

NAFR

HIGH COURT OF CHHATTISGARH, BILASPURWP (227) No.622 of 2016

Cholamandlam Investment and Finance Co. Ltd., Through
Manager, Branch Office- 2nd Floor, Chauhan Estate, P.S.
Supela, G.E.Road, Supela, Bhilai Revenue and Civil District
Durg (CG)

---- Petitioner

Versus

1. Manita Bai Nishad W/o Shri Yashwant Kumar Nishad, aged about 27 years, R/o H.No.96, Dhobipara, Village Ghatiyakala, Tah. Berla, District Bemetara (CG)
2. Shri Yashwant Kumar Nishad S/o. Bhulau Ram, aged about 27 years, R/o. H. No. 96, Dhobipara, Village Ghatiyakala, Tah. Berla, District Bemetara (CG)

---- Respondents

For Petitioner : Mr. Mukesh Sharma, Advocate

Hon'ble Shri Justice Sanjay K. AgrawalOrder On Board01/12/2016

1. The *HALSBURY'S LAWS OF ENGLAND*¹ states about finality attached to award as under:-

“The effect of the award is such as the agreement of reference expressly or by implication prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is to be final and binding on the parties and any persons claiming under them respectively.

¹ 4th Ed., Vol.2, para 611

“As between the parties to the arbitration agreement, the award gives rise to an estoppel inter parties with regard to the matters decided therein analogous to that created by the judgment in an action in *personam*; thus, if the award was in respect of a breach of a contract, it may bar further proceedings even though fresh damage has flowed from the breach. Once an award has determined the construction of contract, the parties are bound by that construction even though a new source of difference raising the question occurs. Since it is the duty of a party to bring forward his whole case where the reference is of all matters in difference, he will, generally speaking, lose his right of action in respect of any matter of difference not brought to the arbitrator's attention to the same extent as if it had been included in the matters actually determined.

“The publication of the award thus extinguished any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.

“An award which deals with and decides a claim under a contract is a bar to an action on the contract in respect of that claim, but if the award does not deal with the claim but merely deals negatively with a question of the arbitrator's jurisdiction, then the award is not a bar to the action.”

2. The Supreme Court in the matter of Union of India vs. A.L. Rallia Ram² clearly held that the civil court cannot exercise apparent power over the decision of the arbitrator wrong or right irrespective and award of the arbitrator is final and conclusive unless a contra intention is disclosed by the agreement itself and succinctly held as under:-

² AIR 1963 SC 1685

“.....The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilities arbitration and to effectuate the awards cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.....”.

3. The above-stated proposition of law held in **A.L. Rallia Ram** (supra) has been followed in the matter of **Ispat Engineering & Foundry Works, B.S. City, Bokaro vs. Steel Authority of India Ltd., B.S. City Bokaro**³.

4. The above-stated statement of law aptly as well as squarely applies to the following facts of the present case.

5. Invoking supervisory jurisdiction of this Court under Article 227 of the Constitution of India, petitioner-Cholamandlam Investment and Finance Company Limited (non-banking financial institution) has preferred this writ petition challenging the order dated 1.8.2016 passed by the District Judge, Bemetara in unregistered Execution Case by which the petitioner's application filed under Section 36 of the Arbitration and Conciliation Act, 1996

3 (2001) 6 SCC 347

(hereinafter called as AC Act) has been rejected holding that the award passed by the Arbitrator is against the public policy which cannot be executed and thereby closed the proceeding of award.

6. The essential facts requisite to consider the plea raised at the Bar are as under:-

(i) The Sole Arbitrator passed an award on 28.7.2015 in arbitration matter between the petitioner and respondents herein and delivered the award of ₹ 4,68,994/- along with 18% interest till the date of realization along with costs.

(ii) The petitioner herein filed execution application on 22.3.2016 before the Executing Court. The Executing Court considered the question as to whether the execution is maintainable or not and ultimately without noticing to other party by order dated 1.8.2016 rejected the application for execution by setting aside the arbitration award.

(iii) Feeling aggrieved and questioning that order, this writ petition under Article 227 of the Constitution of India has been filed.

