OD-10

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/246/2022
WITH
EC/457/2018
IA No.GA/1/2022
FUTURE MARKET NETWORKS LIMITED
VS.
LAXMIPAT SURANA & ANR.

BEFORE :
THE HON'BLE JUSTICE HARISH TANDON
And
THE HON'BLE JUSTICE PRASENJIT BISWAS
Date : 31st January, 2023.

Appearance :
Mr. S.N. Mookherjee, Sr. Adv.
Mr. Rishav Medora, Adv.
Ms. Radhika Misra, Adv.
Ms. Roshni Deepta Acharya, Adv.
Ms. Pooja Chakraborti, Adv.
....for appellant

Mr. Shuvasish Sengupta, Adv.
Mr. Arindam Guha, Adv.
Ms. Arpita Dey, Av.
...for respondent no.2

Mr. L.P. Surana (in person)

The Court : A peculiar situation has arisen upon discerning the facts and the arguments advanced by the respective counsels on implied consequences arising from the orders passed by this Court as well as the Apex Court. Pursuant to the dispute having arisen between the parties an approach was made to the arbitral Tribunal who finally made and published the award. All the contracting parties challenged the said award before the Court under Section 34 of the Arbitration and Conciliation Act, 1996. It is not in dispute that the aforesaid proceedings is pending before this Court. The aforesaid proceedings are pending before this Court.

The peculiarity in the facts as unfurled are that on an application seeking stay of the operation of the arbitral award and further proceedings in the execution proceeding, an order was passed on 12th October, 2018 directing securing of the principal sum, that is, Rs.12 Crore. It was indicated that out of Rs.12 Crore, a sum of Rs.6.5 Crore has already been secured in terms of the order passed in a proceeding under Section 9 of the said Act and the balance amount of Rs.5.5 Crore shall be secured by the appellants herein within a specified time by way of an unconditional bank guarantee in favour of the Registrar, Original Side and directed the listing of the matter at the future date.

The aforesaid order would further reveal that a plea was taken that by virtue of Section 87 of the said Act, the arbitral proceeding which commenced before coming in force of the Arbitration and Conciliation (Amendment) Act, 2015 or the court proceedings arising out of or in relation thereto shall not apply. Taking clue from the same, it was argued that since the arbitral proceedings commenced prior to coming in force of the amended Act, 2015, the amendment sought to be brought thereunder shall not apply meaning thereby the moment the award is challenged under Section 34 of the Act, it brings an automatic stay of its enforceability.

It is no longer res integra that the aforesaid provision has been rendered ultra vires by the Supreme Court in the case of *Hindustan Construction Company vs. Union of India reported in 2010 SCC Online SC 1520*. The effect which can be envisaged from the aforesaid fact that the amended provisions would apply even to an arbitral proceeding commenced prior to coming in force of the same. Section 36 of the Act makes it imperative to seek for a stay of the arbitral award and the power of the Court to grant the stay on such terms and conditions as may deem fit. It would be apposite and profitable to quote the amended provisions contained in Section 36 of the said Act which reads thus:

> *"**36. Enforcement** – (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedures, 1908 (5 of 1908), in the same manner as if it were a decree of the court.*
>
> *(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.*
>
> *(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:*
>
> *Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).*
>
> *Provided further that where the Court is satisfied that a Prima facie case is made out that, -*
>
> *(a) the arbitration agreement or contract which is the basis of the award; or*

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."

The reading of the said provision leaves no ambiguity in our mind that mere filing an application for setting aside the arbitral award under Section 34 does not ipso facto render the enforceability thereof at rest or in suspended animation, but an application is to be taken out before the court, where the arbitral award is challenged, for grant of the stay of the operation of the said arbitral award. The moment such application is filed, the court may subject to such conditions as may deem fit grant stay of the operation of such award for the <u>reasons to be recorded in writing</u> *(emphasis supplied).*

Admittedly, the order dated 12th October, 2018 does not expressly stay the operation of the arbitral award nor the execution proceeding except the direction to secure the principal sum, that is, the awarded sum. When the application for stay came up on 28th April, 2022, a plea was taken that mere securing the awarded sum or the principal sum may not be appropriate nor justified as over and above the said amount interest has been awarded and, therefore, unless the principal amount together with the interest is deposited, the enforceability of the award should not be stayed. The Court directed a further sum of Rs.10 Crore and odd to be secured by way of a bank guarantee and in cash as a condition precedent for securing the stay of the execution proceedings or the enforceability of the award. The said order was sought to be reviewed at the behest of the appellant, but the review application was dismissed on 1st September, 2022.

Both the orders are assailed before the Supreme Court in a Special Leave to Appeal (C) Diary No.31325 of 2022. The Apex Court stayed the operation of the impugned order until further orders on 21st October, 2022.

Amidst the aforesaid orders challeneged before the Supreme Court and the order of stay passed by the Supreme Court, the execution proceeding was continued and an attention was drawn that despite the order passed on 28th April, 2022 and September 1, 2022, two bank guarantees are lying with the Registrar, Original Side to the tune of Rs.6.50 Crore and Rs.5.50 Crore which are being renewed yearly, the award-holder intended to proceed with the said execution case and ultimately by an order dated 23rd September, 2022, the executing court directed the Registrar, Original Side to invoke the bank guarantee valued at Rs.6.50 Crore and to transfer Rs.3 Crores to the account of the account-holder maintained with the Union Bank of India and the remaining sum of Rs.3.5 Crore to be invested in a nationalised bank in an interest bearing fixed deposit. It was further indicated that the said amount of Rs.3 Crore shall be utilised by the award-holder to make an upfront payment under the OTS dated August 30, 2022.

