

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.1438 of 2015

ORDER :

This Revision is filed under Article 227 of the Constitution of India, challenging the order dt.06.04.2015 on the file of II Additional Chief Judge, City Civil Court, Hyderabad in E.P.No.61 of 2011 in Award No.HMSEFC/2010/08 (Case No.7).

2. Heard for Sri B. Harinath Rao, counsel for petitioner; and Sri M.V.S. Suresh Kumar, Senior Counsel appearing for M.V. Pratap Kumar, counsel for respondent.

3. The admitted facts are that an Award dt.21.06.2010 had been passed by an Arbitrator in favour of the respondent and against the petitioner. E.P.No.61 of 2011 had been filed against the petitioner by the respondent seeking recovery of a sum of Rs.1,55,00,272/- by way of attachment of movable properties invoking Order 21 Rule 43, Order 21 Rules 64 and 66 C.P.C., and a direction was also sought to attach the bank accounts of petitioner, and to direct the banks to debit the said amount and deposit the amount in the account of respondent.

4. A petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') came to be filed in the Court of the Additional District Judge, Chandigarh challenging the said award. That application was

numbered as Arbitration Case No.580 of 19.10.2010, and it was dismissed on 27.08.2014 with costs.

5. Thereafter, the respondent sought to pursue the EP.No.61 of 2011 filed against petitioner to execute the award. Objections were raised by petitioner to the execution of the said award and it was *inter alia* contended that E.P.No.61 of 2011 could not have been entertained by the II Additional Chief Judge, City Civil Court, Hyderabad, on the ground that enforcement of an award is barred under Section 36 of the Act, since application under Section 34 to set aside the award had been filed. It was the contention of petitioner that even the filing of the E.P. is barred as per the language in Section 36 of the Act.

6. Other objections were also raised including an objection that the E.P. filed in the Court at Chandigarh came to be transferred to the City Civil Court, at Hyderabad without issuing notice to petitioner, and without giving an opportunity to petitioner to oppose the transfer of E.P. to the City Civil Court, at Hyderabad.

7. However, by order dt.06.04.2015, the II Additional Chief Judge, City Civil Court, at Hyderabad observed that there is no stay of execution of the award, and therefore, he directed issuance of warrant under Order 21 Rule 43 C.P.C.

8. Challenging the same, the present Revision is filed.

9. The counsel for petitioner contended that the objection raised by petitioners, as mentioned above, had not been considered by the Court below, and therefore the impugned order has to be set aside. He also placed reliance on the judgments of the Supreme Court in **Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd.**^[1], and **Fiza Developers and Inter-Trade P. Ltd. V. AMCI (I) Pvt. Ltd. and another**^[2]. He also raised a contention that there is non-compliance with the provisions of Order 21 Rule 23 (2) C.P.C.

10. The counsel for respondent, on the other hand, refuted the said contentions. He pointed out that when Section 36 speaks of enforcement of arbitral award the word 'enforcement' should be understood as in common parlance. He contended that the filing of execution petition cannot be taken as "enforcement" and only if the execution petition is allowed, "enforcement" of an award starts, and therefore, mere filing of an execution petition is not prohibited by Section 36. He also contended that petitioner had not questioned the transfer of execution petition from the Court at Chandigarh to the City Civil Court, at Hyderabad before any superior Court, and having failed to do so, it is not open to the petitioner to

question the same before the II Additional Chief Judge, City Civil Court, at Hyderabad, which was considering the execution petition, or before this Court. He pointed out that since the execution petition was filed within two years of passage of the award in the Court at Chandigarh and had been transferred to the City Civil Court, Hyderabad under Order 21 Rule 22 (1) C.P.C., there was no necessity for the executing court to issue a notice to petitioner; that, in any event, petitioner did have notice of the proceedings in E.P. and has also contested it; and it cannot be allowed to stall the execution of decree, raising these frivolous objections.

11. I have noted the submissions of both sides.

12. The admitted facts are that the award of the Haryana Micro and Small Enterprises Facilitation Council i n Award No.HMSEFC/2010/08 (Case No.7) was pronounced at Chandigarh on 21.06.2010 in a dispute between petitioner and respondent. After the award was passed, within two years, an Execution Petition was filed in the Court at Chandigarh. In the mean time, the petitioner had questioned the award in Award No.HMSEFC/2010/08 (Case No.7) before the Additional District Judge, Chandigarh under Section 34 of the Act, and the said challenge failed on 27.08.2014. It is the contention of the counsel for petitioner that there was a further appeal preferred in the High Court at Chandigarh

against the order dt.27.08.2014 dismissing the Section 34 application. He fairly admits that there was no stay granted in the said appeal of execution of the Award.

