
(2015) 02 BOM CK 0064

In the Bombay High Court

Case No : Appeal (L) No. 161 of 2015 in Chamber Summons No. 2068 of 2011
in Execution Application (L) No. 1499 of 2011

Abhishek Talwar

APPELLANT

Vs

L and T Finance Ltd. and Others

RESPONDENT

Date of Decision : 23-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 2(1)(e), 34, 36, 42
Constitution of India, 1950 — Article 227

Citation : (2015) 3 ABR 179

Hon'ble Judges : Mohit S. Shah, C.J.; B.P. Colabawalla, J.

Bench : Division Bench

Advocate : Ameya Gokhale and Archit Dhir i/b Bimal Rajasekhar, for the Appellant; Anand Poojary, S.I. Joshi and Nikita Pawar instructed by S.I. Joshi and Co., Advocates for the Respondent

Final Decision : Dismissed

Judgement

B.P. Colabawalla J.

1. Admit. By consent of parties, rule is made returnable forthwith and heard finally.

2. This Appeal takes exception to the order passed by the learned Single Judge dated 21 January 2015. The impugned order was passed in a Chamber Summons taken out in execution proceedings seeking execution of an Arbitral Award passed in favour of Respondent No.1. By the impugned order, the learned Single Judge negated the contention of the Appellant that this Court had no jurisdiction to entertain the Execution Application and thereafter proceeded to direct the Appellant to disclose particulars of his assets as contemplated under the provisions of the Code of Civil Procedure, 1908.

3. The facts stated briefly are that the Appellant had taken certain finances as and by way of a loan from Respondent No.1. For the aforesaid loan transaction,

Respondent Nos.2 and 3 stood as guarantors. It is not in dispute that the loan agreement between the Appellant and Respondent No.1 incorporated an arbitration clause. As disputes arose between the parties, Respondent No.1 (claimant in the arbitration) invoked the arbitration clause and proceeded to arbitration. Thereafter, the Arbitral Tribunal passed an Award dated 4 December 2010 under which the Appellant and Respondent Nos.2 and 3 herein were jointly and severally directed to pay Respondent No.1 (claimant in the arbitration) a sum of Rs.18,16,818/-together with further interest at the rate of 24 % p.a. on Rs.9,61,216/-from 16 August 2009 and on Rs.8,55,602/- from 5 September 2009 respectively, till payment and / or realisation. In addition thereto, the Appellant and Respondent Nos.2 and 3 were ordered to pay a sum of Rs.3,500/- towards Arbitrator's fees and another sum of Rs.3,500/- towards the costs of the arbitration. Admittedly, the said Award has not been challenged either by the Appellant or by Respondent No.3 herein.

4. However, the said Award was challenged in this Court by Respondent No.2 (Mr Sunil Nanda) on 1 March 2011 by filing a petition under section 34 of the Arbitration and Conciliation Act, 1996 (the Act). This petition was withdrawn by Respondent No.2 (Mr Sunil Nanda) on 5 August 2011 with liberty to adopt an appropriate remedy in the appropriate Court. The said order of withdrawal dated 5 August 2011 reads as under:-

"On the request of Learned Advocate for the Petitioner, Petition is allowed to be withdrawn with liberty to adopt appropriate remedy in appropriate Court."

5. It is a common ground before us that after withdrawal of the aforesaid section 34 petition, the present Execution Application dated 9 September 2011 was lodged in this Court on 16 September 2011 seeking enforcement of the Award dated 4 December 2010 against all the Award Debtors.

6. While this Execution Application was pending, Respondent No.2, pursuant to the liberty granted by this Court, on 8 December 2011, sought to challenge the said Award in the Court of Additional District Judge - 12, Central District, Delhi. The said challenge of Respondent No.2 was allowed by an order dated 13 September 2013 and the Award as far as Respondent No.2 was concerned, was set aside by the said Court inter alia on the ground that the Arbitrator had no jurisdiction to entertain the reference qua Respondent No.2. It is important to note that by the said order, the Additional District Judge-12, Central District, Delhi set aside the Award dated 4 December 2010 only qua Respondent No.2. In fact, in the said order, it is categorically stated that Respondent No.1 herein (claimant in the arbitration), is at liberty to take action for recovery of the loan amount from the Appellant and Respondent No.3 herein, as per law. It is therefore not in dispute that as far as the Appellant and Respondent No.3 are concerned, the impugned Award has not been set aside and has therefore attained finality. In fact, as stated earlier, there has been no challenge to the said Award either by the Appellant or by Respondent No.3.

