

(2022) 03 CAL CK 0068

In the Calcutta High Court

Case No : I.A. No. GA 3 of 2021 In A.P. No. 175 of 2020, E.C. No. 156 of 2020,
I.A. No. GA 1 of 2020

Bharat Heavy Electricals Limited-Electric Division

APPELLANT

Vs

Optimal Power Synergy India Pvt. Ltd.

RESPONDENT

Date of Decision : 23-03-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34, 36, 36(2), 36(3)
Micro, Small and Medium Enterprises Development Act, 2006 — Section 2(d), 2(n),
15, 16, 18, 19

Citation : (2022) 03 CAL CK 0068

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Tilak Kumar Bose, Ganesh Prasad Shaw, Gaurav Kumar, Jishnu Saha,
Touseef Khan, Ishan Saha, Arindam Paul

Final Decision : Disposed Of

Judgement

Moushumi Bhattacharya, J

1. Three applications filed by the parties before the Court are being considered in this judgment.

2. The first application is for setting aside of an Award dated 24th September, 2019 passed by the Facilitation Council under the provisions of The Micro, Small and Medium Enterprises Development Act, 2006 wherein Optimal Power Synergy emerged as the Award-holder. The second application is for stay of the Award under section 36 of The Arbitration and Conciliation Act, 1996. Both these applications have been filed by Bharat Heavy Electricals Limited (BHEL), the Award-debtor. The third is an Execution Petition filed by Optimal for execution of the Award.

3. The prayer of the Award-debtor, BHEL, is that the Award should be stayed pending hearing of the application for setting aside of the Award. The Award-

holder Optimal prays for withdrawing 75% of the principal amount of Rs. 61,08,654/- awarded to Optimal by the Facilitation Council without being required to furnish security in lieu of such withdrawal.

4. Mr. Tilak Kumar Bose, learned senior counsel appearing for the Award -holder Optimal, relies on the provisions of the MSME Act to urge that section 19 of the said Act requires the appellant to deposit 75% of the amount of the Award before an application for setting aside of the Award can be entertained. Counsel further relies on the proviso to section 19 under which the Court can make an order for payment of such percentage of the amount deposited by the appellant to the supplier as the court may consider to be reasonable. Counsel submits that Optimal is in a precarious financial condition and that the title deeds which Optimal initially wanted to deposit as security in exchange for the amount to be withdrawn are defective.

5. Mr. Jishnu Saha, learned senior counsel appearing for the Award-debtor BHEL, seeks stay of the impugned Award on the ground that the Award-debtor has already deposited 50% of Rs. 2,09,16,171/- (which is 75% of the total amount comprising of the principal sum awarded plus interest) in cash with the Registrar Original Side of this Court and has also given a bank guarantee of the balance 50% of the amount in compliance with the direction passed on 1st September, 2021. Counsel submits that Optimal should not be permitted to withdraw any amount of the deposit lying with the Registrar without furnishing security. Counsel seeks to distinguish the provisions of the MSME Act and the Arbitration and Conciliation Act, 1996 and submits that unconditional withdrawal of the amount deposited is not contemplated under the former.

6. A brief background of the three applications is necessary for a better understanding of the stand taken by the parties before this Court. The impugned Award was passed by the West Bengal State Micro Small Enterprises Facilitation Council under section 18 of the MSME Act on 24th September, 2019 on a reference by Optimal arising out of a dispute with BHEL. BHEL is the buyer and Optimal is the supplier as defined under sections 2 (d) and (n) respectively of the MSME Act. The Award notes that Optimal is a small manufacturing enterprise which issued eight purchase orders on BHEL for supply of a Solar Power Conditioning Unit and other items for a diesel power plant. The payment terms in the purchase order were 80% - 90% payment on supply plus 100% taxes to be made with 30 -45 days of credit from receipt of the material at site and the balance 10% on execution of basic supply of the materials. The Award was passed after BHEL failed to participate in the conciliation pursued under section 18 of the MSME Act. The arbitration was commenced after the conciliation failed.

7. By the impugned Award, BHEL was directed to pay the principal sum of Rs. 61,08,654/- along with the interest thereon at three times the bank rate notified by RBI compounded with monthly rests under Section 16 of the MSME Act. The claimant / Award-holder, Optimal was directed to submit its claim of interest on the principal sum and the Award-debtor, BHEL was directed to pay the said sum

within 30 days from the date of submission of the claim of interest. Optimal submitted its claim on 28th November, 2019 for an amount of Rs. 2,78,88,228/- inclusive of interest. The 3 applications for setting aside and stay of the award and for execution were filed by BHEL and Optimal thereafter. Optimal filed an Execution Application before this Court. The stay application was disposed of by a judgment and order of this Court on 1st September, 2021 by which BHEL was directed to deposit 75% of the total awarded amount (principal plus interest) of Rs. 2,78,88,228/- [75% of Rs. 2,78,88,228 = Rs. 2,09,16,171] and to deposit 50% of this amount (Rs. 1,04,58,085.50) with the Registrar Original Side of this Court. The remaining 50% was directed to be given by way of a bank guarantee from a reputed bank within a specific time frame. BHEL was given liberty to make a separate application for stay of the Award only after deposit of the amounts as directed.

