

Serial No. 02
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

CRP No. 16 of 2023

Date of Decision: 25.08.2023

Public Works Department
(National Highway)

Vs.

M/s BSC - C&C (JV)

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. A.S. Pandey, Adv.
Ms. S. Laloo, GA
Ms. A. Thungwa, GA.

For the Respondent(s) : Mr. R. Banerji, Sr. Adv. with
Mr. K. Ch. Gautam, Adv.
Ms. G.C. Marboh, Adv.
Mr. R. Prakash, Adv.
Mr. A. Pande, Adv.
Ms. S. Gangar, Adv.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER (ORAL)

1. This Application under Section 115 read with Section 151 of the CPC is against orders dated 26.06.2023, 27.07.2023 and

10.08.2023, passed by the Court of the Learned Judge, Commercial Court, Shillong, in Commercial Arbitration Execution No. 1 of 2022. The grievance of the petitioner is first, against order dated 26.06.2023, with regard to the rejection of their objections against the execution of the arbitral award dated 27.07.2021, including the impleadment of a 3rd party namely the Ministry of Road Transport and Highways in the execution proceedings, as also order dated 27.07.2023, whereby the application seeking stay of execution proceedings due to pendency of the matter before the Supreme Court was rejected, and the last order dated 10.08.2023, which is asserted was passed without taking note of the order of the Supreme Court dated 07.08.2023, passed in SLP, Diary No. 282231 of 2023.

2. Keeping the facts within a short compass, as the challenge in the present proceedings is directed only against the 3 impugned orders which has been detailed above, which were passed in the execution proceedings pursuant to an arbitral award dated 27.07.2021, this Court will only examine the purport of the impugned orders in the context of the said execution proceedings.

3. It has been contended by the learned counsel for the petitioner that, the arbitral proceedings and execution proceedings in view of Section 36(1) of the Arbitration and Conciliation Act, 1996, stand on a

different footing altogether, and the findings or conclusions arrived at in the course of arbitral proceedings, which though tested and subjected to Section 34 and Section 37 applications, will have no bearing in the execution proceedings which were to be dealt with under the provisions of the CPC. This argument, has been advanced to further the objection taken before the Executing Court, that the point of impleadment of a 3rd Party namely MoRTH was a matter that had to be examined afresh. This objection however, had been rejected by the Learned Commercial Court, on the ground that the arbitral tribunal had already dealt with the same, which was then confirmed in the applications under Section 34 and Section 37, under the A&C Act.

4. The respondent Senior counsel, Mr. R. Banerji, has strongly refuted the submissions of the learned counsel for the petitioner and has taken the Court to the entire sequence of events, and placed orders dated 27.07.2021 passed by the Arbitral Tribunal, order dated 17.05.2023 passed by the Learned Commercial Court, order dated 19.06.2023 of the Division Bench of this Court passed in ***Arb. A. No. 6 of 2023 (Public Works Department (National Highway) vs. M/s BSC-CC & JV, 6-2-913/914)***, and order dated 07.08.2023 passed by the Hon'ble Supreme Court in SLP (Civil) No. 16223/2023. In these series of orders, it is submitted the issue regarding the impleadment of

MoRTH as a necessary party, has been addressed and rejected. Further, the contents of the order impugned herein, has been read out by the learned Senior counsel to show that the petitioner had only sought time for satisfaction of the decree and that even in the last order dated 10.08.2023, it has been recorded that the Judgment Debtor was ready to make the payment and was thus allowed further time, to complete the same. As such, he submits the petitioner by pursuing a dead issue is only seeking to avoid execution of the decree.

5. Having heard the learned counsels for the parties and examined the materials on record, at the outset, it is noted that certified copies of the orders impugned herein, have not been supplied or filed with the Revision Application. Further, one Revision Application has been preferred against three orders. These two aspects, make the maintainability of the instant Revision Application questionable, but however, as noted earlier, the issue involved being short, this Revision Application is taken up for consideration on its merits. At this juncture, the three impugned orders dated 26.06.2023, 27.07.2023 and 10.08.2023, for the sake of easy reference are reproduced herein below.

“26.06.2023

CR put up before me.

Decree Holder is represented by Shri. Ranjit Prakash, Advocate who appeared via V/C.

Judgment Debtor is represented by Shri. Shaurya Sahay, Advocate who also appeared via V/C. He is assisted by Shri. E.R. Chyne and J.N. Rynjah, Advocates.

Ld counsel for the Decree Holder submits that in view of the Judgment rendered in Arbitration Appeal No. 6 of 2023, the Decree may be executed by directing the Judgment Debtor to satisfy the decree as the Judgment Debtor has already exhausted the remedies provided in the Arbitration and Conciliation Act.

