

ODC-2

IA No.GA/1/2021
In
EC/74/2021

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

SREI EQUIPMENT FINANCE LIMITED
Versus
MARG LIMITED
(Commercial Division)

BEFORE:
The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA
Date :30th June, 2021
(Via Video Conference)

Appearance:

Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Swatarup Banerjee, Adv.
Mr. Paritosh Sinha, Adv.
Mr. Saubhik Chowdhury, Adv.
Mr. Dripto Majumdar, Adv.
Ms. Ayusmita Sinha, Adv.

Mr. Rohit Das, Adv.
Mr. Kishwar Rahman, Adv.

The Court: This is an application made on behalf of an award-debtor for dismissal of the execution application filed by the award-holder under Section 36 of The Arbitration and Conciliation Act, 1996 (the Act). The Award, which forms the subject-matter of the execution application, is dated 31st August, 2020. By the said Award, the award-debtor was directed to pay a substantial sum of money to the award-holder.

The point as argued by learned counsel appearing for the parties on the maintainability of the application is being addressed in this order since that would have a bearing on the execution proceedings as well. The argument on the maintainability, urged on behalf of the applicant/judgment-debtor consists of two points: first that the time to execute the Award has not commenced and second, that this Court does not have jurisdiction to entertain the execution proceedings since the award-debtor is based in Chennai and the assets are located outside the jurisdiction of this Court. The second point is not being gone into since the first point with regard to the time from which the execution could have commenced is sufficient in deciding the maintainability of the execution proceedings.

Learned counsel appearing for the applicant relies on the orders passed by the Supreme Court by which periods of limitation under the general and special laws were extended in view of the pandemic. According to counsel, since the periods of limitation have been thus extended by the Supreme Court, the time to file an application for setting aside of the Award has not ended.

Learned counsel appearing for the award-holder submits that the provisions of the Act make it clear that stay of an Award is no longer automatic and that the award-debtor has to make a separate application for grant of stay which would be clear from the amendment brought into effect from 2015. It is submitted that the time to file for setting aside of the Award has admittedly expired and the award-debtor has also not applied for stay of the Award. Counsel places the mandatory period within which the award-debtor must

apply for setting aside of the award and further submits that the award-debtor owes a sum of Rs.27 crores to the award-holder.

Upon considering the submissions of Counsel, this Court is of the view that the intention of the Supreme Court would be clear from the operative portions of at least three of the orders namely, 23rd March, 2020, 8th March, 2021 and 27th April, 2021 passed in *Suo Motu Writ Petition (Civil) No. 3/2020*. By the first order dated 23rd March, 2020, the period of limitation for filing proceedings under the general and special Laws was extended with effect from 15th March, 2020 for alleviating the difficulties faced by litigants in the Covid-19 pandemic. By the 8th March, 2021 order the extension of limitation was regulated and somewhat curtailed by the Supreme Court in view of the improvement in the situation and lifting of the nationwide lockdown. By the order dated 27th April, 2021, passed in *Miscellaneous Application No.665 of 2021 in *Suo Motu (C) No.3 of 2020** which is the last order in the series, the Supreme Court noting the steep rise in COVID cases in the second wave of the pandemic thought it fit to restore the first order of 23rd March, 2020. In essence, the benefit of the extension of the period of limitation given to litigants was revived and restored by the order dated 27th April, 2021. The *Miscellaneous Application* is due to be listed on 19th July, 2021.

The relevant paragraphs from the order dated 27th April, 2021 that is relevant in this context are set out:-

“6. We also take judicial notice of the fact that the steep rise in covid-19 virus cases is not limited to Delhi alone but it has engulfed the entire nation. The

extraordinary situation caused by the sudden and second outburst of covid-19 virus, thus, requires extraordinary measures to minimize the hardship of the litigant-public in all the States. We, therefore, restore the order dated March 23, 2020 and in continuation of the order dated March 8, 2021 direct that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders.

8. We have passed this order in exercise of our powers Under Article 142 read with Article 141 of the Constitution of India. Hence it shall be a binding order within the meaning of Article 141 on all courts/Tribunal and Authorities.

9. This order may be brought to the notice of all High Courts for being communicated to all subordinate courts/Tribunals within their respective jurisdiction.”

Section 36 of the 1996 Act on ‘Enforcement’ of arbitral awards provides under sub-section (1) that the award shall be enforced in accordance with the provisions of The Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court, provided the time for making an application to set aside the Award under Section 34 has expired. Section 36(2) clarifies that filing of an application under Section 34 of the Act shall not by itself render the Award unenforceable. A different possibility has been carved out in the inevitability of the enforcement process where the Court grants an order of stay of operation of the Award under Section 36(3) upon imposition of suitable conditions on the award-debtor for granting an order of stay of the Award. The proviso to sub-section (3) of Section 36 is in the nature of guidelines which the Court may consider for grant of stay.

