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WPO/15/2024
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

SAURABH MUKLANIA
VS
NATIONAL JUTE MANUFACTURES
CORPORATION LIMITED AND ORS

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 7th March, 2024.

Appearance:
Mr. Anuj Singh, Adv.
Mr.Gaurav Khaitan, Adv.
Mr. Srinjoy Bhattacharya, Adv.
. . .for the petitioner.

Mr. Jayanta Kumar Mitra, Sr. Adv.
Mr. Surya Prasad Chattopadhyay,Adv.
Mr. Rahul Karmakar, Adv.
. . .for the respondents.

The Court: The petitioner has challenged a refusal by the respondent authorities to abide by the Vivaad Se Vishwas-II (Contractual Disputes) scheme floated vide office memorandum dated May 29, 2023 issued by the Government of India, Ministry of Finance.

Learned counsel for the petitioner contends that the respondent no.1 is a Central Public Sector Enterprise. It is submitted that an arbitration proceeding was initiated at the behest of the petitioner which culminated in an award being passed in favour of the petitioner against the respondent no.1.

The said award was passed on December 28, 2021. Subsequently, the scheme came into force in the month of May, 2023. The petitioner, it is submitted, is fully eligible to take advantage of the scheme. Under the said scheme, in case of arbitral awards being passed against any of the entities as contemplated under the scheme, if the award holder is agreeable to come within the purview of the scheme, the award debtor shall agree to the offer of the award holder in respect of payment in terms of the scheme, which would be somewhat reduced from the original claims. Such payment to the award holder shall be in full and final settlement of the claims between the parties.

Learned counsel for the petitioner places particular reliance on Clause 4(c) which stipulates that the scheme would apply to contractual disputes if one of the parties is, inter alia, a Central Public Sector Enterprise.

Clause 5 of the same provides that disputes only for monetary value would be eligible for settlement under the scheme and not those which fall within the purview of specific performance of contract. Clause 8 on the other hand confines the applicability of the scheme to domestic arbitration as opposed the international arbitration.

Clause 10(b) stipulates that the scheme would apply to arbitral awards passed on or before January 31, 2023, inter alia, in cases where there may or may not be a challenge/appeal before a Court. The modalities of the calculation have also been stipulated under Clause 10.

Clause 12 in particular provides that wherever the procuring entity has deposited some amount with the Court before filing an appeal/challenge, the interest payable on the amount due as per Para 10(a) or 10(b) shall be on the amount payable under the scheme without any deduction of the amount deposited with the Court. In Clause 17, the date of commencement of the scheme has been fixed on July 15, 2023 and claims can be submitted by October 31, 2023. Clause 18 provides that in all cases where the claim amount is Rs.500 crore or less, procuring entities will have to accept the claim if the claim is in compliance with the guidelines.

However, it is argued that the respondent authorities refuted the application of the petitioner to take advantage of the scheme on the two fold grounds of the dispute arising out of the non performance of contract and that the award debtor has already deposited 100% of the awarded amount in terms with the direction passed by this Court along with cost to the tune of Rs.20,000/- to the award holder.

It is argued that in terms of the specific clauses of the scheme, in particular Clause 10(b)(i), the scheme applies to cases where a challenge/appeal has been preferred or has not been preferred, thereby covering the present case as well. Hence, it is immaterial that the award debtor has already deposited 100% of the awarded amount in terms of the direction of the Court.

Moreover, Clause 12 provides that wherever the procuring entity has deposited some amount with a court before filing an appeal/challenge, the interest payable on the amount due shall be on the amount payable under the scheme without any reduction for the amount deposited with the court.

It is also argued that the claim and the award are specifically confined to monetary components and do not have any ingredient or specific performance. Thus, it is argued that neither of the grounds for the refusal impugned herein are tenable within the confines of the scheme.

Learned senior counsel appearing for the petitioner seeks to draw a distinction between the situations contemplated under the scheme and the present case. Learned senior counsel, in particular, places reliance on the fact that in the present case, the respondent no.1 entity has chosen to challenge the award which has been entertained at the first instance by the Court taking up the challenge under Section 34 of the Arbitration and Conciliation Act, 1996. Not only that, the petitioner has secured in cash 100% of the decretal amount as well as paid costs in the Court taking up the application under Section 34.

In such view of the matter, it is sought to be argued that this is not a case where merely a challenge has been taken out under Section 34 but being prima facie satisfied with the cause of the respondent no.1 in the challenge under Section 34, an order of stay has been granted. Moreover, it is argued that in view of the stay being operative at the relevant point of time and till date, the award has been kept in a state of 'suspended animation'. As such, it is contended that the provisions of the scheme are not applicable in the present case.

