

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

The Hon'ble **JUSTICE SANJIB BANERJEE**
And
The Hon'ble **JUSTICE ANIRUDDHA ROY**

APO No. 39 of 2020
With
IA No. GA 1 of 2020
(Old No. GA 583 of 2020)

PND INFRASTRUCTURE PRIVATE LIMITED AND ANOTHER
-VERSUS-
M/S FAB LEATHERS LIMITED AND ANOTHER

For the Appellants:

Mr S. N. Mookherjee, Sr Adv.,
Mr Ratnanko Banerji, Sr Adv.,
Mr Deepan Kumar Sarkar, Adv.,
Mr Arunabha Deb, Adv.,
Mr Tanmoy Chakravarty, Adv.

For the Respondents:

Mr Ranjan Bachawat, Sr Adv.,
Mr Ishan Saha, Adv.

Hearing concluded on: December 22, 2020.

Date: December 24, 2020.

ANIRUDDHA ROY, J. :-

The present appeal arises from the order dated February 18, 2020 as corrected by a subsequent order dated February 24, 2020 passed in GA No.1590 of 2019, EC No.113 of 2007, AP No.55 of 2001 whereby the executing Court directed the Registrar, Original Side to release and make over the proceeds of account No.31454704056 dated September 27, 2007 lying with State Bank of India, specialized institutional banking branch, Kolkata with the accrued interest thereon in favour of respondents award/decreeholders.

2. The instant appeal is being taken up on the basis of the undertaking already given on behalf of the respondents that they would withdraw the appeal arising out of the special leave petition being Special Leave Petition (Civil) No.11740-11742 of 2009 pending before the Supreme Court preferred from the judgment and order of the Division Bench dated March 16, 2009 as recorded in the said impugned order dated February 18, 2020 and Mr. Bachawat the Learned Senior Counsel appearing for the respondents has further confirmed such undertaking before this Court and the present appeal is being disposed of subject to such undertaking.

3. The first appellant is successor-in-interest of an insolvent company, the second appellant, whose assets in effect been purchased by the first

appellant in an insolvency proceeding. The respondents lent and advanced money to the second appellant from time to time. The agreement between the parties envisaged the loan to carry interest @ of 28% per annum with quarterly rests. The agreement further provided that *in lieu* of the money due being paid to the respondents, the second appellant being the debtor company would hand over certain constructed flats at 30, Shakespeare Sarani, Kolkata-700017 (hereinafter referred to as the said property). The second appellant was to complete the construction on the said property and hand over the flats on or before March 31, 2000. If the second appellant failed to construct the flats within the said period it was to refund the amount to the respondents. The second appellant failed to discharge its obligation in terms of the said agreement.

4. An arbitral reference was commenced by the respondents herein which culminated into an award dated December 8, 2000, whereunder, the second appellant was directed to pay a total sum of Rs.6,82,62,117/- together with interest @ of 16% per annum simple on the principal sum of Rs.5,18,98,909/- from April 16, 1999 until payment within a period of three months from the date of the said award. The said award further stipulated that in the event the second appellant failed to pay the said sum within the said period of three months, the respondents would be entitled to get the conveyance of the said property together with the benefit of the sanctioned plan registered in their favour or anyone of them or their

nominee or nominees on compliance of all legal formalities. The transaction was directed to be completed within a period of six months.

5. The value of the land was already determined under the said award at Rs.12.50 crores in the event of execution of such conveyance, if the total amount payable by the second appellant to the respondents does not exceed the sum of Rs.12.50 crores, the respondents would pay the difference of excess amount simultaneously to the second appellant. The award also stipulated that the interest @ of 15% per annum on the principal amount should accrue either until payment of the awarded amount or the date of conveyance as the case may be.

6. Subsequently certain modifications were carried out in the said arbitral award dated December 8, 2000 (hereinafter referred to as the said award) and the modified award was made and published by the arbitral tribunal on September 18, 2002. The modifications carried out in the said award are not relevant for the purpose of adjudication of the instant appeal.

7. The said award has attained finality.

8. Since the second appellant failed to satisfy the said award which is a deemed decree under the provisions of the Arbitration and Conciliation Act, 1996, the respondents instituted execution proceeding being EC No.113 of 2007.

