

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2017

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD) No.1894 of 2015
and M.P.No.1 of 2015

Veerapathiran ... Petitioner

Vs

Rajavel ... Respondent

Civil Revision Petition is filed under Section 115 of Civil Procedure Code against the order dated 22.01.2015 made in E.P.No.26 of 2013 in Arbitration Case No.1 of 2010 on the file of the Principal District Judge, Villupuram.

For Petitioner : Mr.V.Subramani

For Respondent : Mr.G.Ilangovan

ORDER

This Civil Revision Petition is filed against the order dated 22.01.2015 made in E.P.No.26 of 2013 in Arbitration Case No.1 of 2010 on the file of the Principal District Judge, Villupuram.

2. The petitioner is the respondent in E.P.No.26 of 2013 on the file of Principal District Judge, Villupuram and Judgment Debtor in Arbitration Case No.1 of 2010 before the Council for National and International Commercial Arbitration (CNICA), Chennai. The respondent is the petitioner in E.P.No.26 of 2013 and decree holder in Arbitration Case No.1 of 2010. The respondent has filed the above said E.P to enforce the arbitration award dated 22.01.2011 made in ACP (CNICA) No.1 of 2010 for realizing the amount by attachment and sale of the properties belonging to the petitioner. The petitioner filed counter affidavit and contended on merits and submitted that the award passed by the arbitrator is barred by limitation. The learned Judge, considering the fact that the petitioner has not taken any steps to set aside the Arbitration Award dated 22.01.2011, rejected the contention of the petitioner and allowed the EP by ordering attachment.

3. Against the said order dated 22.01.2015 made in E.P.No.26 of 2013 in Arbitration Case No.1 of 2010, the present Civil Revision Petition has been filed.

4. The learned counsel for the petitioner contended that EP filed in the District Court, Villupuram is not maintainable as the said court is not the court which passed the decree / award or decree is transmitted to District Court, Villupuram. The arbitration award was passed by the arbitrator at Chennai. Hence, the EP filed by the respondent before District Court, Villupuram is not maintainable as the said court will have no jurisdiction. The learned counsel for the petitioner further contended that as per Section 2 (1) (e) r/w Section 26 of the Arbitration and Conciliation Act, 1996 the District Court, Villupuram has no jurisdiction. In support of his contention, the learned counsel for the petitioner relied on the following judgments -

(1) AIR 2016 CAL 293 [Srei Equipment and Finance Pvt.Ltd. v. Khyoda Apik and Ors.]

37. With the greatest of respect we are unable to agree with the view of the learned Single Bench of the Delhi High Court that an execution application is not an application arising out of the arbitration agreement or the arbitral proceedings. Section 37 of the 1996 Act relates to an appeal not to an application whereas an application has to be made for execution.

44. An execution against immovable property lying outside the jurisdiction of the executing Court is possible in terms of Order 21, Rule 3 of the Code,

which governs a case where the particular immovable property forms one estate or tenure within the local limits of the jurisdiction of two or more Courts and where all those Courts is approached for execution of the decree against that property. In a case, where Order 21, Rule 3 has no application, the position is that, if a decree-holder wants to proceed against a property situate outside the jurisdiction of the Court which passed the decree, he has to get the decree transferred to the appropriate Court for execution, on moving the executing Court in that behalf. On our view, Order 21, Rule 50 applies only to immovable property and not to movable property, cash, etc. which would not necessarily be situate within the territory of any one Court, but could be moved from one place to another.

50. We are in full agreement with the view of Bombay High Court. Where an application under Part I has been made in a Court with respect to an arbitration agreement, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and arbitral proceedings including execution proceedings.

51. As held by the Bombay High Court the expression "all subsequent application arising out of the arbitral proceedings" must be read in a comprehensive manner to include recourse to execution proceedings.

52. In *I.C.D.S. Ltd. v. Mangala Builders Pvt. Ltd.*, reported in AIR 2001 Karnataka 364, a Single Bench of the High Court held, and in our view, rightly, that the Court which could exercise jurisdiction under Section 34 of the 1996 Act would be the only Court which could enforce an award. We approve the view of the learned single Bench.

71. However, where an application had earlier been filed in this Court, the Court cannot refuse to execute the award on the ground that the judgment-debtor and/or the assets were located outside the jurisdiction of this Court.

