



**IN THE HIGH COURT OF ORISSA, CUTTACK**

**W.P.(C) No.4189 of 2024**

**AFR**

Birla Institute of Management ..... Petitioner  
& Technology (BIMTECH),  
Gothapatna, Bhubaneswar

-Versus-

M/s. Fiberfill Interiors & ..... Opposite Party  
Constructions, U.P.

**For Petitioner : Mr. Ramachandra Panigrahy  
Advocate**

**For Opp. Party : Mr. Santosh Dwibedy,  
Advocate**

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**CORAM: JUSTICE SANJAY KUMAR MISHRA**

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**Date of Hearing:13.05.2024 & Date Judgment:16.07.2024**

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**S.K. MISHRA, J.**

1. The Writ Petition has been preferred challenging the order dated 23.12.2023 passed by the Court of Senior Civil Judge (Commercial Court), Bhubaneswar, in Execution Petition No.367 of 2023, vide which the Petition dated 02.12.2023 filed under section 36(2) of the Arbitration and Conciliation Act, 1996, shortly, hereinafter “the Act, 1996”, by the Petitioner, being the Judgment



Debtor, stood rejected and the matter was posted for hearing on Execution Petition.

**2.** The brief background facts, which led to filing of the present Writ Petition, are that the Petitioner issued a Letter of Intent (LOI) in favour of the Opposite Party for execution of civil construction, furnishing and interior design of various buildings at the premises of the Petitioner situated at Birla Institute of Management and Technology, IDCO Plot No.2, Gothapatna, Bhubaneswar, Odisha.

Pursuant to the same, a formal agreement was executed between the parties, wherein it was, inter alia, agreed that the Opposite Party will complete the work by 15.11.2012 for a contract value of Rs.18,00,00,000/- (Rupees Eighteen Crores) only. Several correspondences were addressed by the Petitioner to the Opposite Party, inter alia, pointing out the defects, poor workmanship and slow pace with which the work was being undertaken by the Opposite Party. As the work was perpetually delayed and the Opposite Party failed to fulfil its contractual obligation and committed material breach of the said agreement, the Petitioner, vide e-mail, asked the Opposite Party to vacate the site by 30.07.2014 as the Petitioner had decided to get the work finished by employing other contractors. Even if suffering loss at the hands of the Opposite Party, the Petitioner



without taking any coercive step, chose to adhere to the terms of the agreement. Accordingly, in accordance with Clause 10-B of the agreement, the Opposite Party was communicated through e-mail about the defects/poor workmanship observed in the work done by it and was asked to rectify the same.

Since the Opposite Party failed to take any step for either removing the defects or completion of the incomplete work, the Petitioner gave a notice to the Opposite Party, inter alia, calling upon it to take corrective steps. As the Opposite Party failed to take any corrective step, considering the academic session had commenced, the Petitioner issued various work orders to third-party contractors for completion of defective and incomplete work. Consequently, since the disputes had arisen between the parties, the Petitioner invoked the arbitration clause in the agreement against the Opposite Party. In response, the Opposite Party, vide its letter addressed to the Petitioner, raised several frivolous and unjustified demands. Pursuant thereto, the process of constitution of the Arbitral Tribunal commenced and both the parties appointed their respective nominee Arbitrators, and both the nominee Arbitrators appointed the Presiding Arbitrator. Pursuant to the same, the statement of claim was filed by the Petitioner along with the cost of assessment certificate and experts evidence duly accompanied with their affidavits regarding the



work done by the third-party contractors, inter alia, raising claims to the tune of Rs.3,76,35,234/- (Rupees Three crore seventy six lakh thirty five thousand two hundred and thirty four) only and Rs.90,00,000/- (Rupees Ninety Lakh) only. Counter claims were made by the Opposite Party to the tune of Rs.6,21,60,618/- (Rupees six crore twenty one lakh sixty thousand six hundred and eighteen) only. The Petitioner also filed its Reply to the Counter Claims before the Arbitral Tribunal.

