

OCD-11

ORDER SHEET
EC-COM/447/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE

ESSEX DEVELOPMENT INVESTMENTS MAURITIUS LIMITED
VS
GOVERNMENT OF WEST BENGAL AND ANOTHER

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date : 22nd November, 2024.

Appearance:

Mr. Ratnanko Banerji, Sr. Adv.

Mr. Arunabha Deb, Adv.

Mr. Deepan Kr. Sarkar, Adv.

Ms. Ashika Daga, Adv.

Mr. Raunak Das Sharma, Adv.

Ms. Samparna Mukherjee, Adv.

. . .for the petitioner.

Mr. Kishore Dutta, Advocate General.

Mr. Siddharth Sethi, Adv.

Mr. Majoj Kumar Tiwari, Adv.

Mr. Raghavendra Pratap Singh, Adv.

. . .for the respondents.

The Court: Affidavit of service filed in Court today is taken on record.

The execution case has been filed by the award-holder. Interim orders are prayed for. Learned Advocate General appears on behalf of the award-debtors and submits that the award is a nullity. Thus, no orders can be passed in the execution case.

The application under Section 36(2) of the Arbitration and Conciliation Act, 1996 was taken up by a Coordinate Bench and the same was disposed of.

The prayer for unconditional stay of the award made by the award-debtor was rejected. The plea that the award was vitiated by fraud and corruption, was not accepted. Direction was issued upon the award-debtors to secure 50% of the award in cash by transmitting the funds directly to the account of the Registrar, Original Side, High Court at Calcutta and remaining 50% was directed to be secured by furnishing a bank guarantee. This order was challenged by the award-debtors before the Hon'ble Apex Court, but the Special Leave Petition was dismissed.

Under such circumstances, this Court is of the view that the order passed by the learned Coordinate Bench has attained finality. As the award-debtors have not secured the amount as yet, this Court does not find any reason to stall the execution proceeding.

As the learned Advocate General raises the question of maintainability of the execution case, the Court invites learned Advocate General to make his preliminary submissions.

The Learned Advocate General submits that Section 36(1) of the Arbitration and Conciliation Act, 1996 makes the provisions of Code of Civil Procedure applicable. In such view of the matter, objections to the executability of the award on the grounds akin to those provided under Sections 47 of the Code of Civil Procedure, 1908, could be raised. Learned Advocate General has relied on several decisions to show that the point of inexecutability of a decree can be raised not only at the time of execution of the award, but also in collateral proceeding. An award under the Arbitration and Conciliation Act, 2016 has to be executed in terms of the provisions of the Code of Civil Procedure, 1908. Such

provision also allows raising of objections by filing an application akin to one under Section 47 of the Code. Some decisions have been placed in support of the contention that if a decree is passed either in ignorance of law or in violation of law, the same is a nullity and void. The same cannot be executed.

In the present case, section 54(9) of the West Bengal State Goods and Services Tax Act, 2017, is relied upon to show that notwithstanding any decree or order of Court or an Appellate Tribunal, GST cannot be refunded. The award has been placed along with the clauses of the contract, in support of the contention that a contractual obligation could not override the statutory bar. It is urged that, the clause in the contract provided that in case of change of law and with the promulgation of the GST Act, the clause would remain the same. GST Act may have been made applicable, but the applicability of such law could not be contrary to law.

Mr. Banerji, learned Senior Advocate for the award-holder relies upon the documents annexed to the application for execution and submits that a similar point was raised in the proceedings under Section 36(2) of the Act and also in the special leave petition filed by the award-debtors before the Hon'ble Apex Court. Once, the proceeding under Section 36(2) was disposed of upon taking note of the various objections raised by the learned Advocate General and the Court had elaborately discussed the reasons why the award should not be stayed unconditionally, the observations of His Lordship would be binding. At the stage of execution, no further objections with regard to the executability of the award on the same point which were urged before His Lordship and also before the Hon'ble Apex Court, could be entertained. Reliance has also been placed on a

decision of the Allahabad High Court, wherein it was held that allowing an objection under Section 47 of the Code of Civil Procedure in respect of arbitral awards, would undermine the finality and the binding nature of the award. Such decision was shown to the Court in support of the contention that although the provisions of the CPC was made applicable to execution, such applicability was limited to the procedural aspect.

The learned Advocate General submits that the Hon'ble Apex Court had left all points open, to be agitated in the proceeding under Section 34 of the said Act, Mr. Banerji submits that the order of the Hon'ble Apex Court could not be interpreted to mean that the observation of the Co-ordinate Bench in the proceedings under Section 36(2) would not be applicable in the execution case. The execution under such circumstances should be automatic.

The point as to whether objection as to executability of the award can be raised at the stage of execution and whether the execution case can be rejected on this ground alone, shall be decided after exchange of affidavits.

There is a subsisting award of Rs.2171,87,68,877/- against the respondents. The same has to be protected during the pendency of the proceeding for enforcement. Whether the parties can contract outside the law or not and whether the award is without jurisdiction, being in violation of law and a nullity, will be decided finally.

However, considering the prima facie case, balance of convenience and inconvenience and irreparable loss and injury, this Court directs that the award-debtor no.1 shall be injuncted from creating any third party interest by way of transfer, sale or assignment of any of its immovable properties within the limits

of the Kolkata Municipal Corporation. The award-debtor no.2 will also be enjoined from transferring, selling, encumbering and alienating the property situated at 23, Camac Street, Kolkata- 700 017 (Abanindra Nath Thakur Sarani). The principal officers of each of the award-debtors will file their affidavits of assets within two weeks from date. Advance copy of the same will be served upon the petitioner.

This interim order of injunction will continue till 28th February, 2025.

Let the matter appear on 3rd January, 2025. Affidavits may be exchanged between the parties in the meantime and the parties are at liberty to take appropriate steps.

This order is passed without prejudice to the question of maintainability of the execution proceeding which has been raised by the learned Advocate General.

All parties are to act on the basis of server copy of this order.

(SHAMPA SARKAR, J.)