

AP 222 of 2020

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

SAREGAMA INDIA LTD.
Versus
MITESH MEHTA

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 5th March, 2021.

Appearance:

Mr. Anirban Ray, Adv.
Mr. Soumabho Ghose, Adv.
Mr. Rishav Dutta, Adv.
...for the petitioner.

Mr. Anirban Bose, Adv.
Mr. Jit Ray, Adv.
Md. Jalaluddin, Adv.
...for the respondent.

The Court : This application has been filed under Section 9 of the Arbitration & Conciliation Act, 1996 (The Act) for a direction on the respondent/award-debtor to furnish security for a sum of Rs.4,20,05,695/- towards an Arbitral Award dated 28th November, 2012.

Before this Court embarks upon a discussion on the matter, it is first made clear that an application for setting aside of the Award dated 28th November, 2012 was allowed by this Court by a judgment dated 2nd March, 2021. The present application was filed in August, 2020 before the judgment was delivered in the application for setting aside of the award.

Learned counsel for the petitioner submits that this application has been made to secure the amount awarded and to prevent the award-debtor from alienating its assets before the award is executed.

Mr. Anirban Ray, learned counsel appearing for the petitioner submits that the petitioner is entitled to make the present application under Section 9

of the Act for securing the amount awarded to the petitioner. It is also submitted that despite several orders passed by the learned Judges of this Court requiring the respondent to indicate by way of an affidavit that the respondent has the capacity to satisfy the awarded amount, the respondent has failed to do so and that the affidavit subsequently filed is devoid of any particulars.

Mr. A. Bose and Mr. Jit Ray, learned counsel appearing for the respondent award-debtor contend that Section 9 of the Act is akin to Order 38 Rule 5 of The Code of Civil Procedure (CPC). Counsel submits that no particulars have been pleaded in the application to substantiate the fear of the applicant that the respondent would alienate his assets pending execution of the award. On the factual score, counsel submits that even though the award was passed on 28th November, 2012 and the disputes are of 2007-2008, the petitioner did not proceed to secure the amounts claimed in the arbitration.

Upon hearing learned counsel appearing for the parties, this Court is unable to agree with the contention that in order to make out a case under Section 9 of the 1996 Act, a petitioner must satisfy the requirements under Order XXXVIII Rule 5 of the CPC. This is by reason of the fact that unlike Section 9 of the 1996 Act which begins with “*A party may ... or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced ...*”, Order XXXVIII Rule 5 deals with “*Attachment before judgment*”, which brings out the difference between the two provisions. The decisions cited by counsel for the respondent namely, *Arvind Constructions Co. (P) Ltd. versus Kalinga Mining Corporation (2007) 6 SCC 798* and *Adhunik Steels Ltd. versus Orissa Manganese And Minerals (P) Ltd (2007) 7 SCC 125* do not support the contention of the respondent since the decisions reiterate that an

order under Section 9 must be in keeping with the recognized principles governing grant of interim injunctions. In *Adhunik Steels*, the principles for grant of injunction have been enumerated as balance of convenience, prima facie case and irreparable injury. There cannot be any contrary view to the law which has been laid down in these decisions.

It is however to be seen whether a case requiring the respondent to furnish security has been made out in the facts pleaded by the petitioner in the present case. Paragraphs 19 to 22 of the application are relevant for this purpose and can be summarized as;

- (a) That the respondent deliberately and with ulterior motive attempted to delay the proceedings to reduce the effectiveness of the Award;
- (b) That the respondent has been prolonging the Section 34 proceedings with the ulterior motive of rendering the Award infructuous;
- (c) That in view of the pandemic the award is going to be reduced to 'a paper award' which makes it necessary that the same be secured;
- (d) That necessary directions for disclosure of the respondent's assets are required since the respondent is a sole proprietor running commercial operations;
- (e) That there is a reasonable apprehension that the respondent will remove and deal with all his assets with a view to render the award, a paper award;
- (f) That the petitioner is further apprehending that the respondent is taking undue advantage and in the circumstances arising out of the lockdown resulting from the present pandemic might alienate or

otherwise create third party interest in the particulars owned by the respondent to frustrate the award.