Similarly, the Opposite Party also filed its Reply to the Statement of Claim filed by the Petitioner. Ultimately, an arbitral Award was passed on 02.09.2019 by the Arbitral Tribunal, whereby the claim of the Petitioner was partly allowed to the tune of Rs.1,00,00,000/- (Rupees one crore) only. On the other hand, the Counter Claim of the Opposite Party was allowed to the tune of Rs.6,21,60,618/- (Rupees six crore twenty one lakh sixty thousand six hundred and eighteen) only.

Being aggrieved by the said Award, the Petitioner filed two separate applications under section 34 of the Act, 1996, which were registered as ARB(P) No.80 of 2019 and ARB(P) No.86 of 2019, before the Court of District Judge, Khordha at Bhubaneswar, one challenging the arbitral Award to the extent it had allowed the Counter Claim of Rs.6,21,60,618/- in favour of the Opposite Party



and the other challenging the arbitral Award to the extent it had disallowed the claim of the claimant to the tune of Rs.3,76,35,234/-.

The District Judge, Khordha, passed a common judgment on 16.04.2022 dismissing both the Applications filed by the Petitioner under section 34 of the Act, 1996. Being aggrieved by the said common judgment, the Petitioner filed two Appeals before this Court i.e. ARBA No.26 of 2022, arising out of ARB(P) No.80 of 2019 and ARBA No.28 of 2022, arising out of ARB(P) No.86 of 2019. This Court, vide order dated 28.07.2022, allowed the ARBA No.26 of 2022 and set aside the part of the arbitral award to the extent it had allowed the counter claim filed by the Opposite Party on the sole ground that it was barred by limitation. So far as other Appeal i.e. ARBA 28 of 2022, which is arising out of ARB(P) No.86 of 2019 preferred under section 37 of the Act, 1996, is still pending adjudication before this Court.

It is further case of the Petitioner that, being aggrieved by the said order dated 28.07.2022 passed in ARBA No.26 of 2022, the Opposite Party preferred SLP (C) No.17438 of 2022, which was later numbered as Civil Appeal No.3058 of 2023, before the Supreme Court. The Supreme Court, vide order dated 24.04.2023, set aside the said order passed by this Court holding that counter claim filed by



the Opposite Party was not barred by limitation. Operative portion of the said order is extracted below for ready reference.

*“Applying the law laid down by this Court in the aforesaid two decisions to the facts of the case on hand and as observed hereinabove, communication dated 07.04.2017 which as such was reply to notice given by the respondent, the same can be said to raising the counter claim as well as for praying for referring the dispute to arbitration and 27.07.2014 was the final bill, **the High Court has committed a very serious error in holding that the counter claim was barred by limitation.***

*In view of the above and for the reasons stated hereinabove, the impugned judgment and order passed by the High Court is erroneous and unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. The Award passed by the learned Arbitral Tribunal, confirming the proceedings under Section 34 of the Act is hereby restored.”*

**(Emphasis supplied)**

It is further case of the Petitioner that neither this Court vide its order dated 28.07.2022 passed in ARBA No.26 of 2022 nor the Supreme Court vide its order dated 24.04.2023 passed in Civil Appeal No.3058 of 2023 decided anything on merit of the case and the issue raised by the Petitioner in ARBA No.26 of 2022, save and except the point as to whether the counter claim was time barred. Thereafter, the Petitioner filed CMAPL No.480 of 2023 in ARBA No.26 of 2022 before this Court, inter alia, seeking revival / restoration of the ARBA No.26 of 2022 for adjudication of all other grounds / issues raised in the said Appeal, save and except the limitation issue, which had been conclusively decided by the Supreme Court. However, this Court vide order dated 25.07.2023 disposed of the said Application, inter alia, holding that the Supreme Court did not make any



reservation of bifurcating the contention raised by the Petitioner in section 37 Appeal and had restored the arbitral award itself. The said order passed in CMAPL No.480 of 2023 is extracted below:

*“1. Mr. Mohapatra, learned senior advocate appears on behalf of applicant and submits, **his client’s appeal under section 37 in Arbitration and Conciliation Act, 1996 was disposed of on preliminary point regarding bar of limitation against the counter claim raised by respondent in the appeal.** His client was successful here but said respondent preferred appeal to the Supreme Court. Said Court by order dated 24th April, 2023 restored the award. In the circumstances, **the application is for restoration of the appeal in respect of other grounds taken therein apart from limitation and to tag the same with the other pending appeal of his client (ARBA no.28 of 2022) preferred against rejection of challenge to short award on his client’s case.**”*

