

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
APPELLATE SIDE

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

AO-COM 17 OF 2025

With

IA No.: CAN 1 of 2025

Mackintosh Burn Limited

Vs.

Damodar Valley Corporation

For the Appellant : Mr. Jayanta Mitra, Ld. Sr. Adv.
Mr. Arnab Chakraborty, Adv.

For Respondent : Mr. Suman Kr. Dutt, Ld. Sr. Advocate
Mr. Dwaipayan Basu Mallick, Adv.
Mr. Swarajit Dey, Adv.

Hearing Concluded on : April 16, 2026

Judgment on : April 22, 2026

DEBANGSU BASAK, J.:-

- 1.** Appellant has assailed order No. 33 dated April 1, 2025 passed by the learned Judge, Commercial Court at Alipore in Misc. Case (Arb.) 27/2022 renumbered as Misc. Arb. (Com) 31 of 2022.
- 2.** By the impugned order, learned Single Judge had dismissed the application filed by the appellant, praying for withdrawal of the cash deposit in lieu of furnishing bank guarantee.

3. Learned Senior Advocate appearing for the appellant has contended that, learned Trial Judge erred in dismissing the application of the appellant. He has submitted that, appellant had furnished adequate and proper particulars of events occurring subsequent to the initial order dated March 18, 2024 and requested the learned Trial Judge to put the measures in place so as to protect and preserve the subject matter of the litigation.

4. Learned Senior Advocate appearing for the appellant has contended that, the respondent suffered an award. Appellant had put such award into execution. Respondent had challenged such award under Section 34 of the Arbitration and Conciliation Act, 1996. The respondent had applied under Section 36(2) of the Act of 1996 for stay of the award when, the order dated March 18, 2024 was passed.

5. Learned Advocate appearing for the appellant has relied upon **2020 SCC OnLine Cal 1777 (Satyen Construction vs. State of West Bengal)** and contended that, the relief sought for by the appellant was maintainable and in fact, was required to be granted.

6. Relying upon the Full Bench decision of this Hon'ble Court reported in **2015 (2) CHN 446 (Union of India vs. Amitava Paul)** learned Senior Advocate appearing for the appellant has contended that, the relief sought for by the appellant is equitable in nature and

ought to be and could be granted by a Court exercising jurisdiction under Section 36 of the Act of 1996.

7. Relying upon **2019 (8) SCC 112 (Pam Developments Private Limited Vs. State of West Bengal)** learned Senior Advocate appearing for the appellant has contended that, the Full Bench decision rendered in **Amitava Paul (supra)** was noticed and approved. He has contended that, on equitable considerations, the order dated March 18, 2024 directing security as a condition for grant of stay, can and should be modulated as prayed for.

8. Learned Senior Advocate appearing for the appellant has contended that, the award was yet to be enforced. Therefore, the parties to the arbitration proceeding was entitled to invoke Section 9 of the Act of 1996 for protection and preservation of the subject matter of the litigation. He has contended that, the application filed by the appellant resulting in the impugned order, was under Section 9 of the Act of 1996 and must be treated to be so.

9. Learned Senior Advocate appearing for the appellant has contended that, since, the application in which, the impugned order was passed, was under Section 9 of the Act of 1996, the impugned order was appealable under Section 37 of the Act of 1996 and therefore, the appeal was maintainable under Section 13 of the Commercial Courts Act, 2015.

10. Learned Senior Advocate appearing for the respondent has questioned the maintainability of the appeal. He has contended that, the awards dated October 21, 2021 were put into execution. Respondent had filed an application under Section 34 of the Act of 1996. Respondent had applied under Section 36(2) of the Act of 1996 in which, the order dated March 18, 2024 was passed requiring the respondent to furnish security by way of deposit for 60 per cent of the amount in the award and the balance by way of other securities. He has contended that, the respondent complied with the order dated March 18, 2024.

11. Learned Senior Advocate appearing for the respondent has contended that, the respondent applied for relief with regard to the order dated March 18, 2024. He has contended that, the application in which, the impugned order was passed, cannot be classified as one under Section 9 of the Act of 1996.

12. Learned Senior Advocate appearing for the respondent has referred to and relied upon Section 37 of the Act of 1996 as also Section 9 and Section 36 thereof. He has contended that, the impugned order is not appealable under Section 37 of the Act of 1996 as, no order passed under Section 36 of the Act of 1996 is appealable.

13. Learned Senior Advocate appearing for the appellant has contended that, the initial order for security dated March 18, 2024 was passed under Section 36 of the Act of 1996. Such order cannot be modified, under Section 9 of the Act of 1996 as sought to be erroneously contended on behalf of the appellant.