7. Mr.Mukesh Sharma, learned counsel appearing for the petitioner, would submit that valid and binding award has been delivered by learned Arbitrator and legality & validity of the award has not been questioned by the respondents judgment-debtor and such an award has become final. The Executing Court cannot go

beyond the award while considering the application under Section 36 of the AC Act and cannot hold that award is in conflict with the public policy of India and as such, there is no challenge to the arbitration award, therefore, learned Executing Court has gone beyond its jurisdiction to declare the award against the public policy and thereby rejected the application for execution and therefore, the order impugned be set aside and the Executing Court be directed to execute the award in accordance with law by granting the writ petition.

8. On the other hand, Mr.S.C.Verma, learned counsel appearing for the respondents, would support the award impugned and submit that ex-parte award has been passed without noticing the respondents, which is ex-facie without jurisdiction and without authority of law and therefore, learned Executing Court is absolutely justified in holding that the impugned award is against the public policy and therefore, the Executing Court is right in rejecting the application under Section 36 of the AC Act and as such, the writ petition deserves to be dismissed.

9. The short question for consideration is whether learned Executing Court is justified in rejecting the application under Section 36 of the AC Act holding the award to be against the public policy without there being any challenge to the arbitration award under Section 34 of the AC Act.

10. Chapter VII of the AC Act provides recourse against arbitral award. Section 34 (1) provides 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). Section 34 (2) of the AC Act provides that an arbitral award may be set aside by the Court. Section 34 (2) (b) provides that the Court can set aside an arbitral award if he finds arbitration award in conflict with public policy of India. Section 35 of the AC Act provides subject to this part an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Section 36 (unamended) of the AC Act provides 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.

11. In the case in hand, there is no dispute on the fact that arbitral award has not been challenged and it has become final by virtue of provisions contained in Section 35 of the AC Act. Section 35 of the Arbitration and Conciliation Act provides as under:-

“35. Finality of arbitral awards.- Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them

respectively.”

Thus, by virtue of Section 35 of the AC Act an award made by the arbitral tribunal is final and binding on the parties and persons claiming under them respectively. The award therefore itself creates new rights between the parties in most cases, superseding their previous right in relation to matters referred.

12 Now, the question is whether the Executing Court can go beyond the award and can hold that award is unexecutable being in conflict with public policy.

13. It is well settled law that the executing court cannot go beyond the decree and has only to execute the decree granted by the competent court either it may be the trial Court or the appellate Court, as the case may be.

14. The Privy Council in the matter of Bank of Bihar v. Sarangdhar Singh and another⁴ has held that under Section 47 of the CPC execution court cannot go behind the decree. Sir Madhavan Nair speaking for the *Privy Council* held as under:-

“16.An execution Court cannot go behind the decree and question its correctness; but when the decree is silent, and gives no indication as to what property should be sold in execution, it is permissible for the Court to look into the judgment in order to find out whether upon any issue properly raised and determined as between the parties interested the property brought to sale has been held to belong to the judgment-debtor.....”

4 AIR 1949 PC 8

15. In Municipal Committee v. Harda Electric Supply Co. Ltd.⁵ the Division Bench of the Madhya Pradesh High Court has held when the award becomes final, it puts an end to all the controversies between the parties and points which were taken either an attack or in defense cannot be agitated.

16. The Supreme Court in the matter of TCI Finance Ltd. Vs. Calcutta Medical Centre Ltd. And another⁶ had held that the executing court cannot go beyond the decree. It is the settled position in law which flows from Section 38 of the CPC; except when the decree is a nullity or is without jurisdiction.

17. Very recently, the Supreme Court in the matter of Shivshankar Gurgar Vs. Dilip⁷ following its earlier judgment in the matter of Deepa Bhargava Vs. Mahesh Bhargava⁸, has held that the executing court neither can go beyond the decree nor it has jurisdiction to modify the decree, it has to execute the decree as it is. Relevant paragraph of the report states as under:-

“.....It is a settled principle of law that the executing court cannot go beyond the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. This Court in Deepa Bhargava v. Mahesh Bhargava (supra) held thus:-

“9. There is no doubt or dispute as regards

5 AIR 1964 MP 101

6 (2005) 8 SCC 41

7 (2014) 2 SCC 465

8 (2009) 2 SCC 294

interpretation or application of the said consent terms. It is also not in dispute that the respondent judgment-debtors did not act in terms thereof. It has no jurisdiction to modify a decree. It must execute the decree as it is.....”

