

(2013) 03 DEL CK 0257

Delhi High Court

Case No: E.A. (OS) No. 818 of 2012 in Ex.P. No. 112 of 2010

Morgan Securities and Credits
Pvt. Ltd.

APPELLANT

Vs

B.K. Modi

RESPONDENT

Date of Decision: March 12, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 37

Citation: (2013) 3 AD 413

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: P.S. Bindra, with Ms. Inkle Roy Barooah, for the Appellant; Srinivasan Ganesh and Mr. Harish Malhotra, with Ms. Shweta Bharti, Vineet Dwivedi, Ms. Neha Kapoor and Mr. Vikram Hazarika, for the Respondent

Judgement

Manmohan Singh, J.

By this order I propose to decide E.A.(OS)No.818/2012 filed by Dr. B.K. Modi, judgment debtor, who has sought permission to withdraw the undertaking given on 28th April, 2010 regarding creating any third party interest in his assets and has also sought de-attachment of properties bearing No. 1, Prithviraj Road Property, New Delhi, and 36, Amrita Shergil Marg, New Delhi. The main dispute between the parties arose from the inter corporate deposit given by the decree holder to M/s. Modi Rubbers Ltd. for which judgment debtor i.e. Dr. B.K. Modi and Sh. V.K. Modi stood guarantors. Since the amount was not repaid in terms of the agreement, the decree holder invoked the arbitration in which the sole Arbitrator passed the Award dated 6th May, 2004 holding that Modi Rubber, Dr. B.K. Modi and Sh. V.K. Modi were Jointly and severally liable to pay Rs. 6,72,63,015/- up to the date of reference, thereafter interest at the contractual rate of 21% per annum from the date of reference upto the date of Award and thereafter similar interest @18% per annum from the date of Award till payment.

2. The judgment debtor Dr. B.K. Modi admittedly paid Rs. 13 crores paid to the decree holder in terms of the orders passed by the Division Bench. According to the decree holder, after deducting an amount of Rs. 13 crores paid by the judgment debtor in the present proceedings, an amount of Rs. 118,684,065/- is still due and payable as on 8th February, 2013 by the judgment debtor to the decree holder.
3. The decree holder has filed the Computation Chart showing the calculation of amount payable and due to the decree holder as on 8th February, 2013. The details given in the said chart are reproduced hereinbelow:
4. It is an undisputed fact that the judgment debtor also challenged the award by way of petition u/s 34 of the Arbitration and Conciliation Act, 1996 which was dismissed by order dated 21st October, 2009. Aggrieved by the said judgment, the judgment debtor filed an appeal, being FAO (OS) No. 39/2010, u/s 37 of the Arbitration and Conciliation Act, 1996 which was dismissed as withdrawn on 19th January, 2010.
5. The other two judgment debtors Modi Rubbers Ltd. and Sh. V.K. Modi had filed Special Leave Petitions before the Supreme Court with regard to dismissal of objections u/s 34 of the Act, wherein notice was issued.
6. The present judgment debtor thereafter, filed an application before the Division Bench of this Court in his appeal seeking withdrawal of order dated 19th January, 2010 on the ground of parity with Modi Rubbers Ltd. and S.V.K. Modi. The said application of the judgment debtor was dismissed by the Division Bench by order dated 21st September, 2010. The SLP filed by the judgment debtor against the said order was also dismissed by the Supreme Court on 21st January, 2011.
7. The contention of the decree holder is that as far as the Award against the present judgment debtor is concerned, the same has attained finality and the judgment debtor's prayer seeking permission to withdraw the undertaking given on 28th April, 2010 regarding creating any third party interest in respect of the assets of the judgment debtor as well as de-attachment of properties bearing No. 1, Prithviraj Road Property, New Delhi, and 36, Amrita Shergil Marg, New Delhi, cannot be allowed by the executing Court unless the judgment debtor be asked to deposit a sum of Rs. 118,684,065/- which is still due and payable (as on 8th February, 2013) to the decree holder.
8. Mr. Bindra, learned counsel appearing on behalf of the decree holder, states that since the judgment debtor is asking for lifting of the interim order, at least he should deposit the said amount as suggested by the decree holder by way of bank guarantee with the Registrar General of this Court without prejudice till the decision of the Special Leave Petitions filed by Modi Rubbers Ltd. and Sh. V.K. Modi in the Supreme Court which are pending for disposal. The second alternative given by Mr. Bindra is that the judgment debtor should wait the outcome of the decision to be passed by the Supreme Court in the said Special Leave Petitions.

