

HIGH COURT OF CHHATTISGARH, BILASPUR

CR No. 179 of 2012

1. IndusInd Bank Limited registered under Indian Companies Act, having its office at IIIrd Floor, 340-345, Ravi Bhawan, Jaistambh Chowk, Raipur, District Raipur, through Power of Attorney Holder Shri Pushpendra Choudhary, aged about 33 years, S/o Shri R.L. Choudhary, Area Officer, ARD (Legal), IndusInd Bank Bank Limited, having office at IIIrd Floor, 340-345, Ravi Bhawan, Jaistambh Chowk, Raipur, Post Office Head Post Office, P.S. City Kotwali, District Raipur (C.G.) (though in the impugned order it is mentioned as M/s Ashok Leyland Finance Ltd. Rep. By Shri V.Govindarajan Having its office at Sudarsan building 86, Chamiers Road, Alwarpet, Madras 600018, which is now merged into IndusInd Bank Limited transferring all assets and liability thus present petition is filed by IndusInd Bank Limited)

---- Petitioner

Versus

- 1-a Varsha Chitaliya, wife of Late Manish Kumar Chitaliya;
 - 1-b Monu Chitaliya, son of Late Manish Kumar Chitaliya;
 - 1-c Shivani Chitaliys, daughter of Late Manish Kumar Chitaliya;
- All are residents of A/13-14, IVth Floor, Baldev Towers, Moti Talabpara, behind Hotel Akanksha, Jagdalpur, District Bastar (Chhattisgarh)
2. Mr. Madhukant Chitaliya, aged about 60 years, C/o Rasiklal Chitaliya, Opp. School Road, Post Office Head Post Office, Jagdalpur, P.S. City Kotwali, Jagdalpur, Distt. Bastar C.G.

---- Respondents

For Petitioner – Shri Ashish Surana, Advocate.

For Respondents – None, though they are served.

Order on Board

29/07/2015

1. Heard on I.A.No.8/15 for urgent hearing. The same is disposed of.
2. This is an admitted civil revision, admitted for hearing on 23-09-2014.
3. Heard finally.
4. As per brief facts regarding the matter that before District Judge, Bastar at Jagdalpur award dated 30 September, 2000 along with application for

execution of decree filed for execution within limitation and submission that property of the decree situated within the jurisdiction of the Court. Further prayed in this behalf that though award passed at Chennai, there was no necessity to file the execution application at Chennai and the application for execution of decree without obtaining any order of its transfer is maintainable as the award passed in arbitration proceeding is executed as if it were decree of the court.

5. After hearing the decree holder the Court below held that as the award not primarily filed before original jurisdiction, Court at Chennai and thereafter the award is not transferred to court below, hence, as there is no transfer of the execution of decree, execution proceeding is not maintainable before the Court. Court placed reliance on **Computer Science Corporation India Pvt. Ltd Vs. Harishchandra Lodwal**¹ and held that principles reiterated is having binding effect, hence, other cited case law mentioned in the impugned order are of no help thereby as the execution proceeding was not maintainable, the Court below dismissed the proceeding as unregistered proceeding.

6. Against the impugned order, the petitioner filed the instant civil revision under Section 115 of the Code of Civil Procedure, 1908 (in brevity 'the Code') and submitted that as per Section 36 of Arbitration and Conciliation Act 1996,

“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 (5 of 1908) in the same manner as if it were a decree of the Court.”

As per provisions, the award passed under the Arbitration and Conciliation Act 1996 (in brevity 'the Act') is acceptable as if it were a decree of the court as a legal fiction used for appropriate authority and proceeding. It is further held that as per definition clause Section 2(1)(c)(d) and (e),

2. Definitions. -

1 AIR 2006 Madhya Pradesh 34

- (1) In this Part, unless the context otherwise requires, -
- (a) xxxxx xxxxxx
 - (b) xxxxx xxxxxx
 - (c) "Arbitral award" includes an interim award;
 - (d) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
 - (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;
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From the perusal of the aforesaid provisions as the sole arbitrator as in the present case passed an award and same is having the status of a decree of a Court as the award not passed by any Court having original jurisdiction as applicable for Order 21 Rule 6 of the Code onwards, the said provision is having no scope for Court to refuse to enforce the award and to require that there should be transfer of decree as required. Further prayed that as provided in Sections 37, 38 and 39 of the Code, it is regarding Definition of Court which passed a decree, Court by which decree may be executed and Transfer of decree. There was no any requirement or necessity to get the award transferred as transfer decree for execution. The Court below erred in holding that as the award is not transferred from competent court regarding execution of the decree, hence, the execution proceeding is not maintainable. On a detailed demonstration regarding the legal position, it is prayed that order dated 05-10-2012 be set aside and executing Court be directed to proceed with the execution of the award dated 30-09-2000 in accordance with law without insisting upon transmission of award from any other court.

7. Heard counsel for the petitioner present during hearing.

8. Learned counsel for the petitioner duly supported the revision on the grounds taken in the petition and submitted that on the basis of the grounds taken in the petition, the instant civil revision may be allowed and the relief as claimed may be given.

9. Learned counsel for the petitioner submitted that the case law cited, **Computer Science Corporation India Pvt. Ltd Vs. Harishchandra Lodwal** (supra) in the impugned order is distinguishable and does not apply to the instant case. In support, he placed reliance on an unreported order dated 30-04-2015 passed by the High Court of M.P. in **W.P.No.12371/2014(S) (Magma Fincorp Limited v. Rajbhan Singh)**. The learned counsel referred paras 4, 5 and 6 of **W.P.No.12371/2014(S)** which are as under:-

“4. I have considered the submissions made by learned senior counsel for the petitioner. Section 38 of the Code of Civil Procedure provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 37 of the Code of Civil Procedure defines the "Court which passed a decree" to include the Court of first instance where the decree has been passed in exercise of appellate jurisdiction or the Court which would have jurisdiction to try the suit if the Court of first instance has ceased to exist or to have jurisdiction to execute it. Section 39(1) enables the Court which passed the decree to send it for execution to another Court of competent jurisdiction.

