

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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EA.No. 105/2009 in Ex.No. 242/2008

13.03.2009

Date of decision: 13th March, 2009

DAELIM INDUSTRIAL CO LTDDecree Holder

Through: Mr Ashok Sagar, Mr Dharmendra Rautray and Mr R. Vasanth, Advocates.

Versus

NUMALIGARH REFINERY LTD. Judgment Debtor

Through: Mr Sudhir Chandra, Sr Advocate with Mr Parijat Sinha, Ms Reshmi, Mr T.K. Majumdar, Mr Mrinal Kanti Mandal and Mr Snehasish Mukherjee, Advocates

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. Objection of the judgment debtor to the territorial jurisdiction of this court to entertain this execution petition of an arbitral award dated 23rd September, 2000 as affirmed/modified by judgment dated 6th September, 2007 of the Apex Court in Civil Appeals No. 4079/2007 and 4080/2007 is for consideration.

2. The decree holder filed the execution petition in this court stating, inter alia, that out of the awarded amounts, a sum of Rs 4,98,97,205/- had been received on 29th February, 2008 as part payment, without prejudice, by the decree holder; that a sum of Rs 34,22,19,014.06 was still outstanding under the award and seeking

execution of the award as a decree by issuance of warrants of attachment of the movable and immovable assets of the judgment debtor lying at 6th floor, 15-17, Tolstoy Marg, New Delhi and by attachment of the monies lying in the accounts of the judgment debtor with the State Bank of India, New Delhi Main Branch, New Delhi.

3. The execution was listed first on 4th July, 2008 when the decree holder was called upon to file an affidavit explaining how this court has territorial jurisdiction to entertain the execution petition. The decree holder filed an affidavit dated 18th July, 2008 stating, inter alia, that as per the agreement between the parties, the venue of arbitration was agreed to be in India and it was further agreed that the courts at Guwahati shall have exclusive jurisdiction in all matters except in relation to the arbitration; that the arbitration proceedings were held and the award announced at Calcutta; that the award was challenged by the judgment debtor in the District Court of Golaghat which court set aside the award; that in appeal the High Court of Guwahati set aside the order of the District Court, Golaghat and partly upheld the award; in further appeal the Supreme court partly modified the order of the High Court of Guwahati and partly upheld the award. It was further stated that under the Arbitration and Conciliation Act, 1996 the execution of the award cannot be equated with judgments of Civil Court which are required to be converted into a decree to become executable and the court which passed the judgment alone has jurisdiction to execute or transfer the decree; that since no court intervention is required for an award to be converted into a decree, the normal rule of CPC of the court which passed the judgment alone being entitled to execute the decree or

transfer the decree, would not apply and it would be not appropriate to send the decree holder to the District Court of Golaghat simply because the application under Section 34 of the Act was made in that court. It was further stated that since no court had passed the decree, it is up to the decree holder to seek to enforce the award wherefrom the assets of the judgment debtor may be situated; so long as some assets are situated within the jurisdiction of the court, the court would have jurisdiction to entertain the execution. Reliance was placed on **Brace Transport Corporation Vs Orient Middle East Lines Ltd** 1995 Supp (2) SCC 280 in support of the principle though laid down in relation to the Foreign Awards (Recognition and Enforcement) Act 1961 that an award can be enforced wherefrom the property may be situated. It was urged that the position would be the same in the present case.

4. During the subsequent hearing on 28th July, 2008, **Brace Transport Corporation** (supra) was held to be not applicable since in relation to foreign awards, subject matter of that case, the jurisdiction was governed under the proviso to Section 47 of the Act and it was further felt that jurisdiction in relation domestic award is governed by Section 2(e) of the Act. However, it was found that the Apex Court in **Merla Ramanna Vs Nallaparaju** AIR 1956 SC 87 had held that the court to whose jurisdiction the subject matter of the decree is transferred, acquires inherent jurisdiction to entertain the execution petition, notwithstanding Section 38 of the CPC. It was further held in the order dated 28th July, 2008 that the subject matter of the decree being money lying in the bank account of the judgment debtor within the jurisdiction of this court, and further since the decree holder has submitted that it will face difficulties in

applying for execution in the courts at Golaghat, Assam, warrants of attachment of the monies lying in the account of the judgment debtor with the State Bank of India, New Delhi Main Branch, were ordered to be attached. The attachment did not yield any result since no money was found on that date in the account of the judgment debtor.

5. The judgment debtor thereafter failed EA.No.6/2009 for review, inter alia, of the order dated 28th July, 2008 holding that this court had territorial jurisdiction to entertain the execution. EA.No.7/2009 has been filed for condonation of delay in applying for review. Thereafter, EA.No.105/2009 by way of objections to the execution has been filed.

6. The senior counsel for the judgment debtor has fairly stated that the main objection of the judgment debtor is to this court entertaining the execution. The other objections are only as to the calculation of the amount due and of curative petition pending consideration in the Apex Court. Arguments have been heard on the aspect of territorial jurisdiction only.

