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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 29th August, 2018

+ EX.P. 440/2014 with R.P.248/2016, Ex.APPL.(OS) 203/2017 & Crl.M.A.7449/2017

M/S MEDICO ABROAD

..... Decree Holder

Through: Mr. Soumik Ghosal with
Mr. Gaurav Singh, Advs.

versus

M/S ISM FOCAL POINT

..... Judgement Debtor

Through: Mr. Suprabh Kumar Roshan, Adv.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. The decree holder filed the Execution Petition 440/2014 against the judgment debtor to seek execution of the arbitration award dated 18th December, 2010 in which the learned Arbitrator awarded a sum of Rs.69,57,720/- along with interest at the rate of 18% per annum to the decree holder.

2. The decree holder stated in the execution petition that the judgment debtor has an office at C-93, Anand Niketan, Dolapur, New Delhi and the decree be executed by attachment/sale of the movable properties of the judgment debtor mentioned in *Annexure - A2*, namely computers, air conditioners, steel almirahs, tables, chairs, coolers or any other articles lying at the residence of the judgment debtor at C-93, Anand Niketan, Dolapur, New Delhi and J-116, Rajaji Gardens, New Delhi-110027. Along with the petition, the decree holder filed an affidavit of V. Narahari (*Annexure-A3*), in which it was stated that the judgment debtor has offices at C-93, Anand

Niketan, Dolapur New Delhi and J-116, Rajaji Gardens, New Delhi-110027.

3. On 14th January, 2015, the notice was issued to the judgment debtor who filed an affidavit dated 14th September, 2015 stating that the judgment debtor is a permanent resident of Kyrgyzstan and has no immovable or movable properties or bank account in India. The judgment debtor further stated that the address given in the execution petition is the old address of Kyrgyzstan Embassy. The judgment debtor further stated that the judgment debtor has filed objections under Section 34 of the Arbitration Act against the *ex parte* award before the City Civil Court, Hyderabad. Relevant portion of the affidavit of the judgment debtor is reproduced hereunder:-

“I, Mr. Phani bhushan Potu, S/o Raghava Rao Potu, aged about 40 yrs, R/o 89/1, Turusbekova Street, Bishkek City, Kyrgyzstan, temporarily came down to Delhi, do hereby solemnly affirm on oath and submit as under:

1. I submit I am the deponent herein and JDR in the above E.P, as such I am well acquainted with the facts of the case. I am filing this affidavit to comply with the orders dated 14.1.2015 passed by this Hon’ble Court, declaring that I have no movable or immovable properties in my name and I have no bank account also in my name in India.

2. I submit that I am working as Vice-Dean for International School of Medicine of International University of Kyrgyzstan and I am a permanent resident of Kyrgyzstan. I submit that I am a resident of No.89/1, Turusbekova Street, Bishkek City, Kyrgyzstan.

3. I submit that the address shown in the E.P was the old address of Kyrgyzstan Embassy and later it shifted to No.78, Poorvi Marg, Vasant Vihar, New Delhi. The DHR served the notice in the above E.P. in new address of Kyrgyzstan embassy.

*4. I submit that the DHR obtained the *ex parte* award by showing wrong address and filed the present E.P also with the same address and he obtained all the *ex parte* orders showing*

the old Kyrgyzstan Embassy address. The above E.P filed to execute an exparte Award, hence I filed an application to set aside the said exparte decree U/S 34 of Arbitration Act on the file of XI ACJ, City Civil Court, Hyderabad and the same was numbered as O.P.No.790/15.

Therefore, I am most respectfully filing this affidavit to comply with the orders dated 14.1.2015 by this Hon'ble Court declaring the properties Nil in my name in India and I have no bank account also."

