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GA No. 3232 of 2018
APO No. 373 of 2018
OCO No. 2 of 2018
in
EC No. 745 of 2014
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

PAM DEVELOPMENT PRIVATE LIMITED
Versus
STATE OF WEST BENGAL & ORS.

BEFORE:
The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE SUVRA GHOSH
Date : 13th December, 2018.

Appearance:
Mr. Priyankar Saha, Adv.
Mr. Amritam Mandal, Adv.

Mr. Samrat Sen, Adv.
Mr. Paritosh Sinha, Adv.

The Court : The appeal involves a point of principle and the authority available to an executing Court. Classically, an executing Court cannot keep the decree-holder waiting and even a mere adjournment of the execution proceedings, in so far as it can cause prejudice to the decree-holder, has been judicially held to be an appellable order.

The appellant herein was successful in obtaining an award at the end of an arbitral reference. The award was passed on July 30, 2014. The award-debtor, the State of West Bengal, challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 as it stood prior to its 2015 Amendment.

At the relevant point of time, the mere filing of a petition challenging an arbitral award operated as a stay since the enforcement of an award could not be resorted to prior to such challenge being decided or repelled.

It transpires that the State applied beyond the period of three months then recognised in Section 34(3) of the Act of 1996 prior to its 2015 Amendment and sought condonation of the delay for the period beyond such three months. The period for which delay was asked to be condoned was indicated to be 40 days. The appropriate court in Chinsurah rightly found that the delay that could be condoned beyond three months was limited to 30 days, and as such, the challenge to the arbitral award stood dismissed. An appeal was carried from such order to this Court and, in course of such appeal, it was discovered that the delay beyond the period of three months was to the extent of about 28 or 29 days. On facts, since the delay was found to be within the period of 30 days as envisaged in the then Section 34 of the Act of 1996, the appeal was allowed by condoning the delay and disposing of the petition under Section 5 of the Limitation Act, 1963. This was done on January 13, 2016 and the Chinsurah court was requested to ensure that the setting-aside petition was disposed of within three months. Though it was completely unnecessary in the context, the operation of the arbitral award was stayed for a period of six months from the date of the appellate order of January 13, 2016.

The 2015 Amendment to the provisions for enforcing an arbitral award fell for consideration before the Supreme Court in a judgment reported at AIR 2018 SC 1549 (*Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd.*). It was held in this case that notwithstanding Section 26 of the Amending Act of 2015, the effect of the 2015 Amendment had to be extended to pending petitions filed

under Section 34 of the Act of 1996. In other words, the right of an award-holder to enforce an arbitral award, that was not stayed, after the specified period of three months and thirty days in the post 2015 Amendment regime was extended to award-holders who had obtained awards which were covered by the law prior to the Amendment.

On the strength of the Supreme Court dictum in the *Kochi Cricket* case, the appellant herein applied before the executing Court here to resurrect the execution proceedings that had been filed in 2014 after the expiry of three months and thirty days from the date of the appellant's receipt of the award and at a time when the appellant was not aware that setting-aside proceedings in respect of the award had been instituted by the respondent herein. The execution proceedings were, however, adjourned sine die in 2014 once the State brought it to the notice of the executing Court that its setting-aside proceedings were pending elsewhere. Upon the application being carried to the executing Court in July, 2018 for implementation of the arbitral award of 2014 in the light of the dictum in *Kochi Cricket*, the executing Court passed an order on July 31, 2018 adjourning the execution case for six weeks "to enable the judgment-debtor to apply before the appropriate Court for stay of operation of the award." This, the executing Court did, presumably in exercise of its authority under Order XXI Rule 26 of the Code. Such order of July 31, 2018 has not been challenged and even if it had been challenged, the appeal may have been repelled on the ground that an element of discretion was available to the executing Court to afford the award-debtor an opportunity to have the award stayed, particularly, since the law as it stood prior to the 2015 Amendment had only lately been interpreted in the *Kochi Cricket* case.

However, when the matter appeared next before the executing Court on September 11, 2018 and it was found that the State had not obtained a stay of operation of the arbitral award of 2014, the executing Court, instead of implementing the award by ensuring that the payment in terms thereof was reached to the award-holder, passed an order attaching a sum of Rs.57 lakh, which was equivalent to the awarded amount together with interest thereon, maintained by the State with the Reserve Bank of India. Again, since it is common knowledge that Courts are burdened with heavy dockets, the executing Court was well within its rights to extend the time to afford the State a further opportunity to obtain a stay of the operation of the award by putting the State on terms. The execution proceedings were adjourned by the order dated September 11, 2018 to October 9, 2018.