9. In the execution proceeding the second appellant being the award-debtor filed an application praying for a direction to deposit a sum of Rs.13,38,31,477.30/- and for recording of satisfaction of the said award with other consequential reliefs. In the said application an order was passed by the executing Court dated September 13, 2007, when the second appellant being the award/judgment-debtor was permitted to deposit a sum of Rs.13,38,31,477.30/- with the Registrar, Original Side, who then was directed to invest the said sum in a short term fixed deposit with the State Bank of India, main branch, Kolkata and to keep it renewed until further order.

10. By a judgment and order dated July 11, 2008 the Executing Court was pleased to disposed of the execution proceedings *inter alia* directing the second appellant to convey the said property in favour of the respondents or their nominee or nominees. The said judgment and order dated July 11, 2008 was subsequently set aside by the judgment and order dated March 16, 2009 passed by the Appellate Court. Thus, the claim of the respondents award-holders was found to have crystallised in the money deposited in the executing court.

11. The second appellant accepted the said judgment and order of the Appellate Court dated March 16, 2009 whereas the respondents award-holders preferred a special leave petition being Special Leave Petition (Civil) No.11740-11742 of 2009 (hereinafter referred to as the said special leave

petition) wherein leave was granted on January 20, 2010 by the Supreme Court.

12. The respondents award-holders on or about July 10, 2019 took out a master Summons before the executing court praying for directions upon the Registrar, Original Side to make over the proceeds with the accrued interest lying in the bank account after deducting the applicable charges. By the impugned order dated February 18, 2020 such prayer of the respondents was allowed.

13. Meanwhile the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC) was promulgated. On an application filed by the creditors before the relevant adjudicating authority under the said IBC [National Company Law Tribunal (NCLT)], on August 30, 2018 a resolution process within the meaning of the said IBC had commenced and resolution professional was appointed in respect of the second appellant. Committee of creditors was formed pursuant to the direction of the relevant adjudicating authority. The resolution professional on September 3, 2018 published necessary advertisement inviting claims from the creditors at large of the second appellant. The said advertisement *inter alia* stipulated that all such claims were to be submitted within September 18, 2018. However, the said period was subsequently extended for another 90 days under the direction of the adjudicating authority and such extended period had also elapsed on November 28, 2018. During such period no claim was

submitted by the respondents before the resolution professional in terms of the provisions laid down under the IBC. The resolution professional by its communication dated March 16, 2019 requested the respondents to submit its claim as against the second appellant for the same being considered for approval of the resolution plan of the second appellant. Ultimately on June 01, 2019 the necessary resolution plan was approved by the relevant adjudicating authority.

14. Mr. Soumendra Nath Mookherjee, Learned Senior Counsel appearing for the appellants submitted that it is true that the second appellant on its own asking deposited the sum with the Registrar, Original Side pursuant to the direction made by the executing Court towards the satisfaction of the claim of the respondents under the said award. However, in view of the intervening resolution process initiated by the creditors against the second appellant under the IBC and the resolution plan being approved without any claim being submitted by the respondents under the provisions of the IBC, the respondents are not entitled to claim any right over and above the said awarded dues which was deposited with the Registrar, Original Side by the second appellant. The provisions of IBC has a prevailing effect over the said awarded/decretal claim of the respondents, no direction could be made to hand over the said sum to the respondents. Thus, the order under the appeal is illegal, bad in law and is not sustainable and should be set aside.

15. Mr. Mookherjee referred to the various provisions from the Bankruptcy Code in support of his above contention. He referred to the definition of “claim” as defined under IBC and submitted that a claim is a right of payment, whether or not such right is reduced to judgment, secured or unsecured. The said definition also includes even a disputed claim. The submission was made that in view of the operation of Section 13 of the Bankruptcy Code immediately after admission of an application filed for resolution process before the adjudicating authority it is the duty of the such adjudicating authority to declare a moratorium for the purposes referred to in Section 14 of the said Bankruptcy Code. The moratorium is declared to give reliefs to the corporate debtor being the second appellant herein from the claims of its creditors. Section 15 of IBC provides for a public advertisement of corporate insolvency resolution process which essentially is for inviting claims from the diverse creditors of the corporate debtor and to inform the last date for submission of claims so that such claims could be taken into consideration at the time of approval of the corporate resolution plan by the relevant adjudicating authority. Referring to Section 31 of the Bankruptcy Code the Learned Senior Counsel argued that once the resolution plan is approved no creditor will have any right to lodge its claim or to enforce its claim in any manner, if not, already submitted before the resolution professional pursuant to the advertisement made by it within the stipulated period mentioned therein for consideration by the committee of creditors and the

resolution professional, who would in turn prepare and furnish the necessary resolution plan before the relevant adjudicating authority. In other words Mr. Mookherjee's submission is that once a creditor has lost its opportunity, for whatever reasons may be, from submitting its claim before the resolution professional for appropriate consideration before approval of the resolution plan, such a creditor will lose its right to lodge its claim and to enforce its claim against the corporate debtor after the resolution plan is approved.

