
(2016) 04 AHC CK 0013
In the Allahabad High Court
Case No : Misc. Single No. 8960 of 2016.

M/S Bharat Harmonium Works Thru Partner Ramesh Bahadur Singh APPELLANT

Vs

State of U.P. Thru Prin. Secy. Deptt. of Law Civil Sectt. and Others RESPONDENT

Date of Decision : 29-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 36, 42

Citation : (2016) 163 AIC 910 : (2016) 6 AILLJ 646 : (2016) 116 ALR 632

Hon'ble Judges : Devendra Kumar Upadhyaya, J.

Bench : Single Bench

Advocate : Dev Kumar Tripathi, Counsel, for the Appellant; C.S.C, for the Respondent

Final Decision : Dismissed

Judgement

Devendra Kumar Upadhyaya, J. - Heard Shri Dev Kumar Tripathi, learned counsel for the petitioner and Shri Ajay Pratap Singh, learned Standing Counsel appearing for respondent no. 1-State of Uttar Pradesh. Though neither the State of Uttar Pradesh, nor the court, which has passed the order under challenge in this petition are necessary parties to this petition, however, on the request of the Court, learned Standing Counsel has rendered his assistance in the matter.

2. These proceedings under Article 227 of the Constitution of India have been instituted by the petitioner (hereinafter referred to as "judgment debtor") assailing the validity of an order dated 06.09.2014, passed by the learned Additional District Judge, Pratapgarh, whereby the objection raised by the judgment debtor as regards the jurisdiction of the court at Pratapgarh to proceed with the execution of an arbitral award given at Aurangabad, Maharashtra, has been rejected.

3. Submission of learned counsel for the petitioner is that an application seeking execution of an arbitral award dated 06.03.2012 was filed by the respondent

no.3 (hereinafter referred to as "decree holder") before the district court at Pratapgarh on 21.09.2013, under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") on which the Munsarim had reported that since the Transfer Certificate of the decree sought to be executed has not been obtained from the court concerned, as such the execution can proceed only after the same is received. His further submission is that since the arbitral award was made at district-Aurangabad, Maharashtra, as such the application seeking execution of the award ought to have been preferred by the decree holder in the court at Aurangabad and if the court at Aurangabad was of the view that the award has not been satisfied, the award could have been sent to the court at Pratapgarh for its execution after following the provisions contained in Section 39 and Order 21, Rule 6 of the Code of Civil Procedure. His submission, in sum and substance, is that though it is correct that the execution of an arbitral award can be made by the court within whose territorial jurisdiction the properties etc. of the judgment debtor from whom the realisation of money could be made are situated, however, the same can be done only after the award is transferred in terms of the provision contained in Section 39 of the Code of Civil Procedure. He has further drawn attention of the Court to the provisions of Order 21, Rule 6 of the Code of Civil Procedure and has submitted that the said provision provides a complete procedure where the Court desires that its decree shall be executed by another court. According to the said provision, the court sending a decree for execution shall send a copy of the decree and a certificate setting forth therein that satisfaction of the decree has not been obtained by the execution within the jurisdiction of the court by which it was passed. The Court, under the said provision, is also required to send a copy of the order for the execution of the decree or if no such order has been made, then certificate to that effect.

4. It has further been contended by the learned counsel for the petitioner that in absence of any certificate sent by the court sitting at Aurangabad for execution of the award by the court at Pratapgarh, the application moved by the decree holder for execution of the arbitral award was not maintainable.

5. The said prayer of the judgment debtor was opposed before the court below on behalf of the decree holder and it was submitted that any award made under the Arbitration and Conciliation Act can be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court and further that there lies a distinction between an arbitral award and decree of a court. The arbitral award, by application of legal fiction, has to be treated as decree of court for its enforcement and execution but the arbitral award in itself cannot become the decree of the court.

