitration would be defeated as the decree-holder would be fully deprived of the fruits of the award on mere filing of objection under Section 34 of the Arbitration Act. The Arbitration Act is a special Act which provides for quick resolution of disputes between the parties and Section 18 of the Act makes it clear that the parties shall be treated with equality. Once the Act mandates so, there cannot be any special treatment given to the Government as a party. As such, under the scheme of the Arbitration Act, no distinction is made nor any differential treatment is to be given to the Government, while considering an application for grant of stay of a money decree in proceedings under Section 34 of the Arbitration Act. As we have already mentioned above, the reference to CPC in Section 36 of the Arbitration Act is only to guide the court as to what conditions can be imposed, and the same have to be consistent with the provisions of the Arbitration Act.

27. It may be true that CPC provides for a differential treatment to the Government in certain cases, but the same may not be so applicable while considering a case against the Government under the Arbitration Act. For instance, Section 80 CPC provides for a notice of two months to be given before any suit is instituted against the Government. Further, it also provides that no ex parte injunction order can be passed against the Government. Whereas on the other hand, under the Arbitration Act no such special provision has been made with regard to arbitration by or against the Government. There is no requirement under the Arbitration Act for a notice of two months to be given to the Government before invoking arbitration proceeding against the Government. Further, Sections 9 and 17 of the Arbitration Act also provide for grant of ex parte interim orders against the Government.

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.”

33. In the decision of ***Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co.***, reported in **(2005) 4 SCC 1**, the Hon’ble Apex Court 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 above said, 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.

34. The majority view of ***Hyder Consulting (supra)*** Bobde, J was as follows:-

“**13.** Thus, it is apparent that vide clause (a) of sub-section (7) of Section 31 of the Act, Parliament intended that an award for payment of money may be inclusive of interest, and the “sum” of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such “sum” for the post-award period vide clause (b) of sub-section (7) of Section 31 of the Act, at which stage the amount would be the sum arrived at after the merging of interest with the principal; the two components having lost their separate identities.

14. In fact this is a case where the language of sub-section (7) clauses (a) and (b) is so plain and unambiguous that no question of

construction of a statutory provision arises. The language itself provides that in the sum for which an award is made, interest may be included for the pre-award period and that for the post-award period interest up to the rate of eighteen per cent per annum may be awarded on such sum directed to be paid by the arbitral award.

21. In the result, I am of the view that *S.L. Arora case* [*State of Haryana v. S.L. Arora and Co.*, (2010) 3 SCC 690 : (2010) 1 SCC (Civ) 823] is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the substantive claim does not refer to interest pendente lite awarded on the “sum directed to be paid upon award” and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language.”

35. In the concurring view rendered by Justice A.M. Sapre, it was held as follows : -

“30. Therefore, I am inclined to hold that the amount award under Section 31(7)(a) of the Act, whether with interest or without interest, constitutes a “sum” for which the award is made.

31. Coming now to the post-award interest, Section 31(7)(b) of the Act employs the words, “A sum directed to be paid by an arbitral award...”. Clause (b) uses the words “arbitral award” and not the “Arbitral Tribunal”. The arbitral award, as held above, is made in respect of a “sum” which includes the interest. It is, therefore, obvious that what carries under Section 31(7)(b) of the Act is the “sum directed to be paid by an arbitral award” and not any other amount much less by or under the name “interest”. In such situation, it cannot be said that what is being granted under Section 31(7)(b) of the Act is “interest on interest”. Interest under clause (b) is granted on the “sum” directed to be paid by an arbitral award wherein the “sum” is nothing more than what is arrived at under clause (a).

32. Therefore, in my view, the expression “*grant of interest on interest*” while exercising the power under Section 31(7) of the Act does not arise and, therefore, the Arbitral Tribunal is well empowered to grant interest even in the absence of clause in the contract for grant of interest.