14. Learned Senior Advocate appearing for the respondent has relied upon **2020 SCC OnLine Del 737 (Prasar Bharati vs. Stracon India Limited and Another)** for the proposition that, the present appeal is not maintainable in view of the provisions of the Act of 2015. He has referred to and relied upon Sections 8 and 13 of the Act of 2015. He has contended that, the impugned order is not an order which is final in nature, and is also not appealable in view of Sections 8 and 13 of the Act of 2015.

15. Learned Senior Advocate appearing for the respondent has relied upon **AIR 2022 Cal 1 (State of West Bengal and Another vs. Dilip Kumar Saha)** and contended that, the issue as to the maintainability of the appeal under Section 13 of the Act of 2015 did not fall for consideration therein. He has contended that such issue also did not fall for consideration in **Amitava Paul (supra)** or in **Satyen Construction (supra)**.

16. Learned Senior Advocate appearing for the respondent has relied upon **AIR OnLine 2021 Cal 139 (Kolkata Metropolitan**

Development Authority vs. South City Projects (Kolkata) Ltd. and Ors.) and contended that, application of a similar nature was dismissed by the learned Single Judge.

17. Parties before us had entered into a contract dated November 20, 2008 with regard to Raghunathpur Thermal Power Project, Phase I, Unit I and II, Plant Water System Package 1. Disputes and differences had arisen between the parties with regard to such contract which were referred to the Arbitral Tribunal.

18. Arbitral Tribunal had made and published a majority award dated October 21, 2021 and a minority award of the same date.

19. Respondent had filed a petition under Section 34 of the Act of 1996 assailing both the awards dated October 21, 2021 on May 21, 2022.

20. Appellant had filed an execution application in respect of the awards on August 03, 2023 which was registered as Misc. Execution Com No. 47 of 2023. Respondent had filed an application under Section 36(2) of the Act of 1996 which was registered as IA No. 2 of 2024 in the proceedings under Section 34 of the Act of 1996. In such application under Section 36 (2) of the Act of 1996 by an order dated March 18, 2024, the learned Trial Judge, held that, a sum of Rs. 102,01,35,943.39 was awarded together with interest. The learned Trial Judge, had granted stay of the award subject to the condition

that the respondent deposited 60 per cent of the awarded amount by way of cash security or its equivalent to the satisfaction of the learned Registrar District Judges, Court at Alipore, South 24 Parganas. Upon receipt of such deposit, learned Registrar was directed to open a Fixed Deposit with any Nationalized Bank bearing interest and to keep the same renewed till disposal of the petition under Section 34 of the Act of 1996, until further order whichever was earlier. Remaining 40 per cent of the awarded amount was directed to be secured by way of bank guarantee of any Nationalized Bank to the satisfaction of the Registrar, District Judges Court at Alipore, South 24 Parganas. Bank guarantee was directed to be renewed and kept alive till the dismissal of the proceeding under Section 34 of the Act of 1996.

21. Respondent did not comply with the direction for furnishing security. Respondent had applied being IA No. 3 of 2024 seeking extension of time to comply with the order dated March 18, 2024. Learned Single Judge had allowed such prayer by an order dated April 23, 2024 extending the time for compliance till May 17, 2024. The respondent had filed an affidavit for compliance on June 14, 2024.

22. Appellant had applied for withdrawal of the cash security of Rs. 61,20,81,566/- upon furnishing of appropriate indemnity bond

or bank guarantee before the learned Trial Judge, on July 30, 2024 which was registered as IA GA No. 4 of 2024 and disposed of by the impugned order.

23. It is admitted at the Bar that, the subject matter of the disputes in the arbitration, is a commercial dispute within the meaning of Section 2(1)(c) of the Act of 2015. It is also admitted at the Bar that, the specified value of the subject matter of the disputes between the parties, is more than what is prescribed under the Act of 2015.

24. The proceedings under Section 34 of the Act of 1996 filed by the respondent, therefore, are to be governed by the provisions of the Act of 2015. Consequently, the provisions of Section 13 of the Act of 2015 applies to an appeal directed against the order passed by the Commercial Court.

25. Since, the subject matter of the disputes between the parties is a commercial dispute within the meaning of Section 2(1)(c) of the Act of 2015 and is of the specified value thereunder, respondent had filed the proceedings assailing the award before the Commercial Court at Alipore.