7. In this factual background, the only contention raised by the learned counsel for the Appellant was that this Court has no jurisdiction to entertain the Execution Application. This argument proceeded on the basis that Respondent No.2 had challenged the Award under section 34 of the Act before the Additional District Judge - 12, Central District, Delhi and therefore by virtue of section 42 of the Act, all subsequent applications, including an application filed for the purposes of executing the Award, would lie only before that Court. He submitted that the learned Single Judge erred in negating this contention, and hence the present Appeal.

8. We have heard the learned counsel for the parties and perused the papers and proceedings in the Appeal. Since the entire argument proceeds on the basis of section 42 of the Act, it would be apposite to reproduce it hereunder:-

"42. Jurisdiction.--Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

9. On a plain reading of section 42 it is clear that when any "application" under Part I of the Act is made in a Court, then notwithstanding anything contained elsewhere in Part I, that Court alone would have jurisdiction over the arbitral proceedings, and all subsequent applications arising out of that agreement and the arbitral proceedings, shall be made only in that Court and no other Court. The word "Court" has also been defined in section 2(1)(e) of the Act which reads thus:-

(e) "Court" means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;

10. Section 2(1)(e) of the Act defines a "Court" means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court exercising ordinary original civil jurisdiction. Needless to mention that it should be a Court having jurisdiction to decide the questions forming the subject-matter of the arbitration, as if the same had been the subject-matter of a suit.

11. The provisions of section 34, 36 and 42 of the Act came up for consideration before a learned Single Judge of this Court (Dr. D. Y. Chandrachud J as he then was) in the case of Eskay Engineers Mumbai Vs. Bharat Sanchar Nigam Ltd., Mumbai. 2009 (5) Mh.L.J. 565 : 2009 SCC OnLine Bom 893 In a nutshell, the facts of this case were that a petition was instituted by Bharat Sanchar Nigam Limited in order to challenge the Arbitral Award under section 34. The petition

came to be dismissed by a learned single Judge of this Court and the same was challenged without any success before a Division Bench of this Court. The SLP to the Supreme Court from the order of the Division Bench was also dismissed. The Arbitral Award having attained finality, and capable of being enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court (section 36 of the Act), an Execution Application (Execution Application No. 158 of 2006) was filed by the original claimant-decree holder before this Court in which a claim was made for the total sum of Rs. 97,58,084/-comprising of a principal amount of Rs. 83.34 lakhs and the security deposit of Rs. 14.23 lakhs. In the said Execution Application a Chamber Summons was filed by the Judgement Debtor in order to question the jurisdiction of this Court as an executing Court. After analyzing the provisions of section 34, 36 and 42 of the Act, the learned Single Judge at paragraph 10, held as under:-

10. In the present case, the judgment-debtor moved an application for setting aside the arbitral award before this Court under section 34. Neither in the pleadings nor, for that matter, in the course of the submissions is it the contention of the judgment debtor that this Court did not have jurisdiction to entertain the challenge to the arbitral award under section 34. Indeed, as already noted earlier, the validity of the arbitral award was decided all the way upto the Supreme Court and the award attained finality by the rejection of the challenge. Thereupon the arbitral award becomes enforceable as if it were a decree of the Court under section 36. The expression "the Court" cannot for the purposes of section 36 be read at variance with the meaning of the expression under section 34. To do so would do violence to the use of the same expression, namely, the Court, in sub section (2) of section 34 and in section 36 of the Act. That would also do violence to the underlying legislative object of the enactment of the Arbitration and Conciliation Act, 1996. The main object of the Bill which was based on the uncitral model law was to provide for a procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimise the supervisory role of Courts in the arbitral process. Section 42 of the Act provides as follows :

"42. Jurisdiction. - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court ."

