IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.4 OF 2019
IN
ARBITRATION APPEAL NO.30 OF 2017

M/s. SMS Paryavaran Pvt. Ltd. … Applicant

In the matter between:

Dehu Road Cantonment Board … Appellant
Vs.
M/s. SMS Paryavaran Pvt. Ltd. and others … Respondents

WITH
CIVIL APPLICATION NO.1 OF 2023
WITH
CIVIL APPLICATION NO.40 OF 2018
IN
ARBITRATION APPEAL NO.30 OF 2017

Mr. Hrishikesh Chitaley a/w. Mr. Hitesh B. Sangle for Respondent No.1 in ARA and for Applicant in CAR 4 of 2019.

Mr. Tushad Kakalia a/w. Mr. Sandeep Goyal i/b. Mulla & Mulla & Craigie Blunt & Caroe for Appellant in ARA and for Respondent in CAR 4 of 2019.

CORAM : MANISH PITALE, J.
DATE : APRIL 28, 2023

P.C. :

CIVIL APPLICATION NO.4 OF 2019

. Heard learned counsel for the parties.

2. By this application, the respondent (award creditor) is before this Court, seeking withdrawal of an amount of Rs.2 crores from the amount directed to be deposited by the appellant, pending hearing of the appeal.

3. The appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996, to challenge an order passed by the District Court, rejecting an application filed under Section 34 of the said Act. As

a result of the impugned order, the arbitral award passed as far back as on 04.03.2011 has been confirmed.

4. The record shows that although the award was passed as far back as on 04.03.2011, the respondent has not been able to enjoy the fruits of the award till date. Although the award directs payment of about Rs.1,82,38,740/- with 15% interest to the respondent, with passage of time, the amount has blown upto about Rs.6 crores. The appellant was directed to deposit an amount of Rs.3 crores, of which Rs.2 crores was a cash deposit and Rs.1 crore by way of bank guarantee. There is no dispute about the fact that the appellant has abided by the directions given by this Court, as a consequence of which, the execution of the award is stayed.

5. The applicant (original respondent) has placed on record the fact that the respondent had to face proceedings under the Insolvency and Bankruptcy Code, 2016. Eventually resolution plan has been put into place. Copy of the order approving the resolution plan is placed with an affidavit filed on behalf of the respondent. It shows a consortium of four resolution applicants.

6. The learned counsel for the applicant submits that this Court may permit withdrawal of amount of Rs.2 crores from this Court on an undertaking to be furnished by all the four resolution applicants that, in the event this Court directs, the amount would be brought back before this Court. Reference is made to the order approving the resolution plan and the contents of the application as well as the affidavit to state that such undertakings would sufficiently assure this Court that if and when necessary, the amount would be brought back. It is submitted that if such permission for withdrawal of amount is not granted, it would lead to further inconvenience to the respondent, despite the fact that the arbitral award was passed in its favour as far back as on 04.03.2011. It is

indicated that the respondent had to suffer the proceedings under the aforementioned Code, *inter alia*, due to the fact that such payments genuinely due to the respondent were held up in arbitration proceedings and litigation.

7. On the other hand, the learned counsel appearing for the appellant submits that the fact that the respondent has recently come out of CIRP proceedings and a resolution plan is now in place, is sufficient ground to demonstrate that the appellant is justified in its apprehension i.e. the amount if permitted to be withdrawn, it would be very difficult to make it good if the appeal stands allowed. The learned counsel invited attention of this Court to the contents of the order approving the resolution plan itself to indicate that the clause pertaining to capital infusion states that funding against arbitration awards is to be completed between 350 days to two years from the effective date i.e. 21.02.2023. It is submitted that if the amount is allowed to be withdrawn, it would be utilized towards payments to creditors, thereby indicating that, merely, undertakings given by the resolution applicants will not sufficiently secure withdrawal of such amount. On this basis, it is submitted that this Court may dismiss the present application. It is undertaken that the appellant will co-operate with this Court for final hearing of the appeal, at the earliest, and in any case, well within the time period available to the respondent as per the order approving the resolution plan for funding against arbitral awards.

8. This Court has considered the rival submissions in the backdrop of the material on record. The present appeal has been pending in this Court since the year 2017. The arbitral award was pronounced as far back as on 04.03.2011 and till date, the respondent i.e. the award creditor has not been able to enjoy the fruits of the award. The time consumed in the statutory avenues of challenge available to a party in

such cases works to the detriment of the award creditor and in some cases, the failure to enjoy the fruits of the award results in irreversible and disastrous consequences.

9. It is an admitted position that the respondent has indeed faced proceedings under the said Code leading to the aforementioned order dated 21.02.2023 approving the resolution plan. There can be no denial about the fact that the said order does indicate that internal accruals / funding against arbitration awards can be completed within one to two years from the effective date. But, the said factor in itself ought not to be interpreted to the detriment of the respondent. The entire purpose of the order approving the resolution plan appears to be to ensure that the financial well being and health of the respondent is improved in a systematic manner as per the resolution plan.

10. The order records a consortium of four resolution applicants and it is specifically stated on behalf of the respondent that the resolution applicants shall furnish undertakings before this Court to bring back the amount, in the event the present application is allowed.

11. The applicant seeks withdrawal of an amount of Rs.2 crores. On a rough and ready estimate, the amount presently due as per the arbitral award with interest is in the range of about Rs.6 crores. This indicates that the said amount of Rs.2 crores is about 1/3rd of the said amount.

12. This Court is of the opinion that in such facts and circumstances, it would be in the interest of justice that the application is allowed, particularly because there can be no guarantee of the present appeal being heard at the earliest before this Court. Although the appellant has specifically stated that it would co-operate with the Court for disposal of the appeal, there are a number of appeals admitted before this appeal and pending before this Court for final hearing. Therefore, it cannot be

said with certainty that the appeal can be taken up for hearing in the near future or at the earliest.

13. In such circumstances, it would be in the interest of justice that the contentions raised on behalf of the respondent are accepted.

14. In view of the above, the application is allowed. The applicant (original respondent) is permitted to withdraw an amount of Rs.2 crores from this Court, subject to the resolution applicants, recorded in the order dated 21.02.2023 of the National Company Law Tribunal, submitting undertakings before this Court within a period of two weeks to the effect that in the event this Court directs, they shall bring back the amount in this Court.

15. The interest that may have accrued on the amount deposited by the appellant shall be retained by the Registrar (Judicial), to be invested as per standard practice.

16. Civil Application No.4 of 2019 stands allowed in above terms.

(MANISH PITALE, J.)

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