33. My aforesaid interpretation of Section 31(7) of the Act is based on three golden rules of interpretation as explained by Justice G.P. Singh in *Principles of Statutory Interpretation* (13th Edn., 2012) where the learned author has said that while interpreting any statute, language of the provision should be read as it is and the intention of the legislature should be gathered primarily from the language used in the provision meaning thereby that attention should be paid to what has been said as also to what has not been said; second, in selecting out of different interpretations “the court will adopt that which is just, reasonable, and sensible rather than that which is none of those things”; and third, when the words of the statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequence (see pp. 50, 64 and 132). I have kept these principles in mind while interpreting Section 31(7) of the Act.”

36. In ***Hooghly River Bridge Commissioners vs MBL Infrastructure Limited*** decided in ***GA COM 5 of 2023 in AP-COM 187 of 2024***, it was held as follows :-

“**12.** In this background, it is important to examine the nature of an order passed in an application under section 36 of the Act. There are different situations which may arise even after the passing of an order under this section. The parties or any one of them may need to approach Court in view of subsequent events or changed circumstances. A party may wish to substitute the form of security originally directed by the Court. The security may also require to be renewed, revalued or re-examined. Thus, once a Court exercises its jurisdiction under section 36 of the Act and directs security in a particular mode and manner, it always retains inherent jurisdiction in respect of such security. In such circumstances, any order passed at this stage of the proceeding is an interim order and by nature subject to alteration, variation or modification. As such, a Court

always retains the power and jurisdiction to pass necessary orders. [Damodar Valley Corporation v. Reliance Infrastructure Limited 2022 SCC OnLine (Cal)].

13. There is also no question of res judicata as contended by the respondent. In Arjun Singh v. Mohindra Kumar AIR 1969 SC 993, it has been held as follows:

“14. It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court, usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situation which subsequently emerge.”

14. A reading of the order dated 5 January, 2022 passed by the Supreme Court also preserves and recognizes the right of the petitioner to seek withdrawal of the amount already deposited. The purpose of section 36 is for securing the awarded amount. The object of the section in its amended form is a step in aid of and keeping with the statutory intention of giving primacy to the finality of the arbitral award. The question of withdrawal of the same is commercially prudent and can always be taken into account in balancing the equities between the parties. It does not serve any commercial purpose to allow money to remain lying idle. In view of the above, the contention that there is no power to direct withdrawal of the sum deposited is rejected.

15. It is also contended that the respondent is a public undertaking and is not facing any financial crisis. In Pam Development Pvt. Ltd. v. State of West Bengal, (2019) 8 SCC 112 it has been held that, "in certain cases few provisions exist under the Civil Procedure Code, 1908 which provide for differential treatment to the government. However, no special or exceptional treatment need be given to the State, while considering an application under Section 36 of the Act". Hence, there is no question of the respondent deserving any special treatment on this account. The petitioner has cited facing a cash flow problem and requirement of immediate funds for business purposes. The decision not to seek withdrawal of the money lying pursuant to the initial order dated 16 September 2021 is always subject to reconsideration. The substantial increase of the interest component after passing of the award is also a fact which has subsequently emerged. Admittedly, the awarded amount stood at Rs. 22,40,35,183/- as on 29 June 2020. After, the passing of the order by the Hon'ble Supreme Court, post award interest @ 9.50% calculated from January 6, 2022 till November 16, 2024 has

accumulated to Rs. 7,67,06,721.12/-. This is no meagre amount. In view of the clear mandate of the section, it is now obligatory for the respondent to secure the entirety of the awarded amount so that the security ordered is real.”

37. The order was challenged before the Hon’ble Apex Court. The findings were not interfered with by the Hon’ble Apex Court. Rather, the Hon’ble Apex Court extended the time for deposit of the additional amount. The Hon’ble Apex Court held as follows:-

“While we are not inclined to interfere with the order impugned, we request the High Court to dispose of the Petition filed under Section 34 of the Arbitration and Conciliation Act, as expeditiously as possible, preferably within a period three months from today. The time to furnish the additional security deposit as directed by the High Court is extended by four weeks from today.”