After the order of stay was passed by the Apex Court as indicated above, immediately an application was taken out by the appellant to recall the said order dated September 23, 2022 on the ground that the aforesaid order is dependent upon the earlier orders dated April 28, 2022 and September 1, 2022. The further relief which was sought in the said application pertains to furnishing the counter guarantee for the sum of Rs.3 Crore. By the impugned order the executing court rejected the said application which is impugned in the instant appeal.

The learned Advocate General appearing for the appellant submits that the moment the order dated September 23, 2022 is based upon the earlier two orders which are the subject-matter of challenge in the Special Leave Petition pending before the Supreme Court, such order cannot have its independent existence and therefore, to be recalled. It is further submitted that by order dated 28th April, 2022, the Court directed the deposit of a further sum of Rs.10 Crore and odd by way of a bank guarantee as well as the cash with clear stipulation that in default of its compliance, the award-holder shall be free to take appropriate steps in the execution proceeding. According to him, the moment the Apex Court has stayed the said order, it logically follows that there was a fetter on the part of the executing court in proceeding with the execution proceedings as the condition imposed in the said order has been stayed.

According to Mr. Advocate General, the expression 'in default of complying the order and the leave having been granted to the award-holder to be free to proceed with the execution case' shall be rendered meaningless if the execution proceeding is not intended to be stayed. He further submits that there is no impediment on the part of the executing court to stay the execution proceedings the moment the entire decretal amount is secured which, in fact, has been done in the instant case.

There is no dispute that a peculiar situation has arisen before us, more particularly, on an order staying the operation of the orders dated 28th April, 2022 and 1st September, 2022 passed on an application being GA No.1 of 2022 in AP No.698 of 2016. Interestingly, when the order securing the amount was passed on 12th October, 2018, we do not find any specific order having passed pertaining to the stay of the operation of the arbitral award or stay of the further proceeding of the execution proceedings. The application for stay was finally disposed of on 28th April, 2022 imposing the conditions, that is, securing the amount over and above the awarded sum. The moment the Apex Court has stayed the operation of the said order, it is not advisable to segregate some portion therefrom to have not been covered within the peripheral of the said order, being inclusive therein. The proper course would be that the entire order has been stayed which includes any observation made therein not to be applied either in favour or against any of the parties.

The learned Advocate General is correct in his submission that the order dated 23rd September, 2022 is, in effect, an order based upon an order dated 28th April, 2022 wherein the application for stay was finally disposed of.

As indicated above, the moment the aforesaid order, that is, the order dated 28th April, 2022 is stayed and the dependent orders if allowed to remain operative may create a confusion or may invite an anomalous situation. Equally, we cannot support the contention of the learned Advocate General that the moment the operation of the above order is stayed, the consequential or dependent order should fall on its own. Mere staying the operation of the order does not mean that the order has been affirmed but what it conveys is that the effectiveness or the binding effect of the said order between the parties to the proceedings have been erased or diluted for the time being. The proper course ought to have been to stay the operation of the order dated 23rd September, 2022 instead of recalling the same. The reason for such expression is that in the event the Special Leave Petition is dismissed and in the meantime the order dated 23rd September, 2022 is recalled, it may invite an irreversible situation or may at times re-imposition and/or resurrection of the said order.

We would have ventured to do so unless we are apprised of the fact that the Registrar, Original Side has already disbursed the said sum of Rs.3 Crore in the account of the account holder in due compliance of the impugned order. The moment the said amount has been paid to the respondent which, in fact, has been paid to the bank under the OTS, it would not be justified at this stage to recall or stay the operation of the order dated September 23, 2022.

It leads us to the another situation as to whether the execution proceedings should be stayed as we find that one of the reliefs claimed in the said application relates to the same. Admittedly, when the awarded sum was secured the court did not grant the stay of operation of the award as the consideration was restricted to the applicability of Section 87 of the said Act, which was subsequently declared ultra vires by the Apex Court. The language implied in Section 36(2) of the Act exposes the legislative intention that the Court must expressly grant the order of stay *in writing* as the implied concept of stay as it is stood prior to the amendment is no longer in existence. Mere securing a decretal amount does not ipso facto render the award unenforceable. Any other interpretation shall be opposed to the intention of the lawmaker while incorporating the provisions by virtue of an amended Act of 2015.

The matter can be viewed from another angle. The Special Leave Petition filed by the appellant before the Supreme Court wherein an order of stay has been granted, composite prayer was incorporated therein relating to the setting aside of the orders under challenge as well as stay of the execution proceedings. The moment the Apex Court has granted the stay of the operation of the impugned orders, it can be reasonably inferred that the other prayer relating to the stay of the execution proceeding has not been expressly granted nor may be presumed to be a part thereof. The order staying the operation of the impugned order cannot engulf within itself the stay of the execution proceedings unless expressed so. The executing court have also interpreted the said order in such fashion which cannot be said to be perverse nor can be said to be contrary to the soul and spirit of the order of the Supreme Court.

We, thus, do not find that the impugned order warrants any interference.

The appeal is, thus, dismissed.

No order as to costs.

Urgent certified copy of this order, if applied for, be given to the parties on an urgent basis, preferably within seven days from date.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)

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