6. Learned court below rejected the prayer made by the judgment debtor by means of the impugned order dated 06.09.2014 relying on a judgment dated 13.03.2008 rendered by Hon"ble High Court of Delhi in Execution No. 242/2008, Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.

7. Learned Standing Counsel, as observed above, on the request of the Court has provided his valuable assistance and has submitted that an arbitral award is not a decree of the court. He further submits that any arbitral award given under the Arbitration Act has to be executed and enforced in the manner as if it were a decree of a court as provided under Section 36 of the Act, however, so far as the place of the court executing such an award is concerned, the locus of the judgment debtor, the properties of the judgment debtor and his business etc., which are relevant for the purpose of execution of the award, are necessary ingredients which need to be taken into account to determine the place of instituting the execution proceedings for execution of the arbitral award.

8. Submissions made by the learned counsel for the petitioner as well as the learned Standing Counsel have been taken into consideration by the Court and on a careful analysis of various relevant provisions of the Arbitration and Conciliation Act and those of the Code of Civil Procedure, I find myself in complete agreement with the judgment rendered by Hon'ble High Court of Delhi on 13.03.2008 in Execution No. 242/2008, Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd. (supra).

9. Before proceeding to analyse the submissions made by the learned counsel for the petitioner impeaching the validity of the order passed by learned Additional District Judge and also the reasoning therefor, it would be appropriate to quote certain provisions occurring in the Arbitration and Conciliation Act, 1996 and the Code of Civil Procedure, which are relevant for the purposes of resolution of the issue involved in this case.

10. Once the arbitrator announces its award under the Arbitration and Conciliation Act, the same is open to challenge by making an application for setting aside the same under Section 34 of the Arbitration and Conciliation Act. Section 34 of the Act is quoted as under:-

"34. Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling

within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation - Without prejudice to the generality of sub-clause

(ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

11. After the award is made and time for making an application to set aside the award under Section 34 of the Act expires, or such application having been made is refused, the arbitral award becomes enforceable under the Code of Civil Procedure in the same manner as if it were a decree of a court. Section 36 of the Act is extracted below:-

36. Enforcement.-Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil

Procedure, 1908 (V of 1908) in the same manner as if it were a decree of the Court.

12. For the purposes of determining the jurisdiction of the Court for various aspects related to arbitration proceedings, Section 42 of the Act provides that where with respect to arbitration agreement any application under Part-I of the Arbitration and Conciliation Act has been made in a Court, it is that Court alone which 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. Section 42 of the said Act runs as under:-

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."

13. It would also be relevant to extract the definition of the word "court" as given in Section 2(1)(e) of the Arbitration and Conciliation Act which is as under:-

"2(1)(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."

14. According to Section 2(1)(e) of the Arbitration and Conciliation Act, "Court" means the principal Civil Court in a district which includes the High Court, having jurisdiction to decide the questions forming the subject-matter of arbitration if the same had been the subject matter of a suit, that is to say, the Court as defined in Section 2(1)(e) would mean that the Court which will have jurisdiction to adjudicate upon the subject-matter in a suit will be the court-competent to entertain proceedings relating to the subject-matter of the arbitration as well.

15. The relevant provisions of the Code of Civil Procedure, which the learned counsel for the petitioner has referred to and which also need to be taken into consideration for adjudication of this case, are Sections 38, 39 and also the provisions of Order 21, Rule 6 .

16. Section 38 of the Code of Civil Procedure provides that a decree can be executed either by the court which passes it or by another court to which it is sent for execution. The said provision is as under:-

"38. Court by which decree may be executed.-A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution."

17. The provisions relating to transfer of decree have been provided for by the legislature under Section 39 of the Code of Civil Procedure, according to which, on an application of the decree holder, the court which passes a decree may send the same for its execution to another court of competent jurisdiction under certain conditions. The said conditions given in clauses (a), (b) and (c) of sub Section 1 of Section 39 of Code of Civil Procedure are primarily based on the locus of the person or the property belonging to the person against whom a decree is passed. Section 39 of the Code of Civil Procedure is extracted herein below:-

"39. Transfer of decree.- (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another court of competent jurisdiction,-

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other court, or

(b) if such person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction."