7. The senior counsel for the judgment debtor has contended that under Section 36 of the Arbitration Act, "the award shall be enforced under the Code of Civil Procedure 1908 (5 of 1950) in the same manner as if it were a decree of the **court**". It is further contended that "court" has to mean what is defined in Section 2(e) i.e., the court having jurisdiction to decide the question forming the subject matter of the arbitration if the same had been the subject matter of a

suit. It is further contended that since in the present case the application under Section 34 was filed in the District Court at Golaghat, Section 42 mandates the execution also to be filed in that court only.

8. It was further contended that if at all the decree holder intended to execute by attachment and sale of any property of the judgment debtor at Delhi, the same was possible only by obtaining from the District Court at Golaghat the transfer of the decree to this court and whereupon only the execution application could be entertained by this court. Reliance in this regard was also placed on Section 38 of the CPC providing that the decree may be executed either by the court which passed it or by the court to which it is sent for execution. It was urged that the court which passed the decree would be the District Court at Golaghat which had dealt with the application under Section 34 of the Act. It was argued that the court which passed the decree would be the court which would have been empowered to entertain the disputes subject matter of arbitration had the same been the subject matter of a suit. On inquiry as to what was the agreement between the parties with respect to the jurisdiction, it was informed that the agreement of territorial jurisdiction was with respect to the courts at Guwahati though application under Section 34 was filed at Golaghat. It was further argued that the decree holder is a Korean company and once recovers the money the judgment debtor would have no way of restitution. Per contra, the judgment debtor is a Government of India Company and the decree holder under the award is already entitled to interest at 15% per annum and decree ought not to be executed during the pendency of the curative petition before the

Apex Court. It was further argued that the money if received by the decree holder would not earn any interest in Korea.

9. The judgment of the Apex Court in **Merala Ramanna** (supra) relied upon by this court in entertaining the execution was argued to be distinguishable. It was argued that in that case the subject matter of the suit had been transferred to the court which entertained the execution and in the present case no property subject matter of dispute had been transferred to this court; it was further pointed out that the Apex Court in that case was also guided by the reason of no objection to the territorial jurisdiction having been taken at the earliest opportunity.

10. The senior counsel for the judgment debtor also relied upon the judgment of a Single Judge in **Computer Sciences Corporation India Pvt Ltd Vs. Harishchandra Lodwal** AIR 2006 Madhya Pradesh 34 holding that an execution had to be filed in the court within whose jurisdiction the award had been passed and unless that court transfers the decree to another court, it cannot be executed.

11. The counsel for the decree holder besides again relying upon **Brace Transport** aforesaid relied upon Section 44-A of the CPC in relation to execution of decrees passed by courts in reciprocating territories. Reliance in this regard was placed on **International Woolen Mills Vs Standard Wool (U.K.) Ltd** AIR 2000 Punjab 182 and **Collector of Customs, Calcutta Vs East India Commercial Co. Ltd.** AIR 1963 SC 1124. It was further contended by the counsel

for the decree holder that while the explanation to Section 49 in relation to enforcement of foreign award provides that where the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree **“of that court”**, Section 36 uses the expression “as if it were a decree of the court”. It was thus argued while under Section 49 the decree was deemed to be of the court which had adjudicated the enforcement of foreign award, under Section 36 the decree was not to be treated as the decree of the court which had adjudicated the application under Section 34 of the Arbitration Act with respect to the award.

12. Save for the judgment aforesaid of the Madhya Pradesh High Court I have not found any precedent on the subject.

13. There is no merit in the contention of the judgment debtor that owing to Section 42 of the Act, the execution has to be filed in the court in which the application under Section 34 of the Act had been filed. To be fair, the senior counsel for the judgment debtor, besides urging the said plea, did not even press the same.

14. The Apex Court in **Rodemadan India Ltd Vs International Trade Expo Centre Limited** (2006) 11 SCC 651 held in para 8 of the judgment that the power under Section 11(6) of the Act is the power of a designate referred to under the Section and not that of the (Supreme) Court, albeit that it has not been held to have judicial characteristics by reason of the judgment in **SBP and Company Vs Patel Engineering Ltd** 2005 8 SCC 618. It was further held in para

25 of the judgment that neither the Chief Justice nor his designate under Section 11(6) is a “Court” as contemplated under Section 2(1) (e) of the Act and further that the bar of jurisdiction under Section 42 is only intended to apply to a court as defined in Section 2(1)(e).

15. The Apex Court again in **Pandey and Co. Builders Pvt Ltd Vs State of Bihar** (2007) 1 SCC 467 held that Section 42 only applies to the applications and not to appeals under Section 37 of the Act.

16. Applying the same reasoning, Section 42 would also not apply to execution applications. The execution application is not “arbitral proceedings” within the meaning of Section 42 of the Act and is not a subsequent application arising out of the agreement and the arbitral proceedings. In fact the arbitral proceedings come to an end when the time for making an application to set aside the arbitral award expires and the execution application is an enforcement of the award. Thus the place of filing of the execution application need not be the place of the filing of the application under Section 34 of the Act for the reason of Section 42 of the Act.