5. However, it is noteworthy that the award passed by the arbitral tribunal under the provisions of the Act is enforceable under section 36 of the Act in the same manner as if it were a decree of Court. In other words, the award passed by the arbitral tribunal is equated to a decree of a Court for limited purpose of execution only by creating a legal fiction. The arbitral tribunal is not a Court. It is also, pertinent to mention here that under the Act, an award can be executed directly without seal of approval by the Civil Court. Section 19(1) of the Act provides that arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. An application for execution cannot be filed before the arbitral tribunal by treating the arbitral tribunal, a Court which passed the decree. There is no deeming fiction contained in any provision of the Act in so far as it pertains to proceeding under Part I of the Act that the Court within whose jurisdiction the arbitration award is passed should be deemed to a Court which passed the decree. However, such a provision has been made by the legislature for enforcement of foreign awards contained in section 49 which provides that award shall be deemed to be decree of that Court. Therefore, the procedure for filing a petition for execution before the Court within whose jurisdiction arbitral award has been passed as if it was a Court which passed the decree cannot, but, be said to be misconceived. The Delhi High Court in the case of **Daelim Industrial Co. Ltd.** (supra) has held that section 42 of the Act does not apply to the petition for execution as the same is not an arbitral proceeding within the meaning of section 42 of the Act. It has further been held that expression "Court" in section 36 is not meant to be the Court within the meaning of section 2(1)(e) of the Act. I concur with the view taken by the Delhi High Court on this issue for the reasons recorded in paragraph 18 of the aforesaid decision.

6. There appears to be no plausible reason to take a view that in

respect of **an award**, the execution proceeding cannot be initiated where the person or the property of the person is situate against whom the decree is sought to be executed. Such a Court, in my considered opinion, would have inherent jurisdiction to execute the decree in the absence of applicability of mandate contained in section 38 of the Code of Civil Procedure and, therefore, the pedantic insistence on first applying for execution to one Court, merely to obtain transfer, would be also contrary to the intent of the 1996 Act.
.....”

Learned counsel further placed reliance in an unreported order passed in **E.A.No. 105/2009 in Ex.No.242/2008**, date of decision : 13-03-2009 passed by the High Court of Delhi in **Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.** and submitted that in the facts of the present case transfer of the decree for execution is not required. He placed reliance on paras 18, 25 and 26 of this order which are given 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 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.

xxxx xxxxx xxxxx
xxxx xxxxx xxxxx

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 not 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.”

The learned counsel for the petitioner further submitted that as the case law cited by the Court below is distinguished and not applicable to the facts of the present case, the appreciation relying thereupon of the Court below is erroneous and requires interference, the same may be set aside and the revision may be allowed and the court below may be directed to proceed with the execution of the award dated 30-09-2000 in accordance with law.

10. The facts of the case as mentioned is not disputed as there is no rebuttal.
11. The respondent not contested the instant revision petition though served.
12. The core issue before this Court is whether the decree holder is required to file an application regarding transfer of decree/award before the Court of

original jurisdiction at Chennai or the executing Court i.e. the Court below is required to proceed with the execution of the award impugned without any such transfer as required under Order 39 and Order 21 Rule 6 of the Code and otherwise relevant provisions.

13. So far as the case law cited by the Court below, **Computer Science Corporation India Pvt. Ltd Vs. Harishchandra Lodwal** (supra), is concerned, in the matter of **Magma Fincorp Limited v. Rajbhan Singh** (supra), the High Court of M.P. appreciated and held it distinguishable as it does not apply to the fact situation of the case; and by wide appreciation as in para 4, 5 and 6 held that the transfer of the award impugned by the Court of original jurisdiction as required under Section 39 and Order 21 Rule 6 and onward of the Code, is not required thereby the case law discussed by the trial Court is distinguishable and not applied in the ratio as held. Further, as held in the **Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.** (supra) as discussed in para 18, 25 and 26, also go to show that the award being prayed before the Court of original jurisdiction regarding transfer it as a decree is not proper.

14. As discussed in both the case laws where the reliance is placed and also after reading the Section 36 of the Act whereby the legislature gave the effect to the arbitral award as as it were a decree of the Court; it is discussed that the said is a legal fiction used for giving status on a decree and as award not passed vide any judgment and decree from any Court of original jurisdiction. The sole arbitrator passed the award under the Act, as it is a decree of the Court for a legal fiction used to give the status, though no decree of any court as provided under Section 38, 39 and other relevant provisions of the Code thereby it was not required from the decree holder to get the said award transferred by filing an application before the Court of original jurisdiction at Chennai. The executing Court is required to execute the award as if were a decree of the Court. Dismissing the prayer for execution by the Court below is

not based on sound principles of law thereby illegal and improper and it requires interference.

15. On due consideration, the petition filed on behalf of the petitioner is hereby allowed. The impugned order dated 05-10-2012 is hereby set aside. The executing Court is directed to proceed with the execution of the award dated 30-09-2000 in accordance with law without insisting upon transmission of award from any other Court.

16. The civil revision allowed.

17. No order as to cost.

Sd/-

(Chandra Bhushan Bajpai)
JUDGE