(2) AIR 2001 KAR 364 [I.C.D.S. Ltd. v. Mangala Builders Pvt. Ltd. And Ors.]

4. This is also implied from the wordings of *Section 36* itself. A right to enforce the award arises only after the period for setting aside the arbitral award under *Section 34* has expired or such an application having been made is rejected. That is to say, the Court executing the decree has to satisfy itself, before entertaining the application for execution that, the period for setting aside the award has expired or such an application having been made has been refused. If that be so, inferentially, the Court that can exercise the power under *Section 34* of the Act can alone entertain the steps to enforce the arbitral award. It means the "Court" as understood in *Section 34* has alone the jurisdiction to entertain the enforcement of the arbitral award.

(3) AIR 2015 SC 260 [State of West Bengal v. Associated Contractors]

4. We have perused the decisions cited by learned counsel for the parties, which are all decisions of two Judges Bench. In our opinion, the law has to be clarified beyond doubt as to which Court will have the jurisdiction to entertain and decide an application for setting aside the Award under *Section 34* of the Act read with *Section 2 (e)* of the Act and other provisions, including *Section 42* of the Act. We, therefore, refer the matter to a larger Bench to decide this question of law.

11. It will be noticed that *Section 42* is almost the same terms as its predecessor *Section* except that the words "in any reference" are substituted with the wider expression "with respect to an arbitration agreement". It will also be noticed that the expression "has been made in a court competent to entertain it", is no longer there in *Section 42*. These two changes are of some significance as will be

pointed out later. Section 42 starts with a non-obstante clause which does away with anything which may be inconsistent with the Section either in Part-I of the Arbitration Act, 1996 or in any other law for the time being in force. The expression "With respect to an arbitration agreement" widens the scope of Section 42 include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to Courts which are before, during or after arbitral proceedings made under Part-I of the Act are all covered by Section 42. But an essential ingredient of the Section is that an application under Part-I must be made in a court.

(4) 2009 (6) BCR 176 [Eskay Engineers v. Bharat Sanchar Nigam Ltd.]

8. For convenience of exposition, it would be appropriate to deal with Chamber Summons No. 771 of 2009, taken out by the judgment debtor in order to question the jurisdiction of this Court. The submission that has been urged on behalf of the judgment debtor is that the award in the present case was made at Khamgaon in the District of Buldana. Section 31(4) of the Act requires the award to state the place where it was made. **section 2(1)(e)** defines the Court as the principal Civil Court of original jurisdiction in a District having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit. The submission is that under section 36, an award is to be enforced under the Code of Civil Procedure, 1908 in the same manner as if it was a decree of the Court. The expression Court can in the present case only mean the principal Civil Court of original jurisdiction to decide the questions forming the subject-matter of arbitration, which would be the District Court at Buldana. On the other hand, it has been submitted on behalf of the decree holder that the judgment debtor had addressed a challenge to the Arbitral

Award under section 34 before this Court. It was urged that it was not the contention of the judgment debtor that this Court did not have jurisdiction to entertain the challenge to the Arbitral Award initiated by the judgment debtor and as a matter of fact the judgment of this Court was carried to its logical conclusion in appeal before the Division Bench and eventually before the Supreme Court. Secondly, it was submitted that the expression Court for the purposes of section 34 cannot be read in a manner which would be different from the meaning of the same expression in section 36 and since a challenge to the Arbitral Award was preferred before this Court, an application for enforcement of the award or the decree could legitimately be entertained before this Court. Thirdly, it was submitted that section 42 provides that once an application under Part-I has been made in a Court, that Court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings.

9. Section 34 provides for recourse to a Court against an arbitral award, by an application for setting aside the award in accordance with the **provisions of sub-section (2) and sub-section (3). sub-section (2) of section 34** specifies the grounds on which an Arbitral Award may be set aside by the Court. Section 36 provides that where the time for making such an application to set aside the Arbitral Award under section 34 has expired or such an application having been made, it is 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. Section 36 creates a legal fiction under which an award is capable of being enforced as if it were a decree of the Court. The enforceability of the award comes into being either when no application challenging the award is preferred under section 34 within the time stipulated or upon an application being refused. What is enforceable under section 36 is the arbitral award. The manner of enforcement is provided in the Code of Civil Procedure, 1908. The legal fiction