*2. Mr. Rana, learned advocate appears on behalf of respondent in the reference. He has not been called upon to answer.*

*3. There is no requirement for respondent to answer because by order dated 24th April, 2023 the Supreme Court did not make any reservation of bifurcating contention raised by applicant in ARBA no.26 of 2022. In the circumstances, this Bench will not venture with the further with the appeal disposed on the order set aside by the Supreme Court, restoring the award.*

*4. The CMAPL is disposed of.”*

**(Emphasis supplied)**

Being aggrieved by the said order dated 25.07.2023 passed in CMAPL No.480 of 2023, the Petitioner challenged the same before the Supreme Court in SLP (C) No.20662 of 2023 and also filed Miscellaneous Application No.2028 of 2023 in Civil Appeal No.3058 of 2023, seeking clarification of the order dated 24.04.2023. However, so far as SLP (C) No.20662 of 2023, the same was dismissed as withdrawn recording the submission made by the Petitioner that the



Review Petition would be filed by it. Thereafter, the Miscellaneous Application No.2028 of 2023 in Civil Appeal No.3058 of 2023 was also dismissed without any clarification. The said order passed in M.A. No.2028 of 2023 is extracted below:

*“Though the letter has been circulated by the applicant for adjournment, we have heard this application seeking clarification/direction of the order dated 24.04.2023 passed in SLP(C) N. 17438/2022.*

*Having heard learned counsel for the parties and looking into the exposition of law by this Court in Delhi Administration v. Gurdip Singh Uban & Ors. [(2000) 7 SCC 296], as also the substance of this application, we do not find any reason to entertain this application, because it is nothing, in substance, but a clever move for review. Consequently, the Miscellaneous Application and I.A. No. 182704/2023 are dismissed.”*

Pursuant to the said order, the Petitioner filed Review Petition before the Supreme Court on 02.11.2023, vide Diary No.45932 of 2023 and the same is still pending for adjudication.

Since the Opposite Party filed Execution Petition No.367 of 2023 before the Senior Civil Judge, (Commercial Court), Bhubaneswar for execution of the arbitral Award, being noticed, the Petitioner filed an application under section 36(2) of the Act, 1996 in the said execution proceeding praying therein to stay the execution proceeding till the arbitral Award attains finality, on the ground that it has moved an application for review on 02.11.2023 before the Supreme Court vide Diary No.45932 of 2023 and the same is still pending adjudication.





Since, normally the Review Petitions are being heard in Chamber and not in open Court, the Petitioner (Judgment Debtor in the execution proceeding) is unable to ascertain the exact outcome of the Review Petition. But in the website of the Supreme Court, it is still showing as pending and if its Review Application is allowed, the entire execution proceeding would fail. Hence, a prayer was made to stay the execution proceeding. However, the Court below rejected the said Petition on the ground that on perusal of the case record and all orders passed by this Court as well as Supreme Court, the Petitioner (Judgment Debtor) has not obtained any stay order from any Court and under such circumstances, the Court is not inclined to allow the petition. Hence, this Writ Petition.

**3.** Being noticed, the Opposite Party has filed a Counter Affidavit reiterating the facts as detailed above. That apart, it has been stated in the Counter that the judgment relied upon by the Petitioner reported in (2005) 2 SCC 367 (**National Buildings Construction Corporation Ltd. vs. Lloyds Insulation India Ltd.**) is of the year 2005, which is prior to the amendment in the Arbitration & Conciliation Act, 1996 and was made by Act 3 of 2016 for section 36 of the Act (w.e.f. 23.10.2015). The award was passed in the year, 2019 in the arbitration proceeding. Therefore, on the face of it, the



judgment relied upon by the Petitioner, which is of the year 2005, is not applicable to the facts of the present case.