(Emphasis supplied)

4. The judgment debtor filed a certificate of the Embassy of Kyrgyz Republic certifying that C-93, Anand Niketan, New Delhi-110021 was the Embassy address and from 2011, it was changed to F-78, Poorvi Marg Vasant Vihar, New Delhi-110057. The certificate dated 14th April, 2015 is reproduced hereunder:-

*"EMBASSY OF THE KYRGYZ REPUBLIC
NEW DELHI*

APRIL 14, 2015

TO WHOM IT MAY CONCERN

The Embassy of Kyrgyz Republic in India has to inform that from 2011 the official address C-93 Anand Niketan, New Delhi, 110021 was changed to F-78 Poorvi Marg Vasant Vihar, New Delhi, 110057.

*Nurzat Omurakunova
Consul on the Embassy
Of the Kyrgyz Republic of India."*

5. The judgment debtor also filed a certificate dated 18th August, 2015 which is reproduced hereunder:

"Reg. No.938 Date 18.08.15

To whom it may concern

This is to certify that Mr. Phani Bhushan Potu, citizen of India is currently a Vice-Dean of International School of Medicine of International University of Kyrgyzstan since 12/03/2004 onwards and has been staying at str. Shevchenka 96/25, Bishkek 720001, Kyrgyzstan and he is a permanent resident of this Country.

*Rector of ISM
Professor*

Chyngyshpaev Sh.M.”

6. On 22nd September, 2015, this Court dismissed the execution petition in view of the pendency of the proceedings under Section 34 of the Arbitration and Conciliation Act. This Court also noted that the judgment debtor has no properties within the jurisdiction of this Court. The order dated 22nd September, 2015 is reproduced hereunder:-

“1. Learned counsel for the judgment debtor submits that the execution petition is not maintainable as the judgment debtor has filed objections under Section 34 of the Arbitration and Conciliation Act before the XIth ACJ, City Civil Court, Hyderabad which have been numbered as OP No.790/2015 in which notice has been issued to the decree holder who has also filed his reply to the objections.

2. Learned counsel for the judgment debtor further submits that this Court has no territorial jurisdiction to entertain the execution petition as the judgment debtor has no properties whatsoever in India and an affidavit to that effect has been filed. It is submitted that two properties mentioned by the decree holder in para 9 of the execution petition do not belong to the judgment debtor.

3. In view of the pendency of the proceedings under Section 34 of the Arbitration and Conciliation Act, this execution petition is not maintainable and is therefore dismissed.”

7. The petitioner is seeking review of the order dated 22nd September,

2015 on the ground that the objections have been filed by the respondents beyond the prescribed period of limitation and therefore, the petitioner can seek execution of the award without waiting for the adjudication of the objections. It is further urged that this Court has territorial jurisdiction to entertain the execution petition as the respondent has properties within the jurisdiction of this Court and the addresses of the judgment debtor given in the petition are correct. Reliance is placed on *Daelim Industrial Co. Ltd. V. Numaligarh Refinery Ltd.*, 159 (2009) DLT 579 in which this Court held that the execution proceedings can be initiated where the judgment debtor has properties.

8. During the course of hearing dated 6th April, 2018, learned counsel for the judgment debtor urged that the judgment debtor has no properties or office within the jurisdiction of this Court and the decree holder has given incorrect addresses in the petition whereupon this Court directed the decree holder to visit both the addresses and file an affidavit with respect to their status.

9. On 12th April, 2018, the decree holder filed an affidavit in which he conceded the property bearing No.C-93, Anand Niketan, Dolapur, New Delhi was earlier occupied by the Embassy of Kyrgyzstan which has now been shifted to A-10/11, Vasant Vihar, New Delhi-110057. With respect to property no. J-116, Rajaji Gardens, New Delhi-110027, the decree holder deposed that no such address existed and a new address is given in the review petition i.e. J-161, Rajouri Garden, New Delhi where the family members of the Judgment Debtor resided. According to the judgment debtor, this Rajouri Garden property was owned by his father-in-law and no immediate family members of the judgment debtor stayed there.