8. I now come to the merits of the case made out by the parties in the three applications pertaining to the Award.

9. Section 36 of The Arbitration and Conciliation Act, 1996, provides for enforcement of an arbitral award after the time for applying for setting aside of the award has expired and subject to stay of the award under section 36(2) of the Act.

10. Section 36(2) empowers the Court to grant an order of stay of the operation of the arbitral award in accordance with section 36 (3) on a separate application made for that purpose.

11. For ease of comparison, section 36(3) of the Arbitration and Conciliation Act, 1996 and section 19 of the MSME Act, 2006, are set out in sequence :-

Section 36(3) of the 1996 Act:

"36. Finality of Arbitral Awards ?

.....

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

Section 19 of the MSME Act:

"19. Application for setting side decree, award or order.? No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court

unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court :

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.”

12. The words used in section 36(3) are “... the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award....”. The discretion of the Court in the matter of grant of stay of an award becomes evident from the construction of the provision – the imposition of conditions unobtrusively nestled in the sentence. The discretion, which is also spelt out in the proviso for conditions for grant of stay, is extended to the next level of decision-making, as it were, for stay of the award. The free-hand given to the Court is in fact continued from the preceding provision – 36(2) – where the enforcement of an Award is deemed to continue unfettered and regardless of an application for setting aside of the Award. Further, the ‘may’ in 36(3) set against the ‘shall’ in the proviso placed thereafter also serves to lay stress on the element of discretion in the matter of stay of an award.

13. In contrast, the discretion of the Court considering the application for setting aside of an award under the proviso to section 19 of the MSME Act is dressed both in ‘shall’ and ‘may’; the mandate on the Court is to order payment of a part of the deposit (by the award-debtor for stay of the award) to the supplier award-holder “as it considers reasonable...subject to such conditions as it deems necessary to impose”. The discretion of the Court is thus built into the proviso on the quantum which shall be released to the supplier and the terms on which such payment can be made. In other words, the Court is statutorily-mandated to ensure that the supplier can withdraw a part of the amount deposited by the buyer and the amount which is to be released. The Court is also empowered to decide whether to impose terms for such withdrawal on an assessment of the attending circumstances as would be evident from the last line of the proviso.

14. The leverage given to the supplier in section 19 of the MSME Act seamlessly fits into the overall scheme of the Act. The right of an award-holder to withdraw a certain percentage of the amount deposited by the award-debtor pending an application for setting aside of the award is absent in section 36(3) of the 1996 Act and is indeed a remarkable step-up in respect of the rights of an award-holder. This right is also perfectly in sync with the other provisions of the MSME Act which was enacted with the object of facilitating the promotion and development of micro, small and medium enterprises and enhance their competitiveness. The object is reinforced in and runs through several sections including section 15 under which a buyer is liable to pay the supplier for the supply of goods on or before the date agreed upon between the buyer and supplier in writing or before the appointed day in the absence of a written

agreement. Section 16 continues in the same vein on the default of the buyer on its payment obligation to the supplier. The buyer is then made liable for compound interest with monthly rests to the supplier on the amount from the appointed day or from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank. Section 19 makes it mandatory on the appellant, to deposit 75% of the amount in terms of the decree/award. Section 19, discussed above, reserves the obligation to deposit 75% of the awarded amount only on the award-debtor who is not a supplier; the exclusion being clearly indicated in parenthesis. The proviso further makes it clear that a percentage of the amount deposited shall be paid to the supplier under such circumstances as the Court may deem fit. Hence, section 19 of the 2006 Act would entitle Optimal (supplier) to withdraw a portion of the amount deposited by BHEL which is presently lying with the Registrar, Original Side of this Court; the other part is by way of a bank guarantee. Optimal seeks to withdraw 75% of the principal sum awarded, i.e. 75% of Rs. 61,08,654/-. The demand is fair since the dispute in the setting aside application is in relation to the amount of interest which is to be added to the principal sum under section 16 of the MSME Act. Optimal should hence be allowed to withdraw 75% of Rs. 61,08,654/- which is in tandem with section 19 of the MSME Act.

15. The second question which must be answered is whether Optimal can withdraw 75% of the principal amount without requiring furnishing of security. The accepted principle is that a person who withdraws money which has been deposited to the credit of the suit must furnish corresponding security. The judgment-debtor in other words remains secured in the event the decree is set aside.

