IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

ORIGINAL SIDE

APO No. 86 of 2020

GANNON DUNKERLEY AND CO. LTD.
Versus
SREI EQUIPMENT FINANCE LIMITED

IA No.GA/1/2020(Old No.GA/1198/2020), GA/2/2020(Old No.GA/1199/2020)

WITH

AP No.417 of 2019

SREI EQUIPMENT FINANCE LIMITED
VERSUS
GANNON DUNKERLEY AND CO. LTD.

IA No.GA/1/2019(Old No.GA/2380/2019), GA/2/2019(Old No.GA/2381/2019), GA/3/2020(Old No.GA/955/2020), GA/4/2020 (Old No.GA/957/2020, GA/5/2020 (Old No.GA/1026/2020), GA/6/2020(Old No.GA/1027/2020)

BEFORE:
The Hon'ble JUSTICE HARISH TANDON
AND
The Hon’ble JUSTICE TIRTHANKAR GHOSH

Date : 14th September, 2020

(Through Video Conference)

Appearance:
Mr. Moinak Bose, Adv.
Mr. Nirmalya Dasgupta, Adv.
Mr. Om Prakash Jhunjhunwala, Adv.
Ms. Sweta Gandhi Murgai, Adv.

Mr. Ayan Chakraborty, Adv.
Mr. Swatarup Banerjee, Adv.

The Court : Several contracts formed part of the arbitral proceeding initiated allegedly on the ground of breach of the terms and conditions embodied therein. Inevitably several receivers have been appointed to take possession of the assets/hypothecated goods pertaining to such contracts. The Memorandum of Understanding was entered into on 30th June, 2020 with an intention to bring an end to the litigation. The salient feature of the said Memorandum of Understanding concerns rescheduling of the payment of the defaulted amount relating to such several contracts which is lucidly and explicitly jotted down in Annexure IV thereto. The parties are not at variance on the payment of the instalment depicted in Serial Nos.1 and 2 of Annexure IV to MOU and admittedly those amounts have been paid within the stipulated time. However, there appears to be a default in payment of the third instalment which took a front seat of defence in resisting the prayer of the appellant made before the trial court for release of the equipments concerning the respective contracts shown in Annexure IV thereto; more particularly, the contract shown against the payment of first and second instalments. An application by the appellant has not been disposed of by the trial court for the reason that the disputed facts cannot be adjudicated without exchange of affidavits.

According to the appellant, the moment, payment as shown in Annexure IV, is made within the schedule time against a particular contract, the respondent cannot resist the prayer for release of such equipments even after accepting the amount in full and final settlement of such contracts.

On the other hand, the respondent resisted the claim of the appellant on the premise that Clause 4 denotes a composite settlement in the form of MOU and provides the consequences in case of default and/or breach of any of the terms therein. For elucidation and clear understanding of the intention of the parties, Clause 4 is quoted as under:

> “4. This MOU shall be valid for a period of 6months from its date of execution, provided that if the Borrower fails to comply with any of its obligations under this MOU including payment of Instalments strictly as per **Annexure IV** for any reason whatsoever or in any manner whatsoever, and/or makes any further default as described under MFA, the following would be the consequences of default in addition to the consequences of events of default as mentioned in MFA:-
>
> a) SEFL may, notwithstanding anything else stated in this MOU, cancel, suspend, terminate, withdraw with retrospective effect, all or any of the relief and/or concessions provided to the Borrowers under this MOU,
>
> b) The Total claim of Rs.**82.43 Crores (Rupees Eighty Two Crores Forty-three Lacs Only)** excluding the amount paid if any under this MOU would be forthwith due and payable by the Borrower to SEFL alongwith interest @18% p.a. till full and final realisation to the saitsfaction of SEFL.
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> c) Borrower would immediately and unconditionally surrender all the assets/securities hypothecated and/or charged to SEFL except those forming part of the contract, if any, in respect of which the instalment as mentioned in the Repayment Schedule IV has been paid by the Borrower.
>
> d) SEFL shall have the right to take possession and/or sell the hypothecated assets and collateral properties offered against this settlement as mentioned in **Annexure V** without any further reference to Borrower.”

No doubt, the MOU comprised of several contracts entered into by and between the parties and the intention manifests that the parties settled the dispute by rescheduling the payment dates. Sub-clause (c) of Clause 4 of the MOU unequivocally suggests that in the event of the default, the borrower would immediately and unconditionally surrender all the assets/securities hypothecated and/or charged with the respondent except those forming part of the contract in respect of which the instalment as mentioned in Annexure IV has been paid by the borrower. There is no ambiguity in our mind in perceiving the intention of the parties that if the payment as shown against a particular contract has been made and the payment in respect of the other contract has not been made, the assets forming the contract for which the payments have been made shall not be surrendered in favour of the respondent. We do not find any discrepancy in the aforesaid clause which is clear, unequivocal and sufficiently conveys the intention of the parties for which we do not think that any further affidavits are required.

However, we appreciate the submission advanced by the respondent that the contracts which do not form the subject-matter in AP No.417 of 2019 and the assets comprise in such contract, even if in possession of the receiver, cannot be directed to be released by the Court. In other words, an objection is taken that the contracts which do not form part of the subject-matter of the proceeding cannot be brought by way of an application and the Court cannot pass any order beyond the subject dispute. The appellant has not disputed the fact that the contract nos. 147197, 154895 and 168736 do not form part of AP No.417 of 2019. There is no dispute and/or quarrel over the other contract numbers incorporated in prayer (c) of the said application being GA No.957 of 2020 as they are intricately forming the subject dispute.

In view of the above, we do not find any justification in allowing the parties to exchange their affidavits when the respondent has not disputed the receipt of the money concerning serial nos. 1 and 2 relating to the contracts as shown therein. The receiver is, therefore, directed to release the assets pertaining to the contract numbers shown in prayer (c) to the said application i.e. GA No.957 of 2020 and hand over the physical possession thereof except the contract nos. 147197, 154895 and 168736. After handing over the possession the receiver shall stand discharged to the extent of such assets, subject to the other statutory obligations, if there be any. Liberty is granted to the appellant to apply for release of the assets pertaining to the contract nos. 147197, 154895 and 168736 in a proceeding in which those are the integral part of the subject-matter of dispute. If any applications are made for a similar direction as made in the instant applications, those would be dealt with by the trial court independently and such applications shall not be hit by a principle of res judicata or otherwise.

With these directions both the appeal and the applications are disposed of.

(HARISH TANDON, J.)

(TIRTHANKAR GHOSH, J)

bp./kc.