Upon hearing learned counsel for the parties, it transpires that the arguments made by the respondents are not tenable on a proper interpretation of the scheme. The preamble of the scheme, under the heading "Subject", clearly stipulates that statistics have shown that in cases where the arbitration award is challenged, a large majority of cases are decided in favour of the contractor. In such cases, the amount becomes payable with interest at a rate which is often far higher than the Government costs of funds. This results in huge financial losses to the Government. Hence, in aggregate, it is in public interest to take the risk of paying a substantial part of the award amount subject to the result of the litigation, even if in some rare cases of insolvency etc. recovery of the amount in case of success may become difficult.

Thus, the premise of the scheme was intended to be beneficial for public interest.

That apart, it cannot be overlooked that the scheme has been floated by none other than the Government of India, Ministry of Finance, under the aegis of which respondent no.1, which is Central Public Sector Enterprise, operates. Hence, no question can be raised about the scheme being binding on the respondent no.1.

For the purpose of considering the applicability of the scheme, the Government of India and the respondent no.1 have to be considered to be an identical entity.

There is no option for the respondent no.1, under the Office Memorandum, to defy such memorandum. Hence, there is no scope of rebellion at the level of the respondent no.1 against the decision taken by the Government of India in its Office Memorandum dated May 29, 2023. Seen in such perspective, it should also be added that Clause 4(c) applies the provisions of the scheme squarely to all Central Public Sector Enterprises, which the respondent no.1 does not deny to be.

Let us now consider the primary objection of the respondents in refusing to extend the scheme in the present case. To be fair, learned senior counsel appearing for the respondent has not pressed seriously the first ground of refusal, to the effect that the award was for specific performance of contract. In fact, a mere perusal of the award itself clearly shows that the entire premise of the award was comprised of a monetary component and monetary component alone. There is no element of specific performance of contract anywhere in the award. The mere fact that the money claim arose/emanated from the provisions of a contract does not render a money claim or a money award per se to be a specific performance of contract. Moreover, in view of the said ground not being pressed by the respondent, the same need not be gone into in further detail.

The other question which arises is whether in view of the stay granted in favour of the respondent no.1 and the deposit of 100% of the award along with cost, the applicability of the scheme can be assailed by the respondent no1. Learned Senior Counsel reiterates that once the award has been challenged in a Court of law and being proceeded with, the provisions of the scheme ought not to be applicable.

Taking last things first, the said argument of the respondent does not find place in the refusal dated October 10, 2023, which has been assailed herein. It has been well settled in *Mohinder Singh Gill's case* and other similar cases by the Supreme Court that additional grounds cannot be added at the stage of hearing of a writ petition or by way of affidavits. Even apart from that, if we construe the argument as a purely legal argument, then also the same is defeated by the very purpose of the scheme itself. The very premise of the Vivaad Se Vishwas Scheme is that there has been an arbitral award which might or might not have been challenged. The scheme is applicable not to cases where an arbitration proceeding is pending but where an award has been passed. Moreover, Clause 10(b) clarifies that a case may or may not be under challenge/appeal before a Court.

A challenge under Section 34 of the 1996 Act definitely comes within the purview of the said clause, since it may be captioned as a case which has been under challenge before a Court. It is well settled that a Court acts as a Court while taking up a challenge under Section 34 within the contemplation of the 1996 Act. As such, the respondents cannot say that the scheme does not apply to cases where the award has been challenged before a Court under Section 34.

In so far as the argument of the award being in suspended nomination is concerned, it is well settled that although the operation of an award, if stayed, cannot be implemented for the time being, it is equally well settled that in such cases the award remains alive and is not obliterated unless finally set aside. Hence, this is a case where despite the challenge and the subsistence of the stay, it cannot be denied that there is an award which is a monetary award and comes under the ceiling of Rs.500 crore.

Clause 18 of the Scheme clearly provides that in all cases where the claim amount is Rs.500 crore or less, procuring entities will "have to accept" the claim, if the claim is in compliance with its guidelines. Since the instant claim is otherwise within the guidelines of the scheme, there is no option or discretion at the disposal of the respondent no.1 to deviate from the guidelines issued by its superior authority, the Central Government.