Ld counsel for the Judgment Debtor objected to the execution on two grounds viz. (1) That the award is not stamped and (2) That the award is to be satisfied by a 3rd Party, i.e. MoRTH and prayed that notice may be issued to MoRTH. In this regard, the Ld counsel relied on Order 41 Rule 46D CPC.

With regard to the first leg of submission, the Ld counsel for the Decree Holder submits that the stamp has already been paid as per the Meghalaya Stamp Act.

There is no dispute that the stamp duty has been paid by the Decree Holder and therefore this point of objection has become redundant.

With regard to the second leg of submission, it may be stated here that Order 41 Rule 46D CPC provides for the procedure when debt belongs to third persons. The relevant provision is reproduced below:-

“46D. Procedure where debt belongs to third person.- Where it is suggested or appears to be probable that the debt belongs to some third person, or that any third person has a lien or charge on, or other interest in, such debt, the Court may order such third person to appear and state the nature and particulars of his claim, if any, to such debt and prove the same.”

The Judgment Debtor has tried to impress upon this court that the MoRTH is the principle and the State PWD is merely the executor of the project. In this regard, the issue whether MoRTH is a necessary party to the Arbitration proceedings has already been decided by the Ld Arbitrator, confirmed in the application U/s 34 of the Arbitration and Conciliation Act and further in the application U/s 37 of the Arbitration and Conciliation Act. Therefore, this court is of the view that this leg of objection raised by the Judgment Debtor is no longer in dispute. Further, an executing court cannot go behind the decree and when the decree specifically is against the PWD (NH) Govt. of Meghalaya, this court is not inclined to accept the objections raised by the Ld counsel for the Judgment Debtor.

The Judgment Debtor is hereby directed to satisfy the award along with the cost Rs.10,00,000/- within 1 (one) month from the date of this order.

Fix 26.07.2023 for report on payment.

27.07.2023

CR put up before me.

Decree Holder is represented by Shri. Anshuman Pandey who appeared via V/C.

Judgment Debtor is represented by Shri. A.S. Pandey, Advocate who appeared via V/C and E.R. Chyne and J.N. Rynjah.

This court in Commercial Misc Case No. 4 of 2023 has rejected the prayer of the Judgment Debtor for stay. The Ld Counsel for the Judgment Debtor therefore prays that 4 weeks time may be given to the Judgment Debtor to satisfy the decree.

The Ld Counsel for the Decree Holder objected to the prayer stating that it would amount to granting a stay and submitted that the court may consider 1 or 2 weeks time be given to the Judgment Debtor to satisfy the decree.

Having heard the Ld Counsels, the Judgment Debtor is given 2 weeks time to satisfy the decree.

Fix 10.08.2023 for report.

10.08.2023

CR put up before me.

Decree Holder is represented by Shri. Ranjit Prakash, Advocate who appeared via V/C.

Judgment Debtor is represented by Miss Y. Pallavi, Advocate who appeared via V/C. Mr. A.H. Kharwanlang and Shri. E.R. Chyne, Advocates are also appeared physically.

Ld. counsels for both sides informed the court that SLP has been dismissed.

Ld. counsels for the Judgment Debtor Miss Y. Pallavi submits that the order has been communicated to the Government and prays for 4(four) weeks time to make the payment.

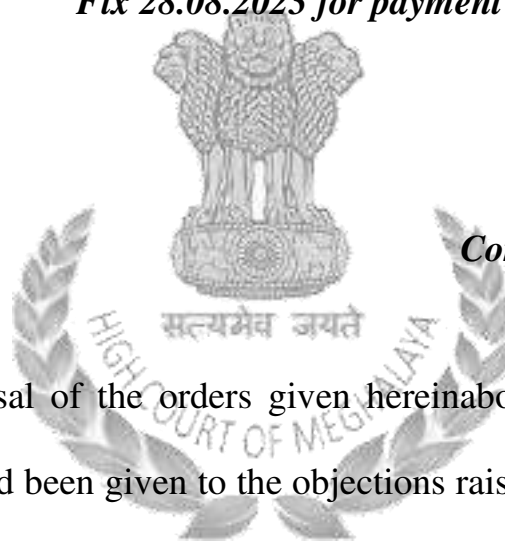
Ld. counsel for the Decree Holder submits that the Judgment Debtor has been given sufficient time to make the payment but has time and again delayed in the payment and prayed that show cause may be issued to the Chief Engineer (N.H) PWD (Roads) to show cause as to why coercive action by way of detention in civil prison should not be taken against him for failure to satisfy the decree.

