

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Biswaroop Chowdhury

AP 745 OF 2022

Dagcon (India) Private Limited

Judgment On :- **26.09.2024**

This is an appeal of Kolkata Metropolitan Development Authority. It arises out of quite interesting circumstances. The appellant applied before the court to set aside its order dated 13th December, 2022 by which it had been directed to furnish cash security for Rs.69,43,73,572.88/- to obtain stay of an arbitral award and the execution proceedings in connection with it. By this application the appellant tried to plead that its counter-claim of Rs.80,66,81,775/- should be set off against the arbitral award enjoyed by the respondent. Now this counter-claim had been raised in the arbitral proceedings. Since the respondent had been “admitted into CIRP” under the provisions of the Insolvency and Bankruptcy Code, 2016, its counter-claim of Rs.80,66,81,775/- against the respondent could not be pursued as a consequence of the moratorium imposed under Section 14 of the Insolvency

and Bankruptcy Code. It appears that on 23rd January, 2023 the resolution professional wrote to the appellant that its claim of Rs.80,66,81,775/- had been admitted in the resolution plan. On the strength of this development the appellant applied before the learned trial judge to set off the admitted counter claim against the security.

By a judgment and order made on 25th April, 2023 the learned judge found it “unfortunate” that a “counter-claim remedy lies under the code and the receivables if any have to be decided as per the resolution plan... the arbitral award has to be enforced in the way as it stands”. The application was dismissed. Time to deposit Rs.69,43,73,572.88/- to obtain stay of the arbitral award was extended by two weeks failing which an order in terms of prayer (h) of the tabular statement in the execution application EC/434/2024 would follow.

The award debtor Kolkata Metropolitan Development Authority appeals against this order to us.

At the outset Mr. Jayanta Kumar Mitra, learned senior counsel appearing for the respondent contended that this order passed in an application under Section 36 of the Arbitration and Conciliation Act, 1996 as consequential to the application for setting aside of an arbitral award is non-appealable. Simply put the impugned order has refused to reduce the security ordered to be furnished to the court to obtain stay of the award and its execution. Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 and Commercial Courts Act, 2015 does not permit an appeal from such an order, learned counsel submitted.

One should decide the appealability of an order from the substance of the order. The section under which the order is passed is not material. In the Arbitration and Conciliation Act, 1996 the right to appeal is identified in relation to the section under which an order is passed. The appealability of an order is also to be appreciated in the context of the subject matter. In

my opinion, if the appellant had succeeded in its application before the learned single judge the effect would have been adjustment of a part of the award resulting in its reduction by setting off of the counter-claim against the award. In that event part of the award would have stood set aside. That in my opinion is very much appealable under Section 37 of the Arbitration and Conciliation Act, 1996 read with section 13 of the Commercial Courts Act, 2015. Therefore, the preliminary objection of learned counsel for the respondent fails.

Now the facts in some detail.

There were arbitral proceedings between the parties. On 20th November, 2019 the respondent was admitted in corporate insolvency resolution process by the National Company Law Tribunal, Kolkata Bench, Kolkata (NCLT, Kolkata). On 28th August, 2021 the appellant recorded in the minutes of the arbitral tribunal that it would not proceed with their counter-claim of Rs.80,66,81,775/-. On 1st August, 2022 the arbitral tribunal passed an award of Rs.60,33,95,000/-.

An application under Section 34 of the Arbitration and Conciliation Act, (AP No.742 of 2022) followed, made by the appellant. It was accompanied by a Section 36(3) application for stay of the award. On 13th December, 2022 the appellant was directed to furnish cash security for Rs.69,43,73,572.88/- with the Registrar, Original Side for stay of the award. Directions were also made for filing affidavits in the Section 34 application. In the mean while, on 9th January, 2023 the resolution plan for the respondent was approved by NCLT, admitting the claim by the appellant for Rs.80,66,81,775/- directing disbursement of Rs.4.12 lakhs. Immediately, the appellant made an application before the learned trial judge to recall its order directing the above security to be furnished on the ground that their claim for Rs.80,66,81,775/- has been admitted by the resolution professional and that they were entitled to set off that amount. The appellant was directed to

immediately deposit Rs.69,43,73,572.88/-, failing which an order in terms of prayer (h) of the tabular statement would follow.

Hence this appeal.

At the admission of the appeal the appellant was directed to furnish a bank guarantee of Rs.80,66,81,775/- for stay of the award.

The short point which is raised in this appeal by the appellant is that by virtue of admission of their claim for Rs.80,66,81,775/- the respondent had been admitted into corporate insolvency resolution plan under the Insolvency and Bankruptcy Code, 2016. Unquestionably, as a result of the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 the appellant could not pursue its counter-claim of Rs. Rs.80,66,81,775/- against the respondent before the arbitral tribunal. The minutes of the arbitral tribunal recorded so. So did the award dated 1st August, 2022.

The judgment in **Bharti Airtel Limited & Anr. vs. Vijaykumar V. Iyer & Ors.** reported in **(2024) 4 SCC 668** cited by Mr. Ishaan Saha, learned advocate discussed various types of set off in common law jurisprudence, namely (a) statutory or legal set off (b) common law set off (c) equitable set off (d) contractual set off and (e) insolvency set off. With regard to insolvency set off the court laid down:

“23. Insolvency set-off under the law of the United Kingdom is permitted when there are mutual debts, mutual credits and other mutual dealings between the parties at the relevant cut-off time, which is essentially the stage of commencement of the liquidation process. We shall subsequently examine the term “mutual dealings” as applicable to liquidation proceedings in India.”

In **Swiss Ribbons Pvt. Ltd. vs. Union Of India** reported in **(2019) 4 SCC 17**, the Supreme Court remarked:

“Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way – amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at

all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the Adjudicating Authority under Section 60.”

Now under the resolution plan, the above amount of Rs.80,66,81,775/- has been admitted. It simply means that the appellant's claim for this amount is found to be justified. It does not mean that Rs.80,66,81,775/- is the ascertained sum of money the appellant would get from the respondent or on account of the respondent. In fact, the disbursement order of the professional has only sanctioned an amount of Rs.4.12 lakhs out of the said sum of Rs.80,66,81,775/- for payment to the respondent.

The short point raised by the appellant is that since the said sum has been admitted by the resolution professional, it is entitled to set it off as against the award of the respondent for Rs.60,33,95,000/-.

This argument has no merit for several reasons. It is as follows:

The set off claim is not contractual, statutory or legal. It is at best an insolvency or equitable set off that is claimed. The claim of the appellant has only been admitted. As held in the above Supreme Court cases the decision of the resolution professional regarding an adjustment is not to be taken as adjudication of a claim. It is not an ascertained sum of Rs.80,66,81,775/-. In fact, the resolution professional has only sanctioned an amount of Rs.4.12 lakhs out of the said sum of Rs.80,66,81,775/-.

This kind of a right to obtain a monetary sum can never be exercised to adjust an award or decree. Order 21 rule 2 provides for adjustment of a decree. Rule 2A is specific to provide that no payment and adjustment shall be recorded unless the payment is made in the manner provided in rule 1. Rule 1 provides for actual deposit in court on account of the decree holder or tender to the decree holder. This kind of set off which the appellant wants is unknown.

For the above reasons this appeal fails. It is dismissed.

The impugned judgment and order of the learned trial judge dated 25th April, 2023 is affirmed.

Urgent certified photo copy of this judgment and order if applied for be furnished to the appearing parties on priority basis upon compliance of necessary formalities.

I Agree:-

(Biswaroop Chowdhury, J.)

(I. P. Mukerji, J.)