

Supreme Court of India

Sundaram Finance Ltd. ... vs Abdul Samad on 15 February, 2018

Author: S K Kaul

REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.1650 of 2018

SUNDARAM FINANCE LIMITED

.Appellant

versus

ABDUL SAMAD & ANR.

..Respondents

JUDGMENT

SANJAY KISHAN KAUL, J.

1. The divergence of legal opinion of different High Courts on the question as to whether an award under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act) is required to be first filed in the court having jurisdiction over the arbitration proceedings for execution and then to obtain transfer of the decree or whether the award can be straightway filed and executed in the Court where the assets are located is required to be settled in the present appeal. Signature Not Verified Digitally signed by MADHU BALA Date: 2018.02.15 16:27:01 IST Reason:

Facts:

2. The appellant claims that the first respondent approached the appellant for grant of a loan for purchase of a Tata Lorry-HCV 2005 model, which loan was granted by the appellant on the terms & conditions specified in the Loan Agreement dated 18.8.2005. Respondent No.2 is stated to have stood guarantee for the repayment of the loan by executing a separate guarantee letter of the same date. The loan had to be repaid in installments commencing 3.9.2005 to 3.1.2009.

3. The appellant alleges that respondent No.1 committed default in payment from the 20th installment onwards. The repossession, however, of the vehicle could not take place and in order to recover the loan, arbitration proceedings were initiated in terms of the arbitration clause contained in the Loan Agreement. Mr. S.

Santhanakrishnan, Advocate was appointed as the sole arbitrator on 3.5.2011 and the claim

statement was filed before the arbitrator but the respondents remained unserved. Notice was served through publication but since none appeared for the respondents, an ex parte arbitration award was made on 22.10.2011 for a sum of Rs.12.69,420 with interest at 18 per cent per annum from 4.4.2011 till realization and costs.

4. The case of the appellant is that the award being enforceable as a decree under Section 36 of the said Act, execution proceedings were filed in the jurisdiction of the courts at Morena, Madhya Pradesh under Section 47 read with Section 151 and Order 21 Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code). The respondents sought to contest the proceedings inter alia on the ground that the vehicle against which the loan was obtained was stolen. It is not necessary to go into further details of the proceedings but suffice to say that the trial court vide order dated 20.3.2014 return the execution application on account of lack of jurisdiction to be presented to the court of competent jurisdiction. The effect of the judgment was that the appellant was required to file the execution proceedings first before the court of competent jurisdiction in Tamil Nadu, obtain a transfer of the decree and then only could the proceedings be filed in the trial court at Morena. This view adopted by the trial court was in turn based on the judgment of the Madhya Pradesh High Court and the opinion of the Karnataka High Court while it is pleaded that the view of the Rajasthan High Court and the Delhi High Court were to the contrary. The petitioner did not approach the High Court against the said order of the trial court but straightway approached this Court by filing the Special Leave Petition on the ground that no useful purpose would be served by approaching the Madhya Pradesh High Court in light of the view already expressed by that Court in conflict with the opinions of some other High Courts. The Conflicting Views:

A. The transfer of decree should first be obtained before filing the execution petition before the Court where the assets are located:

5. The aforesaid view has been adopted by the Madhya Pradesh and the Himachal Pradesh High Courts:

i. Computer Sciences Corporation India Pvt. Ltd. v.

Harishchandra Lodwal & Anr.¹ The learned single Judge of the Madhya Pradesh High Court took recourse to the provisions of Section 42 of the said Act, dealing with the issue of jurisdiction in respect of an arbitration agreement read with Section 2(e) of the said Act which defines the Court. In the context of Section 36 of the said Act dealing with the enforcement of an award prescribing 1 AIR 2006 Madhya Pradesh 34 that the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court, it was observed that the same principle would apply as for enforcing of a decree. Since Section 37 of the Code defines the Court which passes the decree and Section 39 lays down the procedure for transfer of decree, it was opined that for execution of an award a transfer of the decree was mandatory. ii. Jasvinder Kaur & Anr. v. Tata Motor Finance Limited² of the High Court of Himachal Pradesh, Shimla the learned single Judge took note of the fact that the arbitration proceedings were to be settled in Mumbai in accordance with the said Act and the award had been made in Mumbai. Thereafter the learned single Judge copiously extracted from the judgment of this Court in Swastik Gases Private Limited v.

Indian Oil Corporation Limited³. The learned Judge then proceeded to, once again, copiously extract from the then prevailing view of the Karnataka High Court where a learned single Judge in I.C.D.S. Ltd. v. Mangala Builders Pvt. Ltd. & Ors. ⁴ had opined in favour of the 3 JT 2013 (10) SC 354 AIR 2001 Karnataka 364 aforesaid view.