The effect of section 42 is that where an application under Part-I has been made in a Court with respect to an arbitration agreement, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings. The Legislature has affirmatively stated that such a Court alone would have jurisdiction and has placed the matter beyond doubt by stipulating that no other Court would have

jurisdiction . The expression "all subsequent applications arising out of the arbitral proceedings " must be read in a comprehensive manner to include recourse to execution proceedings. The submission which was urged on behalf of the judgment debtor is that the application of the Arbitration and Conciliation Act, 1996 concludes with the delivery of the arbitral award and the forum for initiating proceedings for execution cannot be traced to any provision of the Act. That would not be an accurate reading of the language and the provisions of the Act. Section 36 specifically speaks of enforceability and section 42 of jurisdiction. The expression "all subsequent applications arising out of arbitral proceedings" has been used in a comprehensive sense by the Legislature and must be given full width in interpretation. The judgment debtor sought a recourse to its remedies before this Court in order to challenge the arbitral award. Once that was done, this Court alone would have jurisdiction to entertain all subsequent applications arising out of the arbitral proceedings including applications in the execution of the award as a decree of the Court to the exclusion of any other Court.

(emphasis supplied)

12. On analyzing the said judgment, two things become clear. Firstly, the learned Single Judge has held that an Execution Application filed for the purposes of enforcement of an Award would be an "application" as contemplated under Section 42 of the Act. Secondly, the learned Single Judge has held that once an Award is challenged in a Court under Section 34, then by virtue of Section 42 of the Act, all subsequent applications arising out of the arbitral proceedings, would have to be filed only in that Court. In holding so, the learned Single Judge has, inter alia, held that the words "all subsequent applications arising out of the arbitral proceedings" must be read in a comprehensive manner to include recourse to execution proceedings.

13. In a recent judgment of the Supreme Court in the case of State of West Bengal Vs. Associated Contractors, a three Judge Bench of the Supreme Court had the occasion to consider the provisions of sections 2(1)(e), 8, 9, 11, 34 and 42 of the Act. In the facts before the Supreme Court, the Respondent therein (Associated Contractors) filed an application under section 9 of the Act for interim orders in the High Court of Calcutta. The learned Single Judge of the High Court of Calcutta passed an ad-interim ex-parte injunction order. On appeal from the said order, a Division Bench of the Calcutta High Court condoned the delay in filing the appeal and the ex-parte interim order passed by the learned Single Judge was stayed by the Division Bench. The Arbitrator was however asked to complete the proceedings which were to go on uninterrupted. The arbitration proceedings thereafter culminated in an Award by which the claimant was awarded certain sums together with interest and costs. Being aggrieved by that Award, the Appellant before the Supreme Court (State of West Bengal) filed an application under section 34 of the Act before the District Judge at Jalpaiguri, West Bengal. On receiving notice of the said application, Associated Contractors

filed an application under Article 227 of the Constitution of India challenging the jurisdiction of the Court at Jalpaiguri, West Bengal which came to be allowed by the learned Single Judge of the Calcutta High Court on the ground that since the parties had already submitted to the jurisdiction of the Calcutta High Court in its Ordinary Original Civil Jurisdiction arising out of the said contract between the parties, the jurisdiction of the Court at Jalpaiguri to entertain the application for setting aside the Award was excluded by virtue of section 42 of the Act. The said order was challenged in appeal before the Supreme Court. In these facts, and after analysing the provisions of sections 2(1)(e), 8, 9, 11, 34 and 42 of the Act, the Supreme Court has held as under :-

21. One other question that may arise is as to whether Section 42 applies after the arbitral proceedings come to an end. It has already been held by us that the expression "with respect to an arbitration agreement" are words of wide import and would take in all applications made before during or after the arbitral proceedings are over. In an earlier judgment, *Kumbha Mawji Vs. Union of India (UOI)*, , the question which arose before the Supreme Court was whether the expression used in Section 31(4) of the 1940 Act "in any reference" would include matters that are after the arbitral proceedings are over and have culminated in an award. It was held that the words "in any reference" cannot be taken to mean "in the course of a reference", but mean "in the matter of a reference" and that such phrase is wide enough and comprehensive enough to cover an application made after the arbitration is completed and the final award is made (see SCR pp. 891-93 : AIR pp. 317-18, paras 13-16). As has been noticed above, the expression used in Section 42 is wider being "with respect to an arbitration agreement" and would certainly include such applications.

25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section

42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly.

14. On reading the judgment of Supreme Court, it is clear that section 42 of the Act will apply to all applications made to a "Court" as defined in section 2(1)(e), either before, during, or after the arbitration proceedings have come to end. It further provides that section 42 of the Act will apply to all applications provided they are made under Part I of the Act.