18. In order to appropriately resolved the issue which has arisen in this case, provisions of Order 21, Rule 6 of the Code of Civil Procedure also needs to be extracted which is as under:

"6. Procedure where Court desires that its own decree shall be executed by another Court.-The Court sending a decree for execution shall send-

(a) a copy of the decree;

(b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed,

or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate in that effect.

19. Learned counsel appearing for the petitioner has laid great emphasis on Sections 38 and 39 of the Code of Civil Procedure and has also submitted that in terms of the provisions contained in Section 36 of the Arbitration and Conciliation Act, the award, in fact, for the purposes of execution is a decree of the competent court and hence, it has to be executed only and only in the manner which has been provided for execution of a decree passed by a court under the Code of Civil Procedure. He has thus, submitted that Section 38 of the Code of Civil Procedure mandates that the decree may be executed either by the court which passed it or by the court where it is sent for execution. The submission is, thus, that the award which was given in the instant case at Aurangabad has to be treated to be a decree of the court at Aurangabad and thus, it can be executed only either by the court at Aurangabad or by any other court including the court at Pratapgarh only when the same is transferred for its execution or sent for its execution to any other court. He has further submitted that the court at Aurangabad, in the instant case, on the application of the decree holder could have sent the award for execution to the court at Pratapgarh, however, the decree holder has not filed any execution case for enforcement or execution of the arbitral award in the court at Aurangabad and has rather chosen to institute the execution proceedings directly in the court at Pratapgarh. He further submits that adopting such a manner of execution is against the mandate and provisions contained in Section 38 and 39 of the CPC as also against the provisions contained in Order 21, Rule 6 of the Code of Civil Procedure hence, the learned court below, by not considering the aforesaid aspects of the matter, has passed the impugned order erroneously. His further submission is that for execution of decrees and orders, the Code of Civil Procedure in the form of Order 21 provides a complete procedure and in case the court desires that its decree shall be executed by another court, the provisions contained in Rule 6 Order 21 has to be followed. He has, thus, taken the court to the provisions of Order 21, Rule 6 and has argued that it is mandatory for the court to send a certificate stating therein that the satisfaction of the decree has not been obtained by execution within its territorial jurisdiction and in absence of any such certificate as contemplated in clause (b) of Order 21, Rule 6 , the Court at Pratapgarh could not have proceeded with the execution case, keeping in view the objections noted on the application preferred by the decree holder by the Munsarim on 21.09.2013.

20. The aforesaid submissions made by the learned counsel for the petitioner apparently appear to be attractive, however, on a deeper probe and scrutiny of the entire scheme of Arbitration and Conciliation Act, 1996 and the purpose for which the said enactment has been made by the Parliament, I have no hesitation to hold that the arguments are unacceptable. Section 36 of the Act states that

any arbitral award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of a court, but, as observed above, that itself will not make any arbitral award to be a decree of the court. Section 42 of the said Arbitration and Conciliation Act discusses the jurisdiction in respect of various proceedings related to an arbitration agreement and the applications under the Arbitration and Conciliation Act made in a court. It provides that where any application is made in a court in respect of 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 shall be made in that court and in no other court. Thus, Section 42 contains an ouster clause ousting the jurisdiction of any other court, other than the court where an application by a party to the arbitration agreement is made under Part-I of the Arbitration and Conciliation Act, 1996.

