

Rishima Investments Sa Llc vs Shristi Infrastructure Development ... on 18 November, 2021

Author: C.Hari Shankar

Bench: C.Hari Shankar

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P.(EFA)(COMM.) 6/2021 & EX.APPL.(OS) 1079/2021
RISHIMA INVESTMENTS SA LLC Decree Holder
Through Mr. Raj Shekhar Rao, Sr. Adv,
Mr. Manu Rajvanshi, Ms. Mansi Sood,
Adv.

Versus

SHRISTI INFRASTRUCTURE
DEVELOPMENT CORPORATION
LIMITED Judgement Debtor
Through Mr. Manoj Singh, Adv.

+ O.M.P.(EFA)(COMM.) 5/2019 & EX.APPL.(OS) 1077/2021
RISHIMA SA INVESTMENTS
LLC (MAURITIUS) Decree Holder
Through Mr. Raj Shekhar Rao, Sr. Adv,
Mr. Manu Rajvanshi, Ms. Mansi Sood,
Adv.

Versus

SHRISTI INFRASTRUCTURE DEVELOPMENT
CORPORATION LIMITED & ANR..... Judgement Debtors
Through Mr. Manoj Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER

% 18.11.2021 (Video conferencing) EX.APPL.(OS) 1079/2021 in O.M.P.(EFA)(COMM.) 6/2021
EX.APPL.(OS) 1077/2021 in O.M.P.(EFA)(COMM.) 5/2019

1. These are applications at the instance of the petitioner/award holder, seeking a direction to the respondents/award debtors to deposit, before this Court, the entire amounts awarded against the respondents in favour of the petitioner by the arbitral award dated 30th April, 2019.

2. Mr. Rajshekhar Rao, learned Senior Counsel for the petitioner, submits that though, initially, security had been provided vide order dated 30th May, 2019, by a restraint against the respondents

from creating any third party interest, or parting with the possession of Westin Hotel, Rajarhat, Kolkata, the value of the said hotel has, since, fallen. He submits that hotel is worth, at best, somewhere in the region of 450 crores (as per his instructions), whereas the amount awarded to the award holder, against the respondents, is 761 crores. Para 684 of the award, of which enforcement is being sought, reads thus:

684. Accordingly, the Tribunal makes the following award:

- (1) Shristi Infrastructure Development Corporation Limited is ordered, by way of specific performance, to pay to Rishima SA Investments LLC within 28 days of this Award, The sum of INR 761 pursuant to clause 17.2 of the share Subscription and Shareholders Agreement, as at March 31, 2019.
- (2) The Tribunal orders, by way of specific performance, Shristi Infrastructure Development Corporation Limited to pay to Rishima SA Investment LLC within 28 days of this Award a further sum pursuant to clause 17.2 of the Share Subscription and Shareholders Agreement, being 25% IRR to the date of this Award in an amount to be agreed between the parties, or, failing agreement, to be determined by the Tribunal.
- (3) Upon payment of the sums in (1) and (2) above, Rishima SA Investments LLC shall deliver to Shristi Infrastructure Development Corporation Limited executed transfers and any other title documents relating to its shares in Shristi Hotel Private Limited.
- (4) If for any reason the awards in (1) and/or (2) above are declared unenforceable in whole or in part by any court or tribunal, Shristi Infrastructure Development Corporation Limited shall pay to Rishima SA Investments LLC the sum of INR 160.2 crores pursuant to clause 14.2 of Share Subscription and Shareholders Agreement (or such lesser sum as shall be sufficient to satisfy the awards in (1) and (2) above, after taking account of any amounts paid by Shristi Infrastructure Development Corporation Limited pursuant thereto) upon delivery by Rishima SA Investments LLC to Shristi Infrastructure Development Corporation Limited of executed transfers and any other title documents relating to its share in Shristi Hotel Private Limited.
- (5) Rishima SA Investments LLC's claim for currency losses is reserved to a future award.
- (6) Interest on the sums awarded is reserved to a future award.
- (7) Shristi Infrastructure Development Corporation Limited and Shristi Hotel Private Limited are ordered, for so long as Rishima SA Investments LLC holds its shareholding in Shristi Hotel Private Limited, not to hold any Board Meetings or meetings of Shristi Hotel Private Limited, or passing any resolutions thereat, otherwise than in compliance with clauses 6, 7 and 8 of the Share Subscription and Shareholders Agreement.
- (8) Rishima SA Investments LLC's claims for breach of the arbitration agreement in relation to the actions of Shristi Infrastructure Development Corporation Limited and Shristi Hotel Private Limited

in the National Company Law Tribunal of India and served to a future award.