26. In **Satyen Construction (supra)**, the award-debtor had applied for stay of the execution of the award. The Court in seisin of the proceedings under Section 34 of the Act of 1996 had granted

stay of operations of the award conditional upon deposit. After such order of stay being passed, the award holder had applied for variation of the order of stay. Award holder had intended to withdraw substantial part of the deposit by furnishing a bank guarantee. Learned Trial Judge had dismissed such application.

27. In ***Satyen Construction (supra)*** the Co-ordinate Bench had dismissed the appeal of the award holder directed against refusal to vary the order of stay of the award, on the ground that, award holder did not cite any subsequent event for making the application. However, the point of maintainability of the appeal by reason of Section 13 of the Act of 2015 read with Section 37 of the Act of 1996 appears not to have been raised therein. What had been raised and considered was whether the subsequent application for variation was under Section 9 of the Act of 1996 or not. In such context, the Co-ordinate Bench had observed that, nothing prevented the award holder from applying under Section 9 of the Act of 1996 to carry any subsequent event or development to the Arbitration Court for which an interim protection was necessary and which interim protection may have the effect of modifying the order of conditional or unconditional stay already granted under Section 36 of the Act of 1996. It had observed that, to such extent there is not conflict between the rights conferred by Section 9 of the Act of 1996 and

then under Section 36 thereof. It had also observed that, once the application is carried at the post stay order stage and is treated to be under Section 9 of the Act of 1996, the order impugned becomes appealable under Section 37.

28. Amitava Paul (supra) has answered five questions of law referred for consideration by the Larger Bench. It would be apposite to set out the questions of law and the answers given thereto which are as follows:-

“The following questions of law have been referred for consideration by a Large Bench:

(1) In an appeal preferred by a Government, whether the Government is entitled to get stay of execution of the decree impugned by taking aid of Order 27 Rule 8A of the Code, even if, the conditions mentioned in Clauses (a) and (b) of Sub-Rule 3 of Rule 5 of Order XLI are not complied with?

(2) Whether a money appeal preferred by the Government can be disposed of on merit though till the time of hearing of the appeal, the Government has neither deposited the decretal amount nor has it given security thereof in terms of Sub-Rule 3 of Rule 1 of Order XLI of the Code?

(3) Whether for non-compliance of the requirement of Order XLI Rule 1(3) of the Code, an appeal can be dismissed?

(4) Whether the constitutional guarantee for securing the payment of debt arising out of any judgement and decree against the Union of India as provided in Article 112(3)(f) of the Constitution of India is sufficient for absolving it of its liability of complying with the mandatory requirement of Order XLI Rule 1 sub-Rule 3 of the Code of Civil Procedure?”

“Accordingly, question nos. 1 and 4 are both answered in the negative.

Conclusion:

In view of the aforesaid discussion, it is held as follows: -

i) Order 27 Rule 8A does not exempt the appellant Government from satisfying the Court as to the existence of conditions (a) and (b) of Rule 5(3) of Order XLI in order to obtain stay of execution of the decree appealed against. Hence, question no. 1 is answered in the negative.

ii) Liability under Order 41 Rule 1(3) to deposit or furnish security of the disputed decretal sum as directed by the Court in respect of a money appeal is directory in nature. Hence, failure to comply with such direction per se would not denude jurisdiction of the Court to hear the appeal on merits. However, if such failure is found to be willful, deliberate and contumacious in nature, the Court may in its discretion adjourn the hearing till the appellant purges his contempt and complies with such direction. Question no. 2 is, thus, answered in the affirmative subject, however, to the aforesaid rider.

iii) In view of the law declared in Kayamuddin (supra) and Malwa Strips Pvt. Ltd. (supra) it is opined that a money appeal cannot be dismissed for non-compliance of requirements under Rule 1(3) of Order XLI. Question no. 3 is answered in the negative.

iv) Article 112(3)(f) of the Constitution is a mere acknowledgement of the liability of the Government arising out of a decree/award passed by any Court or arbitral tribunal. The Constitutional provision operates in a different field and does not absolve the liability of the appellant Government under Order XLI rule 1(3) of the Code which, however, is subject to the exemption engrafted in Order 27

Rule 8A thereof. Question no. 4 is therefore answered in the negative.”

29. ***Pam Developments Private Limited (supra)*** has noticed ***Amitava Paul (supra)*** and agreed with the view taken therein.