21. It can well be argued that since Section 36 in Chapter 8 of the Arbitration and Conciliation Act, 1996 falls in Part-I of the Arbitration and Conciliation Act as such even for execution of an arbitral award the decree holder has to necessarily approach the court within whose jurisdiction the arbitration proceedings are drawn and award is made, however, in my considered opinion, the jurisdiction of the court as provided under Section 42 will not cover or encompass in its fold the jurisdiction to proceed with the execution of arbitral award for the reason that any application seeking execution of an arbitral award cannot be said to be arbitral proceedings or proceedings of any subsequent application arising out of arbitration agreement. Execution of award is independent of arbitral proceedings. In fact, it is enforcement of an award made by the arbitrator under the terms and conditions of the arbitration agreement and as such insistence on decree holder to approach the court within whose jurisdiction the arbitral award is made cannot be accepted.

22. Hon"ble High Court of Delhi in the case of Daelim Industrial Co. Ltd. (supra) has elaborately dealt with this issue and has come to the conclusion that the expression "court" occurring in Section 36 is not meant to be the court within the meaning of Section 2(1)(e). The reason given by Hon"ble Delhi High Court in the said judgment is that the definition clause contained in Section 2 commences with the phrase "unless the context otherwise requires". It has, thus, been held by Hon"ble Delhi High Court that the word "court" occurs in Section 36 only in the context of making the award executable as a decree of the court within the meaning of CPC by a legal fiction. The word "court" occurring in Section 36, thus, has been used in the context of describing the manner and enforcement of an arbitral award i.e. as a "decree of the court" and not in the context of providing for the court which will have territorial jurisdiction to execute or enforce the award. Para 18 of the said judgment is relevant, which is extracted herein below:-

"18. However, in my view the expression "court" in Section 36 is not meant to be the court within the meaning of Section 2(1)(e). The definitions in Section 21(1) (e) are, "unless the context otherwise requires". The word "court" is used in

Section 36 only in the context of, by a legal fiction, making the award executable as a decree of the court within the meaning of CPC. The word "court" therein is used to describe the manner of enforcement i.e., as a "decree of the court" and not in the context of providing for the court which will have territorial jurisdiction to execute/enforce the award. In this context, the contention of the counsel for the decree holder of the difference in language in Section 36 and in Section 49 is significant. The legislature has in Section 49 provided for the enforcement of foreign awards by deeming the said awards to be a decree of "that court" which would mean the decree of the court which has adjudicated on the enforcement of the award. However, the legislature in Section 36 did not use the expression "that" and which is indicative of the reference to court therein being only to describe the manner of enforcement of the award as a decree of the court. There does not appear to be a legislative mandate to the effect that arbitral award has to be treated as a decree of that court only which would have had the jurisdiction to entertain the suit."

23. In the instant case, if the submission of learned counsel for the petitioner is accepted that it is the court at Aurangabad alone which will have the jurisdiction to proceed with the execution of the arbitral award, the same, in my considered opinion, would also not be consistent with the object for which the Arbitration and Conciliation Act, 1996 has been enacted. The major reason for enactment and providing for arbitration proceedings is the expediency with which a civil dispute in the society is required to be resolved. Admittedly, the properties of the judgment debtor in this case are situated in Pratapgarh and he also ordinarily resides in Pratapgarh and further that he carries on his business at Pratapgarh. The award made by the arbitrator is for recovery of an amount of Rs. 12,26,146/- along with interest @ 21% from the date of award till the payment is made. The award, in fact, is in the form of a money decree, execution of which may require at appropriate stage, attachment and sale of the properties belonging to the judgment debtor. In such a situation, the proposition that the decree holder ought to have first moved an application seeking execution of the arbitral award before the court at Aurangabad and then the court at Aurangabad would have come to the conclusion that it was not in a position to execute the decree and formed an opinion that the judgment debtor actually and voluntarily resides or carries on his business in Pratapgarh and further that no property belonging to the judgment debtor is situated within the local jurisdiction of the court at Aurangabad and then would have decided to send the award for execution to the court at Pratapgarh, cannot be agreed to. Such a procedure is likely to take time which may not be warranted considering the facts of the present case. The transfer of a decree under Section 39 of the Code of Civil Procedure is not on the mere asking of the decree holder. The court can transfer the decree for execution to another court only on an application to be moved by the decree holder, that too, only on certain conditions, which need to be determined by the court before such a decision is taken. Order 21, Rule 6 of the Code of Civil Procedure requires the court sending a decree for execution to