10. In the present case, the arbitrator was appointed by the Andhra Pradesh High Court by order dated 12th April, 2010 under Section 11(6) of the Arbitration and Conciliation Act, 1996 and the arbitration proceedings were conducted in Andhra Pradesh and the award was also passed in Andhra Pradesh. The respondent filed objections under Section 34 of the Arbitration and Conciliation Act before the City Civil Court at Hyderabad in which the notice has been issued to the petitioner and the proceedings are still pending.

11. On 12th September, 2017, this Court appointed Mr. Sanjeev Sindhvani, Senior Advocate as amicus curiae to assist this Court. Learned amicus curiae has filed brief note of submissions along with the compilation of the relevant judgments.

12. Learned amicus curiae submitted that the decree holder cannot file execution petition for execution of the award dated 18th December, 2010 till the respondent's objection under Section 34 are adjudicated. Reliance is placed on *Fiza Developers and Inter-Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd.*, (2009) 17 SCC 796. It was further submitted that Section 36 of the Arbitration and Conciliation Act was amended with effect from 23rd October, 2015 but the amendment is prospective and shall only apply to the awards passed after 23rd October, 2015. So far as the award dated 18th December, 2010 is concerned, the un-amended provision shall apply. Reference is made to *Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia*, 2017 (237) DLT 140 in which the Division Bench of this Court held the amendment of Section 36 of the Arbitration and Conciliation Act to be prospective in nature.

13. With respect to the petitioner's contention that the execution petition can be directly filed where the judgment debtor has the properties, learned

amicus curiae submitted that the three Judges Bench of the Supreme Court in *State of West Bengal & Ors. v. Associated Contractors*, 2015 (1) SCC 32 overruled the view taken in *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.* (supra) and held that all applications whether before or during arbitral proceedings or after the award, can be filed either before a High Court having original jurisdiction in the State or Principal Civil Court having original jurisdiction in terms of Section 42 of the Arbitration and Conciliation Act. In *SREI Equipment and Finance Pvt. Ltd. v. Khyoda Apik & Ors.*, 2016 AIR (Cal) 293, the Division Bench of Calcutta High Court, after considering the law laid down by the Supreme Court in *State of West Bengal v. Associated Contractors* (supra), held that the execution petition can be filed only before the Court in terms of Section 42 of the Arbitration and Conciliation Act. It is submitted that in the present case, the execution petition would not be maintainable in Delhi even if the respondent has properties in Delhi.

14. This Court agrees with the submissions made by learned amicus curiae that the execution petition is not maintainable in view of the pendency of the respondent's objections under Section 34 of the Arbitration and Conciliation Act. That apart, this Court does not have jurisdiction to entertain the execution petition in view of the bar of Section 42 of the Arbitration and Conciliation Act. Further, the judgment debtor is neither a resident of Delhi nor has any movable or immovable property within the jurisdiction of this Court and the decree holder has raised false claims to abuse and misuse the process of law.

15. There is no merit in the review petition which is hereby dismissed with cost of Rs.1 lakh to be paid by the decree holder to the judgment

debtor. Needless to say that the petitioner would be at liberty to initiate execution proceedings in accordance with law before the competent Court of jurisdiction after the decision of the objections under Section 34 of the Arbitration and Conciliation Act.

16. This Court appreciates the assistance rendered by the learned amicus curiae and the comprehensive written submissions/compilation of the judgments filed by the learned amicus curiae.

Crl.M.A.7449/2017

17. There is merit in the contentions urged by the judgment debtor in this application as the decree holder has raised false claims before this Court. However, this Court does not consider it expedient in the interest of justice to initiate the proceedings against the decree holder under Section 340 Cr.P.C. The application is, therefore, disposed of.

18. Copy of this judgment be given *dasti* to counsels for the parties under signature of Court Master.

AUGUST 29, 2018
Aruna

J.R.MIDHA, J.