38. The award debtors were well aware that deposit of full and adequate security was mandatory in case of a money award. (***Hyder Consulting (Supra)***). The applicant has drawn the attention of the Court to the calculation, in support of the prayer that i.e. Rs. 14,23,80,181/- was payable under the award out of which only Rs. 8,91,00,000/- had been withdrawn upon furnishing bank guarantee. When this application was filed, Rs. 5,32,80,181/- remained unsecured. As a natural corollary to this deficit deposit, this Court is of the view that the deposit of 9 crores would have entailed partial stay of enforcement of the award. The award provides for post award interest at the rate of 18% on the claims allowed by the

Arbitrator from the date of the award till the actual date of payment.

Relevant portions of the award is quoted below :-

“IN CONCLUSION, I, therefore, award in favour of the claimant and against, the Respondents a total sum of Rs. 3,12,31,964.00 (Rupees Three Crores Twelve Lakhs Thirty One Thousand Nine Hundred and Sixty Four) as per the followings: -

Claimed Amount Awarded Amount

1. Claim No. 1	Rs. 21,59,175.00	Rs. 21,59,175.00
2. Claim No.2	Rs. 29,32,548.00	Rs. 29,32,548.00
3. Claim No.3	Rs.57,52,866.00	Rs.35,45,840.00
4. Claim No.4	Rs. 27,49,140.00	NIL
5. Claim No.5	Rs. 52,00,532.00	Rs. 30,00,000.00
6. Claim No.6	Rs. 62,32,173.00	Rs. NIL
7. Claim No.7	Rs.12,66,149.00	Rs. 12,66,149.00

Rs, 1,29,03.712.00

B.F Rs. 1,29,03.712.00

Claim No.8	Rs. 4,57,427.00	NIL
9. Claim No.9A	Rs. 11,55,000.00	NIL
10. Claim No.9B	Rs. 1,28,34,600.00	Rs. 88,29,572.00
11. Claim No.9C	Rs. 1,65,21,480.00	Rs. 94,98,680.00
12. Claim No. 9D	Rs. 62,82,173.00	NIL
13. Claim No. 9E	Rs. 45,000.00	NIL

TOTAL

Rs. 5,73,56,090.00

Rs.3,12,31,964.00

(Rupees Three Crore Twelve Lakh Thirty One thousand Nine Hundred Sixty Four Only)

Interest

I further award and direct that the Claimant shall be entitled to interest on Rs. 3,12,31,964.00 @ 16% p.a. from 11/09/2006 till the date of the publication of the award.

I further award and direct that if the Respondents fail to make payment to the Claimant the awarded sum along with interest within four (4) weeks from the date of publication of the award then, the Claimant shall be entitled to interest on the total sum as on the date of publication of this award @ 18% till the date of payment.

Costs

In terms of the directions of the Arbitrator the Claimant had filed a chart / statement in the 70th sitting held on 23rd November 2019 wherein the Claimant has given particulars of the costs incurred in connection with the present arbitration. The said costs amount to Rs. 15,66,150.00 (Rupees Fifteen lakhs Sixty Six lakhs One hundred and Fifty Only). The Respondent's learned advocate had sent a letter dated 31/01/2020 to me being the Arbitrator disputing the entitlement of the Claimant to the costs as prayed for as also the quantum thereof. I have duly taken into account the said objection of the Respondents. However, I find no reason to dispute the figure of costs as furnished by the Claimant. I, therefore, award and direct that the Claimant shall be entitled to a sum of Rs. 15,66,150.00 (Rupees Fifteen lakhs Sixty Six lakhs One hundred and Fifty Only) on account to costs of the present arbitration proceedings. In addition the Claimant had also paid their share of cost on award amounting to Rs. 28,750 /- along with fees of the arbitrator amounting to Rs. 25,000/.

I further award and direct that the Claimant shall be entitled to interest on such cost amounting to Rs. 16,19,900.00 @18% p.a. from date of the publication of the award till the date of payment of such costs.