*that is created is for treating an Arbitral Award for all intents and purposes as a decree of the Court. **order xxi, rule 10 of the code of civil procedure, 1908** provides that where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, or if the decree has been sent to another Court, then to such other Court for execution.*

5. Per contra, the learned counsel appearing for the respondent submitted that the award passed by the arbitrator is deemed to be a decree passed by a Civil Court and it can be executed where the respondent resides or in a Civil Court. The properties sought to be attached and sold are situated within the territorial jurisdiction of District Court, Villupuram and hence E.P filed before the said court is maintainable. The learned counsel for the respondent, in support of his contention, relied on the following judgments -

(1) 2011 (6) CTC 11 [Kotak Mahindra Bank Ltd. v. Sivakama Sundari]

18. If no application for execution can be filed before the Arbitral Tribunal, by treating the Arbitral Tribunal as the Court which passed the decree, the Arbitral Tribunal cannot also order the transfer of the decree (or award) to any other Court for its execution. Similarly, there is no provision either in the Code or anywhere else, to treat a court, within whose jurisdiction the Arbitral proceedings took place, as the court which passed the decree. It is only when a court within whose jurisdiction the arbitral

award was passed, is taken to be the court which passed the decree within the meaning of [section 37](#) and Order XXI, Rule 10 of the Code that the award holder would be entitled to seek transmission from that court.

19. While the award passed by an arbitral tribunal is deemed to be a decree of a civil court under [section 36](#) of the 1996 Act, there is no deeming fiction anywhere to hold that the court within whose jurisdiction the arbitral award was passed, should be taken to be the court which passed the decree. Therefore, the whole procedure of filing an execution petition before the court within whose jurisdiction the arbitral award was passed, as though it is the court which passed the decree, is pathetically misconceived.

25. In the absence of any provision in the 1996 Act, requiring a Court to pass a decree in terms of the award (except in terms of [Section 34](#)) and in the absence of any provision in the 1996 Act making the Arbitral Tribunal a Court which passed the decree and in the absence of any provision anywhere making the court within whose jurisdiction an award was passed as the court which passed the decree, it is not open for any executing Court (i) either to demand transmission from any other Court; (ii) or to order transmission to any other Court.

(2) AIR 2015 SC 260 [State of West Bengal v. Associated Contractors]

19. An award cannot therefore be construed as a decree, or as an order for the purpose of Sections 38 and 39 of the Code of Civil Procedure. Reference may be made to *Paramjeet Singh Patheja v. ICDS Ltd.* Reported in 2006 (13) SCC 322 : (AIR 2007 SC 168). Moreover, under special statutes, where orders were executable as a decree of a Civil Court, the provisions of Sections 38 and 39 of the Code relating to execution of decrees would not be available. This proposition finds support from *M/s.Sindhu Chits and Trading (P) Ltd. v.*

Smt.Khayirunnissa, reported in AIR 1992 Kar 281 and Anand Finance (P) Ktd. (In Liquidation) v. Amrit Dasarat Kakad, reported in 90 Comp Cas 350 (Del).

6. Heard the learned counsel for the petitioner as well as respondent and perused the materials available on record.

7. The issue to be decided in this Civil Revision Petition is that whether the award passed by an Arbitration Tribunal can be executed in another place from the place where an award was passed, without being transmitted to the court where the award is sought to be executed.

8. As per Section 17 of the Arbitration Act 1940, a person in whose favour an award is passed has to approach the competent Civil Court to get the judgment being passed in terms of the award. Then only, he can execute the decree drawn as per the judgment. In the present Arbitration and Conciliation Act 1996, the said provision has been replaced making the Arbitration Award as a decree of Civil Court without approaching a Civil Court for a decree in whose favour an award is passed. The said person can straightaway execute the Award to realise the amount. As per Section 36 of the Arbitration and Conciliation Act, 1996 the award of

the arbitrator shall be enforced as if it were a decree of the court. In view of this provision, a doubt is raised by the Executing Court as to whether award can be executed in any other place from where the award is passed, without award being transmitted to Executing Court. As per provisions of CPC, a decree can be executed by the court which passes the decree or where the respondent is residing or carrying on business or having immovable property. In case of the award passed by the Arbitration Tribunal, even though the said award is a decree, the Arbitration Tribunal is not a Civil Court. Further, there is no provision in the Arbitration and Conciliation Act 1996, which makes Arbitration Tribunal as the Court which passed the decree.

