

Supreme Court holds government cannot seek preference while seeking stay on enforcement

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Introduction

In *Pam Developments Private Ltd v State of West Bengal* the Supreme Court considered whether an unconditional stay can be granted under Section 36 of the Arbitration and Conciliation Act 1996 when the applicant is the government. The court based its decision on Section 36 of the act and Order 27, Rule 8A and Order 41, Rules 5 and 6 of the Code of Civil Procedure 1908.

The court held that while the Code of Civil Procedure may provide for differential treatment of the government in certain cases, because the Arbitration and Conciliation Act is a special act which mandates that parties to an arbitration are to be treated equally, no special treatment can be given to the government when considering an application for stay of award.

Facts

Disputes arose between the parties from an agreement dated 2 April 2001 for works pertaining to the repair of different stretches of the Hooghly Highway Division in Hooghly District, West Bengal. The appellant raised various claims before the executive engineer of public works and, as these claims remained unpaid, the disputes were referred to arbitration.

The arbitrator appointed by the Calcutta High Court passed an award dated 21 January 2010, allowing some of the appellant's claims and held that the appellant was entitled to Rs2,87,11,553 with interest of 18% per year.

The respondent challenged the award under Section 34 of the act – which was pending consideration at the time of the case. During the intervening period, the act was amended, thereby making it necessary for the respondent to file a stay application under Section 36. Thus, the respondent sought time to file the stay application while the hearing of the appellant's execution application was ongoing.

The respondent's stay application was dismissed for default on 27 September 2018 and the executing court passed an order attaching sum of Rs27.5 million to the respondent's credit. Instead of filing an application seeking to recall the order, the respondent filed a new stay application against the court order in which the impugned order dated 13 December 2018 of unconditional stay was passed when the Calcutta High Court considered Order 27, Rule 8A of the code.

Appellant's arguments

The appellant argued that:

- Order 27, Rule 8A of the code would not be applicable to a proceeding under Section 36(2) of the act. Further, even if Rule 8A was considered, the courts should not pass an order of unconditional stay as they are still at liberty to pass orders directing the deposit of the awarded amount;
- the use of the phrase 'subject to' in Section 36(3) of the act would mean that the grant of a stay must be conditional. However, the proviso to Section 36 uses the phrase 'having due regard' to the Code of Civil Procedure pertaining to grant of stay in money decrees and not the phrase 'in accordance with' the code. This indicates that the code should be considered as a guiding principle and, as such, would not be mandatory;
- the exception carved out for government entities under Order 27, Rule 8A cannot be transposed to the act as it would result in limiting the effect of Section 36. Instead, the courts should be guided solely by Order 41, Rule 5 when deciding applications filed under Section 36;
- Section 18 expressly states that all parties will be treated equally and, as such, the government ought to be treated the same as other parties; and
- even if Order 27, Rule 8A was to be considered, the courts ought not to pass an order of unconditional stay. Rule 8A – while exempting the government from furnishing security – should not come in the way of the court exercising its discretion to direct the government to deposit all or part of the awarded amount.

Respondent's arguments

The respondent argued that:

- the proceedings for enforcing the award fall under Chapter 8 of the act, wherein Section 36(1) states that enforcement must be in accordance with the Code of Civil Procedure (5/1908) and subject to Section 36(2). Therefore, the courts have complete discretion, although judicially guided;
- the use of the word 'shall' in the proviso to Section 36(3) would mean that while considering an application for stay, the courts would have to mandatorily apply the provisions of the Code of Civil Procedure (ie, Order 27, Rule 8A must be made applicable);
- while Order 41, Rule 5(5) of the code requires applicants to make deposits or furnish security – failing which no stay would be granted – Order 27, Rule 8A carves out an exception for the government. Hence, when security itself is not to be deposited by the government under Order 27, Rule 8A, there is no question of the government being urged to make any deposit of the awarded amount while seeking grant of stay.

Decision

The court held that if the respondent's submissions were to be accepted, mere filing of an objection to the award under Section 34 would render the award unenforceable or, in other words, when the judgment-debtor is the government, the award would become unenforceable immediately on the filing of an application under Section 34 as the award would be stayed merely as a matter of course. This could never have been the legislature's intent.

While the Code of Civil Procedure is a guiding factor, the Arbitration and Conciliation Act – as a special act – must be applied first and the code would be applicable only to the extent that it is consistent with the act.

The court further held that the bar envisaged under Order 27, Rule 8A of the code is only with regard to security being provided as mentioned in Rules 5 and 6 of Order 41 of the code. However, the same cannot be stretched to be interpreted that a decretal amount cannot be asked to be deposited in appeal.

Referring to the legislative history of the Code of Civil Procedure, the court observed that Order 27, Rule 8A was introduced in 1937 – during the British Raj – and therefore would not be applicable in today's times with a democratic government in place.

Thus, the court held that the parties must be treated equally and no preferential treatment can be given to the government when dealing with an application for stay of money decrees in proceedings under Section 34. The reference to the Code of Civil Procedure is thus intended only to guide the court and must be consistent with the act. While the code does provide preferential treatment to the government in certain cases, this would not be the case while dealing with matters under the act.

Comment

The court took the opportunity to once again take a pro-arbitration stance by appreciating the legislative intent behind carving out exceptions to state entities in the Code of Civil Procedure, while keeping the act in harmony with the principles guiding enforcement of an award.

The court rightly held that the safeguards which were incorporated for the Crown by Order 27, Rule 8A are now inapplicable and outdated, especially as the purpose and intent of alternate dispute resolution is to treat parties equally.

If the court had read the Code of Civil Procedure with the intent of giving exceptional treatment to state entities and governments, this would have been seen as taking a step backwards in the progress of alternate dispute mechanisms in India.

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