16. Mr. Mookherjee then referred to Section 238 from the Bankruptcy Code and submitted that the provisions of such code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. He argued that by virtue of such provision embodied in the Bankruptcy Code, such Code has an overriding effect over the said award made under the prevailing arbitration act and also having overriding effect over the execution of such award under the provisions of Order XXI of the Code of Civil Procedure, 1908.

17. Mr. Mookherjee, then submitted that the respondents did not accept the said judgment of the appellate court dated March 16, 2009 and preferred the special leave petition in which leave had been granted by the Supreme Court and the appeal is still pending. According to him, this clearly shows the intention of the respondents that at the relevant point of

time they were not ready and willing to accept or receive the awarded sum. Therefore, the respondents subsequent to the approval of the resolution plan under the Bankruptcy Code relating to the second appellant, could not and cannot enforce its claim under the said award against the second appellant once they had failed to lodge their claim in the insolvency proceeding.

18. Mr. Mookherjee then placed reliance on the dictum of the Supreme Court in the matter of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta* reported at (2019) SCC Online SC 1478, emphasising on paragraph 88, he submitted that a successful resolution applicant cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted, this would militate against the rationale of Section 31 of the Bankruptcy Code. He submitted that all claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor.

19. Mr. Mookherjee then placed reliance on a further dictum of the Supreme Court in the matter of *P.S.L. Ramanathan Chettiar v. O. Rm. P. Rm. Ramanathan Chettiar* reported at AIR 1968 SC 1047, relying on paragraphs 2, 11, and 12 of the report, he submitted that any amount deposited in Court by a judgment debtor under a decree to obtain stay of

execution of the decree does not pass right on the sum so deposited in the execution proceeding to the decree holder, hence the respondents cannot claim any right over the amount deposited by the second appellant pursuant to the direction of the executing court.

20. Mr. Ranjan Bachawat, Learned Senior Counsel appearing for the respondent award-holder submitted that the appellant award-debtor had deposited the money voluntarily before the Executing Court much prior in point of time than the insolvency proceeding in respect of the second appellant intervened. The right on such awarded sum had immediately transferred in favour of the award-holder then. Furthermore under the judgment and order dated March 16, 2009 passed by the Coordinate Bench such position stood confirmed and the satisfaction of the award/decreed was recorded and the obligation of the appellant award-debtor also stood discharged then immediately. The appellant, therefore, at this belated stage cannot turn around and contend anything to the contrary. Mr. Bachawat further drew the attention of this court to the averments made in the counter affidavit filed on behalf of the second appellant in the special leave petition and submitted that the appellant also understood and treated the said deposit of the said awarded amount before the executing court as satisfaction of the award in favour of the respondent award-holder.

21. Mr. Bachawat further submitted that the resolution applicant before the NCLT in respect of the resolution plan for the second appellant is the sister concern of the second appellant with common directors. Therefore, question of taking the claim of the respondents as a surprise after the resolution plan being approved by the NCLT does not and cannot arise and on this factual matrix the judgment in the matter of: *Essar Steel* (supra) is clearly distinguishable. Therefore, the ratio of the said dictum will not apply in the facts of the present case.

22. In view of the above, the issue arose for consideration in this appeal is that whether an awarded claim deposited by the award-debtor with the executing court can be realised and received by the award-holder to the satisfaction of the award, when the said awarded claim was not a part of the resolution process of the award-debtor, after the resolution plan is approved by the relevant adjudicating authority under the provisions of the said IBC.

