

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 15TH DAY OF NOVEMBER, 2016

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

A.No.1253 of 2014

in

E.P.No.126 of 2012

M/s.Best Cast Constructions (Private)Ltd.,
No.9, 6th Street, T.N.Nagar, Palanipet,
Arakkonam - 631 002, Tamil Nadu

..Decree Holder

Vs

The Union of India,
Represented by The Chief Engineer/
Construction/West MS,
Southern Railway,
Periyar EVR High Road,
Egmore, Chennai- 600 008

..Respondent

A.No.1253 of 2014:

M/s.Best Cast Constructions (P) Ltd.
No.9, 6th St. T.N.Nagar, Palanipet,
Arakkonam-631002, T.N.

...Applicant

Vs.

The Union of India,
Rep. by Chief Engineer/
Construction/West MS,
Southern Railway,
Periyar EVR High Road,
Egmore, Chennai- 600 008

...Respondent

Application praying that this Hon'ble Court be
pleased to set aside the order passed in the E.P.No.126 of

2012 by the Hon'ble Master on 04.12.2013.

This application coming on this day before this Court for hearing the court made the following order:

Challenging the order dated 04.12.2013 passed in EP.No.126/2012 by the learned Master, rejecting the application filed by the applicant seeking to execute the award, the present application has been filed.

2.On 15.12.2004, an award was passed through arbitration proceedings in favour of the applicant being a contractor of the respondent for a sum of Rs.71,88,491/-. The applicant, by a letter dated 18.02.2005, agreed to receive a sum of Rs.40,06,092/-. The said request was subsequently modified through an affidavit given on 20.04.2005 in a stamp paper duly attested by a notary, agreeing to receive a sum of Rs.38,64,166/- towards full and final settlement. For better appreciation, the contents of the said affidavit of Undertaking given by the applicant are extracted hereunder:

*"I, N.Venugopal, Son of Narasimhalu Naidu
aged about 56 years do solemnly affirm and
sincerely state as follows:*

1. I am the President and authorised signatory of M/s.Best Cast Constructions Pvt. Ltd., having registered office at No.9, 6th Street, T.N.Nagar, Palanipet, Arakkonam - 631 002 and presently office at W-14, G1, 7th Street, 3rd Main Road, Anna Nagar, Chennai - 600 040.

2. I am duly authorised to swear this Affidavit and grant acknowledgement for receipt of a sum of Rs.38,64,166/- (Rupees Thirty Eight Lakhs Sixty Four Thousand and One Hundred and Sixty Six Only) from Railway Administration in respect of Agreement No.387/CN/97 dated 21.10.97 and the Arbitration Award dated 15.12.2004 and corrected Arbitration Award 21.01.2005 in full and final settlement.

3. I declare that the Company has no further claim whatsoever pertaining to the agreement aforesaid and the Arbitration Awards thereon."

Accordingly, the applicant received the aforesaid amount on 27.12.2005.

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3. Thereafter, in the year 2012, the applicant filed a petition in EP.No.126 of 2012 before the learned Master

seeking payment of the remaining amount, other than the amount received by him. The learned Master was pleased to reject the said execution petition holding that having agreed for settlement through the affidavit given by the applicant, the request made by the applicant cannot be acceded to, in the absence of any force or coercion. Incidentally, it has been held that the decisions relied on by the applicant are not applicable to the case on hand, as the same are prior to the award passed and not thereafter.

4.Learned counsel for the applicant submits that an award is a decree and therefore, as per Order XXI Rule 2 CPC, satisfaction has to be recorded by the Executing Court. Thus, in the absence of the same, any settlement arrived at would not have a legal and binding effect.

5.Per contra, learned counsel for the respondent placing reliance upon the decision of the Apex Court reported in **(2006) 13 SCC 322 (Paramjeet Singh Patheja v. ICDS Limited)**, submits that the Arbitral award is not a 'decree' and therefore, this application is liable to be rejected. He further submits that the respondent has not

challenged the award, in view of the settlement entered into between the parties. Thus, he prayed for dismissal of this application.

6.The facts involved in the case are not in dispute. The applicant has executed an affidavit in the stamp paper attested by a notary. Pursuant to the same, he has also received the amount as stated in the affidavit. Therefore, it is not open to him to turn around and contest contrary to the same. As rightly submitted by the learned counsel for the respondent, the respondent has not chosen to challenge the award in view of the settlement arrived at between the parties and the Execution Petition has been filed after a period of seven years from the date of receipt of the amount by the applicant.

7.Order XXI Rule 2 CPC does not apply to the case on hand. Once an award is passed, the Arbitral Tribunal becomes *functus officio*. Such an award does not have trapping of Civil Court decree as held by the Apex Court referred to supra. In the said decision, it has been held as follows:

"21.The words 'Court', 'adjudication' and 'suit' conclusively show that only a Court can pass a decree and that too only in suit commenced by a plaint and after adjudication of a dispute by a judgment pronounced by the Court. It is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree.