18. In the matter of Bhawarlal Bhandari Vs. M/s. Universal Heavy Mechanical Lifting Enterprises⁹, the Supreme Court while dealing with an arbitral award passed under Section 14 of the Arbitration Act, 1940 has held that award/decreed is not shown to be passed without jurisdiction and the respondent judgment-debtor has not filed any objections, award/decreed becomes final. It has also been held that plea by judgment-debtor in execution proceedings to ignore the decree as being nullity is not tenable. The Supreme Court while relying the judgment in the matter of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman¹⁰ has held as under:-

“A Court executing a decree cannot go behind the decree between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties. When a decree which is a nullity, for instance,

⁹ AIR 1999 SC 246

¹⁰ AIR 1970 SC 1475

where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record : where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In *Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarti* (AIR 1933 PC 61) the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction.”

19. The Supreme Court in the matter of **Bhawarlal Bhandari** (supra) has held that this is not a case in which the award decree on the face of it was shown to be without jurisdiction. Even if the decree was passed beyond the period of limitation, it would be an error of law or at the highest a wrong decision which can be corrected in appellate proceeding and not by the executing Court which was bound by such decree.

20. The judgment rendered in the matter of **Bhawarlal Bhandari** (supra) was followed with approval by the Supreme Court recently in the matter of **ONGC Ltd. Vs. M/s. Modern Constructions and Co.**¹¹ and held that the executing court cannot go behind the decree in absence of any challenge to the decree in execution proceeding. It was observed as under:-

“14. There can also be no quarrel with the settled legal proposition that the Executing Court cannot go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution. (Vide : Bhawarlal Bhandari v. Universal Heavy Mechanical Lifting Enterprises, AIR 1999 SC 246 : (1998 AIR SCW 3761); Dhurandhar Prasad Singh v. Jai Prakash University and Ors., AIR 2001 SC 2552: (2001 AIR SCW 2674); Rajasthan Financial Corpn. v. Man Industrial Corpn. Ltd., AIR 2003 SC 4273 : (2003 AIR SCW 4920); Balvant N. Viswamitra and

¹¹ AIR 2014 SC 83

Ors. v. Yadav Sadashiv Mule (Dead) Thru. Lrs. And Ors., AIR 2004 SC 4377 : (2004) AIR SCW 5051); and Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307 : (2011 AIR SCW 5985).”

21. In the matter of Shivshankar Gurgar Vs. Dilip¹² the Supreme Court has held that the Executing Court has no jurisdiction to modify a decree. It must execute the decree as it is. It was observed as under:-

“13.2 In our opinion, the order dated 23.11.2005 virtually amounts to the modification of the decree and is without jurisdiction on the part of the executing court, therefore, a nullity. It is a settled principle of law that the executing court cannot go beyond the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. This Court in *Deepa Bhargava v. Mahesh Bhargava*¹³ held thus:-

“9. There is no doubt or dispute as regards interpretation or application of the said consent terms. It is also not in dispute that the respondent judgment-debtors did not act in terms thereof. An executing court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is....”

14. It is well settled that such a void order can create neither legal rights nor obligations.

¹² (2014) 2 SCC 465

¹³ (2009) 2 SCC 294

Therefore, the appellant cannot be denied his right to recover possession of the property in dispute on the ground that he did not choose to challenge such a void order.”

22. Thus, in the aforesaid judgments legal view has been crystallized by the Supreme Court that the Executing Court cannot go beyond the decree in absence of challenge to the decree in appropriate proceeding and such a question that decree is a nullity cannot be raised and decree is binding between the parties.

23. In the light of law laid down & noticed hereinabove, if the facts of the present case are examined, it is quite vivid that the Executing Court in the instant case has travelled beyond the award as the award passed has not been challenged by the respondents by filing an application under Section 34 of the AC Act and award passed by the arbitrator has become final by virtue of provision contained in Section 35 of the AC Act. In absence of challenge, the only option available to the Executing Court was to execute the award as it is in accordance with law. The Executing Court has exceeded its jurisdiction by setting aside the award and further committed illegality in rejecting the application under Section 151 of the CPC.

24. Accordingly, the order impugned is set aside. Execution application filed by the petitioner is restored to the file of the said

Court for execution of the award in accordance with law. The parties are directed to appear before the Executing Court on 5.1.2017. Record be sent back forthwith.

25. The writ petition is allowed to the extent indicated hereinabove. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-