B. An award is to be enforced in accordance with the provisions of the said Code in the same manner as if it were a decree of the Court as per Section 36 of the said Act does not imply that the award is a decree of a particular court and it is only a fiction. Thus, the award can be filed for execution before the court where the assets of the judgment debtor are located:

i. Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd. ⁵ (Delhi High Court) The learned single Judge of the Delhi High Court repelled the contention that the jurisdictional Section 42 of the said Act requiring an application under Section 34 of the said Act to be filed in that Court would not extend to the execution of a decree. The execution application was not arbitral proceedings. Section 38 of the said Code applies to a decree passed by the Court prescribing that the decree may be executed by the Court which passed it, or by the Court to which it was sent for execution. In case of an award no court passes the decree.

The learned single Judge went into the discussion of the effect of the provisions of Section 635(4) of the Companies Act, 5 2009 159 DLT 579 1956 providing for the order of the Company Law Board to be enforced by the Court in certain circumstances to draw an analogy therefrom.

ii. Maharashtra Apex Corporation Limited v. V. Balaji G. & Anr.⁶ (Kerala High Court) The learned single Judge expressed the view that the Court cannot insist for a decree to receive an execution application on its file and, thus, there was no question of transfer of a decree. The execution court was to accept the execution petition with a certified copy of the award wherever it was filed. iii. Kotak Mahindra Bank Ltd. v. Sivakama Sundari & Ors. ⁷ (Madras High Court) Section 39 of the Code enables the Court which passed the decree to transfer it to any subordinate court even of its own motion without application by the decree holder. The learned single Judge of the Madras High Court examined the provisions of the said Act and the said Code and in the process, a reference was made to Section 41 of the said Code imposing an obligation upon the executing court to inform the court which passed the decree about the completion of execution or about the 6 2011 (4) KLJ 408 7 (2011) 4 LW 745 failure to execute the decree along with attending circumstances.

A passing reference was made to Section 46 of the said Act which speaks of precepts. In a nutshell the conclusion made was that every decree of a civil court was liable to be executed primarily by the court which passed the decree. On the other hand, in case of an award, the same is liable to be enforced under Section 36 of the said Act in the same manner as if it were a decree of the court and thus the award passed is equated to a decree of the court, only for purposes of execution. The execution of the award does not require a seal of approval by the civil court as distinct from the provisions under the Arbitration Act, 1940. The award cannot be executed through the arbitral tribunal which passed the award and, thus, there is no situation envisaged for the arbitral tribunal which passed the decree (or award) to transfer the decree to any other court for its execution. There

was also no provision either in the Code or anywhere else to treat a court within whose jurisdiction the arbitral proceedings took place as the court which passed the decree.

It was, thus, opined that:

19. While the award passed by an arbitral tribunal is deemed to be a decree of a civil court under section 36 of the 1996 Act, there is no deeming fiction anywhere to hold that the court within whose jurisdiction the arbitral award was passed, should be taken to be the court which passed the decree. Therefore, the whole procedure of filing an execution petition before the court within whose jurisdiction the arbitral award was passed, as though it is the court which passed the decree, is pathetically misconceived. xxxx xxxx xxxx xxxx xxxx 21. Therefore, it is clear that no Court to which an application for execution of an award is presented, can insist on the filing of the execution petition first before some other Court and to have it transmitted to it later. It appears that the High Court of Bombay has also adopted the same view, though not by a very elaborate order. In another perspective it was observed that in view of Section 21 of the said Act parties could determine the place of arbitration and thus, the Act transcends all territorial barriers. iv. Kotak Mahindra Bank Ltd. v. Ram Sharan Gurjar & Anr.8 (Rajasthan High Court) The learned single Judge of the Rajasthan High Court agreed with the view adopted by the Delhi High Court.

v. GE Money Financial Services Ltd. v. Mohd. Azaz & Anr.9 (Allahabad High Court, Lucknow Bench) The learned single Judge observed that the arbitrator cannot be treated as a court although the award made by him will be executed as a decree.

8 (2012) 1 RLW 960

9 2013 SCC OnLine All 13365 = (2013) 100 ALR 766

Thus, Sections, 38 & 39 of the said Code would have no application and the award can, thus, be filed for execution as a decree of civil court wherever the judgment debtor resides or carries on business or has properties within the jurisdiction of the said court.

vi. Indusind Bank Ltd. v. Bhullar Transport Company 10(Punjab & Haryana High Court) The view of the Delhi High Court referred to aforesaid was adopted.

vii. Sri Chandrashekhar v. Tata Motor finance Ltd. & Ors. 11 (Karnataka High Court) The learned single Judge of the Karnataka High Court opined that the question of filing an execution petition before the court which passed the decree and then seeking a transfer of the decree to the court where the assets are located would not arise, as an award is not a decree passed by the court.

Our View:

6. In order to appreciate the controversy, we would first like to deal with the provisions of the said Code and the said Act.

