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ORDER SHEET
AC/2/2010
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINALSIDE

SAMBHU NATH GHOSH & CO.
VERSUS
STATE OF WEST BENGAL & ANR.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 18th September, 2024.

Appearance:
Ms. Noelle Dey Banerjee, Adv.
Mr. Akash Agarwal, Adv.
Mr. Saptarshi Kar, Adv.
. . .for the petitioner.

Mr. Priyankar Saha, Adv.
Mr. Paritosh Sinha Ld. AOR.
Mr. Arindam Mandal, Adv.
Mr. Ritaban Sarkar, Adv.
Mr. Aishik Chakraborty, Adv.
. . .for the State.

The Court: The award-holder seeks judgment to be passed and a decree to be drawn up in terms of the award. Learned counsel for the award-holder submits that this Court, while considering a challenge under Section 30 of the Arbitration Act, 1940 turned down the said challenge. Accordingly, in view of the language of Section 17 of the 1940 Act, the Court is mandated to pass a judgment and draw up a decree in terms of the award.

Learned counsel for the award-holder cites a coordinate Bench judgment of this Court reported at *AIR 1960 Cal 22* where, in identical circumstances where an appeal under Section 39 of the 1940 Act was pending against a refusal of a

challenge under Section 30, the Court proceeded to pass a judgment and direct decree to be drawn up.

Learned counsel further cites a judgment of a learned Single Judge of the Bombay High Court in the matter of *Bharat Petroleum Corporation Ltd. versus Reliance Industries Ltd.* reported at 2006(5) Mh.L.J. 624. The Bombay High Court, placing reliance on a Supreme Court judgement in the matter of *Madan Lal versus Sunder Lal and Anr.* reported at AIR 1967 SC 1233, proceeded to observe that the Court “has to” pronounce judgment in accordance with the award if it sees no cause to remit or set aside the same. It was further observed that it does not permit the Court any discretion in the matter.

Learned counsel appearing for the award debtor submits that at present a challenge is pending under Section 39 against the order of this Court refusing the award debtors’ application under Section 30 of the 1940 Act. However, the distinguishing feature of the present case, as opposed to the cited reports, is that an order has been passed by the Division Bench, which is in seisin over the appeal under Section 39, on September 13, 2024 where the Division Bench, inter alia, observed that in the facts and circumstances, no stay order is necessitated.

By highlighting the term “necessitated”, learned counsel argues that even in the opinion of the Division Bench, there was no necessity of passing any order of stay since the pendency of the appeal under Section 39 operates as a continuation of Section 30 and 33 proceedings, thereby automatically having the effect of a stay of the present proceeding.

Learned counsel for the award debtor also places an observation of the said order of the Division Bench dated September 13, 2024 to the effect that the awarded sum is deposited with the Registrar, High Court, Original Side as

security during pendency of the proceeding. In such context, the Division Bench also observed that since the appeal is a continuation of the Section 30 and 33 proceedings, the Division Bench directs the said security be held by the Registrar till the disposal of the appeal or until further orders, whichever is earlier.

Learned counsel for the award-debtor also cites a Division Bench judgment of this Court in the matter of *M/s. National Highways Authority of India versus M/s. B. Seenaiiah & Company (Projects) Ltd.* reported at (2012) 5 CHN 557 where it was observed inter alia that appeal being a continuation of the original proceeding, would enjoy the same protection under Section 36 of the Arbitration and Conciliation 1996 as a proceeding under Section 34 would enjoy.

The facts of the present case are that initially a judgment was passed and a decree was drawn up in terms of the award. Subsequently, however, the awarded amount being secured, the said judgment was recalled by a coordinate Bench.

Thereafter a challenge under Section 30 preferred by the award debtor was turned down by this Court.

In such context, the language of Section 17 of the 1940 Act is required to be looked into, which is as follows:

“17. Judgment in terms of award:- Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.”

The said Section provides that the Court, where it sees no cause to remit the award or any of the matters referred to arbitration for reconciliation or to set aside the award, “shall”, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award.

In the present case, although this Court has refused an application under Section 30 of the 1940 Act, fact remains that a further challenge has been preferred under Section 39 against the said order.

Under normal circumstances, as observed by the Bombay High Court and the coordinate Bench of this Court, the Court “has to” pass a judgment and a decree is to follow in the event it has refused to set aside the award. However, the distinguishing feature in the present case, as rightly pointed out by the award-debtors, is that the Division Bench in seisin over the challenge under Section 39 treated the Section 39 application to be a continuation of the Section 30 and 33 proceeding. The expression used in the order dated September 13, 2024 is not that a stay order is refused but that in the facts and circumstances, no stay order is “necessitated”. The said expression is required to be looked into in conjunction with the subsequent observation of the Division Bench that the appeal is treated to be a continuation of the Section 30 and 33 proceedings. In such context only, the Division Bench recorded that the awarded sum which was deposited with the Registrar, High Court, Original Side was to be treated as security during the pendency of the proceeding under Section 39 itself.

The security was directed to be held by the Registrar, accordingly, till disposal of the appeal.

Thus, on a factual premise, the security furnished in respect of the awarded amount by the award debtor is till retained by the Registrar, which operates as sufficient security regarding the award.

Seen in such context, there is no reason why the expression “after the time for making an application to set aside the award has expired, or such application having been made, after refusing it” should not be looked at in the sense that the refusal contemplated therein has to be at the stage when the challenge under Section 39 culminates. In other words, the contemplation of Section 17 of refusal of an application to set aside the award is to be extended till the refusal of the appeal under Section 39, by deeming the pendency of the application for setting aside the award under Section 30 to be continued through the Section 39 challenge. Since the Section 39 appeal has been construed by the Division Bench (in an order passed in presence of both sides) to be a continuation of the proceeding under Section 30, by obvious extension of the legal fiction that an appeal is a continuation of the suit, the refusal contemplated under Section 17 is also required to be extended till the culmination of the appeal itself in a refusal, if any.

Thus, it would be premature at this juncture to treat the refusal of the Section 30 challenge as conclusive regarding the “refusal” of challenge to the award, which is a *sine qua non* for passing judgment and decree on the award. Rather, in view of the observation of the Division Bench passed in the order in presence of both sides, the challenge under Section 39 is deemed to be a continuation of the application to set aside an award under Section 30 and as such, the judgment can only be pronounced after the continuing challenge under Section 39 is finally refused, if at all.

Having not challenged the order of the Division Bench dated September 13, 2024, which was passed in its presence, the award-holder has conceded to such view of the Division Bench.

Hence, it would inappropriate and contrary to principles of equity if despite the awarded amount having been secured by the award debtor, which is continued by the appellate court, a judgment is passed and a decree is drawn up in terms of this award at this stage. Accordingly, GA 2 of 2024 is allowed, thereby adjourning Award Case no. 2 of 2010 till disposal of the appeal bearing APOT No. 304 of 2024.

(SABYASACHI BHATTACHARYYA, J.)

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