Having heard the Ld. counsels for both sides, the Judgment Debtor had been granted 4 weeks time to make the payment and another extension of 2 weeks was granted to satisfy the decree. However, till date the

Decree Holder has failed to make the payment. However, since the Judgment Debtor is ready to make the payment and already 6(six) weeks has been granted to them to make the payment, this court hereby grant the Judgment Debtor further time of 2(two) weeks to satisfy the decree failing which the Chief Engineer (NH) PWD (Roads) shall file his show cause as to why coercive action by way of detention in civil prison should not be taken against him for failure to satisfy the decree.

Send a copy of this order to the Judgment Debtor.

Fix 28.08.2023 for payment and report.



*Sd/-
Judge
Commercial Court,
Shillong.*

6. A perusal of the orders given hereinabove reflects that, due consideration had been given to the objections raised by the petitioners, with regard to the necessity of impleadment of MoRTH, in view of the fact that the same had been decided by the Arbitral Tribunal and in the subsequent proceedings under Section 34 and Section 37 of the A&C Act, and further that the decree is specifically against the petitioner, PWD (NH), Government of Meghalaya. Further, it is also noted that, as recorded in the order dated 27.07.2023, 4(four) weeks' time was prayed

by the petitioner Judgment Debtor to satisfy the decree and on 10.08.2023, further 4(four) weeks' time was prayed for.

7. At this juncture, it is also useful to refer to the judgment dated 19.06.2023, passed in Arbitration Appeal No. 6 of 2023 under Section 37, wherein the Division Bench of this Court at Para – 34, had observed as follows.

“34. There are other specious excuses which are proffered and irrelevant references made in this matter which has been a complete waste of judicial time. Notwithstanding the contract being between the appellant and the contractor, a fact which is undeniable and is clearly admitted, the appellant refers to the correspondence it exchanged with the relevant Union Ministry and the advice that it is received from such Ministry. In a contract between two parties, neither is governed by the conduct of a third party, whatever may be such third party's control over the other party. Indeed, an issue has been sought to be raised quite seriously that the Union Ministry of Road Transport and Highways was a necessary and a proper party to the present proceedings. Surprises never cease. Such ludicrous assertion may probably be because the officials who are behind the

appellant; who do not need to pay from their own pockets for their recalcitrance and it is the tax-payers' money that being squandered.”

8. On the matter being taken up by way of an SLP being SLP (Civil) No. 16223/2023 before the Supreme Court, the order was not interfered with, and the SLP was dismissed vide order dated 07.08.2023, though the rights and contentions of the parties were kept open. An overview of the orders therefore, can lead to only one inevitable conclusion, that is, the issue regarding impleadment of the MoRTH, notwithstanding the fact that the same has been brought up again in these execution proceedings which as argued by the petitioner is under the CPC, and as such, should be re-looked at, is an issue which is no longer available for consideration.

9. Order XXI of the Code elaborately deals with the subject relating to execution of decrees and the provisions extend from attachment of properties sale and auction thereof and to many other methods on the powers of the Court to enforce execution. These provisions, it can be seen deal with, and are restricted to questions that would be connected with steps that may be taken by a court in the course of execution of a decree and cannot be regarded as a challenge to the validity of the award. Though it may be open to the Executing

Court to apply the principles contained in Order XXI in the course of enforcement of an arbitral award, in the considered view of this Court, it would however, not mean that the proceedings before the Executing Court by the application of the CPC, can lose sight of and disregard cogent findings that have been arrived at, in the arbitral proceedings. As such therefore, there is no further scope for the re-examination of the question of impleadment of the MoRTH, moreso, with the categorical undertaking that has been given by the petitioner, as seen from the impugned orders.

10. However, it is noted that the Executing Court by order dated 10.08.2023, has directed the Chief Engineer, (NH) PWD (Roads) to file a show-cause, as to why coercive action by way of detention in civil prison should not be taken against him for failure to satisfy the decree. In this context, it is noted that the powers of the Court, to enforce execution is given in Section 51 of the CPC. The proviso to Section 51 reads as follows; “

“Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court for reasons recorded in writing, is satisfied-

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,--

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.”

11. The decree in question, though being a money decree, the Judgment Debtor is the PWD (Roads) (NH), through the Chief Engineer, and as such, the same is not in the personal capacity of the Chief Engineer. Taking this into consideration therefore, the Executing Court to enforce execution can resort to other provisions as contained in Section 51, for enforcement of the decree. It is further provided that, as the time limit allowed is to expire very shortly, in the

interest of justice, a further 4(four) weeks' time is allowed from 28.08.2023, for satisfaction of the decree by the Judgment Debtor.

12. This Civil Revision Application, therefore for the reasons aforementioned accordingly stands disposed of, however, with no order as to costs.

Judge

Meghalaya
25.08.2023
"D.Thabab-PS"