The execution case was next taken up on November 13, 2018. However, quite inexplicably, the form of the attachment or security was changed without any benefit to the award-holder and, possibly, not at the invitation of the award-holder. The award-holder submits that the executing Court could adjourn the executing proceedings in terms of Order XXI Rule 26 for a reasonable period but once the executing Court noticed after the lapse of such reasonable period that there was no impediment to the implementation of the decree or award, which is deemed to be a decree, the executing Court could not have changed the form of the security and denied the immediate payment that was due to the award-holder. By the order impugned the execution proceedings have next been fixed for some time early in January, 2019.

A cross-objection has been filed by the State, protesting the change of the form of security. The State, however, exhorts that the executing Court was well

within its rights to give a further chance to the State, particularly, in the light of the fact that the State had pointed out to the executing Court that the substance of its application for stay in the proceedings under Section 34 of the Act of 1996 was that as a Government, the State was exempted by the Code of Civil Procedure, 1908 from making any deposit in lieu of obtaining a stay of operation of a decree.

The State's objection is exceptionable. Apart from the fact that the ground for seeking a stay of the operation of a decree or the execution thereof has to be canvassed before the appellate forum and not the executing Court, the course of action adopted by the State appears to be unacceptable. It was such mischief which was sought to be addressed by the 2015 Amendment since lethargic award-debtors would take the notorious plea of pendency of matters in courts to their advantage and deny settlement of the rightful dues of award-holders. The fact that the principle embodied in the 2015 Amendment qua the implementation of awards has been extended by the Supreme Court in the *Kochi Cricket* judgment would demonstrate that even the previous mischief was intended to be addressed by the Amendment.

It would not do for a State to imperiously deny the rightful dues of an award-holder by the wave of a hand as the State is subject to the laws of the land and enjoys no better position in a court of law than any other litigant unless accorded special status by any statutory provision. The executing Court in this case was well within its authority, particularly, in the light of the *Kochi Cricket* judgment then having been recently delivered, to adjourn the execution proceedings by the order dated July 31, 2018. The executing Court again was eminently justified in granting a further extension by putting the State on terms.

But even when the executing Court put the State on terms, it did not result in any benefit to the award-holder. Execution proceedings are meant for the fruits of a decree or order to be enjoyed by the beneficiary thereof. The meaningless change of the form of security by the order impugned dated November 13, 2018 resulted in no benefit to the award-holder and has even invited a cross-objection from the State. In the absence of the order impugned indicating any exceptional or special circumstances – the suspension of Court or a natural disaster, for example – the generosity of not implementing the decree could not have been extended beyond the first and second time, notwithstanding the award-debtor being put on terms. There is only a limited authority which is available to the executing Court in warding off the immediate implementation of a decree or order which is carried before it and, in passing the order of November 13, 2018 without citing any special circumstances, the executing Court here transgressed the bounds of its authority.

For the reasons aforesaid, the order impugned dated November 13, 2018 cannot be sustained and is set aside. Instead, the State is permitted till the end of working hours of December 17, 2018 to make payment of a sum of Rs.57 lakh to the award-holder; failing which, the decree-holder will be entitled to cite an authenticated copy of this order to obtain the payment from the Reserve Bank of India out of the funds lying to the credit of the State with such central bank. However, in the event the award is set aside or the quantum of the amount awarded is reduced, the payment that may be received by the award-holder in terms of this order will not be an impediment to the State taking recourse to appropriate measures for the recovery thereof. Since this award-holder is a regular contractor under the State and, notwithstanding the State's assertion that

the appellant has been black-listed, there may be several other projects where payments are due to the appellant herein, no special direction is issued for furnishing any undertaking or guarantee in anticipation of the possible setting aside of the award or reduction of the quantum of the amount awarded.

In the light of the above order, the cross-objection loses all meaning.

APO No. 373 of 2018 and GA No.3232 of 2018 are allowed as above with costs assessed at 300 GM to be paid by the State to the appellant. OCO No.2 of 2018 also stands disposed of.

At the invitation of the State, the appropriate court in Chinsurah is requested to ensure that the setting-aside petition is decided by the end of January, 2019. It will be open to the State to invite the attention of the District Judge, Hooghly to ensure that this request is complied with.

It is made clear that this order does not dispose of the execution proceedings and the balance claim in terms of the award may be obtained in course of such proceedings, but subject to any order that may be passed in the stay application filed by the State in the Chinsurah court.

(SANJIB BANERJEE, J.)

(SUVRA GHOSH, J.)