In any event, the said argument of a challenge having been taken out somewhat loses its teeth in view of the purpose and object of the Office Memorandum itself being impleaded in its preamble. The preamble specifies that statistics have shown that in cases where an arbitration award is challenged, a large majority of cases are decided in favour of the contractor. In such cases, the scheme goes on to observe, the amount becomes payable with interest at rates which are often far higher than the Government costs of funds. This results in huge financial losses to the Government. Thus, it is in the public interest to take the risk of paying a substantial part of the awarded amount subject to the result of the litigation. Thus, the scheme fully takes into consideration the argument sought to be advanced by the respondent regarding a challenge having already been preferred and having been entertained.

Thus, the premise of such argument does not find force in the scheme itself as per its plain language, which does not require any further interpretation.

Thus, in the present case, there is no option for the respondent no.1 to opt out of the scheme, in view of the claim being less than Rs.500 crore.

The fact that the award debtor has deposited 100% of the award amount as a condition of grant of stay does not make a difference regarding the applicability of the scheme as such.

There is, however, some doubt as to whether Clause 12 of the scheme is applicable in the present case. The said clause provides that wherever the procuring entity has deposited some amount with a Court “before filing an appeal/challenge”, the interest payable on the amount due as per para 10(a) or

(b) shall be on the amount payable under the scheme without any reduction for the amount deposited with the court.

It may be arguable as to whether the said clause applies only to pre-challenge deposits, if contemplated under any statute, and not to amounts which have been deposited as condition of any stay or interim order granted by the Court taking up a challenge under Section 34 of the 1996 Act. However, irrespective of Clause 12, the fact remains that in the present case an award has been passed which qualifies and is eligible for applicability of the scheme fully.

Clause 10(b)(i) clearly includes matters where challenges have been preferred and are pending before a Court. Thus, the scheme is squarely applicable in the present case and the refusal dated October 10, 2023 on the part of the respondents cannot be sustained.

In so far as the argument of the respondents as to the respondents having already deposited the full amount with the Court, the same cannot create a deterrent in the applicability of the scheme. Under the scheme, what is contemplated is an adjustment of the award. Clause 10(b) clearly specifies that in case the award directs X to be paid to contractor and Y to be paid to procuring entity by the contractor, then the net amount awarded shall be (X-Y) and the amount payable under this scheme will be 85% or 65% as the case may be, of (X-Y). Thus, the entire awarded amount has been treated to be the amount which will be the subject matter of the scheme.

The expression “award” in the scheme refers to the entire awarded amount.

It is the said amount which has been deposited by the respondent before the Court taking up the challenge under Section 34 and the amount payable ultimately to the award holder can very well be adjusted from the said amount.

It is to be noted that in cases where the principles of Order XXIII of the Code of Civil Procedure are applicable, there is no reason why the present scheme cannot be attracted. In spite of the award debtor having deposited as condition of the stay the entire awarded amount, there would be no bar, if the challenge under Section 34 was an appeal or a suit, for the award debtor to withdraw or compromise the said suit or appeal under Order XXIII of the Code of Civil Procedure. Applying the same principle, the mere deposit of the entire decretal amount as condition of stay cannot debar the parties from going ahead with the provisions of the scheme in question. The modalities can very well be worked out before the Court taking up the Section 34 matter or between the parties as to how the amount already deposited will be adjusted and the balance returned to the award debtor. Thus, I do not find any impediment in the applicability of the scheme to the present parties in the context of the award passed in favour of the petitioner.

Accordingly, WPO 15 of 2024 is allowed on context, thereby setting aside the impugned refusal dated October 10, 2023 annexed at page 101 of the writ petition and directing the respondent no.1 to proceed in terms of the Vivaad Se Vishwas-II (Contractual Disputes) Scheme floated by way of the Office Memorandum dated May 29, 2023 by the Government of India, Ministry of Finance in respect of the pending challenge under Section 34 with regard to the award passed in favour of the petitioner against the respondent no.1.

The respondent no.1 shall, accordingly, make an application before the Court taking up the challenge under Section 34 of the 1996 Act for withdrawal of the amount deposited by the respondent no.1 and upon the same being returned to the respondent no.1, the respondent no.1 shall pay the amount due to the petitioner under the Vivaad Se Vishwas scheme within a fortnight thereafter. Such application shall be made with prior notice to the petitioner.

The respondent no.1 shall also be at liberty to take necessary steps for disposal of the challenge under Section 34 of the 1996 Act in terms of the settlement arrived at between the parties under the Vivaad Se Vishwas Scheme.

No order as to costs.

Urgent certified website copy of this order, if applied for, be made available to the parties subject to compliance with the requisite formalities.

(SABYASACHI BHATTACHARYYA, J.)

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