

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6149 OF 2021

Shriram Transport Finance Company
Limited Through Its Authorized Officer
Having Branch Office at Aurangabad. ...Petitioner

Versus

1. The State of Maharashtra
Through the Secretary
Department of Law & Judiciary
Mantralaya, Mumbai.
2. The Registrar
District & Sessions Court at Aurangabad.
3. The Superintendent (Civil)
District & Sessions Court at Aurangabad. ...Respondents
4. Shrkhar Sampat Khillare (Deleted)
5. Vishwanath Pandharinath Borade (Deleted)

...

Mr. M.D. Narwadkar, Advocate for Petitioner.
Mr. Y.G. Gujarathi, AGP for Respondent-State.
Mr. Ajit Kadethankar, Advocate for Respondents No. 2 and 3

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 27th JULY, 2022

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard finally
with the consent of learned advocate for the parties.

2. This petition, filed under article 226 and 227 of Constitution of India, takes exception to the order dated 16.08.2019 passed by 11th District Judge, Aurangabad, below Exhibit-1 in Regular Darkhast No. 606/2015.

3. An arbitral award is passed in favour of the petitioner on 09.04.2014 thereby directing the respondents to pay an amount of Rs. 74094/- with interest at the rate of 9% per annum from 03.02.2014 till 31.05.2015 along with future interest till realisation of amount.

4. The petitioner on 24.06.2015 filed Regular Darkhast No. 606/2015 under section 36 of the Arbitration and Conciliation Act, 1996, (for short 'said Act') for recovery of amount of Rs. 82,985/- plus future interest. In the said darkhast on 16.08.2019, Executing Court passed following order:-

"The present execution petition is filed by the decree holder for the execution of the Arbitration Award under section 36 of the Arbitration and Conciliation Act.

2. As per section 34 of the Act the judgment debtor can file an application for setting aside the award. Section 31 of the Act prescribes form and contents of the arbitral

award. Sub-section 5 of section 31 provides that after the award is made a signed copy should be delivered to each party. This provision is made so as to provide an opportunity to the judgment debtor file application to set aside the award. Therefore, it is necessary to see, as to whether the compliance of section 31(5) is made or not. In this respect the learned advocate for the decree holder/decreed holder will have to be heard for maintainability of the execution petition in absence of compliance of section 31(5) . Hence, following order is passed

ORDER

The decree holder/learned advocate for decree holder to satisfy, as to whether there is compliance of section 31(5) of the Arbitration and Conciliation Act."

The petitioner/decreed holder is aggrieved by the insistence of the Executing Court that the decree holder should place on record documents showing compliance of section 31(5) of the said Act.

5. It is the grievance of the petitioner that in all the execution proceedings filed under section 36 of said Act, the Executing Courts insist that the decree holder should satisfy that there is compliance of section 31(5) of said Act. Similar such orders passed in other Regular Darkhast No. 1037/2017 are filed

along with the petition. By pointing out a copy downloaded from the website of the District Court in Regular Darkhast No. 695/216, learned advocate for the petitioner submits that, though the judgment debtor appeared in said proceeding, still the Executing Court is insisting that the decree holder should place on record the documents showing compliance of section 31(5) of the said Act.

6. Attention of this Court is drawn to the order passed by the Executing Court, below Exhibit-1 in Regular Darkhast No. 317/2012, thereby dismissing the said darkhast for not producing evidence of compliance of section 31(5) of the said Act. As the said order is tendered across the bar, the same is marked 'X' for identification.

7. The learned advocate for the petitioner submits that entire approach on the part of Executing Court in insisting that decree holder should place on record documents showing compliance of section 31(5) of the said Act is unreasonable and the same is not supported by any legal provision. He submits that the impugned order is unsustainable and it may be quashed and set aside.

8. The learned advocate for respondents No. 2 and 3 by placing reliance on the affidavit in reply, supports the impugned order. According to him, ample opportunity is given to the petitioner to show compliance of section 31(5) of the said Act.

9. Heard the learned advocate for the petitioner, learned advocate for respondents No. 2 and 3 and learned Assistant Government Pleader at length. Perused the documents placed on record.

10. Before appreciating the rival submissions, it is necessary to consider relevant provisions of the said Act.

Section 31. Form and contents of arbitral award.

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2)----

(3)----

(4)----

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

Section 36- Enforcement

(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure,

1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

11. From plain reading of section 31(5) of the said Act it is clear that said section mandates that after the arbitral award is made, signed copy of the award shall be delivered to each party. Thus, under section 31(5) of the said Act it is the duty of the arbitrator/arbitral Tribunal to deliver signed copy of the award to each party. Obviously, a party in whose favour arbitral award is passed files execution proceeding under section 36 of the said Act only after copy of the award is delivered to it and after the time for making application to set aside arbitral award, under section 34 of the said Act is expired.

12. The District Court being the Executing Court appears to have misread and misconstrued the provisions of sections 31, 34 and 36 of the said Act while insisting that the petitioner/decreed holder should satisfy as to whether there is compliance of section 31(5) of the said Act.

13. These provisions do not in any manner indicate that the decreed holder is under obligation to produce evidence/documents showing compliance of section 31(5) of the said Act. Therefore, the insistence on the part of the Executing Court that the petitioner should produce evidence/ documents showing compliance of section 31(5) of the said Act is unreasonable and irrational and the same is not supported by any legal provision.