23. It is an admitted position that pursuant to the award made in December 2007 by the Arbitral Tribunal which is a deemed decree within the meaning of the Arbitration and Conciliation Act, 1996 remained unsatisfied at the end of the second appellant, who is the award-debtor. The respondents award-holders were compelled to apply for execution of the same and initiated the execution proceeding before the executing court in terms of Order XXI of the Civil Procedure Code against the second

appellant. The second appellant being the award-debtor also applied before the executing court and prayed for necessary direction to deposit the money claim under the award payable to the respondents. Such an Act on the part of the second appellant was completely in terms of and in conformity with the provision laid down under sub-rule (1)(a) of Rule 1 of Order XXI of the Code of Civil Procedure and amounts to an unequivocal acceptance of the award when the award has been crystallised. Pursuant to the said order dated September 13, 2007 passed by the executing court the awarded sum was deposited by the second appellant with the Registrar, Original Side and the claim of the respondents award-holders was found to have crystallised in the executing court in view of the judgment of the Appellate Court dated March 16, 2009.

24. Upon a money decree becoming final, it is incumbent on the judgment-debtor to make over the decretal debt in court or to make over the decretal debt to the decree-holder and apply to the court that passed the decree for recording satisfaction of the decree. The legal position is identical when an arbitral award ripens to a decree which may be implemented as if it were a decree passed by the court.

25. There was a dispute between the parties at the stage that the decretal amount was tendered by the award-debtor in court. The award-holders insisted that it had a right in respect of the Shakespeare Sarani property and declined to accept the monetary value as awarded since,

according to the award-holders, the time to put in the money in terms of the award had lapsed and an inalienable right had accrued in respect of such Shakespeare Sarani property. For good or bad, the award-holders were found entitled to the property by the executing court. But such order was set aside in appeal and there is no escaping the fact that the implication of the appellate order of March 16, 2009 is that the rights of the award-holder was confined to the money tendered in the executing court.

26. The awarded sum was deposited by the second appellant on its own asking prior in point of time than the IBC proceeding had intervened. When a judgment-debtor deposits money in an executing court, the executing court receives the same for and on behalf of the award-holder and is really and the temporary holder thereof for the benefit of the decree-holder to collect the same. A decretal debt is paid into court and not deposited, so to say. Upon the decretal debt being tendered in court, the decretal interest stops running. It is for the court to invest the money and what accrues on the investment is for the benefit of the decree-holder. It is the executing court through its registrar had held the awarded sum in its custody as a trustee for and on behalf of the respondents who are the beneficiaries of the said sum under the award. The mere release of the awarded sum in favour of the respondents award-holders by encashing the fixed deposits is nothing but a ministerial act. The moment the second appellant had deposited the awarded sum with the executing court in

terms of Order XXI, Rule 1, sub-rule (1)(a) of the Civil Procedure Code the right on the said amount under a crystallised award or decree had passed in favour of its beneficiary, namely, the respondents herein. The deposit was made by the award-debtor second appellant in 2007 whereas the Bankruptcy Code was promulgated as late as in 2016. It is, therefore, cannot be contended that in view of the operation and intervention of the Bankruptcy Code relating to the second appellant, the respondents award/decreed-holders cannot claim any right over the said awarded sum.

27. The legal effect of the appellate order of this court of March 16, 2009 is that it found that the award stood satisfied upon the payment into court by the award-debtor of the amount of Rs.13,38,31,477.30/- on or about September 14, 2007. In the special leave petition, and the resultant appeal upon leave being granted, the respondents herein sought to assert a right in respect of the property and claimed that they were entitled to the property at Shakespeare Sarani rather than the money that had been put in to court by the award-debtor. There is no doubt that such appeal is pending, but the practical aspect of the matter is that the immovable property is no longer available for the respondents to chase the same. In any event, an appellant has every right to abandon an appeal at any stage. The only effect of such abandonment is that the order impugned becomes binding on the appellant.

28. The provisions under Order XXI of the Code of Civil Procedure, it is settled that, is a complete code within the code of 1908. A crystallised decree when remains unsatisfied, to enforce the same, the provisions of the said complete code is available to the beneficiary of the decree to initiate a proper execution proceeding before an executing court having competent jurisdiction. It is equally settled and the time tested proposition that the executing court cannot travel beyond the decree. In the facts of this case, the arbitral award having acquired the character of decree and having been crystallised, the beneficiary of the said award, namely, the respondents award-holders had every right to institute as many as execution proceedings in all possible manners to execute the award until the same is satisfied in its favour. Therefore, the filing of the execution proceeding by the respondents award-holders for execution of the said award is just, proper, lawful and valid.

29. In the present case, the respondents whole-heartedly embrace the order dated March 16, 2009 passed by the appellate court here. There is no impediment to the respondents being permitted to collect the money and receive the same on their undertaking to abandon the appeal.