(The above contentions have been reproduced from the paragraphs in the application).

The question is whether the above contentions would justify a direction on the respondent to furnish a security of Rs.4,20,05,695/-. The respondent has filed an affidavit of assets pursuant to orders of Court. The affidavit lists the bank accounts, stocks and shares, life and endowment policies specifically indicating the amounts under the individual heads. Since a formal affidavit has been filed, the Court assumes that all the assets of the respondent have been included in the said affidavit. It must be mentioned that the Court passed orders on several dates asking the respondent to indicate whether it has the financial capability to satisfy the Award and demonstrate evidence of such capability. Paragraph 8 of the affidavit listing two bank accounts of the respondent, mentions the monetary amounts lying in the accounts. Similar monetary amounts have also been mentioned under the "Stocks and Shares" and "Life Endowment Policies" heads. Therefore, the contention that the respondent has not indicated its financial capability to satisfy the Award, cannot be accepted.

This Court is of the view that before a drastic order of furnishing security is passed against the respondent, the credibility of the apprehension averred by the petitioner should be tested. The apprehension pleaded is restricted to the contentions listed above. The only basis disclosed for such apprehension is that the respondent will remove and deal with his assets for rendering the award infructuous and that the likelihood of such has increased during the lockdown resulting from the pandemic.

In the view of this Court, the petitioner would have to satisfy the test of a real apprehension pleaded, bolstered with factual particulars. It is simply not enough to plead that there is a “reasonable apprehension” or that the pandemic has brought about a situation which would encourage a party to alienate his assets to the detriment of the decree holder. There is admittedly no factual particulars in the present application which would support the “reasonable apprehension” statement justifying an order of security being furnished. It is also not clear as to how the present pandemic/lockdown would result in a real likelihood of the respondent transferring his assets to frustrate the effect of the Award.

The contention that the respondent has prolonged the Section 34 proceedings or delayed the arbitral proceedings is without any factual basis since besides the Arbitrator noting that the respondent failed to participate in the arbitration after January, 2011, there are no other facts supporting such contention. The respondent has also not delayed the Section 34 proceedings which were heard and disposed of by this Court.

On the legal aspect, although there is a stated difference in the situations contemplated under Section 9 of the 1996 Act and Order XXXVIII Rule 5 of the CPC, an application made under the former rests on a factual presumption that there is a tangible risk of a party frustrating the arbitration proceedings which warrants interim measures for preserving the subject matter of the dispute. Although such apprehension may arise even after passing of the Award, the scenario must be clear and immediate so as to persuade the Court to give relief to an Award holder.

The other significant fact remains that the impugned Award is of 28th November, 2012 and the application for setting aside was filed within the statutory time limit in 2013. The petitioner was at liberty after November, 2012 to proceed with the enforcement of the award. Section 36 of the Arbitration Act gives a wide berth to a petitioner which is not curtailed even by an application made for setting aside of the Award, unless the Court grants an order of stay of the operation of the Award. Since there was no order of stay of the impugned award, nothing prevented the petitioner from enforcing the same even after the respondent applied for setting aside of the Award. There is no explanation as to why the petitioner has not proceeded with the execution application/enforcement proceedings which was open for the petitioner to do at all times after November, 2012, but filed the present application after almost eight years in August, 2020.

In view of the above reasons, this Court sees no basis for demanding that security be furnished by the respondent to the extent of the amount awarded in the arbitration. Since the challenge to the Award has also been dismissed in favour of the petitioner, the petitioner has several statutory recourses available to it for taking the benefit of the Award.

AP No.222 of 2020 is accordingly dismissed without any order as to costs.

(MOUSHUMI BHATTACHARYA, J.)