

A PAM DEVELOPMENTS PRIVATE LTD.

v.

STATE OF WEST BENGAL
(Civil Appeal No.5432 of 2019)

B JULY 12, 2019

[R. F. NARIMAN AND VINEET SARAN, JJ.]

Arbitration and Conciliation Act, 1996 – Code of Civil Procedure, 1908 – Effect of s. 36 of the Arbitration Act, vis-a-vis the provisions of Or. XXVII, r. 8A of CPC – Respondent-State invited tender relating to the work of ‘Special Repair Programme 2000-2001 for different stretches of National Highway-II’ – The bid of appellant was accepted and an agreement was registered – The work under the agreement was completed – The appellant raised its claims and dues before the State – The claims of the appellant were not paid – Appellant filed an application u/s. 11(6) of the Act, 1996 – Arbitrator allowed claims of the appellant – Aggrieved, the Respondent-State filed application u/s.34 of the Act, 1996 before the High Court – Thereafter, appellant filed an execution application before the High Court – Executing Court by order dated 3.10.2018 attached the sum of Rs. 2.75 crores and clarified that in the event there was no stay of operation of the award, it was open to the appellant to pray for release of the said amount – In the meantime, the respondent filed stay application u/s. 36(2) of the Act, 1996 and order of the unconditional stay was passed relying on the provisions of Or. XXVII, r. 8A of CPC – Relying on the order of the unconditional stay, the Executing Court dismissed the execution petition – On appeal, held: The Arbitration Act is a special Act which provides for quick resolution of disputes between the parties and s.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 u/s. 34 of the Arbitration Act – The reference to CPC

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in s.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 – Insofar Or. XXVII, r.8A of CPC is concerned, r.8A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof – Thus, order of the High Court granting unconditional stay of the arbitration award not sustainable in the eyes of the law – Accordingly, order dated 03.10.2018 of the Executing Court restored and as already directed, it is open for the appellant-award holder to pray for release of the attached amount.

Code of Civil Procedure, 1908 – Or.XXVII, r.8A – Application of – Held: The archaic r. 8A of Order XXVII, CPC has no application or reference in the present times, even if it is assumed that the provisions of Or.XXVII, r.8A of CPC are to be applied, the same would only exempt the Government from furnishing security, whereas u/Or. XLI, r. 5 of CPC, the Court has the power to direct for full or part deposit and/or to furnish security of the decretal amount – r.8A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof.

Allowing the appeals, the Court

HELD: 1. 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 the case of *Shri Sitaram Sugar Company Limited. v.*

A *Union of India (1990) 3 SCC 223* has held that “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.”. [Para 17] [266-H; 267-A-C]

B 2. In view of this Court, 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
C cannot be construed in such a manner that it takes away the power
conferred in the main statute (i.e. 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
D the Arbitration Act are essentially to be first applied. Since, the
Arbitration Act is a self-contained Act, the provisions of the CPC
will apply only insofar as the same are not inconsistent with the
spirit and provisions of the Arbitration Act. [Para 18] [267-D-F]

3. Arbitration proceedings are essentially alternate dispute
E 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
F 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
G 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. The reference to CPC in Section 36 of the Arbitration Act is
only to guide the Court as to what conditions can be imposed,
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and the same have to be consistent with the provisions of the Arbitration Act. [Para 24] [270-G-H; 271-A-C] A

4. It may be true that the 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 of CPC provides for a notice of two months to be given before any suit is instituted against the Government. Further, it is 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. [Para 25] [271-C-E] B C D

5. 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 view of this Court, makes 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. [Para 26] [271-F-G] E F

6. Although this Court is of the firm view that the archaic Rule 8A of Order XXVII CPC has no application or reference in the present times, this Court may only add that even if it is assumed that the provisions of Order XXVII Rule 8A of CPC are to be applied, the same would only exempt the Government from furnishing security, whereas under Order XLI Rule 5 of CPC, the Court has the power to direct for full or part deposit and/or to furnish security of the decretal amount. Rule 8A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof. [Para 27] [271-G-H; 272-A] G H

A *Superintendent & Legal Remembrancer, State of West Bengal v. Corporation of Calcutta* (1967) 2 SCC 170 – followed.