30. In our understanding ***Amitava Paul (supra)*** and ***Pam Developments Private Limited (supra)*** have held that, notwithstanding the exemption provisions of Order 27 Rule 8–A of the Code of Civil Procedure, 1908 discretionary power of Court to grant stay of execution of a decree can be exercised if the Court is satisfied as to the existence of conditions prescribed in Order XLI Rule 5(3)(a) and (b). Such direction for deposit of the decretal amount is not for the purpose of furnishing security for due performance of the decree but for 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 grant of stay. The direction of the Appellate Court to permit decree holder to withdraw the decretal amount so directed to be deposited is on equitable consideration.

31. In ***Dilip Kumar Saha (supra)*** a Co-ordinate Bench, after noticing ***Pam Developments Private Limited (supra)*** has observed that, the power enshrined under Section 151 of the Code of Civil Procedure, 1908 can be exercised if there is no express provision

contained in the Code or the Special Act. It has also observed that, the Code of Civil Procedure, 1908 could not presume all eventualities and that, precisely for such reason the inherent power is retained to secure the ends of justice. The Co-ordinate Bench in facts of that case has also found that, there were no change in circumstances subsequent to the initial order passed under Section 36(2) of the Act of 1996 calling for interference.

32. In *Kolkata Metropolitan Development Authority (supra)*, the Single Bench has considered an application under Section 36 (2) of the Act of 1996 in the factual matrix therein. It has held, since the petitioner therein could not adduce any evidence to establish that it came within the purview of the second proviso to Section 36 (3) of the Act of 1996 and therefore entitled to unconditional stay, was directed to secure the principal sum awarded by the arbitral award.

33. The Delhi High Court in *Prasar Bharati (supra)* has held that, no appeal is maintainable from any order passed under Section 36 of the Act of 1996.

34. Since the proceedings under the Act of 1996 were instituted in the Commercial Division as the subject matter of the disputes involved a commercial dispute and of specified value within the meaning of the Act of 2015, appeals from orders passed by the

Commercial Division, are governed by Section 13 thereof which is as follows :-

“13. Appeals from decrees of Commercial Courts and Commercial Divisions.—

[(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order: Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.”

35. Sub-section (1) of Section 13 has permitted any person aggrieved by the judgment and order of a Commercial Court below the level of a District Judge to appeal to the Commercial Appellate

Court within a period of 60 days from the date of the judgment and order. Sub-section (1A) has permitted any person aggrieved by a judgment and order of the Commercial Court at the level of District Judge exercising original civil jurisdiction or as the case may be Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of 60 days from the date of the judgment and order. The proviso to Sub-section (1A) of Section 13 of the Act of 2015 has provided that an appeal shall lie from such order passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by the Act of 2015 and Section 37 of the Act of 1996. Sub-section (2) of Section 13 of the Act of 2015 has prescribed that notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court no appeal shall lie from a Commercial Division or a Commercial Court otherwise than in accordance with the provisions of the Act of 2015.

36. On the conjoint reading of the provisions of Section 13 of the Act of 2015 and Section 37 of the Act of 1996, particularly in the facts and circumstances of the present case therefore, an appeal is maintainable only when, appeal against the impugned order is provided for either under Order XLIII of the Code of Civil Procedure

or under Section 37 of the Act of 1996. Clause 15 of the Letters Patent, 1865 has no manner of application.

37. The nature of the impugned order has to be understood in the facts and circumstances of the present case so as to arrive at a finding whether, the impugned order is appealable or not.

38. As has been noted above, initially an order granting conditional stay of execution of the award was granted by the Court in seisin of proceedings under Section 34 of the Act of 1996. Such conditional order of stay had been passed in exercise of powers under Section 36(2) of the Act of 1996. The appellant had applied for reliefs before Court in seisin of the proceedings under Section 34 of the Act of 1996 if which allowed would have the effect of modifying the conditional order of stay granted under Section 36 of the Act of 1996.

39. It is trite law that, quoting a wrong Section of a statute, will not oust the jurisdiction of the Court which the Court otherwise possessed nor will it vitiate an order passed by the Court if such Court had the jurisdiction to pass such order despite the wrong quoting of a particular Section of a statute.

40. According to the appellant, the application filed by it resulting in the impugned order, has to be considered to be one under Section 9 of the Act of 1996 and therefore the impugned order

is appealable under Section 37 thereof. According to the respondent, the application of the appellant, by whatsoever name called, is an exercise under Section 36 of the Act of 1996 and therefore, the impugned order is not appealable.

