

Item No. 5
19.06.2023
Court. No. 19
srm

CAN 1 of 2023
In
C.O. 1493 of 2023

Durgapur Freight Terminal Private Limited
Vs.
Titagarh Logistics Infrastructure Private Limited & Ors.

Mr. Debjit Mukherjee,
Mr. Meghojit Mukherjee,
Mr. Dibesh Diwedi,
Ms. Sushmita Chatterjee,

...for the Petitioner.

Mr. Tilak Bose,
Mr. Sabyasachi Chaudhury,
Mr. Sayantan Bose,
Mr. Shaunak Mukhopadhyay,
Mr. Sattik Raut

...for the Opposite Party No.1.

This application has been filed for modification and/or correction of an order passed by this Court on June 14, 2023 in C.O. 1493 of 2023.

The revisional application was filed challenging an order passed by the learned Judge, Commercial Court at Alipore, rejecting an application for extension of time to furnish the bank guarantee. Such application was filed by the petitioner/applicant. According to the learned court below, IA No.01 of 2023 deserved to be rejected on the ground that the said execution was stayed subject to the applicant furnishing the bank guarantee, which the applicant failed to deposit.

Having heard the learned Advocates for the parties, this Court had passed the following order:

“Demand drafts being nos.007406, 007346 and 00082958 have been produced before the Court and handed over to the learned advocate on record for the opposite party no.1. Mr. Bose, learned advocate has taken delivery of those demand drafts.

Costs of Rs.1,00,000/- shall be paid to the opposite party no.1 within the course of June 15, 2023. With regard to the prayer for payment of occupation charges from the date of the award, the opposite party no.1 will be at liberty to approach the learned executing court for necessary orders. If such application is filed, the same shall be disposed of in accordance with law upon contested hearing.

Now, with regard to the bank guarantee, the petitioner is directed to deposit the same in the learned court below by June 19, 2023. The learned court below is requested to post the matter on June 20, 2023 in order to ascertain compliance of the order of this Court. Although the matter has been posted tomorrow, total compliance of this order may not be possible and hence such request is being made by the Court.

The learned Judge, Commercial Court at Asansol shall proceed with the execution proceeding being Arbitration Execution Case No.3 of 2023 expeditiously if the order of this Court is not complied with. In the event of compliance, the execution proceeding shall remain stayed. Any default in payment of the occupation charges as already directed, shall also amount to vacation of the interim order that is being passed by this Court, without further reference to the court.

Accordingly, the revisional application is disposed of.”

The modification application has been filed on the ground that the liberty granted by this Court to the opposite party No.1 to approach the learned executing court for necessary orders with regard to payment of occupation charges from the date of the award was an error apparent on the face of the record because the learned Court below had already adjudicated the point and had directed that a sum of Rs.11,00,000/- should be paid as occupation charges. Prayer

has been made for deletion of the portion of the order granting such liberty. The learned court below recorded as follows:

“In view of above ratio, Mr. Chowdhury stated that Petitioner in order to retain possession is to pay a further sum at the rate of Rs.25,00,000/- per month, being the market rent on and from November, 2022 as per ratio of Atma Ram’s case (supra).

Ld. Counsel appearing for the Petitioner has contended that the Respondent has no shown any documentary evidence in support of its allegation/contention that the market value rent is more than Rs.25 lakh. He further stated the Petitioner is willing to pay the agreed sum of Rs.10 lakh per month plus enhancement of Rs.10% subject to the Respondent no.2 raising invoices prior to payment and/or simultaneous to payment in as much as the same is the agreed contractual rate between the parties and in fact, is higher than the prevailing market value rent.

Keeping in view of the rival contentions as well as discussions made in the foregoing paragraphs, this court is of considered view that the present application under section 36(2) of the Arbitration and Conciliation Act, 1996 is allowed on contest and the impugned Award dated 17th November, 2022 is hereby stayed during pendency of the application under section 34 of the Act, subject to deposit of sum of Rs.3,73,14,430/- by the Petitioner in the form of Bank Guarantee in favour of the Respondent within four weeks and since, an order of eviction has been passed by the Ld. Aribtral Tribunal, hence, in order to retain possession, the Petitioner is also further directed to pay Rs.11 lakh per month to the respondent within 7th day of each succeeding month according to the English Calendar month within immediate effect.

This order shall automatically stand vacated in the event of default on the part of the petitioner in respect of the aforesaid direction.”

It appears from the order dated March 28, 2023, the prayer of the learned Advocate for the opposite party No.1 that in order to retain possession, a further sum of Rs.25,00,000/- per month being the market rent on and

from November, 2022 as per the ratio of Atma Ram's case was considered. November, 2022 is the month when the award was passed. It is submitted that after considering such fact, the learned court below directed that a sum of Rs.11,00,000/- per month should be paid month by month every month within 7th day of each succeeding month according to the English calendar, with immediate effect. The learned court below recorded that the opposite party No.1 had not shown any documentary evidence in support of its allegation/contention that the market value rent was more than Rs.25,00,000/-.

It appears that the question whether the occupation charges of Rs.25,00,000/- per month from the month of the award being November, 2022 would be paid or not, was decided by the learned court below. The learned court below upon adjudicating the entire issue came to the conclusion that Rs.11,00,000/- per month should be the occupation charges.

Mr. Bose, learned Senior Advocate appearing for the opposite party No.1 opposes such prayer for modification and submits that the revisional application was not maintainable at its first instance and that the opposite party No.1 was always at liberty to claim occupation charges in case of non-payment.

Upon contested hearing, the order was passed in the revisional application. It is also a matter of record that Rs.1,00,000/- as cost has already been tendered to the

learned Advocate-on-record and sent to the opposite party No.1. It also appears that three demand drafts were handed over by the order of this Court to Mr. Sayantan Bose on June 14, 2023. Hence, the Court does not find any reason to re-appreciate such question. However, the Court agrees with the submission of Mr. Bose that in case of non-payment of Rs.11,00,000/- as directed by the learned court below, the opposite party No.1 would be at liberty to approach the learned court below for necessary orders and directions.

The issue which has already been decided as to whether Rs.25,00,000/- from the month of November, 2022 should be paid or not is no more *res integra* and arising between the parties.

As this aspect was not gone into although it was a part of the revisional application, the error cropped up in the order dated June 14, 2023. The sentences in paragraph 2 of the said order, namely, “With regard to the prayer for payment of occupation charges from the date of the award, the opposite party no.1 will be at liberty to approach the learned executing court for necessary orders. If such application is filed, the same shall be disposed of in accordance with law upon contested hearing.” is deleted by modifying the order dated June 14, 2023.

It is submitted by Mr. Bose that the cost of Rs.1,00,000/- was tendered by way of a demand draft drawn on account of the learned Advocate-on-record for the applicant. The opposite party No.1, has expressed its anxiety

as to whether that would be a proper tender. This Court clarifies that as long as the demand draft is encashed and the cost of Rs.1,00,000/- is paid or is available with the opposite party No.1, the order of this Court is complied. The understanding between the applicant and its learned Advocate-on-record or the terms between them resulting in the issuance of the aforementioned demand draft from the account of the learned Advocate towards payment of cost, shall not cause any prejudice to opposite party No.1.

The application is, thus, disposed of.

There will be no order as to costs.

Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)