The Respondents have not paid their share of remuneration for the Arbitrator, Stenographer and venue charges for 42 nos. of sittings in spite of repeated reminders recorded in the various minutes of the earlier sittings of this arbitral proceeding. The expenses incurred on Stenographer in so far as the Respondent's share is concerned amounting to Rs. 31500 /- and the venue charges for those days is Rs. 15,750 /- which had been paid by the Claimant. These should be reimbursed by the Respondent to the Claimant. In addition, the Claimant had also paid the Respondent's share of the Arbitrator's Fees amounting to Rs. 2,10,000/- which had fallen due on the

Respondent's share for the 31st to 72nd Sitting along with the Respondent's share towards cost on award being Rs. 28,750/-.

The total amount paid by the Claimant on this account is Rs. 2,86,000.00 (Rupees Two Lakhs Fifty Eighty Six thousand only).

I award and direct that the Claimant shall be entitled to a sum of Rs. 2,86,000.00 (Rupees Two lakhs Eighty Six thousand) in favour and against the Respondent. I further award and direct that the Claimant shall be entitled to interest @ 18% p.a. on the said sum of Rs. 2,86,000.00 (Rupees Two lakhs Eighty Six thousand only) from the date of publication of the award till the date of payment of such sum.

It is hereby recorded that if any payment is received from the Respondents towards the due fees of the Arbitrator subsequent to the publication of the award then the equivalent amounts shall be refunded to the Claimant and i, being the Arbitrator, shall pass a separate order in exercise of powers under Section 33(3) of the Arbitration and Conciliation Act 1996 modifying or deleting the part of the Award which directs the Respondents to pay the Claimant the sums paid by the Claimant on the account of the Respondent's share of the remuneration of the Arbitrator, Stenographer and Venue Charges which remains unpaid on the date of the award.

The reference is disposed of as above.”

39. This court accepts the grounds taken by the applicant to justify withdrawal upon further deposit. Inability to repay the dues of the bank, inability to invest in further contracts and other business dealings and the losses suffered during Covid-19, pandemic are reasonable grounds to seek further deposit of the ‘sum’ and pray for withdrawal of the same.

40. The principle behind securing the money was elucidated by the Hon’ble Apex Court in the matter of **M/s. Atma Ram Properties(P) Ltd. vs M/s Federal Motors Pvt. Ltd** reported in **AIR 2004 SC 597**, the Hon’ble Apex Court held as follows :-

“It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in the Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate Court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate Court is that in spite of the appeal having been entertained for hearing by the appellate Court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the Court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the Court dealing with a prayer for the grant of stay asks to itself is: Why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted.

Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be 'substantial loss' to the party applying for stay of execution within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security for the due performance of the decree or order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. However, this is not the only condition which the appellate Court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate Court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not the statutory right conferred on the appellant. So also, an appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case an appellate Court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal. In *South Eastern Coalfields Ltd. Vs. State of M.P. & Ors.*, (2003) 8 SCC 648, this Court while dealing with interim orders granted in favour of any party to litigation for the

purpose of extending protection to it, effective during the pendency of the proceedings, has held that such interim orders, passed at an interim stage, stand reversed in the event of the final decision going against the party successful in securing interim orders in its favour; and the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery to it of benefit earned by the opposite party under the interim order of the High Court, or (b) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the Court. In our opinion, while granting an order of stay under Order 41 Rule 5 of the CPC, the appellate court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal in so far as those proceedings are concerned. Thus, for example, though a decree for payment of money is not ordinarily stayed by the appellate Court, yet, if it exercises its jurisdiction to grant stay in an exceptional case it may direct the appellant to make payment of the decretal amount with interest as a condition precedent to the grant of stay, though the decree under appeal does not make provision for payment of interest by the judgment-debtor to the decree-holder. Robust commonsense, common knowledge of human affairs and events gained by judicial experience and judicially noticeable facts, over and above the material available on record - all these provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on. After all, in the words of Chief Justice Chandrachud, speaking for the Constitution Bench in *Olga Tellis and Ors. Vs. Bombay Municipal Corporation and Ors.* (1985) 3 SCC 545, - "commonsense which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants"."