(9) Costs are reserved to a future award."

3. On this aspect, Mr. Manoj Singh, learned Counsel for the respondents, submitted that the award was against Respondents 1 and 2 jointly and severally, against the petitioner, and the amount enforceable was only 160.2 crores (for which purpose he relies on para 684(4) of the award).

4. Prima facie, I am not inclined to agree with the submissions of Mr. Manoj Singh. Para 684(1) of the award makes it clear that Respondent 1 is required to pay, to the petitioner, 761 crores. Insofar as in para 684(4) is concerned, that is only in the nature of a residuary dispensation, in the event of the directions in para 684(1) or (2) being declared unenforceable in whole or in part by any Court or Tribunal. No such declaration has taken place and it is not the contention of Mr. Manoj Singh, either, that there is any such declaration. Para 684(4), therefore, does not apply at all. Clearly, as per the award, therefore, Respondent 1 is required to pay, to the petitioner, 761 crores.

5. Mr. Rajshekhar Rao drew my attention to the affidavit of assets filed by Respondent 1, consequent to the directions issued by this Court, specifically paras 4 and 6 thereof, which read thus:

"4. The present annual income of the Judgement Debtor as per the audited financial statements for the year ending 31 March 2021, after paying income-tax, is as follows:-

a. From business carried on by the Judgement Debtor Rs. - 1,444.19 Lakhs (Loss before Exceptional Item, Income Tax Earlier years, Deferred Tax and Other Comprehensive Income) b. From other sources Rs. NIL *****

6. The Judgment Debtor possess the following Assets as on Financial Year ending 31.03.2021:

(a) Banking accounts.

Particulars Value in INR (Crores) In Current Account (including Liquid 1.30 Fund) In unpaid Dividend Account/Special 0.06 Deposit Account In Fixed Deposit (Pledged with Bank) 2.45 Total (A) 3.81

(b) Stocks and shares:

Name of the Investment	No. of Shares	Face Value	Current Value	Remarks
Sarga Hotel	6,00,00,000	10	128.87	Pledged Written Private for down Limited SHPL due to (SHPL) erosion of Net worth Shrishti
Free Urban Infrastructure Development Limited	29,99,960	10	3.00	
Sarga	19,50,000	10	1.95	Free
Udaipur Hotels & Resorts Private limited	3,54,500	10	2.88	Free Written
Transport down Infrastructure due to Development erosion Limited of Net worth East Kolkata	1,00,000	10	0.10	Pledged Infrastructure Development Private Limited
Vipani	4,96,000	10	0.28	Pledged Written Hotels & down Resorts due to Private

erosion Limited of Net worth Finetune 20,00,000 10 1.04 Free Written Engineering down Services due to Private erosion Limited of Net worth Vindhayachal 89,311 10 0.09 Pledged Attivo Food Private Limited Haldia Water 51,000 10 0.05 Pledged Services for Private HWSPL Limited (HWSPL) Bengal 9,89,800 10 123.13 Free Shristi Infrastructure Development Limited Asian Health 1,05,00,000 10 10.50 Free Care Services Limited Shristi Sam 3.76 Free Lain Yogi (Investment in Partnership Firm) Shrishti Sam 0.36 Free Lain (Investment in Partnership Firm) Shristi SPML 0.21 Free (Investment in Partnership Firm) Total (B) 276.22

(c) Life and endowment policies : NIL

(d) House Property : NIL

(e) Other Property:

Property	Area	Book Value in INR (Crores)	Remarks
Land at Premises AA II/CBE/2 (Erstwhile Plot No. CBD 2 in Action Area II at Jatragachi, New Town, PS, Rajarhat	8 acres		
Divided into:			
i) Housing	1.18 Acre	0.00	Charge o for unit mortgage lenders. 17.87 Cr inventor progress
ii) Long-term lease to Sarga Hotel Pvt. Ltd.	3.50 Acre	53.01	Charge h rights b faciliti
iii) Land for development of Retails mall &	3.32 Acre	50.28	Developm Citimall mortgage

