

ORDER

APO 77 of 2020
GA 1 of 2020 (Old GA 1115 of 2020)
GA 2 of 2020 (Old GA 1116 of 2020)
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

M/S. SATYEN CONSTRUCTION
Versus
STATE OF WEST BENGAL

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE ARIJIT BANERJEE

Date : 6th October, 2020.

(Through Video Conference)

APPEARANCE:

Mr. Jayanta Mitra, Sr. Advocate
Mr. Suman Dutt, Advocate
Mr. Priyankar Saha, Advocate
Mr. Amritam Mandal, Advocate
Mr. Nirmalendu Das, Advocate
...for the appellant.
Mr. Samrat Sen, Sr. Advocate
Mr. Paritosh Sinha, Advocate
Mr. Tirthankar Das, Advocate
Mr. Arindam Mandal, Advocate
...for the respondent/State.

The Court : The appeal arises out of an order dated March 12, 2020 passed on an application filed by the award-holder appellant herein. On or about December 24, 2018, an award was passed in favour of the appellant for a sum in excess of Rs. 4 crore. It appears that upon the award-holder noticing that the time for applying for setting aside the award had elapsed, execution proceedings were instituted late in August, 2019. However, by the end of the first week of September, 2019, the award-debtor State applied for setting aside the award

contending that it had not received the award in time and hence the delay. In due course, the award-debtor also applied for a stay of the operation of the award in tune with the amended provisions of the Arbitration and Conciliation Act, 1996.

In the interlocutory proceedings in the petition for setting aside the award, an order was made on September 9, 2019 for a certain amount of money to be deposited with the Registrar, Original Side and for a bank guarantee to be furnished for another specified account, as preconditions for a stay of the operation of the award. The deposit was to be made and the guarantee was to be furnished by November 7, 2019. In default, the order clearly allowed the award-holder to put the award into execution. The award-holder obtained a certificate from the department on November 14, 2019 to the effect that the deposit in terms of the order dated September 9, 2019 had not been made. Even as the award-holder pursued the execution case, a prayer was made before the executing Court on behalf of the award-debtor that the time to make the deposit ought to be extended or, at any rate, the execution proceedings should be adjourned to afford the award-debtor time to approach the Arbitration Court for the purpose of obtaining an extension. On at least two occasions, the Executing Court afforded time. The award-holder came up in appeal in the meantime and the submission made by the parties was recorded, though the question of the very maintainability of the appeal which had arisen was not gone into.

It is not in dispute that the principal amount awarded together with the interest that had accrued till a particular date have now been deposited in Court. As a consequence, the operation of the award remains stayed and the same is not executable.

After the order of stay of the operation of the award was passed and the stay became effective upon the deposit in terms of the relevant order being made, the award-holder appellant herein applied for a variation of the order of stay before the Arbitration Court. The award-holder intended to withdraw a substantial part of the deposit by furnishing a bank guarantee. It does not appear that the award-holder cited any event subsequent to the passing of the order of stay by the Arbitration Court while making the relevant application.

When a point of maintainability of the present appeal is taken on behalf of the award-debtor before this Appellate Court, it is submitted on behalf of the award-holder that the application before the Arbitration Court should be seen to be one under Section 9 of the Act of 1996. Such submission is accepted, since it is trite law that notwithstanding how an application or petition may be intitled, if the authority to file the same is found in some other provision, the appropriate provision would apply.

Section 9 of the Act of 1996 permits an application for interim measures to be carried to a Court before the arbitral proceedings commence, during the continuation of the arbitration proceedings and even “at any time after the making of the arbitral award but before it is enforced in accordance with Section 36...”.

Thus, when an arbitral award has not ripened for execution, a post-award application under Section 9 of the Act may be made.

Ordinarily, when a prayer for stay of the operation of the award is taken up for consideration under Section 36 of the Act, the Court would hear both sides and would weigh the rival cases before passing an order for a conditional or

unconditional order of stay. Once such exercise is completed, the same cannot be interfered with unless subsequent events are cited. Thus, when a conditional or unconditional order is made staying the operation of an arbitral award under Section 36 of the Act, the award-holder cannot seek to have the order modified unless the award-holder invokes Section 9 of the Act on the basis of such material that could not have been placed before the Section 36 Court earlier, or had not been placed because of some insurmountable difficulty or the like. Section 9 of the Act, particularly in clause (e) of sub-section (1) is wide enough to allow an application for interim measures to be made to the Arbitration Court even after an order for stay of the operation of the award, conditionally or unconditionally, has already been made. As to whether an order would be passed on such application, would depend on the quality of the application and the grounds which are cited.

In the present case, the subsequent application made by the award-holder may, charitably, be treated as a post-award and a post-stay order application for interim measures, which is permitted under Section 9 of the Act. However, inasmuch as no event subsequent to the passing of the order of stay of the arbitral award was cited, the order impugned cannot be faulted. But nothing prevents the award-holder to apply again under Section 9 of the Act to carry any subsequent event or development to the Arbitration Court for which an interim protection is 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. To such extent, there is no conflict between the rights conferred by Section 9 of the Act and those under Section 36 thereof.

Once the application carried at the post-stay order stage is treated as an application for interim measures under Section 9 of the Act, the order impugned becomes appellable since Section 37 of the Act permits an order granting or refusing to grant any interim measure to be the subject-matter of an appeal. Thus, the appeal is found to be maintainable. However, since the grounds carried in the application are not found to be worthy, the order impugned is not interfered with. It now appears that certain subsequent events may have arisen which may not have been brought to the notice of the Arbitration Court. If such is the case, there is nothing stopping the award-holder from invoking Section 9 of the Act afresh.

APO 77 of 2020 along with all interim applications therein are disposed of on the above basis without interfering with the order impugned. In the event a subsequent application is found worthy, the Arbitration Court is requested to consider the order of costs contained in the impugned order. There will be no order as to costs in this appeal.

Urgent certified photostat copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

(SANJIB BANERJE, J.)

(ARIJIT BANERJEE, J.)

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