41. The Hon'ble Apex Court as quoted hereinabove, held that power to grant stay was discretionary and flowed from the jurisdiction conferred upon an appellate Court which was equitable in nature. To secure an order of stay merely by preferring an appeal, was not a statutory right conferred on the appellant, so also, the appellate Court was not ordained to grant an order of stay merely because an appeal had been preferred and an application for stay had been made.

42. Therefore, by adopting the said principle, this Court holds that an award debtor who prays for an order of stay must do equity, to seek equity, by depositing the sum awarded. A balance should be struck between protecting the award debtors as also the award holders. Business common sense does not permit postponement of the enjoyment of the fruits of the award to any uncertain future date. Permission to withdraw is in consonance with the purpose behind the object to amend the provisions of section 36 of the said Act. The provisions should be interpreted in the light of commercial relationships. In a commercial world, the provisions of the said Act should be interpreted in such a way, so as to give maximum room to the business houses to have adequate earnings from such commercial contracts. The Act treated all parties equally. There could not be any special treatment for the State Government, and as such the deposit of part of the award for stay of the enforcement was contrary to the very essence of equal treatment of the parties as envisaged under Section 18 of the said Act.

43. Moreover, stay of enforcement meant that the award holder could not execute the award, it did not mean that the money could not be withdrawn for reasonable cause. The stay did not amount to stay on the accrual of interest.

44. In ***Manish vs Godawari marathawada Irrigation Development Corporation*** decided in ***Special Leave to Appeal No(s). 11760 – 11761 of 2018***, the Hon'ble Apex Court held as follows:-

“The Bombay High Court has ordered 60% deposit, pending the Section 37 appeal. We have passed orders stating that 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.

Accordingly, we set aside the impugned orders dated 19.03.2018 and mandate a 100% deposit be made within a period of eight weeks from today.

The Special Leave Petitions are disposed of accordingly.” Upon being mentioned by learned counsel for the petitioner, the following sentence is incorporated in the aforesaid order before the last line:

The deposit so made may be allowed to be withdrawn on furnishing solvent security to the satisfaction of the Registrar of the High Court”

45. The Hon’ble Apex Court directed 100% deposit by the appellant and the respondent therein was allowed to withdraw the amount deposited by furnishing solvent security to the satisfaction of the High Court.

46. In the decision of ***Shapoorji Pallonji and Co. Pvt. Ltd. vs Gujarat State Electricity Corporation*** decided in ***Special Civil Application No. 9590 of 2023***, the High Court of Gujarat held as follows:-

“6.3.3 In that view, the order passed by the Commercial Court below stands in error. It is required to be modified by directing the respondent to deposit the interest and cost as awarded by the Arbitral Tribunal to be necessary condition for operation of the stay of the award.

6.4 The Supreme Court in ***Manish vs. Godawari Marathawada Irrigation Development Corporation***, which was Special Leave to Appeal No. 11760-11761 of 2018, decided by order dated 16.07.2018, passed the order as under, setting aside the order of the Bombay High Court requiring the deposit of the amount to the extent of 100%, “The Bombay High Court has ordered 60% deposit, pending the Section 37 appeal. We have passed orders stating that 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. Accordingly, we set aside the impugned orders dated 19.3.2018 and mandate a 100% deposit be made within a period of eight weeks from today. The Special Leave Petitions are disposed of accordingly."

6.5 In light of the above position of law, reasons recorded and discussion supplied, the following directions are issued,

(i) The order dated 02.01.2023 of the Additional District Judge, Bhavnagar - Commercial Court below exhibit 5 in Commercial Civil Misc. Application No. 1 of 2021 is modified. A further direction is hereby given that the respondent shall have to deposit the interest as awarded by the Arbitral Tribunal in paragraph 523 of the arbitral award to be calculated till the date of actual deposit of such amount. The cost awarded by the arbitrator shall also be deposited.

(ii) The interest and costs as above shall be deposited with the Commercial Court below on or before 17.07.2023.

(iii) The amount of interest and costs to be deposited as above, shall be a condition for stay on the operation and implementation of the award during the pendency of the proceedings under section 34 of the Arbitration Act."