If Section 36 is read as a whole the intention of the framers of the Act becomes evident; namely that an award-holder shall proceed, unhindered, to enforce the award without being fettered by the filing of an application under Section 34 of the Act. The uninterrupted march towards enforcement is, however, subject only to one condition; the time to file for setting aside of the award under Section 34 must first expire. This is the only speed-breaker, so to speak, which the winning party is subjected to in the momentum of Section 36(1) read with 36(2) for enforcing the Award. Although the enforcement of an award is to be treated as a decree of the Court by reason of the deeming provision in 36(1), the mandate on the award-holder to wait until the period for setting aside expires, makes Section 36 of the 1996 Act different from Order XXI and the Rules thereunder of The Code of Civil Procedure, 1908. The roadblock of the Award being stayed comes later in the enforcement provisions and is in any event subject to the discretion of the Court and the ability of the award-debtor to put in security for stay of the award.

Under Section 34(3), an award-debtor has three months from the date on which it received the arbitral award to apply for setting aside the award. The additional 30 days in the proviso is available to the award-debtor only if the Court is satisfied that the award-debtor was prevented by sufficient cause from making the application within the three months provided under Section 34(3) of the Act. There is no doubt that the time frame within which an award-debtor has to apply for setting aside of an arbitral award is mandatory as settled by various decisions of the Supreme Court and the High Courts.

The Award is dated 31st August, 2020. The applicant/award-debtor received the said Award on 7th September, 2020. The three months under Section 34(3) therefore expired on 7th December, 2020. The proviso relating to the additional 30 days is not relevant in the present case since the present application is not for extension of time to file Section 34 for setting aside of the Award.

The question in the present case is whether the time for the award-debtor to apply under Section 34 for setting aside of the award has elapsed or continues to run. The answer to the question then must entirely turn on the effect of the order of the Supreme Court dated 27th April, 2021. The portion set out above makes it clear that the earlier order of 23rd March, 2020 was being restored as an extraordinary measure to lessen the difficulties faced by litigants in the upsurge of the pandemic. The order clarifies that the period of limitation whether under general or special laws or in respect of judicial/quasi judicial proceedings, shall stand extended till further orders. The intention of the Supreme Court is to preserve the rights of litigants who would otherwise have missed the statutory deadlines for instituting proceedings in the courts. The applicant's time to file the Section 34 expired on 7th December, 2020 and the applicant hence comes within the zone of benefit given to litigants commenced from 15th March, 2020 and continued to run as on the date of filing the present application - 21st June, 2021. Simply put, the time to apply for setting aside of the award dated 31st August, 2020 has still not expired.

Any other interpretation of the orders passed by the Supreme Court would lead to an absurd result. If the Supreme Court orders were construed as not limiting an award holder from enforcing the award under Section 36 (1) and (2) of the Act, it would in effect take away the benefit given to litigants who failed to institute proceedings within the period of limitation. It would lead to a scenario akin to opening a window but drawing the curtains to prevent the sunlight from coming in; a more topical analogy would be lifting of travel curbs but shutting down places where people may visit. This surely cannot be what the Supreme Court intended.

The view of the Court is re-inforced by the first and only caveat to initiation of enforcement proceedings under Section 36, namely that an award can only be enforced after the period for filing an application for setting aside of the award has expired. The important issue is not whether the application under Section 34 has been filed but whether the time to file the Section 34 application has expired (underlined for emphasis).

Since the award debtor's time to apply for setting aside under Section 34 continues to run, the award-holder cannot seek enforcement of the award dated 31st August, 2020. Enforcement of awards where the time to apply for setting aside has not expired, must therefore halt till the award-debtor takes appropriate steps or the relevant Supreme Court orders are modified, whichever is earlier. Equity would however demand that the award debtor cannot remain complacent by the order of the Supreme Court. The law protects litigants who are vigilant and not those who take their rights for granted for an

indefinite period of time. The award holder has been awarded a substantial sum of money and it is only fair that the award debtor is directed to take appropriate steps under the 1996 Act. The consequences of the award debtor taking recourse under the provisions of the Act or failing to do so shall follow as a matter of course.

In view of the above reasons, the application of the award debtor is allowed and disposed of with a direction on the award debtor to take appropriate steps within ten days from date. Since prayer (b) of the application is for recalling of an order passed by a learned single Judge of this Court who is sitting and available at present, the applicant is given liberty to approach the particular Bench, if required.

GA No.1 of 2021 is disposed of in terms of the above. EC 74 of 2021 is held to be premature and is dismissed.

(MOUSHUMI BHATTACHARYA, J.)