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

Date of Decision: 15.03.2021

+ **CM(M) 222/2021**

KARTIKE ENTERPRISES Petitioner
Through Mr.A.K. Singh, Adv.

versus

DELHI JAL BOARD Respondent
Through Ms.Nandita Rao, ASC

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

CM No.10098/2021 (Exemption)

Allowed, subject to all just exceptions.

CM(M) 222/2021

1. This petition has been filed by the petitioner challenging the order dated 17.02.2021 passed by the learned District Judge (Commercial Court), North West District in Execution Civil No.352/2020, *Kartike Enterprises v. Chief Executive Officer, Delhi Jal Board*, dismissing the application of the petitioner filed under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') on the ground that as objections to the Arbitral Award under Section 34 of the Act have been filed by the respondent

are pending before the learned District Judge (Commercial Court), South East District, the execution petition filed later on cannot be entertained by the Court at North West District.

2. The learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court in ***Sundaram Finance Limited v. Abdul Samad and Anr.***, (2018) 3 SCC 622 and of this Court in ***Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.***, 2009 SCC OnLine Del 579 and on the Order dated 21.01.2021 in EFA(OS)(Comm) 01/2021 titled ***Union of India v. Atlanta Ltd. & Anr.***, to submit that the view taken by the learned District Judge in the Impugned Order cannot be sustained. He further places reliance on the judgment of the Calcutta High Court in ***BLA Projects Pvt. Ltd. v. Asansol Durgapur Development Authority***, 2019 SCC OnLine Cal 1868 in support of his contention that Section 42 of the Act will have no application to the Execution Petition filed under Section 36 of the Act.

3. On the other hand, the learned counsel for the respondent has placed reliance on the judgment of the Supreme Court in ***State of West Bengal and Ors. v. Associated Contractors***, (2015) 1 SCC 32 and submits that the Supreme Court has held that Section 42 of the Act would be applicable to any application filed even post the termination of the arbitral proceedings. She submits that an application under Section 36 of the Act being one under Part I of the Act, Section 42 would clearly be applicable to such proceedings. She further submits that the judgment of the Supreme Court in ***Sundaram Finance***

Limited (supra) has not taken note of the earlier binding precedent in **Associated Contractors** (supra) inasmuch as **Sundaram Finance Limited** (supra) holds that Section 42 would not have any application post termination of the arbitral proceedings, which is contrary to what has been held in **Associated Contractor** (supra).

4. She further sought to distinguish the judgments of this Court on similar lines as also by submitting that in those cases, the application under Section 34 of the Act was not pending before any Court.

5. I have considered the submissions made by the learned counsels for the parties.

6. Section 42 of the Act reads as under:

“42. Jurisdiction. — Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

7. On the other hand, Section 36 of the Act provides that an arbitral award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.

8. In **Sundaram Finance Limited** (supra), the Supreme Court held that while an award passed by the Arbitral Tribunal is deemed to be a

decree under Section 36 of the 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. It was held that therefore, for seeking the enforcement of an award execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, “which would have jurisdiction over the arbitral proceedings”.

9. The Supreme Court expressly affirmed the judgment of this Court in ***Daelim Industrial Co. Ltd.*** (supra), which in turn has held as under:

“16. Applying the same reasoning, Section 42 would also not apply to execution applications. The execution application is not "arbitral proceedings" within the meaning of Section 42 of the Act and is not a subsequent application arising out of the agreement and the arbitral proceedings. In fact the arbitral proceedings come to an end when the time for making an application to set aside the arbitral award expires and the execution application is an enforcement of the award. Thus the place of filing of the execution application need not be the place of the filing of the application under Section 34 of the Act for the reason of Section 42 of the Act.