47. In ***State of West Bengal and Another vs. Dilip Kumar Saha*** reported in

2021 SCC OnLine Cal 3118, the Division Bench held that :-

"18. Since the provision of the Code is held to be a guiding factor and there is no express provision preserved in the Court in contemplation to a situation as has arisen herein, one can borrow the principles of the other provisions as guidance in exercise of the inherent power. Order 39 Rule 4 though restricted to the injunction contained a provision relating to modification, variation of the said order in the changed circumstances. Such principle can be borrowed while permitting the withdrawal of the deposited amount in exercise of the inherent power. The Co-ordinate Bench of this Court in case of *Satyen Construction* (supra) has somewhat followed the aforesaid principle though not expressly which would be evident from the following excerpts as under:

"(5) Once the application carried at the post-stay order stage is treated as an application for interim measures under Section 9 of the Act, the order impugned becomes appellable since Section 37 of the Act permits an order granting or refusing to grant any

interim measure to be the subject matter of an appeal. Thus, the appeal is found to be maintainable. However, since the grounds carried in the application are not found to be worthy, the order impugned is not interfered with. It now appears that certain subsequent events may have arisen which may not have been brought to the notice of the Arbitration Court. If such is the case, there is nothing stopping the award-holder from invoking Section 9 of the Act afresh.

48. In the decision of ***State of West Bengal and Ors. vs BBM Enterprise*** reported in **2023 SCC Online Cal 2134**, a Co-ordinate bench held as follows:-

“23. In the case of section 36 of the 1996 Act, the Court retains jurisdiction to pass further orders while in the second instance the Court becomes functus officio. *K.A. Ansari v. Indian Airlines Limited*, (2009) 2 SCC 164 is an example of the latter, namely, a writ petition where the Supreme Court held that it is not open to the Court to reopen the proceedings by a miscellaneous application for a fresh cause of action. Moreover, the Division Bench in its order dated 29.11.2021 in *State of West Bengal v. Dilip Kumar Saha* held that an order may be modified on subsequent events. The principles underlying Order XXXIX Rule 4 of The Civil Procedure Code, 1908 where an injunction may be varied can be imported in a case, such as the present one, where the Court can exercise jurisdiction for modification of the earlier order in appropriate cases on changed circumstances. (Ref : *State of West Bengal v. Dilip Kumar Saha* in APO 95 of 2021).

24. The present application is hence found to be maintainable for the above reasons. This Court is of the view that the award-holder is not under any obligation statutorily or otherwise to file an application for release of the money in the application filed by the award-debtor for stay of the award.

25. GA 1 of 2023 is accordingly allowed for these reasons. The award-holder is permitted to withdraw the amount of Rs. 9 crores upon furnishing a bank guarantee of an equivalent amount with the Registrar, Original Side. The award-holder shall furnish the bank guarantee before withdrawing the money which shall be from a Bank which is a constituent of the RBI. The award-holder shall be at liberty of taking steps within such time as is found to be reasonable. The award-debtor shall be at liberty to take steps for listing of the application for setting aside of the award. GA 1 of 2023 is disposed of

in terms of the above. The Bank guarantee shall be kept renewed till disposal.”

49. In the matter of ***Damodar Valley (supra)***, the co-ordinate bench held as follows:-

“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.

23. 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 v. 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 *Development Corporation (APOT No. 144 with AP 1989/2014 dated in West Bengal Transport Infrastructure Development v. 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 *Satyen Construction v. State of West Bengal* reported in 2020 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 v. Godawari Marthawada Irrigation Development Corporation* (SLP No. 11760-11761 of 2018 dt. 16/07/2018), *Dilip Kumar Chatterjee v. State of West Bengal* (SLP No. 6717 of 2021 dt.18/09/2020), *Toyo Engineering Corporation v. 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 v. 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.

24. 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.”