It has further been stated in the Counter that the Petitioner sought for a clarification in the matter before the Supreme Court and also moved an application before this Court, which got dismissed. Therefore, the said issue has come to an end and the Petitioner is liable to pay the entire amount awarded to the Opposite Party in terms of order dated 02.09.2019, which has been finally upheld by the Supreme Court on 24.04.2023. It has also been stated in the Counter that the plea of the Petitioner as to pendency of the Review Petition is of no use and the same has been filed to delay the execution proceeding, as the Petitioner has submitted that the same is pending since 02.11.2023. It has further been stated in the Counter that this Court, after order of the Supreme Court, passed an order on 25.07.2023, wherein it has been said that the Supreme Court did not make any reservation of bifurcating contention raised by the applicant in ARBA No.26 of 2022 and did not pass any order stating that the Supreme Court has restored the Award. Since the Supreme Court has restored the entire Award, which includes the issue of claim and the counter claim without any bifurcation of the two, the Petitioner is now trying to agitate the same issue again and again, which has been finally set to rest by the Supreme Court and



such attempt is with a malafide intention not to pay the legitimate outstanding dues of the Opposite Party, which has been awarded by the Arbitral Tribunal vide Award dated 02.09.2019 and the same has been upheld by the Supreme Court.

4. In response to the Counter filed by the Opposite Party, the Petitioner has filed a Rejoinder Affidavit indicating therein that the Petitioner, in this Writ Petition, has raised pertinent questions of law i.e.

*“(i) Whether the executing Court should exercise its discretion while deciding the Application under section 36(2) of the Arbitration and Conciliation Act, 1996, and*

*(ii) Whether the said discretion is mandatory.”*

Apart from denying the assertions made in various paragraphs of the Counter, the contentions and allegations made in Paragraphs from 1 to 12 of the Counter have been denied to be false and frivolous stating that the Petitioner filed an application seeking clarification from the Supreme Court with regard to the order dated 24.04.2023 passed by it. But the said application was dismissed with an observation that the Petitioner wants to review the order dated 24.04.2023. Consequent thereto, the Petitioner filed a Review Petition before the Supreme Court, being Diary No.45932 of 2023, which is still pending for adjudication. It has also been stated in the Rejoinder that the claim and counter claim are separate and distinct proceedings though permitted to file in a single proceeding. Even



though there may be a single judgment on the suit / claim and or counter claim, there were two separate Appeals and, out of the said two Appeals, ARBA No.28 of 2022 is pending before this Court.

Referring to the order dated 25.09.2023 passed in SLP(C) No.20662 of 2023 filed by the Petitioner, it has been stated in the Rejoinder that the issues of the parties are still open before the Supreme Court and it is wrong on the part of the Opposite Party to say anything contrary and otherwise. It has further been reiterated that since the order dated 24.04.2023 passed by the Supreme Court is under challenge in the Review Petition, the allegation of choosing a new device to initiate further round of litigation is incorrect. Rather, it is a continuation of the same litigation which is still open. Hence, it has been contended in the Rejoinder that since the executing Court failed to exercise its discretion under section 36(2) of the Act, 1996, the Petitioner is justified to challenge the legality of the said order.

**5.** Mr. Panigrahy, learned Counsel for the Petitioner, reiterating the stand taken in the Writ Petition so also Rejoinder, submitted that the impugned order dated 23.12.2023 passed by the executing Court in Execution Petition No.367 of 2023 is arbitrary, capricious, unreasoned and has been passed ignoring the settled principles of law. Mr. Panigrahy further submitted that when one of the Appeals i.e. ARBA No.28 of 2022, preferred under section 37 of



the Act, 1996 against the order passed under section 34 of the Act, 1996, challenging part of the arbitral Award, is pending before this Court so also the Review Petition is also pending before the Supreme Court, the said arbitral Award cannot be and should not be executed during pendency of the Appeal under section 37 of the Act, 1996, so also Review Petition before the Supreme Court.

Mr. Panigrahy further submitted that the Court below failed to appreciate that the arbitral Award, based on which the said execution proceeding has been initiated, is yet to attain finality and though the Court below is empowered under section 36(2) of the Act, 1996 to exercise its discretionary power to stay the execution proceeding by imposing any condition, as it deems fit and proper, it failed to exercise its power delegated under Section 36(2) of the Act, 1996, deserving interference by this Court with the said impugned order dated 23.12.2023, which resulted in travesty of justice. Unless it is interfered with, the ARBA No.28 of 2022 so also Review Petition pending before the Supreme Court shall be completely redundant, nugatory and otiose and the Court below erred in law to reject its Petition under section 36(2) of the Act, 1996 on the ground that the Petitioner (Judgment Debtor) has not obtained any stay order from any Court.