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25.In *Ramshai v. Joylall* (AIR 1928 Cal. 840), the Calcutta High Court held as follows:

"(a) Presidency Towns Insolvency Act, Section 9(e) - Attachment in execution of award is not one in execution of a decree.

Attachment in execution of an award is not attachment in the execution of a decree within the meaning of Section 9(e) for the purpose of creating an act of insolvency: Re. Bankruptcy Notice, (1907) 1 K.B. 478, Ref.

(b) *Arbitration Act*, Section 15 - Award.

An award is a decree for the purpose of enforcing that award only."

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27.The same view was taken on *Section 36* of the 1996 Act in *Siddharth Srivastava v. K.K. Modi Investment and Financial Service*

(P) Ltd. 2002(4) Mah. L.J. 281. It was held thus:

"Where the award in favour of the petitioning creditor came to be passed on the basis of the consent terms and not on the basis of an adjudication, the Award which has the force of decree does not fulfil the essential conditions of decree as contemplated by Section 2(2) of the Civil Procedure Code. Even though the Award dated 5.9.1997 is enforceable as if it were a decree still it is not a decree within the meaning of the term as defined in section 2(2) of the Civil Procedure Code and, therefore, obtaining of such as Award does not fulfil the requisite conditions contemplated by clause (i) of section 9(1) of the Presidency Towns Insolvency Act. Consequently, on that basis the respondent cannot be said to have committed act of insolvency, either under clause (i) of sub-section (1) or sub-section (2) of section 9 of the Act. Ramshai v. Joylall, AIR 1928 Cal.840; Ghulam Hussein v. Shahban, AIR 1938 Sind 220; Khusal Chand Sadani v. Balkissen Mohta, AIR 1975 Cal 169 and Diwan Bros. v. Central Bank of India, AIR 1976 SC 1503, Ref.

28.It is settled by decisions of this Court that the words 'as if' in fact show the distinction between two things and such words are used for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created.

29. Section 36 of the Arbitration and Conciliation Act, 1996 which is in pari materia with Section 15 of the 1899 Act, is set out hereinbelow:

"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 in the same manner as if it were a decree of the Court."

In fact, Section 36 goes further than Section 15 of the 1899 Act and makes it clear beyond doubt that enforceability is only to be under CPC. It rules out any argument that enforceability as a decree can be sought under any other law or that initiating insolvency proceeding is a manner of enforcing a decree under CPC. Therefore the contention of the respondents that, an Award rendered under the Arbitration and Conciliation Act, 1996 if not challenged within the requisite period, the same becomes final and binding as provided under Section 35 and the same can be enforced as a decree as it is as binding and conclusive as provided under Section 36 and that there is no distinction between an award and a decree, does not hold water.

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33.The words 'litigant', 'money decree', 'judgment-debtor', 'decretal amount' and 'decree-holder' plainly show that Parliament intended to deal with litigants who do not pay amounts decreed by Civil Courts. There is no reference at all to arbitrations and awards in the Statement of Objects and Reasons and in sub-sections (2) to (5) of [Section 9](#), which were introduced in 1978 by Parliament.

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35.That litigation is therefore very different from arbitration is clear. The former is a legal action in a Court of law where judges are appointed by the State; the latter is the resolution of a dispute between two contracting parties by persons chosen by them to be arbitrators. These persons need not even necessarily be qualified trained judges or lawyers. This distinction is very old and was picturesquely expressed by Edmund Davies, J. in these words:

"Many years ago, a top-hatted gentleman used to parade outside these law Courts carrying a placard which bore a stirring injunction 'Arbitrate - don't Litigate'."

36. Moreover, the position that arbitrators are not Courts is quite obvious and this Court noted the position as under in two decisions:

"16.....But the fact that the arbitrator under Section 10A is not exactly in the same position as a private arbitrator does not mean he is a tribunal under Article 136. Even if some of the trappings of the Court are present in his case, he lacks the basic, essential and fundamental requisite in that behalf because he is not invested with the State's judicial power..he is not a Tribunal because the State has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement between parties.(Engineering Mazdoor Sabha & Anr. Vs. Hind Cycles Ltd., AIR 1963 SC 874.) "

"4. There was no dispute that the arbitrator appointed under Section 19(1)(b) [of the Defence of India Act, 1939] was not a court. (Collector, Varanasi vs. Gauri Shankar Misra & Ors., AIR 1968 SC 384) "

37. Thus the thrust of submissions made by both the learned senior counsel can be summarized as under:

Courts are institutions invested with the judicial power of the State to finally adjudicate upon disputes between litigants and to make formal and binding orders and decrees. Civil Courts pass decrees and orders

for payment of money and the terms 'decree and order' are defined in CPC. Arbitrators are persons chosen by parties to adjudge their disputes. They are not Courts and they do not pass orders or decrees for the payment of money; they make awards."

8. Therefore, considering the facts of the case and also in the light of the judgment of the Apex Court referred to supra, there is no question of application of Order XXI Rule 2 CPC to the case on hand. The learned Master has correctly recorded that no force or coercion is involved.

9. In the result, this application stands dismissed.

sd/.M.M.S.J
15.11.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/20.01.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.