9. The learned Senior Counsel appearing on behalf of the judgment debtor is neither agreeable with the suggestion given by Mr. Bindra, nor computation chart showing the calculation of amount. According to judgment debtor, net amount due and payable by the judgment debtor is only Rs. 3,81,86,131/-. Counsel has referred to the Calculation Chart showing the amount due and payable filed by the judgment debtor. The said details are given as under:

10. The main argument of Mr. Srinivasan Ganesh and Mr. Harish Malhotra, learned Senior counsel appearing on behalf of judgment debtor is that the Award dated 6th May, 2004 contemplates payment of interest from the date of reference till the date of the Award i.e. 6th May, 2004 and from the date of Award till the date of payment merely simple interest @18% per annum on the original principal amount of Rs. 5 crores. It is argued that the decree holder instead of taking the principal amount of Rs. 5 crores has substituted the same with Rs. 6,72,63,015/- while calculating the interest from the date of reference (i.e. 15th April, 2002 till the date of Award i.e. 6th May, 2004) and thereafter on the total amount, decree holder has calculated the interest from the date of Award till 8th February, 2013 the penal interest @ 18% per annum instead of on principal amount. Had the decree holder made calculation of simple interest in terms of the Award on the principal amount, the figure suggested by judgment debtor would have been reached. It is stated by the learned Senior counsel for the judgment debtor that without prejudice to the rights and contentions of the judgment debtor, as per the Award dated 6th May, 2004 the amount i.e. 3,81,86,131/- which is due and payable, the judgment debtor is agreeable to furnish a bank guarantee. And subject to said deposit, the prayer made in the application be allowed.

11. In a nut-shell, his submission is that the decree holder has wrongly calculated the interest on the compound basis and not simple interest in complete disregard of the directions given by the learned Arbitrator as contained in the arbitration Award dated 6th May, 2004.

12. He also submits that even otherwise, as far as remaining amount is concerned, in para 37 of the judgment passed by the Division Bench on 23rd May, 2012, the judgment debtor in compliance thereto has paid amount of Rs. 13 crores to the decree holder. In the said para, the Division Bench has observed that as far as principal amount of Rs. 5 crores is concerned, the Division Bench has already clarified that the same could not be recovered till final orders are made in the in the Special Leave Petitions, being No. 14293/2010 and 21589/2010, filed by Modi Rubbers Ltd. and Sh. V.K. Modi respectively. Counsel states that as far as remaining amount, if any, is concerned ultimately the same shall be recoverable subject to the final orders of the Supreme Court.

13. Learned Senior counsel states that as the judgment debtor in terms of the order dated 23rd May, 2012 passed by the Division Bench has already discharged his liability of Rs. 13 crores the remaining amount, if any, ought not to have been

recovered from the present judgment debtor in view of other two judgment debtors being involved. He has also pointed out that principal amount of Rs. 5 crores had already been deposited by another judgment debtor Mr. V.K. Modi before the Supreme Court in SLP No. 21589/2010 and also amount of Rs. 13 crores interest component had been secured vide a bank guarantee given by the principal borrower M/s Modi Rubbers Ltd. before the Supreme Court in SLP No. 26699/2010. Thus, in fact Rs. 18 crores had already been secured before the Supreme Court in favour of the decree holder over and above the amount of Rs. 13 crores which has already been paid by the judgment debtor herein in the present execution proceedings. Thereafter, from every corner, the remaining claim is safe and despite of above, his client is prepared to deposit the bank guarantee for a sum of Rs. 3,81,86,131 without prejudice to his right so that the interim order passed be vacated due to hardship already suffered by judgment debtor on account of interim order passed. The said amount is being deposited in order to show his bonafide.

14. Before passing the order sought by the judgment debtor in the present execution, it is necessary to refer to the operative portion of the Award which reads as under:

i) The claimant is entitled to receive from the respondents and the respondents are jointly and severally liable to pay Rs. 6,72,63,015/- up to the date of reference;

ii) The claimant will also be entitled to interest at the contractual rate of 21% p.a. from the date of reference i.e. 15.4.2002 till the date of Award and thereafter i.e. from the date of Award till the date of payment simple interest @18% p.a. However, if the entire amount is paid within three months from the date of the award, the rate of interest from the date of Award till the date of payment shall stand reduced to 12% p.a.

iii) The claimant will also be entitled to costs of arbitration which are fixed at Rs. 2,00,000/-.

15. In case both the calculation sheets are perused, it indicates that as per the decree holder sum of Rs. 118,684,065/- is due as on 8th February, 2013. On the other hand according to the judgment debtor, a sum of Rs. 3,81,86,131 is due and payable by the judgment debtor as on 8th February, 2013. It appears that the judgment debtor has calculated the simple interest @ 18% per annum from the date of Award till the date of payment on the original principal amount of Rs. 5 crores. On the other hand, the decree holder has calculated the interest @ 21% per annum from the date of reference i.e. 15th April, 2002 on Rs. 6,72,63,015/- till the date of the Award and thereafter made the calculation of simple interest @18% per annum not on the principal amount but after calculation, on the total amount by adding the interest @ 21% which was granted from the date of reference till the date of Award. Prima facie, it appears to the court that the said calculation is not correct. Simple interest is just the amount of money paid on a loan which is the basic type of

interest. The interest ought to have been calculated on the principal amount of Rs. 5 crores.

16. At present, this court finds force in the argument of judgment debtor. The prayer made in the application is allowed subject to furnishing the bank guarantee of Rs. 3,81,86,131 to the satisfaction of Registrar General of this Court within two weeks from today. It is also obvious that the interest of the decree holders is otherwise protected in view of already securing of 18 crores in two SLP pending in the Supreme Court. The decree holder in any case is granted liberty to move an application after disposal of two petitions filed by Modi Rubber Ltd. and Shri V.K. Modi with the fresh calculation in case of such situation arises. E.A. No. 818/2012 is accordingly disposed of. No costs.

Ex.P. No. 112/2010

List the matter before the Registrar General on 1st April, 2013 for compliance.