B *Board of Control for Cricket in India v. Kochi Cricket Private Limited* (2018) 6 SCC 287 : [2018] 2 SCR 829; *Shri Sitaram Sugar Company Limited. v. Union of India* (1990) 3 SCC 223 : [1990] 1 SCR 909 – relied on.

Case Law Reference

	[2018] 2 SCR 829	relied on	Para 3
C	[1990] 1 SCR 909	relied on	Para 17
	(1967) 2 SCC 170	followed	Para 22

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5432 of 2019

From the Judgment and Order dated 13.12.2018 of the High Court at Calcutta in G.A. No. 2680 of 2018 in A.P. No. 212 of 2010

With

E Civil Appeal No. 5433 of 2019.

Saurav Agarwal, Priyanka Saha, Sarad Kumar Singhania, Ms. Rashmi Singhania, Rajat Kapoor, Anshuman Chowdhury, Ms. G. Goyal, Subhasish Bhowmick, Advs. for the Appellant.

F Anand Grover, Sr. Adv., Ms. Chitra Lekha Das, Suhaan Mukerji, Ms. Astha Sharma, Amit Verma, Prastut Dalvi, Ms. Dimple Nagpal (for PLR Chambers & Co.), Advs. for the Respondent.

The Judgment of the Court was delivered by

VINEET SARAN, J. 1. Leave granted.

G 2. In response to a notice inviting tender issued by the respondent relating to the work of “*Special Repair Programme 2000-2001 for different stretches of National High Way-II from 622 Kmp to 625 Kmp, 627 Kmp to 628 Kmp and 630 Kmp to 631 Kmp (vide Job No.CRF/W.B./70/2000) under the Hooghly High Way Division No.II in the District of Hooghly (Package No. II)*”, the appellant, along with

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others, had applied. The bid of the appellant was accepted on 26th March 2001, for which an agreement was registered on 2nd April, 2001. After several extensions were granted by the respondent for the delay which, according to the appellant, was entirely attributable to the respondent, the work under the agreement was completed by the appellant on 28.02.2002. Then, on 26th May 2003, the appellant raised its claims and dues before the Executive Engineer of Public Works (Roads) Department, Government of West Bengal. The claims of the appellant having not been paid, an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short ‘the Arbitration Act’) was filed by the appellant. By an order dated 14th August 2003, the Calcutta High Court was pleased to appoint Retired Justice Sujit Kumar Sinha as the Arbitrator to decide the disputes. By his award dated 21st January, 2010, the Arbitrator allowed some claims of the appellant and held the appellant to be entitled to a sum of Rs.2,87,11,553/- plus interest at the rate of 18% per annum on a sum of Rs.1,34,06,965/- from the date of the award till the date of the payment. Challenging the award passed by the Arbitrator, the respondent State of West Bengal filed an application under Section 34 of the Arbitration Act before the Calcutta High Court. The appellant filed its affidavit in opposition of the aforesaid, to which reply had also been filed by the respondent. The matter is still pending consideration before the Calcutta High Court.

3. Section 36 of the Arbitration Act has been amended by Act number 3 of 2016 with retrospective effect from 23.10.2015. In view of the pre-amended provision of Section 36 of the Arbitration Act, the respondent had not filed injunction application in the proceedings under Section 34 of the Arbitration Act. However, in view of the pronouncement of the judgment by this Court in the case of *Board of Control for Cricket in India vs Kochi Cricket Private Limited* (2018) 6 SCC 287, wherein it was held that the amended provisions of Section 36 of the Arbitration Act would also apply to the pending proceedings under Section 34 of the Arbitration Act, the appellant filed an execution application before the Calcutta High Court (registered as E. C. No.297 of 2018). The respondent then sought time to file an application for staying the award.

4. In the executing proceedings, on 18.09.2018, the Executing Court adjourned the matter after recording that “*in the event the operation of the award is not stayed by the adjourned date, the*

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A *petitioner shall be entitled to pray for attachment of the said amount in execution of the said award*". In the meantime, the respondent filed stay application under the amended Section 36(2) of the Arbitration Act in the pending proceedings under Section 34 of the Arbitration Act before the Calcutta High Court. On 27.09.2018, the stay application of the respondent was dismissed in default. Consequently, on 03.10.2018, B which was the adjourned date fixed by the Executing Court in E.C. No.297 of 2018, the Executing Court passed an order attaching the sum of Rs. 2.75 Crores lying to the credit of the respondent-State of West Bengal with the Reserve Bank of India. It was further clarified that in the event there was no stay of operation of the award by the adjourned C date (04.12.2018), it would be open to the appellant (award holder) to pray for release of the said amount. Relying on an order dated 05.09.2018 of a coordinate bench of the High Court wherein an unconditional stay of award had been granted to the State Government and the SLP against such order had been dismissed in limine, the Executing Court dismissed the execution petition filed by the appellant. D

