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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 06th July, 2023

Pronounced on: 18th July, 2023

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OMP (ENF.) (COMM.) 103/2023

B L KASHYAP AND SONS LTD..... Decree Holder
Through: Mr.Sandeep Sethi, Sr Advocate
with Mr.S.K.Maniktala,Mr.Udit
Maniktala, Mr.Jatin Kumar,
Mr.Mohit Sharma, Mr.Kritik,
Mr.Vikram Singh Dalal,
Ms.Shreya Sethi and Ms.Tanvi
Tewari, Advocates.

versus

EMAAR INDIA LTD Judgement Debtor
Through: Mr.Parag Tripathi and Mr.Akhil
Sibal, Sr Advocates with
Mr.Dhanesh Relan, Mr.Saurav
Agarwal, Mr.Gaurav Gupta,
Mr.Apoorv Tripathi, Mr.Arindam
Dey, Mr.Srinivas Ramaswamy,
Mr.Anshuman Chowdhary,
Ms.Kavya Pahwa, Ms.Deboshree,
and Mr.Shailender Singh,
Advocates.

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OMP (ENF.) (COMM.) 104/2023

B L KASHYAP AND SONS LTD..... Decree Holder
Through: Mr.Sandeep Sethi, Sr Advocate
with Mr.S.K.Maniktala,Mr.Udit
Maniktala, Mr.Jatin Kumar,
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EMAAR INDIA LTD Judgement Debtor
Through: Mr.Parag Tripathi and Mr.Akhil

Sibal, Sr Advocates with Mr.Dhanesh Relan, Mr.Saurav Agarwal, Mr.Gaurav Gupta, Mr.Apoorv Tripathi, Mr.Arindam Dey, Mr.Srinivas Ramaswamy, Mr.Anshuman Chowdhary, Ms.Kavya Pahwa, Ms.Deboshree, and Mr.Shailender Singh, Advocates.

CORAM:

**HON'BLE MR. JUSTICE YOGESH KHANNA
YOGESH KHANNA, J.**

EX.APPL.(OS) 740/2023 in OMP (ENF.) (COMM.) 103/2023;

EX.APPL.(OS) 741/2023 in OMP (ENF.) (COMM.) 104/2023

1. This application is filed by the applicant under Order XXI Rule 26 CPC read with Section 151 CPC to enable the judgment debtor to obtain stay of the execution of the award against furnishing bank guarantee.
2. On 30.05.2023 the judgment debtor was directed to deposit entire decretal amount by 10.07.2023. The said amount is about Rs.165 crores and it is alleged if the judgment debtor is directed to deposit such huge sum it shall lead to a liquidity crunch in its company and its business would come to a standstill.
3. It is submitted the judgment debtor is inclined to give 100% of the bank guarantee of the decretal amount, hence is requested either the enforcement proceedings be stayed for a reasonable period so as to enable the judgment debtor to obtain stay on the execution of award pending by way of petition under Section 34 of Arbitration and Conciliation Act, listed on 03.10.2023 or in alternative to secure the arbitral amount by way of an unconditional and irrevocable bank guarantee or any solvent non cash security. It is alleged this Court has

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every power to pass such an order per provisions of CPC as under:

“Order XXI Rule 26 (1):

26. When Court may stay execution.—(1) The Court to which a decree has been sent for execution shall, **upon sufficient cause being shown**, stay the execution of such decree for a reasonable time, **to enable the judgment-debtor to apply to the Court by which the decree was passed**, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person **pending the result of the application.**

(3) Power to require security from, or impose conditions upon, judgment-debtor.—Before making an order to stay execution, or for the restitution of property or the discharge of the judgment debtor, [the Court shall require] such security from, or impose such condition upon, the judgment-debtor as it thinks fit.

Order XLI Rule 1(3):

1. Form of appeal-What to accompany memorandum

(1) to (2) xxx

(3) Where the appeal is against a decree of payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit, the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.

Order XLI Rule 5(3)(c)

5. Stay by Appellate Court.—(1) xxxxxx

(3) No order for stay of execution shall be made under sub-rule (1) or sub rule (2) unless the Court making it is satisfied—

(a) xxxxxxxx

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.”

4. The learned senior counsel for the applicant then referred to *Santanu Kumar Dey vs. Sanat Kumar Dey and Anr.* 2019 SCC OnLine Cal 6700 to say Order XXI Rule 26(1) CPC empowers the executing Court to grant stay in execution to enable the judgment debtor to prefer an appeal.

5. It is submitted the applicant filed two OMPs viz. OMP(C)178/2023 and 184/2023 and in such petitions the petitioner did not press for an interim stay at such moment as execution petitions were not filed by then and now since the executions are filed it is thus prayed the order dated 30.05.2023 be modified enabling the judgment debtor to furnish bank guarantee instead of cash deposit. The learned senior counsel for the applicant then referred to *Alimenta S.A.Switzerland vs. National Agricultural Co-operative Marketing Federation of India Limited* (2020) 19 SCC 315 to show bank guarantee was accepted for the principal amount decreed.

6. On the contrary, the learned senior counsel for the decree holder says such application(s) for stay were never pressed in petitions filed under Section 34 of Arbitration and Conciliation Act and hence in petitions under Section 36 of Arbitration and Conciliation Act when listed on 30.05.2023 a direction was passed to deposit the entire decretal amount with the learned Registrar General of this Court within a period of six weeks failing which the managing director of the company was to remain present in the Court. Such direction was a *conscious direction by this Court being fully aware of the fact such stay applications in petitions under Section 34 Arbitration and Conciliation Act were pending for 03.10.2023*. The petitioner then moved early hearing application(s) in both OMP (Com)s citing reasons viz. liquidity crunch, furnishing bank guarantee etc., but *despite such averments* in such early hearing applications, both applications were rejected on 02.06.2023.