14. In affidavit in reply, respondent No. 2 has made following statement:

"It is an admitted fact and settled principle of law that, the District Court cannot proceed with the Execution petitions unless the provisions of Section 31(5) of the Arbitration Act is duly complied with. I further say and submit that,

the District Court is bound to give sufficient opportunity to the Petitioner in an Execution Petition i.e. Regular Darkhast No. 606/2015 for compliance of the Section 31(5) of the Arbitration Act and upon failure to comply the same, the Execution Petition is liable to be dismissed."

15. It is further stated that "*since the petitioner wants to execute the award, hence, being an executant, it is his boundant duty to show, at this stage, that the award is executable.*" Insistence on the part of the Executing Court to show compliance of section 31(5) of the said Act is tried to be justified by stating that "*same will facilitate the Executing Court and it will be obliging the early disposal of the proceedings. Therefore, compliance of section 31(5) has been initiated to curb the delay and to avoid further complications.*"

When the learned advocate for the respondents was called upon to substantiate the above statement by pointing out that by which judgment this principle of law is settled and/or this statement is based on which legal provision, he is not in a position to point out any legal provision and/or citation, which casts burden on the decree holder to show that there is compliance of section 31(5) of the said Act.

16. The Executing Court has misdirected itself in casting burden on the decree holder to show that there is compliance of section 31(5) of the said Act, particularly, when the said provision mandates arbitrator/arbitral Tribunal to deliver signed copy of the arbitral award to each party. Because of this erroneous approach on the part of the Executing Court, execution is delayed. By issuing notice to the judgment debtor and after his appearance compliance of section 31(5) of the said Act can be ascertained from him.

17. It is the duty of the arbitral Tribunal to deliver signed copy of the arbitral award to each party under Section 31(5) of the said Act. Time to file an arbitration application under Section 34(3) of the said Act commences upon receipt of the signed copy of the award from the arbitral Tribunal upon a party. Application under Section 36 of the said Act for enforcement can be made only when time for making an application to set aside the arbitral award under Section 34 of the said Act has expired. If the aggrieved party has not been served with the signed copy of the award by the arbitral Tribunal under Section 31(5) of the said Act, limitation for filing an application under Section 34(3) of the said Act does not

commence. In that event, the execution application for enforcement of such arbitral award under Section 36 of the said Act would be premature.

18. Under the provisions of the said Act, the arbitral Tribunal is not required to file the original papers and proceedings along with copy of the award and the proof of delivery of the signed copy of the arbitral award in Court unless otherwise directed by Court. The petitioner who has filed execution application for enforcement of the award is not expected to prove that the signed copy of the arbitral award has already been delivered upon the opponent by the arbitral Tribunal, who may be aggrieved by the said arbitral award. In the writ petition filed by the petitioner herein, the judgment debtor has not been impleaded as a party.

19. Be that as it may, in these circumstances, the Executing Court could have issued a notice upon the judgment debtor to produce before the Executing Court the proof of delivery of the signed copy of the arbitral award from the arbitral Tribunal as contemplated under Section 31(5) of the said Act or if the judgment debtor remains absent or does not co-operate with the Executing Court in producing such proof,

the Executing Court could have directed the arbitral Tribunal to produce the original records including proof of delivery of signed copy of the arbitral award under Section 31(5) of the said Act upon the judgment debtor, to ascertain whether the time prescribed for impugning such arbitral award under Section 34(3) of the said Act had expired or not.

20. The Executing Court has followed a unique procedure by casting the burden of proof of delivery of signed copy of the arbitral award by the arbitral Tribunal upon the judgment debtor unknown in law before entertaining the execution application for enforcement. The arbitral Tribunal does not inform the parties to the arbitral proceedings with proof that all the parties are already served with signed copy of the arbitral award as contemplated under Section 31(5) of the said Act.

21. For the aforestated reasons, this Court is of the considered view that, insistence on the part of the Executing Court that decree holder should bring evidence/documents showing compliance of section 31(5) of the said Act is unwarranted and uncalled for and same is unsustainable in law and facts.

22. In the result, following order:

ORDER

- i) The writ petition is allowed.
- ii) The impugned order dated 16.08.2019 passed by the learned 11th District Judge, Aurangabad, below Exhibit-1 in Regular Darkhast No. 606/2015, is hereby quashed and set aside.
- iii) The execution proceedings are restored to file before the Executing Court. The Executing Court is directed to issue notice to the judgment debtor with a direction to remain present and to produce the proof of service of the signed copy of the arbitral award upon the judgment debtor by the arbitral Tribunal, along with date of delivery, within a reasonable period to be prescribed by the Executing Court.
- iv) If the judgment debtor does not appear on the assigned date or does not produce the proof of delivery of the signed copy of the arbitral award upon him, the Executing Court would be at liberty to direct the arbitral Tribunal to produce the original record and proceedings and the proof of delivery of the signed copy of the arbitral award upon the judgment debtor alongwith date of delivery within such reasonable time as the Executing Court may deem fit.

- v) The Executing Court to consider such records, as may be produced either by the judgment debtor or by the arbitral Tribunal before entertaining the execution application filed by the petitioner on its own merits. If neither the judgment debtor nor the arbitral Tribunal produces the proof of delivery of signed copy of the arbitral award, the Executing Court would be at liberty to draw adverse inference against the judgment debtor.

Rule is made absolute in the aforesaid terms. No order as to costs.

[NITIN B. SURYAWANSHI, J.]