IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
(COMMERCIAL DIVISION)

A.P. No.267 of 2021

MEDIMA LLC
VS.
BALASORE ALLOYS LTD.

BEFORE:
The Hon'ble Justice Ravi Krishan Kapur

For the Petitioner	: Mr. S. N. Mookherjee, Mr. Shaunak Mitra, Ms. Shreya Singh, Ms. Nandini Khaitan, Mr. Vishal Sinha,
For the Respondent	: Mr. Rishad Medora, Mr. Meghajit Mukherjee,
Heard on	: 17.11.2021, 07.12.2021, 17.12.2021
Judgment on	: 22.12.2021

Ravi Krishan Kapur, J.:

1. This is an application under Section 9 of the Arbitration and Conciliation Act, 1996 ('the Act').

2. The application has been necessitated in view of an award dated 29 March, 2021 passed by an ICC, London Arbitral Tribunal ('the award'). By the award, the petitioner has been awarded a sum of USD 30, 35, 249.87 (USD 3.03 million) with interest @ 5% per annum (equivalent to approximately Rs.22 crores on the

basis of the exchange rate as on 29 March, 2021) payable by the respondent. The award further directs the respondent to pay the said sum within a period of 30 days i.e. by the end of April, 2021. The respondent has not paid the said sum nor any portion thereof. It is also an admitted position that the respondent has not challenged the award under Section 17 of the UK Arbitration Act, 1996.

3. In this application, the petitioner seeks the following reliefs:

(a) *Leave be granted under Clause 12 of the Letters Patent, 1865;*

(b) The respondent be directed to furnish security for Rs.22,08,75,133/- in respect of the dues under the Award dated 29 March, 2021, in such mode and manner as this Hon'ble Court may deem fit and proper;

(c) Order of injunction restraining the respondent and its men, servants, agents or assigns from in any manner dealing with, disposing of, encumbering or creating any third party rights or interests in its assets and properties, without setting apart a sum of Rs.22,08,75,133/- as security for the dues under the Award;

(d) Order of injunction restraining the respondent from and its men, servants, agents or assigns from operating the bank accounts of the respondent including the bank accounts mentioned in paragraph 32 above, without setting apart a sum of Rs.22,08,75,133/- as security for the dues under the Award;

(e) Receiver be appointed to take possession and custody and to make an inventory of the respondent's corporate office at 71,

Park Street, Park Plaza, 1st floor, Kolkata-700016 and the bank accounts mentioned in paragraph 32 above;

(f) Ad-interim orders in terms of prayers above;

(g) Costs be paid by the respondent;

(h) Such further orders or directions be passed as this Hon'ble Court may deem fit and proper.

4. At the ad-interim stage, by an order dated 23 September, 2021 a Co-ordinate Bench had granted an order of injunction in terms of prayer (c) of the Notice of Motion. The respondent was further restrained from dealing with or disposing of or creating any third party rights in respect of its assets and properties without setting aside a portion of Rs. 22,08,75,133/-as security for its dues under the award. This order has been subsisting till date. The matter was taken up after the parties had filed their affidavits.

5. It is submitted on behalf of the petitioner that the conduct of the respondent has been malafide throughout and the respondent does not have any assets to satisfy the award. It is also alleged that the respondent is in an impecunious condition. There is also a mass exodus of the senior management and the independent directors of the respondent which demonstrates that the respondent has for all practical purposes wound up its activities. In this connection, the petitioner relies on various articles and letter written by independent directors as also the

resignation of the Director of Finance of the respondent company. It is further submitted that in order to avoid its obligations under the award, the respondent company has taken every possible specious and hypertechnical plea simply to create a web of confusion and deception. Accordingly, the petitioner prays for cash security for the entire sum awarded to the petitioner.

6. On behalf of the respondent it is submitted that, the petitioner has relied on outdated data in support of the prayers made in the petition. It is further submitted that there is inordinate delay in the filing of this application. It is also submitted that the respondent is a tenant insofar as its corporate office is concerned. Furthermore, it is submitted that there is neither any enforcement nor execution proceeding filed by the petitioner till date nor is any case made out for an order of attachment or injunction or any other relief.

7. Section 9 of the Act contemplates wide ranging interim measures for which a party may apply to Court *before* or *during* or at any time *after* making of an arbitral award. In the Trends in the Field of International Commercial Arbitration, Lord Mustill commented:

> "*Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the*

> *arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award". [Pieter Sanders, "Trends in the Field of International Commercial Arbitration" (1975-11) RCADI 207,288].*

8. It is an indisputable and admitted fact that the petitioner has an award of approximately Rs. 22,08,75,133/-in its favour which has not been set aside nor suspended nor interdicted till date. The time period for making an application for setting aside the award has also expired. The application under Section 9 is for interim protection so that the award is not rendered in futility. There is no doubt that a party may apply to Court for interim measures of protection after the making of the award, prior to its enforcement under Section 36 of the Act. It is also well settled that the powers of a Court under Section 9 of the Act are very wide and are not controlled by the provisions of the Code of Civil Procedure, 1908.

9. I find that other than bare denials there is nothing in the affidavit in opposition filed by the respondent. In my view, this

demonstrates that there is not an iota of bonafides far less any willingness or means on the part of the respondent to satisfy the award. The only document which the respondent relies on is the 31st Corporate Report of the respondent company which incorporates the Annual Report for the Financial Year 2018-19. Thus, even as per the respondent's own case the respondent company's financial performance is only available till the year ending 31 March, 2019. Accordingly, it is fair to assume that the respondent company has not prepared nor filed its statutory returns after 31 March, 2019 or at least is not in a position to provide the same before this Court. This is not only in violation of inter alia the provisions of the Companies Act, 1956 but unequivocally demonstrates that the respondent is concealing its own current financial position with ulterior and oblique motive.

10. In this context, one may highlight the fact that, the promoter of the respondent company being one Promod Mittal who is also the Chairman of Ispat Industries Limited has already been declared insolvent and is residing in the United Kingdom.

11. I am of the view that the respondent company has prima facie all the hallmarks of being in a financial disastrous condition. The financial accounts of the respondent company are not available since 1 April, 2019. It also appears that the Financial Chief of the respondent company has resigned. The employees of the

respondent company also appear not to have been paid their salaries. There are allegations of non payment of electricity charges by the respondent company. The trading of the shares of the respondent company has also been suspended by the Bombay Stock Exchange. All these factors in my view, prima facie demonstrate that the respondent company has all the symptoms of modern day corporate insolvent.

12. For the foregoing reasons, I find that the petitioner has strong prima facie case on merits, the balance of convenience and irreparable injury is overwhelmingly in favour of orders being passed as prayed for by the petitioner. I am also prima facie satisfied that unless appropriate orders are passed there is a strong possibility that the award passed in favour of the petitioner would be rendered worthless. Accordingly, there shall be the order in terms of prayers (b), (c) and (d) of the Notice of Motion. The respondent company is directed to secure a sum of Rs. 22,08,75,133/-with the Registrar, Original Side, High Court at Calcutta in cash or itsequivalent to the satisfaction of the Registrar, Original Side. If deposited, the Registrar, Original Side is directed to create a fixed deposit of the said sum with a nationalized bank in an interest bearing account. In default of furnishing the aforesaid security, the petitioner is at liberty to seek appropriate reliefs in accordance with law, if so advised.

The aforesaid exercise is to be completed by the respondent within a period of four weeks from the date of this order.

13. With the aforesaid directions, AP 267 of 2021 stands disposed of.

(Ravi Krishan Kapur, J.)