16. The question is can Optimal – the award-holder - be allowed to do so?

17. The proviso to section 19 of the MSME Act contemplates exercise of discretion in considering stay of an award with regard to (a) the percentage of the deposited amount which is to be paid to the supplier and (b) the conditions to be imposed for such payment. The thread of discretion runs through both (a) and (b) and weaves into imposition of conditions for withdrawal. The concluding part of the proviso is framed "as it deems necessary to impose." The court therefore is empowered to not only decide on the nature of conditions which may be imposed on the supplier for withdrawing the money but also whether imposition of conditions is at all necessary in the facts of the case. The background facts would be the guiding factor in the exercise of discretion, reinforced as it is, by repetition of "as it considers reasonable under the circumstances of the case" and "such conditions as it deems necessary to impose" two times over in the proviso.

18. The determining facts in the instant case are as follows.

19. The claim of Optimal in the arbitration was essentially for the balance price for the goods sold and delivered to BHEL. The claim related to contracts entered

into between the parties in 2013 and 2014 and most of the claims were on account of balance retention money which became payable to Optimal in 2015. Mediation proceedings were initiated in 2018 and arbitration commenced only after the Mediation failed. Optimal has successfully emerged from the arbitration proceedings by being awarded a sum of Rs. 61,08,654/- by an Award dated 24th September, 2019. The Award-debtor, BHEL was directed to pay this amount along with interest computed under Section 16 of the MSME Act within 30 days from the date of submission of claim by Optimal. Optimal was thereafter forced to contest proceedings filed by BHEL in this regard for setting aside and stay of the Award. By a judgment dated 1st September, 2021, BHEL was directed to deposit a portion of the awarded amount which was put in towards the end of 2021. Moreover, Optimal's claim in the arbitration arose from supplies made by it to BHEL from 2011 onwards.

20. Optimal has just revived from a financial crisis suffered in the aftermath of the pandemic. Optimal requires urgent funds for meeting the operational costs of its business and for the survival of its workmen. The facts would indicate that Optimal, despite supplying materials to BHEL from 2011 onwards, has not got a farthing from such supplies for the last 11 years despite having an Award in its favour. Optimal has stated on oath that furnishing a bank guarantee as security will not be possible as Optimal is presently facing a severe financial crunch. Optimal has only recently restructured its account from a Non Performing Asset to an operational account consequent upon an one-time settlement of its dues with the bank only in April 2021. The earlier intention to provide land as security for withdrawal of the deposit is also not feasible since the title deeds were found to be defective upon inspection. The aforesaid statements are part of the records.

21. The proviso to section 19 of the MSME Act and the discretion conferred on a Court to decide upon the quantum of withdrawal by a supplier must be given a construction which is not in dissonance with either section 19 or the other provisions of the MSME Act. The object is to ensure that the small or medium scale enterprise survives; the object is not to hasten the death of the enterprise under the weight of financial pressures aggravated by initiation of proceedings for realization of its dues from supply of materials to a buyer. Section 19 of the MSME Act matches the object of the Act and strengthens its core by broadening the contours for stay of an award / decree compared to section 36(3) of The Arbitration and Conciliation Act, 1996 where the discretion is limited to granting stay of an award subject to appropriate conditions. There is no mandate to allow withdrawal of the amount deposited by the Award-holder. A Single Bench of the Delhi High Court recognized the 2-step discretion under section 19 in *Indian Oil Corporation Ltd. vs. FEPL Engineering (P) Ltd.* This Court construes the said section to stretch the boundaries of the discretion even further.

22. The facts in the present case provide the quintessential framework where discretion should be exercised in consonance with the underlying intent of section 19 of the MSME Act for a financial leg-up to a beleaguered supplier. In

essence, the facts warrant that Optimal should be permitted to withdraw 75% of the principal amount awarded to Optimal in the arbitration ? Rs. 61,08,654/- ? without requiring to furnish security for withdrawing the said amount. This order is being passed in the Execution proceeding; E.C. No. 156 of 2020. Optimal shall therefore be permitted to withdraw the said amount within a period of two weeks from date. Since BHEL has already deposited 50% of Rs. 2,09,16,171/- with the Registrar, Original Side of this Court, Optimal shall withdraw the amount as directed from this amount. The balance amount of Rs. 58,76,595/- shall remain with the Registrar and be treated as security for the purpose of the pending application under Section 34 of the 1996 Act.

23. G.A 3 of 2021 is accordingly allowed and disposed of in terms of prayer (a). The Award dated 24th September 2019 and received under cover of a letter dated 7th November, 2019 shall be stayed until disposal of the pending proceedings.

24. BHEL and Optimal shall have the liberty of mentioning A.P. 175 of 2020 and E.C. No 156 of 2020, respectively, for listing.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.