41. *Satyen Constructions (supra)* has considered the interplay of Sections 9 and 36 of the Act of 1996. Section 9 of the Act of 1996 has allowed the making of an application for interim relief, post the award till the award is enforced. Section 36 of the Act of 1996 on the other hand has empowered the Court in seisin of a proceeding under Section 34 of the Act of 1996 to stay operation of the award. This power of stay under Section 36 of the Act of 1996 has been explained in ***Amitava Paul (supra)*** and ***Pam Developments Private Limited*** to mean that, the Court can pass an order of stay on equitable consideration so as to permit the award holder to enjoy the usufructs of the award in a given case subject to the conditions prescribed being satisfied.

42. There is a world of difference between measures taken under Section 9 of the Act of 1996 and the enforcement regime under Section 36 of the Act of 1996. While, Section 9 of the Act of 1996, permits the Court to intervene to protect and preserve the subject matter of the disputes in the arbitration, pre initiation of arbitration, during pendency of the arbitration, as well as post the award,

Section 36 of the Act of 1996, deals with the power of grant of stay of the enforcement of the arbitral award. While Section 9 contemplates protection and preservation of the subject matter of the disputes involved in the arbitration, Section 36 of the Act of 1996 confines itself to the condition for granting of stay of the enforcement of the award passed by the Arbitral Tribunal. Section 36 of the Act of 1996 comes into play only on an award being passed coupled with a valid challenge to the award under Section 34 being pending, whereas Section 9 operates pre reference of the disputes to arbitration, pending the adjudication of the disputes as also post award till the enforcement of the award.

43. A Court can be invited to pass interim measure under Section 9 of the Act of 1996 post the award. The Court in seisin of the proceeding under Section 34 of the Act of 1996 can be invited to pass an order of stay of the award. Such Court can also be invited to modify the initial order of grant of stay. In the scenario, where, a Court in seisin of a proceeding under Section 34 of the Act of 1996 is invited to modulate its initial order of stay under Section 36 of the Act of 1996, then such Court is invited to exercise powers under Section 36 of the Act of 1996 and not under Section 9 thereof. If repeat application under Section 36 of the Act of 1996 when such application is confined to measures to be put in place under Section

36 of the Act of 1996 that is to say that, condition for grant of stay of the enforcement of the award impugned under Section 34 of the Act of 1996 then, such repeat application by no stretch of imagination can be classified to be one under Section 9 of the Act of 1996, sans any other details. In absence of relief being sought by an applicant for protection and preservation of the subject matter of the disputes referred to in arbitration, post the award, an application simplicitor touching on the modalities for grant of stay of enforcement of the arbitral award, cannot be treated to be an application under Section 9 of the Act of 1996.

44. An award embodies the resolution of the disputes referred to arbitration. In an arbitration relating to money claim the award represents the final adjudication of the amounts in dispute referred to arbitration. Post award the money claims no longer remains amount in dispute in the arbitration within the meaning of Section 9(i) (ii) (b) of the Act of 1996, unless the applicant under Section 9 of the Act of 1996 is able to demonstrate and establish that the award is vitiated to such an extent that notwithstanding the award, the money claims continue to remain in dispute as if no valid arbitration took place.

45. Staying the enforcement of the award on conditions to be imposed under Section 36 of the Act of 1996 in such prism of logic

cannot be equated with exercise of powers under Section 9 of the Act of 1996. **Satyen Construction (supra)** needs to be read and understood in such context. It recognises that exercise of powers under Section 9 of the Act of 1996 is possible post award and during pendency of an application under Section 34 of the Act of 1996. In the event, an order under Section 9 of the Act of 1996 is passed, post award, the same becomes appealable under Section 37 of the Act of 1996.

46. On the maintainability of the appeal, in the Commercial Division or the Commercial Appellate Division, the test required to be applied is whether the order impugned can be classified under any of the provisions of Order XLIII of the Code of Civil Procedure, 1908 as amended by the Act of 2015 or under Section 37 of the Act of 1996. If the order impugned does not fall within any of such provisions, no appeal will lie.

47. On the anvil of the law as discussed above, in the facts and circumstances of the present case, the application of the appellant resulting in the impugned order, cannot be classified to be one under Section 9 of the Act of 1996. The impugned order is therefore a product of exercise of powers under Section 36 of the Act of 1996 which is not appealable under Section 37 of the Act of 1996.

48. Inasmuch as the impugned order is not appealable under Section 37 of the Act of 1996, we do not find the present appeal to be maintainable.

49. We clarify that the discussions on merits, by us, are limited to the issue of maintainability of the appeal. None of the observations made by us on merits will prejudice any of the parties.

50. AO-COM 17 of 2025 with IA No.: CAN 1 of 2025 are dismissed without any order as to costs.

[DEBANGSU BASAK, J.]

51. I agree.

[MD. SHABBAR RASHIDI, J.]