Commercial		Financial
Land at	329321 sq. 0	The amou
Krishnanaga	ft. (FSI to	the valu
r, Dist. -	be	inventor
Nadia, West	developed)	progress

Bengal

value of t
developed a
Rs.65.86 Cr
home buyers
allotted an
held by len

TOTAL (C) 103.29

(f) Other securities;

Property	Cost in INR (Crores)	Remarks
Inventory of Work in Progress & Raw Materials - Housing & Other Projects	422.01	The Comp recogniz received customer IndAS-11 subject homebuye Bank/Fin Institut charge o Flows. Subject the Work lenders
Advance to Vendors & Others Housing & Other Projects	23.99	
Loans & Advances to Subsidiaries & Other Companies	29.92	
Advance against Revenue Share to Land Owners (Pending adjustment)	39.13	Subject Lenders
		* Secure 1st char acres of Guwahati project movable immovabl assets b and futu
Other Fixed Assets	0.49	Includes

Sundry Debtors	5.48
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subject
hypothec
lenders
Subject
Working

TDS/GST Receivable	9.54
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lende
Subjec
Workin
lender

Deferred Tax Assets	14.20
Total (D)	544.76
GRAND TOTAL (A+B+C+F)	928.08

6. A conjoint reading of paras 4 and 6 (supra) does not disclose the existence of unencumbered assets, which could secure the awarded amount of 761 crores. He submits that, therefore, in order to ensure that the arbitral award is not frustrated, the respondents ought to be directed to deposit the aforesaid amount in Court.

7. Mr. Manoj Singh, learned Counsel appearing for Respondent 1, submits, firstly, that the application has been preferred under a wrong provision of law, inasmuch as it cites Section 151 of the Code Civil Procedure, 1908 (CPC), which is not applicable in such a circumstance. This, in my view, is a technical objection, against which there is wealth of judicial authority to the effect that mere citing of a wrong provision in an application does not imperil the application fatally, provided it is otherwise maintainable.

8. Some amount of discussion took place, at the bar, with respect to Section 48(3) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), which reads thus:

"(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

9. Mr. Singh submits that, though the direction for securing the Westin Hotel, against the awarded amount, might have been sustainable under Section 48(3), that provision is no longer applicable to

the award holder, as at that stage, the challenge, by the respondents against the award was pending before the High Court of Singapore. According to Mr. Manoj Singh, Section 48(3) applies only during the pendency of a challenge against the award and not after the challenge is decided, one way or the other. Even though the challenge has failed, he submits that once the decision of the High Court of Singapore has been passed, Section 48(3) exhausts itself.

10. Prima facie, I am not inclined to agree with this submission either. In my, prima facie view, an award debtor, who is pursuing a challenge against the award before a competent forum, cannot be placed in a worse position than an award debtor who fails in the said challenge. If the challenge launched by the award debtor against the award fails, in my view, Section 48(3) would continue to apply. It is interesting to note that Section 48(3) does not use the words "during the pendency of the challenge against the award", or "awaiting the outcome of the challenge to the award" or any other words to like effect. All it states is that if an application for setting aside has been made to a competent authority, the Court could, if it considers it proper to do so, adjourn the decision on the enforcement of award and could direct the other party to give suitable security. Such security has been directed during the pendency of the challenge. If the security has now become insufficient, I see no reason why in exercise of the power of the Court under Section 48(3), further security cannot be directed.

11. Mr. Manoj Singh further contends that he has moved a separate application under Section 48(1) of the 1996 Act, disputing the enforceability of the award. He submits that, till this application is decided, no direction for securing the amount in the award can be passed by the Court. He was citing, in this contest, the judgment of the Supreme Court in Government of India v. Vedanta Ltd 1, when the clock struck 5:30 pm and the Court decided to call it a day.

12. Accordingly, renotify as part heard on 24th November, 2021 for continuation of submissions of Mr. Singh.

C.HARI SHANKAR, J NOVEMBER 18, 2021 r.bararia 2020 (10) SCC 1 Signing Date:24.11.2021 18:11:16