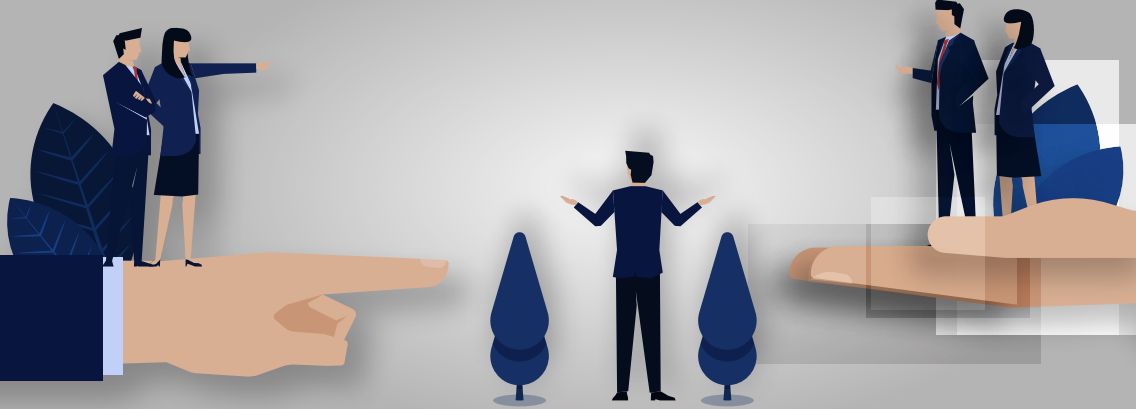


April 2022



## High Court of Calcutta rules on rights of an MSME award-holder seeking withdrawal of a part of the amount deposited by the award-debtor with the court<sup>1</sup>

### Brief Facts

Optimal Power Synergy India Pvt. Ltd. (“**Optimal**” or “**Award-holder**”), a small manufacturing enterprise, had issued eight purchase orders to BHEL (“**Award-debtor**”) for the supply of a solar power conditioning unit and other items for a diesel power plant. The payment terms in the purchase order stipulated 80–90% payment on supply and 100% taxes with 30–45 days of credit from receipt of the material at site. The balance of 10% was required to be paid on execution of basic supply of the materials. On non-payment of the stipulated amounts, Optimal referred the dispute under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (“**MSME Act**”). BHEL failed to participate in the conciliation proceedings and the dispute was finally referred to arbitration.

In terms of the award dated 24 September 2019 (“**Impugned Award**”), the West Bengal State Micro Small Enterprises Facilitation Council directed BHEL to pay the principal sum of INR 61,08,654/- along with interest. Further, Optimal was directed to submit its claim for interest and BHEL was directed to pay the said sum within 30 days from the date of submission of the claim of interest. Accordingly, Optimal submitted its claim for an amount of INR 2,78,88,228/- inclusive of interest.

Thereafter, Optimal filed an execution application before the High Court of Calcutta (“**Court**”) while BHEL filed applications for setting aside and stay of the Impugned Award. The stay application was disposed of by an order of the Court by which BHEL was directed to deposit 75% of the total awarded amount (principal and interest) and to deposit 50% of this amount with the Registrar (Original Side) of the Court. The remaining 50% was directed to be given by way of a bank guarantee from a reputed bank within a specific time frame.

### Issues

**Issue (i):** Whether the Award-holder will be entitled to withdraw the amount deposited by the Award-debtor, if the application for setting aside the Award is filed?

**Issue (ii):** Whether the Award-holder can withdraw 75% of the principal amount without furnishing security?

### Judgment

**Issue (i):** The Court observed that Section 36(3) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) provides the Court with the discretion to grant stay of an arbitral award subject to conditions that it may deem fit. However, in terms of Section 19 of the MSME Act, it is mandatory for an award-debtor to deposit 75% of the amount in terms of the award. Further, the *proviso* to Section 19 clarifies that a percentage of the amount deposited shall be paid to the supplier under such circumstances as the court may deem fit.

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While interpreting the text of Section 19, the Court emphasised upon the leverage given to the supplier under Section 19 of the MSME Act and held it to be in consonance with the overall scheme of the MSME Act, the object of which is to facilitate promotion, development and competitiveness of micro, small and medium enterprises (“MSMEs”). Accordingly, the Court upheld the right of the Award-holder to withdraw a portion of the amount deposited by the Award-debtor pending an application for setting aside the award.

In the present case, the Court allowed Optimal to withdraw 75% of the principal sum awarded by the Impugned Award, since the dispute in the application for setting aside the award was only in relation to the amount of interest, which was to be added to the principal sum under Section 16 of the MSME Act.

**Issue (ii):** The Court observed that Section 19 of the MSME Act contemplates exercise of discretion in considering the application for stay of an award with respect to: (a) the percentage of the deposited amount, which is to be paid to the supplier; as well as (b) the conditions to be imposed for such payment. The Court highlighted that the concluding part of the proviso, i.e., “as it deems necessary to impose” clarifies that the court is empowered to not only decide the nature of conditions that may be imposed on the supplier for withdrawing the money but also consider if such conditions are necessary in light of the facts of the case. Accordingly, the Court emphasised the importance of considering the particular facts of the case, which act as a guiding factor for exercise of discretion by courts under Section 19 of the MSME Act.

In the present case, the Court also took into account the Award-holder’s ailing financial position. The Court noted that Optimal had just recovered from a financial crisis suffered on account of the pandemic and required urgent funds for meeting its operations costs and for survival of its workmen. Therefore, the Court allowed Optimal to withdraw 75% of the principal amount awarded in the arbitration without requiring any security.

## Analysis

The Court has reiterated the rights of MSMEs protected by the MSME Act. The present decision of the Court has emphasised upon and reinforced the discretionary power of courts under Section 19 of the MSME Act to decide the quantum and terms on which the amount deposited by an award-debtor could be withdrawn by a supplier award-holder. The Court interpreted Section 19 in consonance with the object and scheme of the MSME Act, which is to ensure survival of MSMEs and prevent them from being crushed under the weight of financial pressures aggravated by initiation of proceedings for realisation of their dues from supply of materials to a buyer.

## Endnotes

1 Authored by Binsy Susan, Partner, Neha Sharma, Senior Associate and Palak Kaushal, Associate; *BHEL v. Optimal Power Synergy India Pvt. Ltd.*, I.A. No. GA 3 of 2021 in A.P. 175 of 2020 and *Optimal Power Synergy India Pvt. Ltd. v. BHEL*, I.A. No. GA 1 of 2020 in E.C. 156 of 2020, High Court of Calcutta, 2022 SCC OnLine Cal 521, judgment dated 23 March 2022.

**Coram:** Moushumi Bhattacharya, J.

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