13. Section 36 of the Act states :

“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.”

14. In Thyssen Stahlunion GmbH (1 supra), the Supreme Court held that Section 36 of the Act is a deeming provision which provides for enforcement of an award as if it is a decree of a Civil court under the Civil Procedure Code. It observed that a stage for enforcement comes after application for setting aside of the arbitral award under Section 34 had been dealt with. It quoted the judgment in **Oil and Natural Gas Commission v. Western Company of North America** ^[3], (a case under the Arbitration and Conciliation Act, 1940) and held that till an award is transformed into a judgment and decree under Section 17 of the Act, it is altogether lifeless from the point of view of its enforceability; and that life is infused into the award in the sense of it becoming enforceable only after it is made rule of the court upon the judgment and decree and in terms of the award being passed.

15. Similar view was echoed in Fiza Developers (2

supra), wherein it was observed that until the dismissal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award, and that the very filing and pendency of an application under Section 34, in effect, operates as a stay of enforcement of the award.

16. In my considered opinion, neither of these two decisions nor the language in Section 36 prohibits a successful party in arbitration from filing an execution petition in the competent court for executing the award. The language of Section 36 only bars “enforcement” of the award till the time for making an application to set aside the arbitral award under Section 34 had expired, or where such application had been made, it had been refused. The proper understanding of Section 36 as well as the above two decisions of the Supreme Court only suggests that the executing court cannot decide the execution petition and direct execution of the award, unless the time for making an application to set aside the award under Section 34 had expired, or where such application had been made, it had been refused. The language in Section 36 or in the above two decisions of the Supreme Court referred to above does not warrant an interpretation that the very filing of an execution petition is prohibited since the time for making application to set aside the arbitral award under Section 34 had not expired or when such application had been made it had not yet

been refused. Therefore, the contention of the counsel for petitioner that the very execution petition filed by petitioner could not have been maintained till the challenge to the award had failed, is without any substance.

17. Coming to the further contention of the counsel for petitioner that no notice was given to petitioner when the execution petition filed in the Court at Chandigarh and it came to be transferred to the City Civil Court, at Hyderabad is concerned, the petitioner never challenged the said transfer in any Forum, and has acquiesced in it. Having allowed the transfer to go un-challenged, it is not open to the petitioner to raise the said contention either before the transferee court, i.e., City Civil Court, Hyderabad in the E.P. proceedings or before this Court hearing this Revision against an order of the trial court passed in the execution proceedings.

18. Coming to the last contention canvassed by the counsel for petitioner about the failure of compliance with Order 21 Rule 23 (2) C.P.C., I am of the opinion that the said provision would apply only when the petitioner is entitled to a notice under Rule 22 of Order 21 C.P.C. The petitioner would have been entitled to a notice under Order 21 Rule 22 C.P.C. if application for execution is made more than two years after the date of the decree/award. Since admittedly, the execution application had been filed within a period of two years from the date of

the award, Order 21 Rule 23 (2) is not attracted.

19. The counsel for petitioner also contended that the State of Andhra Pradesh had since been bifurcated into the State of Telangana and the State of Andhra Pradesh, and there is no allocation of assets and liabilities between the newly formed two States, and in this scenario it is not permissible to execute the decree against the petitioner. The fact that such distribution of assets had not occurred between the newly created State of Telangana and the State of Andhra Pradesh, cannot be an excuse for the petitioner to stall the execution of the award obtained by respondent against it. It will have to first satisfy the said award and make any recovery, if it is held entitled to seek such a recovery from the State of Telangana, in a separate proceeding.

20. I, therefore, do not find any merit in the Revision, and it is accordingly dismissed. No order as to costs.

21. As a sequel, miscellaneous petitions pending, if any, in this Revision shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 04.09.2015

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[\[1\]](#) (1999) 9 SCC 334

[\[2\]](#) (2009) 17 SCC 796

[\[3\]](#) (1987) 1 SCR 1024