9. In view of the absence of provisions in the Arbitration and Conciliation Act, 1996 making the Arbitration Tribunal as Civil Court and Court which passes the decree, there is no necessity to transmit the award. In the decisions reported in **2011 (6) CTC 11 and AIR 2015 (SC) 260**, cited *supra*, it had been held that though the Award of Arbitral Tribunal is deemed to be a decree, there is no deeming provision to hold Arbitral Tribunal as a court which passed the decree. In **AIR 2015 (SC) 260**, the Hon'ble Apex Court, in Para 19 held that an Award cannot be construed as a decree for

the reasons stated earlier or as an order for the purpose of Sections 38 and 39 of CPC. These aspects were not considered in the decisions relied on by the learned counsel for the petitioner and hence do not advance the case of the petitioner. The judgments of this court and Hon'ble Apex Court relied on by the learned counsel for the respondent reported in **2011 (6) CTC 11** cited *supra* is squarely applicable to the facts of the present case. In the said case, the X Asst. Judge, City Civil Court Chennai returned the EP on the ground that the award passed in Mumbai was not transmitted to the Executing Court. The said docket order was challenged before this Court and this Court considered the relevant provisions of CPC and Arbitration and Conciliation Act, 1996 and held that Arbitration Tribunal is not a Civil Court and it is not the Court which passed the decree and therefore it is not necessary to transmit the decree from the place where the award was passed to the Court where the award is sought to be executed. In the above circumstances, I do not find any irregularity or illegality in the order impugned in this revision, warranting interference by this Court.

10. In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

18.12.2017

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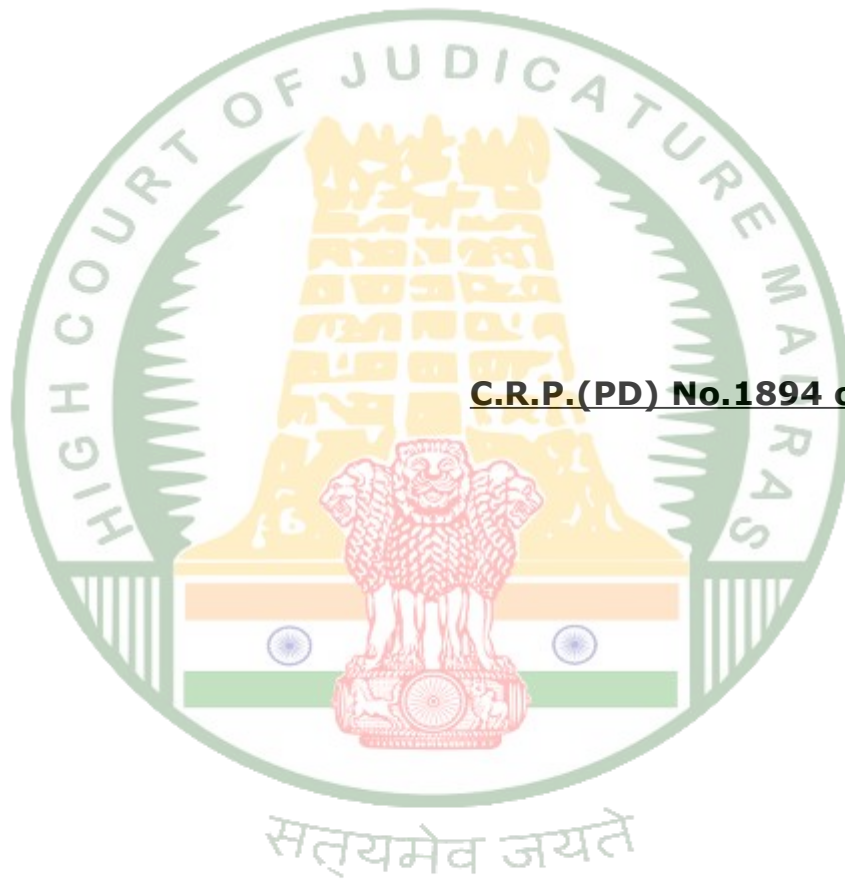
The Principal District Judge,
Villupuram.



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V.M.VELUMANI, J.

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