30. In so far as the argument made on behalf of the appellants with regard to the overriding effect of Bankruptcy Code over all the proceedings and provisions under any other law including the subject execution proceeding in this case is concerned, the same has no merit, as way back

in 2007 when the second appellant deposited the awarded sum payable to the respondents award-holders under a crystallised award with the executing court had discharged its obligation under said crystallised award. Such discharge of obligation on the part of the second appellant under the said crystallised award took place way back in 2007 which is much prior in point of time than the Bankruptcy Code was even promulgated far to speak of approval of the resolution plan relating to the second appellant by the relevant adjudicating authority under the Bankruptcy Code. The right in respect of the said awarded sum had already passed in favour of the respondents award-holders under the way back in 2007. As such there was no requirement on the part of the respondents to lodge its claim in the resolution process of the second appellant under the provisions of the Bankruptcy Code to the extent of the sum already deposited by the second appellant with the executing court under the award with whatever accretion thereupon.

31. The ratio decided by the Supreme Court in the matter of *Essar Steel India Limited (supra)* has no application in the facts and circumstances of the case. In the facts of the said judgment the subject claims against *Essar Steel* was never discharged or satisfied as in the instant case discussed above before the resolution plan was approved relating to the *Essar Steel* by the relevant adjudicating authority. In the present case, as discussed above, the claim against the second appellant corporate debtor under the award stood discharged by the second appellant itself when the

said deposit was made in 2007 before the executing court. The claim of the respondents under the said award as against the second appellant being satisfied either wholly or partly to the extent of the deposit made by the second appellant before the executing court could not be subjected to the resolution process relating to the second appellant under the provisions of the Bankruptcy Code. Hence the ratio decided in the said judgment has no manner of application in the facts of the case.

32. In the matter of *PSL Ramanathan Chettiar (supra)* was a case where for stay of execution of a money decree in an appeal preferred by the judgment debtor the decretal due was deposited as security pending disposal of the relevant appeal from the decree, which is otherwise a condition precedent provided under Order XLI the Code of Civil Procedure for filing an appeal from a money decree. Such deposit was not made in terms of Order XXI Rule 1 sub-rule (1)(a) of the Code of Civil Procedure as a mode of paying money under the award/decreed, as had happened in the present case. Therefore, the ratio of the said decision has no manner of application in the facts and circumstances of the present case.

33. The red herring that has been shown by the appellants herein is the failure on the part of the respondents to lodge a claim pursuant to the advertisement being issued in the insolvency proceedings. Indeed, the respondents could not have lodged any claim, unless the respondents were to exercise any rights pertaining to the Shakespeare Sarani property and

such property was still a part of the assets of the insolvent company. Upon the original award-debtor tendering the awarded amount in court, such award-debtor ceased to have any right over the money or the amount tendered and remaining in court. Such money could never revert to the award-debtor and, if the award-holders did not ultimately receive the same, the award-debtor would still have no right to obtain refund thereof. It is for such reason that the judgments cited are of no avail to the appellants herein. The judgment and order impugned does not call for any interference.

34. In view of the foregoing discussion, this court is of the considered opinion that the appeal preferred by the appellants is not maintainable, and devoid of any merit and as such the same is dismissed with costs assessed at Rs.50,000/-.

35. The Registrar, Original Side is further directed to carry out the directions of the executing Court made in its order dated February 18, 2020 which was subsequently corrected by an order dated February 24, 2020 immediately upon the communication being received in writing from the respondent's advocate on record that the appeal arising from the said SLP has been withdrawn in terms of their undertaking given to both the executing court as well as this court.

36. It is further made clear until appeal arising from the said SLP is not withdrawn by the respondents and the same is properly communicated

with the Registrar, Original Side, none of the orders namely the orders passed by the executing court dated February 18, 2020 and February 24, 2020 and this order will operate.

37. APO 39 of 2020 along with IA No. GA 1 of 2020 are disposed of.

38. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Aniruddha Roy, J.)

I agree.

(Sanjib Banerjee, J.)

Later:

A prayer for stay of the operation of the order is made, which is declined.

Since the cheque issued to the respondents may have lapsed, the Registrar, Original Side should issue a fresh cheque in favour of the respondents within a week after the reopening.

(Sanjib Banerjee, J.)

I agree.

(Aniruddha Roy, J.)