

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION ORIGINAL SIDE

Present: The Hon'ble Justice Shekhar B. Saraf

IA NO. GA/ 3/2021

In

EC/457/2018

LAXMI PAT SURANA

Versus

PANTALOON RETAIL INDIA LIMITED & ANR.

For the Petitioner: Mr. Jishnu Chowdhury, Advocate, Mr. Souradeep Banerjee, Advocate Mr. Abhidipto Tarafder, Advocate

For the Respondents: Mr. Rishad Medora, Advocate Mr. Radhika Misra, Advocate

Last Heard on: September 21, 2022

Judgment on: September 23, 2022 Shekhar B. Saraf, J .:

1. By an order dated April 28, 2022, a co-ordinate bench of this Court, while disposing of an application (IA No. G.A. 1 of 2022 in A.P. 698 of 2016), determined whether the sum to be secured for grant of stay of the Award as per Section 36 of the Arbitration and Conciliation Act, 1996 (' the Act ') would include the post award interest.

While ruling in the affirmative, this Court inter alia directed the following- " Since the value and sum of the Award as it stood on 1st April, 2022 amounts to Rs. 26,53,74,118 and the respondent NO. 1 is already secured to the extent of Rs. 12 crores, the petitioner shall deposit 70% of the balance amount of Rs. 14,53,74,118/- (Rs. 26,53,74,118 Rs. 12,00,00,000) i.e. Rs. 10,17,61,882/-with the Registrar, Original Side of this court within four weeks from date. The petitioner shall have the option of depositing 50% of the said amount (i.e., Rs. 5,08,80,941/-) by way of a bank guarantee and the remaining 50% (Rs. 5,08,80,941/-) in cash. If the petitioner defaults in complying with such condition within the stipulated time, the respondent NO. 1 award-holder shall be free to take appropriate steps in the execution proceedings or as it may think fit. "

2. A review petition (IA No. GA. 1 of 2022 in RVWO 16 of 2022) was preferred against the order dated April 28, 2022. The same was dismissed without costs vide order dated September 1, 2022.

3. It appears that there are two bank guarantees lying with the Registrar, Original Side, Calcutta High Court, wherein one is to the tune of Rs. 6,50,00,000/- and another is to the tune of Rs. 5,50,00,000/-, which are being renewed yearly.

4. The award holder had initiated proceedings for execution of the award (E.C. 457 of 2018) and has now preferred the instant application in the execution proceedings which prays for execution of the balance sum of unsecured amount (i.e. Rs. 20,41,31,216/-) along with invocation of the two bank guarantees mentioned above and leave to withdraw the said amount.

5. Mr. Jishnu Chowdhury, learned advocate, appearing on behalf of the award holder, made the following submissions:

a) The award was passed on May 19, 2016 and the award debtors have still not taken any steps for final adjudication of the setting aside application;

b) The financial condition of the award debtors is precarious considering that (i) several proceedings against the award debtors are pending before the Supreme Court and National Company Law Tribunal, Mumbai, owing to their inability to pay employees and other dues and (ii) their current filings before the Bombay Stock Exchange and National Stock Exchange indicate huge losses;

c) The award debtors have still not complied with the order dated April 28, 2022 as they have not furnished security for 70% of the balance amount of Rs. 14,53,74,118/- (i.e. Rs. 10,17,61,882/-) and therefore there is no stay on the execution of the award;

d) A financial creditor has approached the award holder with a One Time Settlement (OTS) dated August 30, 2022, in respect of certain dues as per which an upfront payment of Rs. 3,00,00,000/- is required, failing which there are grave chances that the award-holder may face insolvency proceedings; and

e) A division bench of this Court in PAM Development Pvt. Ltd. v. State of West Bengal & Ors., [(GA No. 3232 of 2018) in (EC No. 745 of 2014) held that mere pendency of matters in court should not stall the execution proceedings and this decision should be considered in light of the reasons above.

6. The respondents have submitted two objections, which are:

a) The award holders themselves have also challenged the award and therefore cannot contend that only the respondents have not taken any steps to proceedings with the setting aside applications, and

b) If the award holder is allowed to invoke the bank guarantee and withdraw any amounts, a counter-security be presented for the same, or else their rights will be prejudiced.

7. Indisputably, the award holder has succeeded in arbitration proceedings and the award debtors have failed to obtain a stay on the award or even proceed with the setting aside applications. It is preposterous for the defendants to shift or try to share blame for not taking steps in the setting aside applications, since as the facts and the law stand today, liability arising out of the award obliges only the award debtors.

8. In PAM Development (supra), this Court had held that lethargic award debtors cannot be rewarded by staying the operation of a decree or the execution thereof (of arbitral awards) on notorious pleas of pendency of matters in courts. During the hearing, Mr. Jishnu Chowdhury, learned advocate, appearing for the award holder, submitted that the petitioner is also willing to merely withdraw the amount required for upfront payment of Rs. 3,00,00,000/-as under the OTS, if this Court allows.

In all fairness, such candidness cannot be shunted, specifically when supported by the force of law. Furthermore, counter-guarantees cannot be asked for when the award debtors themselves have failed to secure the amount.

9. In light of the urgent financial crisis of the award holders and, interestingly, also of the award debtors, I direct the following to balance the equities:

a. Registrar, Original Side, High Court at Calcutta, is directed to invoke the bank guarantee NO. 01601F1BG130110 valued at Rs. 6,50,00,000/-and transfer Rs. 3,00,00,000/-to the bank Account of the award holder maintained at the Union Bank of India.

b. Registrar, Original Side, High Court at Calcutta, is directed to make a fixed-deposit of the remaining amount, i.e. Rs. 3,50,00,000/-with any nationalised bank.

C. The aforesaid exercise is to be completed within one week from the date of this order.

d. The branch of the Union Bank of India, wherein the award holder has the Account, is directed to utilize Rs. 3,00,00,000/-only for the purposes of upfront payment as required under the OTS dated August 30, 2022.

10. Accordingly, GA/ 3/2021 stands disposed of.

11. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)