10 MANU/PH/2896/2012
11 (2015) 1 AIR Kant R 261

7. Part II of the said Code deals with execution proceedings.

Section 37 of the said Code defines the Court, which passed the decree. Section 38 of the said Code provides as to by which court the decree would be executed and reads 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.

8. Section 39 of the said Code provides for transfer of decree and reads as under:

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 the 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.]

9. One of the relevant provisions, the effect of which has not been really discussed in any of the judgments referred to aforesaid is Section 46 of the said Code which defines Precepts as under: 46. Precepts. (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept. (2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property. Questions to be determined by Court executing decree

10. The relevance of the aforesaid provision is that the application of the decree holder is made to the Court which passed the decree, which issues the precepts to any other Court competent to execute the said decree. As noticed, the expression the Court which passed the decree is as per Section 37 of the said Code. We may note at this stage itself that in the case of an award there is no decree passed but the award itself is executed as a decree by fiction. The provisions of the said Act traverse a different path from the Arbitration Act, 1940, which required an award made to be filed in Court and a decree to be passed thereon whereupon it would be executable.

11. Now turning to the provisions of Order XXI of the said Code, which deals with execution of decrees and orders. In case a Court desires that its own decree is to be executed by another court, the manner for doing so is provided by Rule 6, which reads as under:

Order XXI Execution of Decrees and Orders xxxxx xxxxx xxxxx xxxxx xxxxx

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 to that effect.

12. The manner of presentation of an application is contained in Rule 11(2) of Order XXI, which reads as under:

Order XXI Execution of Decrees and Orders xxxx xxxx xxxx xxxx xxxx 11 (2) Written application Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution of the decree is sought; and the mode in which the assistance of the court is required, whether
 - (i) by the delivery of any property specifically decreed;
 - (ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;
 - (iii) by the arrest and detention in prison of any person;
 - (iv) by the appointment of a receiver;
 - (v) otherwise, as the nature of the relief granted may require.

13. A perusal of the aforesaid shows that what is sought to be disclosed is that the details like the number of suits, appeal against the decree, etc. find a place, which really does not have a relevance to the fiction of an award to be treated as a decree of the Court for purposes of execution.

14. We would now like to refer to the provisions of the said Act, more specifically Section 36(1), which deals with the enforcement of the award:

36. Enforcement. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 to 1908), in the same manner as if it were a decree of the court.

15. The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said code in the same manner as if it were a decree. It is, thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the arbitral tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code.

16. Section 2(e) of the said Act defines Court as under:

2. Definitions. xxxx xxxx xxxx xxxx xxxx [(e) Court means

(i) in the case of an arbitration other than international commercial arbitration, 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;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;]

17. The line of reasoning supporting the award to be filed in a so-called court of competent jurisdiction and then to obtain a transfer of the decree is primarily based on the jurisdiction clause found in Section 42, which reads 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.

18. The aforesaid provision, however, applies with respect to an application being filed in Court under Part I. The jurisdiction is over the arbitral proceedings. The subsequent application arising

from that agreement and the arbitral proceedings are to be made in that court alone. However, what has been lost sight of is Section 32 of the said Act, which reads as under: 32. Termination of proceedings. (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2). (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

19. The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

20. It is in the aforesaid context that the view adopted by the Delhi High Court in *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*¹² records that Section 42 of the Act would not ¹² supra apply to an execution application, which is not an arbitral proceeding and that Section 38 of the Code would apply to a decree passed by the Court, while in the case of an award no court has passed the decree.

21. The Madras High Court in *Kotak Mahindra Bank Ltd. v. Sivakama Sundari & Ors.*¹³ referred to Section 46 of the said Code, which spoke of precepts but stopped at that. In the context of the Code, thus, the view adopted is that the decree of a civil court is liable to be executed primarily by the Court, which passes the decree where an execution application has to be filed at the first instance. An award under Section 36 of the said Act, is equated to a decree of the Court for the purposes of execution and only for that purpose. Thus, it was rightly observed that while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the said Act, there was no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed should be taken to be the Court, which passed the decree. The said Act actually transcends all territorial barriers.

Conclusion:

13 supra

22. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings.

23. The effect of the aforesaid is that the view taken by the Madhya Pradesh High Court and the Himachal Pradesh High Court is held to be not good in law while the views of Delhi High Court, Kerala High Court, Madras High Court, Rajasthan High Court, Allahabad High Court, Punjab & Haryana High Court and Karnataka High Court reflect the correct legal position, for the reasons we have recorded aforesaid.

24. The appeal is accordingly allowed and the impugned order dated 20.3.2014 is set aside restoring the execution application filed by the appellant before the Morena courts. The parties are left to bear their own costs.

.....J.

(J. Chelameswar) ...J.

(Sanjay Kishan Kaul) New Delhi.

February 15, 2018.