5. Without filing the application for recall of the order dated 27.09.2018, whereby the stay application of the respondent had been dismissed in default, the respondent filed afresh application for stay of the award, in which the impugned order dated 13.12.2018 of unconditional stay was passed after relying on the provisions of Order XXVII Rule 8A, Code of Civil Procedure (for short 'CPC'). Challenging the said order, the present Appeal has been filed. E

6. The submission of Shri Saurav Agarwal, learned counsel for the appellant is two-fold. Firstly, that the provision of Order XXVII Rule 8A CPC would not be applicable to the present case, and as such the Court ought not to have considered the same while deciding the application for stay of the award under Section 36 of the Arbitration Act. Secondly, it has been submitted that even if the provision of Order XXVII Rule 8A are to be taken into account, then too the Courts should not pass an order of unconditional stay of award and could still direct deposit of the awarded amount. F G

7. The contention of the learned counsel for the appellant is that as per the amended Section 36 of the Arbitration Act, filing of an application under Section 34 of the Arbitration Act shall not by itself render the award unenforceable unless the stay of the operation of the H

award is granted by the Court in accordance of the provisions of sub-Section(3)of Section 36.It is submitted that under sub-Section (3) of Section 36, it is provided that “*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.*” According to the learned counsel for the appellant, the proviso to the saidSection merely provides that the application for grant of stay is to be considered after “*having due regard to the provisions for grant of stay of money decree under the provisions of CPC*”. It is thus been submitted by the learned counsel for the appellant that under sub-Section (3) of Section 36, the CPC would be applicable “*subject to*” the provisions of sub-Section (2) of Section 36. According to the learned counsel, the phrase “*subject to*” the conditions, would mean that it is obligatory for the Court to impose such conditions at it may deem fit, if it decides to grant a stay of the award, meaning thereby the grant of stay is to be conditional.It is further contended that the proviso to the saidSection merely states that the Court shall “*have due regard*” to the provisions of CPC, which would mean that the Court will take the said provisions of the CPC into consideration as a guiding principle and the same would not be mandatory. Learned counsel for the appellant has contended that the Arbitration Act is a complete code in itself and the stay application has to be considered as per the provisions of Section 36 of the Arbitration Act, having due regard to the provisions of CPC, which would not be same as “*in accordance with*” the provisions of CPC.It is vehemently urged that the provisions of Order XXVII Rule 8A CPC, which is an exception in the CPC, should not be brought into the Arbitration Act as it would then result in limiting the effect of Section 36 of the Arbitration Act itself. According to the learned counsel, the provisions of Order XLI Rule 5 CPC alone have to be considered by the Court as generalguidelines while deciding the application for stay filed under Section 36 of the Arbitration Act.

8. Learned counsel for the appellant submitted that the Arbitration Act does not provide for any special treatment to the Government while considering the application for stay under Section 36, and the provision of Order XXVII Rule 8A CPC would not be attracted while deciding an application for stay filed under Section 36 of the Arbitration Act. According to the learned counsel, under CPC the Government is treated differently, which is not the case in the Arbitration Act. As an illustration, it has been stated that two months noticeunder Section 80 CPC is provided

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A for before any suit is filed against the Government, which is not so in the case of arbitration proceedings. He has also contended that Section 18 of the Arbitration Act expressly provides for equal treatment of all parties involved, which would include the Government as a party.

B 9. In the alternative, learned counsel for the appellant has submitted that even if the provisions of Order XXVII Rule 8A are to be taken into account, then also the Courtsought not to pass an order of unconditional stay of the award, and could still direct deposit of the awarded amount or part thereof, as the said Rule 8A only exempts the Government from furnishing security, which would not mean that the Courts are mandated to pass an unconditional stay of the award. In support of his submissions, C the learned counsel for the appellant has relied upon various decisions of this Court as well as 246th report of the Law Commission, which shall be considered at the time of dealing with the arguments.