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26. The Senior Counsel for the judgment debtor also does not dispute that the award would be executable by this Court by attachment of the properties/monies of the judgment debtor at Delhi. However, he insists upon the same being done only after obtaining a transfer of the decree from the Courts at Guwahati/Golaghat to this

Court. But what will that Court transfer. There is no decree of that Court which it can transfer. The Court after disposing of application/petition under Section 34 is not required to and does not pass any decree in terms of the award, as under the 1940 Act. Moreover, the question of such transfer would arise only if it were to be held that the power to execute and transfer is of that Court only.

27. Such power as aforesaid is only in relation to decrees passed by that Court and no in relation to the arbitral awards which are deemed to be decree for the purpose of enforcement/execution. Without the fetter of Section 38 the Courts of the place where the property/money against which the decree is sought to be enforced is situated would have inherent jurisdiction to entertain the execution.

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29. For the reasons aforesaid I find myself unable to concur with the view taken by the Madhya Pradesh High Court. In that case, there does not appear to have been any application within the meaning of Section 42 of the Act. The court proceeded on the premise that the Court of the place where award is passed is the Court within the meaning of Section 2(1)(e). That premise in my view is not correct.”

10. The Division Bench of this Court in **Atlanta Ltd.** (supra) again took note of the judgment in **Daelim Industrial Co. Ltd.** (supra) and observed as under:

*“7. The ASG, after again going through **Sundaram Finance Ltd.** supra, confirms that the view taken by this Court in **Daelim Industrial Co. Ltd.** supra has been approved. The said view has since also been consistently followed in other dicta of this Court.*

Reference may be made to Religare Finvest Ltd. Vs. Ranjit Singh Chouhan MANU/DE/2330/2012, The State Trading Corporation of India Ltd. Vs. Global Steel Holdings Ltd. AIR 2015 Del 100, ICI-SOMA JV Vs. Simplex Infrastructures Ltd. MANU/DE/2773/2016, Mukesh Sharma Vs. Roger Shashoua 231 (2016) DLT 14 and Dr. S.C. Jain Vs. Sahny Securities Pvt. Ltd. 2018 SCC OnLine Del 13202.”

11. I have no reasons to not follow the judgments mentioned hereinabove.

12. The contention of the learned counsel for the respondent that the judgments/order in *Sundaram Finance Ltd.* (supra), *Daelim Industrial Co. Ltd.* (supra) and *Atlanta Ltd.* (supra) run counter to the earlier judgment of Supreme Court in *Associate Contractors* (supra), can also not be of any help to the respondent. In *Sundaram Finance* (supra), the Supreme Court gave additional reasons for the non-applicability of Section 42 of the Act to the proceedings seeking enforcement of the Arbitral Award. As noted in the above judgments, an application under Section 36 of the Act is an application under the Code of Civil Procedures, 1908 and therefore, Section 42 of the Act will have no application to the same.

13. As far as the submission of the learned counsel for the respondent that the above cases are distinguishable on the fact that an application under Section 34 of the Act is still pending adjudication, in my view, again cannot be accepted. Section 42 of the Act does not

make any distinction on the pendency or disposal of the earlier application. It, in fact, provides that once an application is made with respect to an arbitration agreement in a Court, that Court alone shall have jurisdiction over the arbitral proceedings. Therefore, if it was to be held that Section 42 of the Act applies to such proceedings, the pendency or disposal of the earlier application would lose all significance. However, as it has been held that Section 42 of the Act itself has no application to the proceedings seeking enforcement of the Arbitral Award, the pendency of the application under Section 34 of the Act can come to no avail to the respondent.

14. Accordingly, the Impugned Order dated 17.02.2021 has proceeded on an erroneous understanding of law and is accordingly, set aside. The execution application is restored to its original number. The parties shall appear before the learned District Court (Commercial Court), North West District on 12th April, 2021.

15. Needless to say, this Court has only considered the maintainability of the execution application before the Court and has not expressed any opinion on the merit of the same. There shall be no order as to cost.

NAVIN CHAWLA, J

MARCH 15, 2021/Arya