To substantiate his submission, Mr. Panigrahy relied upon judgments reported in AIRONLINE 2021 CHH 575 (**Premal Khande vs. Ashok Leyland Finance**) and AIRONLINE 2022 SC 1277 (**Nepa Limited through its Senior Manager (Legal) vs. Manoj Kumar Agrawal**) and (2005) 2 SCC 367 (**National Building Construction Corporation Ltd. Vs. Lpyds Insulation India Ltd.**)

6. So far as the **National Building Corporation Ltd.** (supra), cited by the learned Counsel for the Petitioner, facts of the said case is slightly different from the present case, as the Counter Claimant/Respondent challenged part of the composite Award and its application under Section 34 of the Act, 1996 was pending, when the execution case was initiated by the Respondent. However, paras-2, 5 & 6 of the said judgment, being relevant, are extracted below:

*“2. The parties had entered into an agreement under which the respondent was to supply certain material and make construction. Disputes arose between them. The disputes were referred to arbitration. **Claims and counterclaims were made by the parties before the arbitrator. Ultimately, the arbitrator, by an award dated 9-1-2001, held that an amount of Rs 13,97,072.24 was due to the respondent and an amount of Rs 9,85,316 was due to the appellant. In the circumstances, the arbitrator held that ultimately the respondent was entitled to recover a sum of Rs 4,11,756 being the amount of Rs 13,97,072.24 less Rs 9,85,316 from the appellant.** Accordingly, the award was passed directing the appellant to pay the respondent the said sum together with interest at 12% from the date of the award till payment.*

*5. The learned counsel appearing on behalf of the respondent has submitted that in fact there were two separate awards : one which allowed the respondent's claim up to Rs 13,97,072.24 and the second which allowed the appellant's*



counterclaim for Rs 9,85,316. **It is contended that since the respondent alone had challenged the award in favour of the appellant, it was open to the respondent to execute that portion of the award which was in the respondent's favour and against which no application under Section 34 was pending.**

6. **We are of the view that the award clearly states that after an adjustment of accounts, the only amount payable by the appellant to the respondent was Rs 4,11,756.** How the arbitrator arrived at this figure is not for us to see. For the purposes of Section 36 of the Act, the court cannot be called upon to go behind the awarded amount and deal with the processes by which the amount was arrived at. **There is on record only one award for the amount of Rs 4,11,756. Even though the respondent claims that the application under Section 34 was filed in respect of part of the award, it is in fact only a process by which the arbitrator has arrived at the awarded amount. This would mean that the award as a whole cannot be enforced under Section 36 of the Act.** As held by this Court in *National Aluminium Co. Ltd.* [(2004) 1 SCC 540] : (SCC p. 546, para 10)

*“... the mandatory language of Section 34 (Section 36) of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible.”*

**(Emphasis supplied)**

7. In response to the submission made by Mr. Panigrahy, Mr. Dwibedy, learned Counsel for the Opposite Party submitted that even though the Petitioner sought for clarification before the Supreme Court in Civil Appeal No.3058 of 2023 by filing M.A. No.2028 of 2023 so also moved application before this Court by filing CMAPL for restoration of ARBA No.26 of 2022, the said applications were dismissed. Therefore, the said issue has come to an end and the



Petitioner is thus, liable to pay the entire impugned award vide order dated 02.09.2019, which has been finally upheld by the Supreme Court vide its order dated 24.04.2023.