D 10. Per contra, Shri Anand Grover, learned Senior Counsel appearing for the respondent State of West Bengal has contended that the proceedings contemplated under the Arbitration Act are two-fold. Chapters V and VI deal with the conduct of arbitral proceedings, whereas Chapters VII, VIII and IX of the Arbitration Act deal with proceedings after the award. According to him, Section 36 of the Arbitration Act (falling in Chapter VIII) which deals with the enforcement of the award, E is the relevant provision. Sub-Section (1) specifies that the award shall be enforced in accordance with the provisions of the CPC in the same manner as if it was a decree of the Court, which would be subject to the provisions of sub-Section (2). According to the learned Senior Counsel, the phrase used in sub-Section (3) that “*subject to such conditions*” would make it clear that the Court has complete discretion, F though judicially guided, to grant a stay subject to such conditions that it may deem fit and for the reasons to be recorded in writing. It is contended that the phrase used “*have due regard to*” in the proviso to sub-Section (3) would apply to all provisions of the CPC including a money decree. It is thus been contended that by virtue of Section 36(3) of the Arbitration G Act, all the relevant provisions of the CPC namely Order XLI Rule 5 and Order XXVII Rule 8A would come into play.

11. Shri Grover has further submitted that while considering the stay of money decree, Order XXVII Rule 8A would directly be applicable,

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read with Order XLI Rule 5. He has emphasised on the use of word “*shall*” in the proviso to Section 36(3) of the Arbitration Act, which according to him makes a provision of CPC mandatorily to be applied while considering the application for stay under Section 36. The phrase “*subject to such conditions*” used in Section 36(3) of the Arbitration Act is only with regard to discretion exercised by the High Court in deciding the stay application and reasons to be recorded and no conditions as specified in the Statute. He has thus contended that the phrase “*having due regard to*” in the proviso to Section 36(3) would mean the same to be mandatory because of the use of word shall in the opening part of the proviso.

12. It has also been urged that Order XXVII Rule 8A deals with operation of stay in respect of suits against Government, which is distinct from private parties. Since, the Government is always considered to be solvent and expected to honour the decree against it, unlike private parties, the Government cannot avoid the enforcement of final decree against it and thus the award necessarily requires to be stayed in the case of a Government being the judgment debtor. He has further submitted that under Order XLI Rule 5(3), substantial loss has to be shown by the party applying for stay unless such order is made and in the case of the Government, since a large number of arbitration proceedings are made against it, cumulatively they would result in substantial loss. The submission thus is that Order XLI Rule 5(5) requires the applicant to make a deposit or furnish security, failing which, stay would not be granted, but in view of the provisions of Order XXVII Rule 8A the Government would be exempted from furnishing any security or making any deposit. According to the learned counsel, the furnishing of security is the genus and making of deposit is a species and when the security itself is not required to be deposited by the Government under Order XXVII Rule 8A, there would be no requirement of the Government being made to deposit the money, when the genus (security) itself is not to be furnished by the Government.

13. We have heard learned counsel for the parties at length and perused the material on record. For proper appreciation of the facts of this case, the relevant provisions of the Arbitration and Conciliation Act, 1996 and Code of Civil Procedure, 1908 are reproduced hereunder:

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A **The Arbitration and Conciliation Act, 1996.**

“Section 18. Equal treatment of parties. – The parties shall be treated with equality and each party shall be given a full opportunity to present his case.”

B ¹**Section 36.Enforcement. –**

(1) Where the timefor 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.

C *(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.*

D *(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:*

E *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).”*

G ¹ Subs. by Act 3 of 2016, sec. 19, for section 36, for section 36 (w.r.e.f. 23-10-2015).
Section 36, before substitution, stood as under:

“36. Enforcement. —Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”

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CODE OF CIVIL PROCEDURE, 1908.

“Order XXVII, Rule 8A

8A. No security to be required from Government or a public officer in certain cases.—*No such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.”*

“Order XLI, Rule 1

Form of appeal – What to accompany memorandum. – (1) *Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment:*

Provided that where two or more suits have been tried together and a common judgment has been delivered therefore and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the Appellate Court may dispense with the filing of more than one copy of the judgments.

(2) Contents of memorandum.—*The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.*

(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.”*

“Order XLI, Rule 5

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*

A *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.*

B *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,*
C *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.
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(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—

E *(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

F *(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.