50. Upon discussing the various provisions of law and the judicial precedents, this court holds that as principles of the Code of Civil Procedure have been made applicable to the provisions of Section 36(3), the principle underlying Order 39 Rule 4 can be imported and the order dated January 17, 2023 can be modified by this court. This court retains the jurisdiction over the proceeding as the executing court. The award debtors were required to deposit the awarded sum (principal + interest) for stay of enforcement of the award. Such deposit was not made. The sum claimed in the application should be deposited and allowed to be withdrawn. The

award holder will suffer prejudice and hardship if compelled to wait for years together until the application for setting aside the award is disposed of. Courts balance equities by allowing withdrawal, with a counter security, without prejudicing the challenges sought. In the event the award is set aside, the award holder will be liable to refund the money withdrawn, along with interest.

51. The law disfavors frustration of the award by allowing the award debtors to indefinitely delay payment through prolonged litigation. Hence, the courts impose conditions of deposit and allow conditional withdrawal.
52. Until set aside, the award is valid. Stay operates as a postponement of the execution. The award debtor has a right to the fruits, subject to the award debtor's right of challenge. If the withdrawal is denied, the award debtor is deprived of a valid adjudication. On the other hand, if the award is later set aside, the award debtor is protected by ordering the award holder to furnish viable security when withdrawing the deposited amount. Filing of an application for setting aside no longer operates as a stay. Deposit of the 'sum' awarded is a condition for stay. The law ensures that no hardship should be caused to the award holder on account of stay of the award. Allowing withdrawal of the 'sum' deposited is an extension of the principle. Directing withdrawal with a counter security, ensures restitution if the award is ultimately annulled.

53. Dealing with the decisions cited by Mr. Ray, this court holds that this court has given its own reasons in dealing with the question involved, without mechanically accepting the orders of co-ordinate Benches. Under such circumstances, the decision of **Arnit Das (Supra)** is not relevant.
54. There is no quarrel with the proposition of law laid down in paragraphs 19 and 29 of **Pam Development (Supra)**. The principles of the Code of Civil Procedure are applicable to proceedings under the 1996 Act, insofar as, they are not inconsistent with the provisions of said Act, which is a complete code. The said Act provides that while granting stay of the operation of the award of a money decree, the court must follow the provisions of Order 41 Rule 5 of the Civil Procedure Code. In fact, the decision is an authority on the principle that the state must also be directed to deposit the awarded sum like any other litigant. The provisions of CPC are to be followed as a guidance. Thus, in my view, jurisdiction to modify the condition for stay, is borrowed from the principles governing Order 39 Rule 4.
55. **Fuerst Day Lawson (Supra)** was rendered in a different set of facts and law. It was held that power and jurisdiction of High court under Letters Patent was ousted by the specific provisions of the 1996 Act. **Raghunath Rai Bareja and Another vs. Punjab National Bank and Others** reported in **(2007) 2 SCC 230** is not applicable, inasmuch as, there is no statutory interpretation involved in this case.

56. Lastly, the state owes a duty of consistency and fairness in litigation, because it represents the public at large. Having suffered similar orders before co-ordinate Benches courts and having been unsuccessful in the Special Leave Petitions before the Hon'ble Apex Court, same arguments are being advanced again and again on the same issue.

57. In view of the aforesaid, the application is disposed of with the following directions :-

- a) The order dated January 17, 2023 stands modified to the extent that the award debtor shall deposit a sum of Rs. 5.32 crores by way of cash security/demand draft to the satisfaction of the Registrar, Original Side, High Court at Calcutta, within eight weeks from date.
- b) In the event, security as directed is furnished, there shall be a stay of enforcement of the award.
- c) The Registrar, Original Side is directed to make an interest bearing 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.
- d) In the event of failure to deposit, the execution case shall proceed.
- d) If the deposit as directed above is made, the award holder shall be entitled to withdraw the whole amount upon furnishing a similar unconditional bank guarantee to the satisfaction of the Registrar, Original Side, High Court covering the amount withdrawn.

- f) The Bank guarantee as directed above should be kept alive until further orders of Court. The bank guarantee shall be renewed at least one month before the schedule date of expiry.

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

(Shampa Sarkar, J.)