17. Once, Section 42 is out of the way, the question arises as to whether “Court” in Section 36 is to take its colour from Section 2(1)(e). If that were to be so then it will have to be seen which was the court which was competent to pass the decree had the subject matter of the arbitration been the subject matter of the suit. On such reasoning, the court would be the court at Guwahati to whose

jurisdiction the parties had agreed in matters other than the arbitration.

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 2(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.

19. Section 38 of the CPC applies only to a decree passed by the court. In the present case no court has passed the decree. What is to be the position in such cases ?, which court is empowered to

execute the award, which is a decree by a legal fiction and which has not been passed by any court?

20. I find that certain orders of the company law board are also enforceable by a court. Section 635 (4) of the Companies Act, 1956 provides that where any order of the company law board is required to be enforced by a court, a certified copy of the order shall be produced to the court required to enforce the order which shall then be enforced in the same manner and to the same extent as applicable to an order made by a court.

21. In **Sindhu Chits and Trading (P.) Ltd. v. Khayirunnissa** AIR 1992 Karnataka 281 it was held that under the aforesaid Section 635 of the Companies Act, the orders of the company court are not decrees in the strict sense of the word but may be enforced in the same manner as a decree. It was held to mean that though an order passed by the company court does not amount to a decree for the purpose of execution, it will be treated as though it is a decree and all the provisions of CPC relating to the execution of the decree would then apply. It was further held that since the procedure to be followed in the matter of execution of the order of the company court is different from that laid down in the CPC, it is not necessary to comply with the procedure laid down in Sections 38 and 39 of the CPC and get the order first transferred by the court which made it, to the court which is to enforce it and then make an application to execute it. It was held that a mere production of a certified copy of the order is sufficient without getting the order transferred by the

court which is required to enforce the order by taking necessary steps in the same manner as if it had been made by itself.

22. The same High Court also in **Rose Chit funds (P.) Ltd. Vs G. Venkatachallam** 70 (1991) Company Cases 280 took the same view and also observed that the judgment debtor in that case was residing within the jurisdiction of the court where the order of the company court was sought to be executed.

23. This court in **Anand Finance (P) Ltd Vs Amrit Dasarat Kakad** (1997) 90 Company Cases 350 Delhi followed **Rose Chit Funds** (Supra) and held the mere production of a certified copy of the order before the court where it was sought to be enforced, to be sufficient and no certificate/order of transfer of the decree being required.

24. Thus it will be seen that where under other enactments, orders are made executable as a decree of the court, insistence has not been on following Section 38 of CPC. However, the judgments (supra) in relation to Section 635 of the Companies Act cannot be blindly followed, inasmuch as Section 635 itself provides a procedure and which is missing in Section 36 of the Arbitration Act.

25. In this regard the addition of sub-section (4) to Section 39 vide CPC Amendment Act 2002 is relevant. It provides that nothing in Section 39 shall be deemed to authorize the court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The legislative intent appears to be that the decree should be executed by the court within

whose territorial jurisdiction the person or the property of the judgment debtor is situated. That is logical also. The purpose of execution is realization of money from the property or the property of the judgment debtor. Thus while territorial jurisdiction for suits is determined by place of occurrence of cause of action, residence of defendant, locus of property etc, the territorial jurisdiction for execution is determined only by locus of judgment debtor or the property. The agreement between the parties restricting jurisdiction of one, amongst many courts also does not extend to execution and is applicable to the court which will adjudicate the lis. I do not see any reason, why where an award has been made executable as a decree, the execution cannot lie at a place where the property against which the decree is sought to be enforced is situated. That court in my view would have inherent jurisdiction to execute the decree and in the absence of applicability of mandate of Section 38 of CPC, pedantic insistence on first applying for execution to one court, merely to obtain transfer would be also contrary to intent of expedition in the 1996 Act.

26. The senior counsel for the judgment debtor also does not dispute that the award would be executable by this court by attachment of the properties/monies of the judgment debtor at Delhi. However, he insists upon the same being done only after obtaining a transfer of the decree from the courts at Guwahati /Golaghat to this court. But what will that court transfer. There is no decree of that court which it can transfer. The court after disposing of application/petition under Section 34 is not required to and does not pass any decree in terms of the award, as under the 1940 Act. Moreover, the question of such transfer would arise only if it were to be held that the power to execute and transfer is of that court only.

Such power as aforesaid is only in relation to decrees passed by that court and no in relation to the arbitral awards which are deemed to be decree for the purpose of enforcement/execution. Without the fetter of Section 38 the courts of the place where the property/money against which the decree is sought to be enforced is situated would have inherent jurisdiction to entertain the execution.

27. A money award, as in the present case, can be enforced through courts of the place wheresoever the money or any property of the party liable to pay is situated.

28. For the reasons aforesaid I find myself unable to concur with the view taken by the Madhya Pradesh High Court. In that case, there does not appear to have been any application within the meaning of Section 42 of the Act. The court proceeded on the premise that the court of the place where award is passed is the court within the meaning of Section 2(1)(e). That premise in my view is not correct.

29. The objection of the judgment debtor to the territorial jurisdiction of this court to entertain the execution is thus rejected and the objection to that extent is dismissed.

**RAJIV SAHAI ENDLAW
(JUDGE)**

March 13, 2008
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