

Sarkar and Sarkar Vs. State of West Bengal and ors.

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Court : Kolkata

Decided On : Jan-19-2006

Reported in : AIR2006Cal149,(2006)3CALLT342(HC)

Judge : Sengupta, J.

Acts : Arbitration and Conciliation Ordinance, 1996 - Sections 34, 36 and 37; ;
[Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : G.A. No. 1899 of 2005 and A.P. No. 210 of 2004

Appellant : Sarkar and Sarkar

Respondent : State of West Bengal and ors.

Judgement :

ORDER

Sengupta, J.

1. This execution application has been taken out by the deemed decree-holder. Mr. Roychoudhury appearing for the judgment-debtor has raised a preliminary question as to the maintainability and/or continuation of the execution application for the following facts which are admitted.

2. The learned sole Arbitrator made and published an Award on 24th April, 2004. Application under Section 34 to impugn the Award within the parameter of the

aforesaid section was made on 7/8th July, 2004.

3. The application for setting aside of the Award, as above, was dismissed for default on 14th June, 2005. However, no application was made for restoration nor any order was passed for restoration until 8th August, 2005. During this period there has been no application for restoration nor any order of restoration was passed, but the present execution application has been levied on 22nd June, 2005, and from time to time, namely, on 7th July, 2005, 14th July, 2005 and 21st July, 2005 this execution application was heard and at different stages various interim orders were passed by the executing Court including giving direction for filing affidavit-in-opposition to this execution application. Indeed, pursuant to the aforesaid order the affidavit-in-opposition has been filed. Thereafter by an order dated 8th August, 2005, the application for setting aside of the Award was restored by the learned regular Arbitration Court. Now the question is as to whether the order of restoration gets the retrospective effect and thereby nullifies the subsequent proceedings taken by the decree holder or not. In order to ascertain this, Mr. Banerjee, learned senior advocate, submits that under the provision of law at that point of time his client was perfectly within the law to take out this application and he has drawn my attention to Section 36 of the Arbitration and Conciliation Ordinance, 1996. The text is set out hereunder :

36. Enforcement:- Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

He submits that initiation of the execution application is perfectly lawful and subsequent order passed by the regular Arbitration Court cannot render the lawful action as being illegal one, unless it is expressly stayed by the appropriate Court. In this context while considering the argument of Mr. Roychoudhury I see the order of restoration of Justice Indira Banerjee, the order reads like this :

Subject to payment of costs assessed at 60 Gms, to the Registrar, Original Side of this Court, the order dated 14th June, 2005 is recalled. The application being G.A.

No. 2425 of 2005 is disposed of.

Let the application being A.P. No. 210 of 2004 be placed for hearing as 'Adjourned Motion' on 16th August, 2005.

In my view, in fitness of the situation after the aforesaid order was passed, the judgment debtor ought to have approached this executing Court and to draw the attention of the fact of restoration of the aforesaid matter and should have obtained a stay of operation of the aforesaid order, Indeed the matter was not heard. Ultimately the application was dismissed on merit on 12th September, 2005.

4. In my view, the initiation of the execution proceedings was perfectly lawful. It could not be proceeded with until and unless the application under Section 34 is disposed of, and it was, in fact, not proceeded with. Had the application been allowed. Then obviously this execution application would have been dismissed automatically.

5. Therefore, upholding the contention of Mr. Banerjee, levy of the execution application in this peculiar circumstances is quite lawful and valid and it has become valid because of the ultimate dismissal of the application.

6. Now, the question is as to whether the appeal admitted by the appellate Court against the order of refusal to set aside under Section 37 is a continuation of the application under Section 34 so as to disentitle the award holder to proceed with the execution application or not. Mr. Banerjee submits that if the language of Section 36 is read carefully together with Section 37 it would appear that the specific stay of operation of the Award is required to be obtained from the Appeal Court and indeed the appellant prayed for and it was not granted. If the appeal is treated to be automatic continuation of the action under Section 34 the whole object of the language of Section 34 is rendered nugatory.

7. Mr. Roychoudhury submits that the provisions of Sections 34 and 37 have to be read in consonance with Section 35 of this Act. Section 35 deals with subject to the provision of this part meaning thereby the Award reached finality as and when

the action taken under Section 34 is dismissed at the end of the appeal, namely, after the appeal is dismissed as because there is no provision for second appeal. Of course, the constitutional provision to approach the Supreme Court is not and cannot be touched by this enactment.

8. In my view, of course, at this stage, prima facie, the right of appeal has been given to the unsuccessful litigant under Section 37 but filing of appeal does not operate as stay automatically. I am of the view that the stay of operation of the Award has to be obtained once the litigant is unsuccessful before the first Court.

9. Mr. Roychoudhury submits that it was understanding before the Appeal Court that this execution application will not be levied since the entire Award claim is secured and lying in the Reserve Bank of India. The appeal has been admitted. The respondent has undertaken to file the paper book. Mr. Banerjee submits that the claimant has not taken any steps for drawing up and completion of the order appealed against nor did they take any step to take out any appeal against the said order. All these defaults are there. So in reality there is no appeal actually. I have read the Appeal Court's order, I find that the appeal has been admitted and it is the desire of the Appeal Court that it would be heard very shortly and I have been given to understand the matter is likely to be taken up for hearing.

10. In any view of the matter given aforesaid facts and circumstances, I think the following order will sub-serve the interest of justice. I direct the Reserve Bank of India to make over the amount lying to the credit of this execution application to Mr. Debobrata Banerjee and Mr. Bijon Majurndar, Advocates of both the parties, who are appointed Joint Special Officers and they shall invest the amount with the United Bank of India, High Court Branch in a short term fixed deposit. The Reserve Bank of India shall hand over the aforesaid amount within a period of fortnight from the date of communication of the signed copy of the minutes of this order together with a copy of the application for execution duly certified by the Assistant Registrar of this Court.

11. In the event the appeal is not disposed of within a period of two months from the date of receipt of this order, it would be open for Mr. Banerjee's client to pray for encashment of the said amount together with interest and to appropriate the

same on furnishing a bank guarantee in any nationalised bank for the equivalent amount and the same may be renewed from time to time. This order will abide by the result of the Appeal Court.

12. All parties concerned including the Joint Special Officers are to act on a xerox signed copy of this order on the usual undertaking.

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