G *(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 decrees.”*

(emphasis supplied)

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14. Section 36 of the Arbitration Act was amended/substituted vide Act 3 of 2016 with retrospective effect from 23.10.2015. Sub-Section (3) of Section 36 of the Arbitration Act was introduced on the recommendation of 246th Law Commission Report which reads as under:-

AUTOMATIC STAY OF ENFORCEMENT OF THE AWARD UPON ADMISSION OF CHALLENGE

43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under section 34 has expired or after the section 34 petition has been dismissed. In other words, the pendency of a section 34 petition renders an arbitral award unenforceable. The Supreme Court, in *National Aluminum Co. Ltd. V. Pressteel& Fabrications*, (2004) 1 SCC 540 held that by virtue of section 36, it was impermissible to pass an Order directing the losing party to deposit any part of the award into Court. While this decision was in relation to the powers of the Supreme Court to pass such an order under section 42, the Bombay High Court in *Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai* 2014 (1) Arb LR 512 (Bom) applied the same principle to the powers of a Court under section 9 of the Act as well. Admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor.

44. The Supreme Court, in *National Aluminium*, has criticized the present situation in the following words:

“However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be

A *taken by the authorities concerned at the earliest to bring about the required change in law.”*

45. *In order to rectify this mischief, certain amendments have been suggested by the Commission to section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application under section 34.*

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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.

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15. 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.

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16. The backbone of the submissions on behalf of the respondent-State of West Bengal is that under the provisions of Order XXVII Rule 8A of the 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.

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17. In this backdrop, we have now to consider the effect of Section 36 of the Arbitration Act, vis-a-vis the provisions of Order XXVII Rule 8A of CPC. Sub-Section (3) of Section 36 of the Arbitration Act mandates

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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 the case of *Shri Sitaram Sugar Company Limited. v.
Union of India* (1990) 3 SCC 223 has held that *“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.”*.

18. 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. 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 the CPC will apply only insofar as the
same are not inconsistent with the spirit and provisions of the Arbitration
Act.

19. A Full Bench of the Calcutta High Court, while considering
the question as to whether in an appeal preferred by the Government,
the Government is entitled to get stay of execution of decree impugned
by taking aid of Order XXVII Rule 8A of the CPC, even if the conditions
mentioned in Clauses (a) and (b) of sub-rule (3) of Rule 5 of Order XLI
are not complied with, held as follows:

*“36. In order to resolve the aforesaid controversy, one must
examine the legislative intent for incorporating Order 27, Rule*

- A *8A in the Code. The aforesaid provision was engrafted to exempt the Government to furnish security as a guarantee for due performance of a decree as mentioned in Rules 5 and 6 of Order XLI. Notwithstanding such exemption, discretionary power of the Court to grant stay of execution of a decree can be exercised in favour of the Appellant*
- B *Government only if it satisfies the Court as to the existence of clauses (a) and (b) of Rule 5(3) of Order XLI. As “substantial loss” to the appellant is a condition precedent to grant stay, execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to irreparable injury to the appellant as the remedy of restitution is available to him in the event the appeal is allowed. [See, Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai, 2005 (4) SCC 1, para 6]. Under such circumstances, when the court chooses to exercise its discretion in favour of the appellant State to grant stay of execution of a money decree it must be balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. Hence, in appropriate cases, the Court in its discretion may direct deposit of a part of the decretal sum so that the decree holder may with draw the same without prejudice and subject to the result of the appeal. Such direction for deposit of the decretal sum is not for the purpose of furnishing security for due performance of the decree but an equitable measure ensuring part satisfaction of the decree without prejudice to the parties and subject to the result of the appeal as a condition for stay of execution of the decree.*
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- G *37. To hold that the Court is denuded of such equitable discretion while granting stay of execution of a money decree in favour of the Government, would cause grave hardship to deserving decree holders who in the facts of a given case may be entitled to enjoy part satisfaction of the decree without prejudice and subject to the result of the appeal as a condition for stay of execution of the entire decree.*
- H *38. Hence, it is opined although Order 27, Rule 8A may exempt the appellant Government from the mandatory obligation of furnishing security in terms of Rule 1(3) for seeking stay of*

execution of a money decree as under Rule 5(5) of Order XLI, the said provision cannot be said to operate as an absolute clog on the discretion of the court to direct the deposit of the decretal amount as a condition for grant of stay of execution of the decree in appropriate cases more particularly when such direction is coupled with the liberty to the decree holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal.”