Mr. Dwibedy further submitted that pursuant to order passed by the Supreme Court, this Court also passed an order on 25.07.2023 in the disposed of Appeal i.e. ARBA No.26 of 2022, holding that the Supreme Court did not make any reservation of bifurcating contentions raised by Applicant in ARBA No.26 of 2022. Mr. Dwibedy further submitted that since the Supreme Court has restored the entire award, which includes the issue of the claim and the counter claim without any bifurcation, the said issue has set to rest and the Petitioner is avoiding to act in terms of the arbitral Award on the plea of pendency of ARBA No.28 of 2022 so also application for review before the Supreme Court and thereby, there being no infirmity in the impugned order passed by the executing Court, the Writ Petition being devoid of any merit, deserves to be dismissed in limine with exemplary cost.

**8.** In view of the pleadings made so also argument advanced by the learned Counsel for the Parties, the issues, which emerge to be answered by this Court are:





- (i) Whether the executing Court has failed to exercise its power entrusted upon it under Section 36(2) of the Act, 1996 ?
- (ii) Whether the Court below was justified to reject the Application filed by the Petitioner under section 36(2) of the Act, 1996?
- (iii) Whether the impugned order passed by the Commercial Court in Execution Petition No.367 of 2023 needs to be set aside and further proceeding in the said case , pending before the Commercial Court, Bhubaneswar, needs to be stayed till the Arbitral Award attains finality?

9. Before answering the issues emerged, as detailed above, it would be apt to deal with and reproduce below sections 35, 36 and 37 of the Act, 1996, so also relevant provisions of the Code of Civil Procedure, 1908 (5 of 1908)

**9.1. "The Arbitration & Conciliation Act, 1996**

***Finality and enforcement of arbitral awards***

*35. Finality of arbitral awards. - Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.*

*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 of the award.

### **APPEALS**

37. Appealable orders.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.



(2) Appeal shall also lie to a court from an order of the arbitral tribunal –

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

## 9.2.

### **“Code of Civil Procedure, 1908**

**107. Powers of Appellate Court.**—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power- (a) to determine a case finally; (b) to remand a case; (c) to frame issues and refer them for trial; (d) to take additional evidence or to require such evidence to be taken. (2) Subject as aforesaid, **the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.**

### **Order 21, Rule 26**

26. When Court may stay execution.—(1) The Court to which a decree has been sent for execution shall, **upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution,** or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Power to require security from, or impose conditions upon, judgment-debtor.—Before making



an order to stay execution, or for the restitution of property or the discharge of the judgment debtor, [the Court shall require] such security from, or impose such condition upon, the judgment-debtor as it thinks fit.

**Order 41, Rule 1(3), 4 & 5**

**1. Form of appeal What to accompany memorandum-**

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) *Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.]*

**4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.**—Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, **any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.**

**5. Stay by Appellate Court.**—(I) 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.**

*[Explanation.—An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.]*



**(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) 1[Subject to the provision 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.]”

**(Emphasis supplied)**

**10.** As is evident from sub-section (1) of section 36 of the Act, 1996, where the time for making application to set aside the arbitral award under section 34 has expired, subject to provisions of sub-section 2, such award shall be enforced in accordance with the provisions of Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court.



It is also amply clear from sub-section 2, read with sub-section 3 of section 36 of the Act, 1996 that where an application to set aside the arbitral Award has been filed in the Court under section 34 of the Act, 1996, the filing of such 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 and upon filing of such 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 under sub-section (3) of section 36 the Act, 1996 also provides that, while considering the application for grant of stay in the case of an arbitral Award for payment of money, the Court 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 (5 of 1908).

The 2<sup>nd</sup> Proviso under sub-section (3) of section 36 of the Act, 1996 provides that where the Court is satisfied that a prima facie case is made out to the effect that arbitration agreement or contract, which is the basis of the award or 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.

In **Pam Developments Private Limited Vs. State of West Bengal**, reported in (2019) 8 SCC 112, the Supreme Court held as follows:

*“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”.*

*20. In our view, in the present context, the phrase used is “having regard to” the provisions of CPC and not “in accordance with” the provisions of CPC. In the latter case, it would have been mandatory, **but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. the Arbitration Act) itself.** It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act, **the provisions of CPC will apply only insofar***



***as the same are not inconsistent with the spirit and provisions of the Arbitration Act.”***

***(Emphasis supplied)***

In **Board of Control for Cricket in India Vs. Kochi Cricket Private Limited & others**, reported in (2018) 6 SCC 287, the Supreme Court held as follows:

*“60. This brings us to the manner of enforcement of a decree under CPC. A decree is enforced under CPC only through the execution process (see Order 21 of the Code of Civil Procedure). **Also, Section 36(3), as amended, refers to the provisions of the Code of Civil Procedure for grant of stay of a money decree. This, in turn, has reference to Order 41 Rule 5 of the Code of Civil Procedure, which appears under the Chapter heading, “Stay of Proceedings and of Execution”. This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order 21 and Order 41 Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards. This being the case, we need to refer to some judgments in order to determine whether execution proceedings and proceedings akin thereto give rise to vested rights, and whether they are substantive in nature.”***

***(Emphasis supplied)***

**11.** The main ground to assail the order dated 23.12.2023 passed by the Commercial Court in Execution Petition No.367 of 2023 is that it failed to exercise power conferred on it under section 36(2) of the Act, 1996 and it could have imposed any condition in terms of section 36(3) of the Act, 1996 to stay the execution proceeding. Hence, before dealing with the issues as detailed above, from the admitted facts on record and settled position of law, I would





like to express my views regarding applicability of section 36(2) of the Act, 1996 so also C.P.C. to Execution Proceeding initiated under section 36(1) of the Act, 1996 and power of the Executing as well as Appellate Court to stay the Execution Proceeding during pendency of an Appeal preferred under section 37 of the Act, 1996.

- i) The phrase used in the proviso under sub-section-3 of Section 36 of the Act, 1996 “**have due regard to the provisions of grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)**” only mean that the provisions of C.P.C. are to be taken into consideration and not that they are mandatory.

*(Emphasis supplied)*

- ii) The provisions of the Act, 1996 are essentially to be first applied, whereas the provisions of C.P.C. for execution are to be followed as a guidance.
- iii) An application for execution of arbitral award in terms of section 36(1) of the Act, 1996 can only be filed after expiry of the time for making an application to set aside the arbitral Award under section 34 of the Act, 1996.



- iv) Section 36(2) of the Act, 1996 is not applicable to execution proceeding initiated under Section 36(1) of the Act, 1996 and such application for stay operation of arbitral Award can only be filed before the Court during pendency of the Application filed under Section 34 of the Act, 1996.
- v) In terms of sub-section (3) of section 36 of the Act, 1996, 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.
- vi) There is no such specific provision under the Act, 1996 to file application before the executing Court to stay the operation of execution proceeding. Hence, provisions under the C.P.C. are to be followed for the said purpose.
- vii) The Judgment Debtor has to move an application under Order 21 Rule 26(1) of C.P.C. for staying the execution of decree. On moving so, the



executing Court may stay the execution for a reasonable time to enable the Judgment Debtor to apply to the Court by which the decree was passed or to the Court having appellate jurisdiction.

- viii) As prescribed under sub-rule (2) of Rule 5 under Order 41 of CPC, before expiration of the time allowed for appeal against the order passed on an application under Section 34 of the Act, 1996, if an execution proceeding is initiated, the Judgment Debtor may move before the concerned Court, which passed the decree, for stay of the execution proceeding.
- ix) If the Judgment Debtor prefers an Appeal under Section 37 of the Act, 1995 against the order passed by the Commercial Court in a Section 34 proceeding, he/it may move an application under Order 41 Rule 5(1) before the Appellate Court for stay of execution of decree, as there is no such specific provision under the Act, 1996, alike



section 36(2), for stay of the impugned order passed by the Commercial Court.

x) In view of the provisions enshrined under sub-rule (3) of Rule 5 under Order 41 of CPC , no order for stay of execution of an appealable decree shall be made by the Court under sub-rule (1) or sub-rule (2) unless 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.