15. In this judgment, we are not deciding whether an Execution Application would be an application made to a "Court" under Part I of the Act. For the sake of argument, as contended by the Appellant, we will assume that an Execution Application for enforcement of an Arbitral Award is an "application" under Part I of the Act as contemplated by the aforesaid Supreme Court judgment. Even on the basis of this assumption, in the facts of the present case, the present appeal would have to be dismissed. As stated earlier in the judgment, Respondent No.2 herein had challenged the Arbitral Award in this Court by filing a petition under Section 34 of the Act. This petition was filed on 1 March 2011. By an order dated 5 August 2011, Respondent No.2 herein chose to withdraw the said petition with liberty to adopt an appropriate remedy in the appropriate Court. In this judgment, we are also not deciding as to what is the effect of such withdrawal. Be that as it may, after the withdrawal of the aforesaid petition, the present Execution Application namely Execution Application (L) No.1499 of 2011 was lodged in this Court on 16 September 2011 seeking enforcement of the Award. After the lodging of the present Execution Application in this Court, Respondent No.2 filed a section 34 petition in the Court of Additional District Judge-12, Central District, Delhi on 8 December 2011. In this factual background, we find that the argument canvassed by the Appellant that because the Section 34 petition was filed in Delhi, the execution proceedings for enforcement of the Award would also have to be filed only in that Court (i.e. Delhi), as wholly misconceived. Even if we were to assume that an Execution Application is an "application" under Part I of the Act and was therefore covered under section 42

of the Act, admittedly, in this case, the Execution Application was filed in this Court before the section 34 petition was filed by Respondent No.2 in the Court of Additional District Judge-12, Central District, Delhi. In this view of the matter, we fail to see how section 42 of the Act can be of any assistance to the Appellant. The Execution Application lodged in this Court, being filed prior in point of time to the Section 34 petition filed in Delhi, section 42 of the Act cannot come to the aid of the Appellant to contend that because the section 34 petition was filed before the Additional District Judge-12, Central District, Delhi, the execution of the Award also has to be sought only before that Court.

16. It is not in dispute that de-hors section 42 of the Act, this Court would have jurisdiction to entertain the Execution Application. In this view of the matter, even if we were to hold conversely that an Execution Application for enforcement of an Arbitral Award is not an "application" made under Part I of the Act, then such an Execution Application would not fall within the preview of section 42 of the Act, because the Supreme Court in the State of West Bengal (supra) has clearly held that section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I. If section 42 were not to apply to the present Execution Application, then this Court would certainly have jurisdiction to entertain it. Therefore, looking at it from either perspective, we find that the Appellant has no legs to stand on to impugn the order passed by the learned Single Judge. On this ground alone, we find no substance in this appeal.

17. It was also argued on behalf of Respondent No.1 that reliance placed on Section 42 by the Appellant is wholly misconceived inasmuch as the Appellant has not challenged the Award in any Court. Merely because Respondent No.2 has challenged the Award in the Court in Delhi, the Appellant cannot take advantage of that fact. This argument proceeds on the basis that the Appellant, not having filed any "application" as contemplated under section 42 of Act, cannot take shelter under the said provision to contend that this Court has no jurisdiction to entertain the present Execution Application merely because Respondent No.2 has filed an "application" (in the present case the section 34 petition) in the Additional District Judge-12, Central District, Delhi. We clarify that we have not expressed any opinion on this issue as it is not necessary to decide the same in the facts of the present case. For the sake of argument we will presume that the Appellant can take shelter under section 42 even though the Appellant himself has not filed any "application" as contemplated under section 42, but only Respondent No.2 has filed such an "application" (the section 34 petition) before the Court in Delhi. It would still make no difference to the outcome of this appeal as admittedly the Execution Application for enforcement of the Award was lodged by Respondent No.1 in this Court prior in point of time to the section 34 petition lodged by Respondent No.2 before the Additional District Judge-12, Central District, Delhi. In these facts, we find that the reliance placed by the Appellant on section 42 of the Act is wholly misconceived.

18. In view of the discussion in this judgment, we find no merit in the appeal. The same is dismissed. In the facts and circumstances of the case, we leave the parties to bear their own costs.