We find no reason to disagree with such view taken by the Full Bench of the Calcutta High Court and are thus in agreement with the same.

20. Even otherwise a plain reading of Order XXVII Rule 8A of CPC would make it clear that the same is only regarding security as mentioned in Rule 5 and 6 of Order XLI CPC, which is not to be demanded from the Government while considering the stay application filed by the Government. It, however, does not provide that the decretal amount cannot be required to be deposited in the appeal against a money decree.

21. It is also noteworthy that when Order XXVII Rule 8A of CPC was incorporated in the year 1937, at that time Rule 5 of Order XLI CPC had only four sub-Rules. Sub Rule (5) in Rule 5 of Order XLI was inserted by Act 104 of 1976 w.e.f. 01.02.1977. Prior to that, it was sub-Rule (3) (c) of Rule 5 aforesaid which provided that no order for stay of execution was to be made unless the Court was satisfied that security had been given by the applicant for performance of the decree. It was in such context when only security had to be given at the time of grant of stay that Rule 8A of Order XVII CPC was incorporated to give certain protection to the Government by providing for no requirement of security from the Government. It was probably for the reason that the Government is always considered to be solvent, thus was exempted from providing security under Rule 8A of Order XXVII of CPC. However, in 1976 Sub Rule (5) to Rule 5 of Order XLI CPC was inserted, which reads as follows:

(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 decrees.”

A The same provides for making of deposit or furnishing security by the decree holder seeking stay. It would thus mean that after 1977, the Appellate Court had the power to direct for deposit of the decretal amount, which was earlier limited only to furnishing of security under sub-Rule (3) of Rule 5 of Order XLI CPC. It is noteworthy that after insertion of sub-Rule (5), there was no amendment to Order XXVII Rule 8A CPC to exempt the State Government for making such deposit, which would mean that Rule 8A does not exempt the Government from making deposit, which the Court has the power to now direct under Order XLI Rule 5(5) CPC.

C 22. Further, it is to be noticed that Order XXVII Rule 8A of CPC was inserted in 1937 when the British Crown was ruling our country. The same was brought in during the period of British Raj to protect the interest of the then Government (Crown). While considering a case where the State of West Bengal was carrying on trade as owner and occupier of a market in Calcutta (now Kolkata) without obtaining a license as required under Section 218 of Calcutta Municipal Act, 1951, a Constitution Bench of this Court in the case of *Superintendent & Legal Remembrancer, State of West Bengal v. Corporation of Calcutta* (1967) 2 SCC 170 considered the question as to whether this Court should adopt the rule of construction accepted by the Privy Council in interpreting Statute vis-a-vis the Crown and held that “*There are many reasons why the said rule of construction is inconsistent with and incongruous in the present set-up we have no Crown, the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality.*”

F 23. In our considered view, the provision which was incorporated in the year 1937 during the British Raj, giving certain safeguards to the Government (which was then the British Crown) would not be applicable in today’s time, when we have a democratic Government.

G 24. 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

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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.

25. It may be true that the 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 of CPC provides for a notice of two months to be given before any suit is instituted against the Government. Further, it is also provided 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.

26. 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.

27. Although we are of the firm view that the archaic Rule 8A of Order XXVII 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 XXVII Rule 8A of CPC are to be applied, the same would only exempt the Government from furnishing security, whereas under Order XLI

- A Rule 5 of CPC, the Court has the power to direct for full or part deposit and/or to furnish security of the decretal amount. Rule 8A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof.

28. For the foregoing reasons, we are of the opinion that the
B impugned order passed by the Calcutta High Court granting unconditional stay of the arbitration award dated 21.01.2010, cannot be sustained in the eye of law. Accordingly, we allow these appeals and quash the order dated 13.12.2018 passed by the Calcutta High Court and restore the order dated 03.10.2018 of the Executing Court passed in E.C No. 297 of 2018 (Pam Development Pvt. Ltd. vs. State of West Bengal).
C As already directed by order dated 03.10.2018, it shall be open for the petitioner-award holder to pray for release of the attached amount.

29. No order as to costs.

Ankit Gyan

Appeals allowed.