**12.** As is revealed from the facts detailed above, admittedly the Award dated 02.09.2019 passed by the Arbitral Tribunal is a composite Award and the Arbitral Tribunal ordered to pay Rs.5,21,60,618/- to the present Opposite Party-Counter Claimant after adjusting Rs.1,00,00,000/- allowed in favour of the Petitioner-



Claimant. The coordinate Bench allowed ARBA No.26 of 2022 preferred by the present Petitioner by setting aside the part of the said composite Award with regard to allowing the Counter Claim of the present Opposite Party to the tune of Rs.6,21,60,618/- on the ground of limitation only without entering into the merits of the said Appeal. ARBA No.28 of 2022, vide which part of the said composite Award is under challenge, is still pending for adjudication. But the Judgment passed by the coordinate Bench in ARBA No.26 of 2022 being challenged, the Supreme Court, vide order dated 24.04.2023 passed in S.L.P(C) No.17438 of 2022, which was subsequently numbered as Civil Appeal No.3058 of 2023, set aside the said order passed by the coordinate Bench with an observation that counter claim by the present Opposite Party was not barred by limitation. On being so ordered, the Petitioner filed application for restoration of ARBA No.26 of 2022 instead of filing an application for review of the said order dated 28.07.2022, which was registered as CMAPL No.480 of 2023. However, the coordinate Bench disposed of CMAPL No.480 of 2023 on the ground that the Supreme Court did not make any reservation of bifurcating the contention raised by the Appellant in ARBA No.26 of 2022.

**13.** In view of the Judgment of the Supreme Court in **National Building Corporation Ltd.** (supra) and admitted facts on record, this



Court is of the view that the Award impugned in ARBA No.28 of 2022 and ARBA No.26 of 2022 is a composite Award. Since ARBA No.28 of 2022 is still pending before this Court and the issue involved in the said Appeal is regarding legality of the part of the said composite Award, vide which Petitioner's claims of Rs.3,76,35,234/- and Rs.90,00,000/- were reduced to Rs.1,00,00,000/-, the Petitioner should have moved an application for review of the order/judgment passed in ARABA No.26 of 2022 instead of filing CMAPL No.480 of 2023 for restoration of the said Appeal, as the said Appeal was never dismissed for non-prosecution. Rather, the said Appeal preferred by the present Petitioner was allowed solely on the ground that the counter claim made by the present Opposite Party before the Arbitral Tribunal is barred by limitation and the coordinate Bench admittedly never adjudicated ARBA No.26 of 2022 on merit with regard to legality of the Award allowing the counter claim by the Arbitral Tribunal in favour of the present Opposite Party.

**14.** As it revealed from the order dated 24.04.2023 passed by the Supreme Court in S.L.P(C) No.17438 of 2022, while passing the said order, it was not brought to the notice of the Supreme Court regarding pendency of ARBA No.28 of 2022 before this Court.

**15.** Admittedly, the Petitioner has taken a specific stand in the present Writ Petition so also before the Court below as to pendency of



ARBA No.28 of 2022 before this Court, which is arising out of same award, challenging reduction of its claim to the tune of Rs1,00,00,000/- so also Review Petition before the Supreme Court, which was presented on 02.11.2023 vide Diary No.45932 of 2023, which is still pending and the said facts have not been disputed by the Opposite Party. Hence, this Court is of the view that the Petitioner, instead of filing application under section 36(2) of the Act, 1996 in Execution Petition No.367 of 2023, could have moved an application for stay of further proceeding in Execution Petition No.367 of 2023 under Order 41, Rule 5(1) of C.P.C. in ARBA No.28 of 2022, vide which part of the composite Award is under challenge and the same is now pending before this Court for final adjudication.

**16.** In view of provisions enshrined under Order 21 Rule-26 C.P.C., this Court is of further view that the scope to stay the execution proceeding by the executing Court being limited, which is only an interim arrangement enabling the party to obtain stay order from the appropriate Court, including the Appellate Court, as ARBA No.28 of 2022 is now pending before this Court, the Commercial Court could not have stayed the Execution Proceeding exercising its power under Order 21, Rule 26 of C.P.C. or under section 36(2) of the Act, 1996, which is not applicable to execution proceeding, as held



above. All the issues emerged, as detailed above, are answered accordingly.

**17.** There being no infirmity in the impugned order dated 23.12.2023 passed by the Senior Civil Judge (Commercial Court), Bhubaneswar in E.P. No.367 of 2023, the Writ Petition stands dismissed.

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**(S.K. MISHRA)**  
**JUDGE**

Orissa High Court, Cuttack  
Dated, the 16<sup>th</sup> July, 2024/Prasant