another court to send a certificate setting forth therein that satisfaction of the decree has not been obtained by execution within its jurisdiction. For giving such a certificate, the court is required to conduct some enquiry calling upon the parties and issuance of such a certificate is, thus, likely to take some time which, in the instant case, will be uncalled for the simple reason that the judgment debtor does not dispute that he is not doing his business at Aurangabad or he does not ordinarily reside at Aurangabad or he does not own any property at Aurangabad. To the contrary, it is admitted by the judgment debtor that all his properties are situated in Pratapgarh and that he ordinarily resides and does his business at Pratapgarh.

24. In the light of these facts and also taking into account the purpose of enacting the Arbitration and Conciliation Act, which, admittedly, is expediency to be attached to the resolution of civil disputes, submission being made by learned counsel for the petitioner cannot be accepted.

25. Learned counsel for the petitioner has also cited a judgment of Hon''ble High Court of Himachal Pradesh in CMPMO No. 56/2013, decided on 17.09.2013, wherein a judgment of Hon''ble Karnataka High Court in the case of I.C.D.S. Ltd. v. Mangala Builders Pvt. Ltd. and others, reported in [AIR 2001 Karnataka 364] has been relied upon. In the said judgment of Karnataka High Court, the reasoning given is that it is implied from the words occurring in Section 36 that a right to enforce the award arises only after the period for setting aside the same under Section 34 expires or such an application having been made is rejected. Hon''ble Karnataka High Court has further observed that the Court executing the decree has to satisfy itself, before entertaining the application for execution that the period for setting aside the award has expired or such an application, having been made, has been refused. Hon''ble Karnataka High Court has further gone on to say that the court that can exercise the power under section 34 of the Act can alone exercise the powers and jurisdiction to entertain the steps for enforcement of the arbitral award. It has, thus, come to the conclusion that the Court as understood in Section 34 will alone have jurisdiction to enforce the arbitral award. However, I am unable to be in agreement with the view taken by Hon''ble High Court of Himachal Pradesh which is based on the judgment of Karnataka High Court in the case of I.C.D.S. Ltd. (supra) for the reason that while considering the provisions of Section 36, the definition of the word "court" appears to have borrowed therein from Section 2(1)(e) of the Arbitration and Conciliation Act, but while doing so the opening phrase of the definition clause occurring in Section 2 i.e "unless the context otherwise requires" appears to have been lost sight of. It has already been explained by Hon''ble High Court of Delhi in the case of Daelim Industrial Co. Ltd. (supra) that the word "court" occurring in Section 36 has been used only to describe the manner of enforcement of an arbitral award as a decree of a Court and not in the context of providing for the court which will have territorial jurisdiction to execute and enforce the award.

26. With all respect at my command to the view expressed by Hon''ble High

Court of Himachal Pradesh as well as Hon"ble High Court of Karnataka in the aforesaid cases, I find that the view expressed by Hon"ble High Court of Delhi is in tune with the entire scheme of the Arbitration and Conciliation Act, 1996.

27. In the result, the petition fails and is hereby dismissed.

28. Before parting with the case, I would be failing in my duty, if I do not express my appreciation for the laudable efforts made by Shri Dev Kumar Tripathi, learned counsel appearing for the petitioner and Shri Ajay Pratap Singh, learned Standing Counsel appearing for the State in providing very valuable assistance to the Court. I, thus, appreciate their assistance.

29. Learned counsel for the petitioner, at this stage, prays that the petitioner-judgment debtor may be permitted to move the appropriate court for setting aside the award under Section 34 of the Arbitration and Conciliation Act. In my opinion, no such permission is required to be granted by the court as it is always open to the petitioner to seek all the remedies which may be available to him under law against the arbitral award.

30. There will be no order as to costs.