7. Admittedly an award was passed on 28.12.2022 for a sum of Rs.161 crores with future interest but since pendente lite interest was not

awarded, hence petitioner moved OMP(C) 163/2023 on 27.04.2023 seeking interest pendente lite.

8. Admittedly the petitioner filed applications for stay of execution in both its petitions under Section 34 of Arbitration and Conciliation Act but had chosen to get it postponed. This Court, being well aware of the postponement of such stay applications to 03.10.2023, yet on 30.05.2023 had directed the judgment debtor to deposit the entire amount. Admittedly there is a money decree in favour of petitioner, not only for the dues of work done but also for compensation of machinery and material which the decree holder was not allowed to lift from the site. Its running bills were allegedly to the tune of Rs.150 crores, which allegedly were never prayed. Now after years the petitioner has been awarded its dues then deferring such payments to him would rather be harsh. Bank guarantee cannot be utilised by the decree holder to compensate its loss. The arguments of judgment debtor *qua* liquidity crunch equally applies to decree holder. Thus alleged liquidity crunch cannot be a sufficient cause as ensued in Order XXI Rule 26(1) CPC to grant stay.

9. In *Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and Others* (1985) 1 SCC 260 the Court held mere furnishing the bank guarantee would not meet the ends of justice and no governmental business or for that matter no business of any kind can be run on mere bank guarantees and liquid cash is necessary for the running of a government *as indeed any other enterprises*.

10. The order dated 30.05.2023 directing the respondents to deposit the entire decretal amount as noted above was a *conscious* order and now it cannot be modified for reasons of liquidity crunch. Scope of Order XXI

Rule 26 (1) is only to enable a judgment debtor to apply to the Appellate Court and till such time the Court may stay the decree, unconditionally or with conditions. Since now the application for stay is pending with the Appellate Court, it would not be desirable on facts, that this Court should interfere in its realm.

11. Rather in *G.Arumugam vs. P.Jayaraman* 2014 (1) CTC 246 the Court held in para 11 where the matter is seized by the Appellate Court the judgment debtor should approach only the Appellate Court for stay and not the Trial Court or the executing court.

12. Qua condition to deposit 100% of decretal amount, I may refer to *Power Mech Projects Ltd. vs. Sepco Electric Power Construction Corporation* 2020:DHC:1126 wherein direction was given to deposit 100% of dues and such order was never interfered with in SLP(C) No.4511/2021. Similar such orders were made in *Indian Oil Corporation Limited vs. Toyo Engineering Corporation and Anr.* 2020:DHC:1606; *Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Anr.* in OMP(COMM.) 312/2022 order dated 28.02.2023; *Manish vs. Godawari Marathawada Irrigation Development Corporation* order dated 16.07.2018 in SLP(C)No.11760/2018 and *Toyo Engineering Corporation vs. Indian Oil Corporation Limited* in Civil Appeal Nos.4549-50/2021. Further 20 such like orders are passed by this Court as well as by the Hon'ble Supreme Court wherein directions are to deposit the decretal amount viz. order dated 26.02.2021 passed in OMP (Comm) 1/2021; order dated 06.04.2021 passed in OMP (Comm) 110/2021; order dated 16.07.2018 passed in SLP No.11760-11761/2018 by the Supreme Court; order dated 02.04.2018 passed in SLP No.3702/2018 by the

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Supreme Court; *Pam Developers Private Ltd. Vs. State of West Bengal* 2019(8)SCC 112; judgment dated 17.02.2020 in *Power Mech Projects Ltd. Vs. SEPCO Electric Power Construction Corporation* OMP(I)(Comm) 523/2017; order dated 28.05.2018 passed in OMP (ENF) (COMM) 85/2018; order dated 29.05.2018 passed in OMP (ENF) (Comm) 96/2018; order dated 30.05.2019 passed in OMP (ENF) (Comm) 89/2019; order dated 16.07.2019 passed in OMP (ENF) (Comm) 114/2019; order dated 26.07.2019 passed in OMP (ENF) (Comm) 121/2019; order dated 06.09.2019 passed in OMP (ENF) (Comm) 152/2019; order dated 12.09.2019 passed in OMP (ENF) (Comm) 158/2019; order dated 18.09.2019 passed in OMP (ENF) (Comm) 163/2019; order dated 25.09.2019 passed in OMP (ENF) (Comm) 169/2019; order dated 26.09.2019 passed in OMP (ENF) (Comm) 80/2019; order dated 24.07.2019 passed in OMP (ENF) (Comm) 106/2018; order dated 28.05.2018 passed in OMP (ENF) (Comm) 99/2018; order dated 28.09.2018 passed in OMP (ENF) (Comm) 98/2018; and order dated 28.05.2018 passed in OMP (ENF) (Comm) 102/2018.

13. In the circumstances, the request of Judgment Debtor to accept the bank guarantee as security cannot be acceded to. Thus the Judgment Debtor is directed to comply with the order dated 30.05.2023 qua deposit till 01.08.2023.

14. The applications are disposed of in terms of above.

YOGESH KHANNA, J.

JULY 18, 2023/DU

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