Item No. 7
28.08.2023
Court. No. 19
GB

C.O. 2080 of 2023

TIL Limited
Vs.
Shapoorji Pallonji & Co. Private Limited

Mr. Rajarshi Dutta,
Mr. D. Basu,
Mr. Debjyoti Saha,
Mr. Rahul Poddar

...for the Petitioner.

Mr. Suman Kr. Dutt,
Mr. Sankarshan Sarkar,
Mr. Bhaskar Mukherjee,
Ms. Nafisa Yasmin

...for the Opposite Party.

The revisional application arises out of an order dated June 13, 2023 passed by the learned Judge, Commercial Court at Alipore in Arbitration Execution Case No.03 of 2022. By the order impugned, the learned court rejected I.A. No.02 of 2023, which was an application for recalling of an order dated April 5, 2023 passed in I.A. No.01 of 2022.

I.A. No.01 of 2022 was filed by the award holder with prayers for directions upon the judgment debtor to furnish security to the extent of Rs.3,19,30,564/- or in the alternative to deposit the entire amount in a short term interest bearing fixed deposit till the execution was satisfied. Such application was disposed of on April 5, 2023, by the learned Commercial Judge directing the award debtor to secure the entire amount within four weeks from the date of the order in the form of a renewable bank guarantee in favour of the petitioner/award holder, to be deposited with the learned Registrar, Alipore, till further orders.

The learned Commercial Judge considered the allegations made by the award holder that the award debtor was trying to surreptitiously withdraw the money lying in the bank account and was also selling out valuable assets.

Relying on the decisions of the Hon'ble Apex Court in the matter of ***Pam Development Pvt. Ltd. versus State of West Bengal*** reported in ***(2019) 8 SCC 112, Satyen Construction versus State of West Bengal*** reported in ***2020 SCC OnLine Cal 805*** and ***Siliguri Jalpaiguri Development Authority versus Bengal Unitech Universal Siliguri Projects Limited*** reported in ***2022 SCC OnLine Cal 1754,*** the learned court held that the law mandated that for the execution proceeding to remain stayed, the money awarded would have to be secured. While the rights of the award holder were not crystallised till the disposal of the application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act'), the award holder had the statutory safeguard under Section 36 of the said Act to be secured in a fruitful manner, for the entirety of the arbitral award.

Relying on the decisions of the Hon'ble Apex Court, the learned Commercial Judge held that the award holder should be secured for the amount awarded by the learned Arbitral Tribunal along with interest amounting to Rs.3,19,30564/-, and directed that renewable bank guarantee of the entire amount in favour of the award holder be deposited with the learned Registrar, Alipore, till further orders.

The award debtor filed an application for recalling of the said order on the following grounds:-

> *"(i) The Award Holder should not be permitted to rely on the application filed by them since the verification of the application filed by the Award Holder was not in the manner as per the Order VI Rule 15A of Code of Civil Procedure, 1908, as amended, by the Commercial Court Act, 2016. It was submitted that the effect of not verifying a pleading in the manner provided in order VI Rule 15A of Code of Civil Procedure, 1908, as amended, particularly sub-rule (4) thereof, is that a party shall not be permitted to rely on such pleading.*
>
> *(ii) The application filed by the Award Holder cannot be entertained since this Ld. Commercial Court cannot entertain the execution application."*

The said recalling application was dismissed on the ground that except under situations enumerated by the Hon'ble Apex Court in several decisions, a court could not recall its own order. The Commercial Judge did not recall the order dated April 5, 2023.

According to the learned Judge, the tests were laid down in the decision of ***Budhia Swain and Others versus Gopinath Deb and Others*** reported in ***(1994) 4 Supreme Court Cases 396*** and the decision of ***Indian Bank versus M/s. Satyam Fibres India Pvt. Ltd.*** reported in ***1996 (5) SCC 550***. Unless the award was obtained by fraud, misrepresentation or the court committed an apparent error, the power of recall could not be exercised. Referring to the decision of ***A.R. Antulay versus R.S. Nayak & Anr.*** reported in ***AIR 1988 SC 1531***, it was held that the court could recall its own order on certain circumstances, namely, when the decision was rendered in ignorance of a fact or a necessary party had not been served or a necessary party had died and the estate was not represented or unless the order was recalled, a party would suffer serious injustice. The learned Commercial Judge arrived at the finding that the laws applicable in case of exercise of power of recall were not satisfied in the facts of the present case. Thus, the application for recalling was rejected.

Mr. Rajarshi Dutta, learned advocate appearing on behalf of the petitioner submits that the learned court did not take into consideration the specific objection raised in the recalling application. Order 6 Rule 15A of the Code of Civil Procedure as amended by the Commercial Courts Act, 2016, mandated that the pleadings were to be verified in a particular manner. Such procedure, not having been followed by the award debtor, the application for execution of the award could not have been entertained and no orders could have been passed on the basis of such application.

Next contention of Mr. Dutta was that the learned commercial court lacked the jurisdiction to entertain the application for execution of the award as Section 42 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) would be a bar. Mr. Dutta submits that the commercial court did not have the jurisdiction to decide the execution proceeding as the initial application under Section 9 of the said Act, had been filed before the learned District Judge at Alipore.

According to Mr. Dutta, the decision in ***State of West Bengal and Others versus Associated Contractors*** reported in ***(2015) 1 SCC 32,*** ought to have been taken into consideration by the learned court, while deciding the issue of jurisdiction. Relying on paragraphs 11, 12, 19 to 25 of the said judgment, Mr. Dutta submits that a three Judges Bench of the Hon'ble Apex Court had decided that Section 42 of the said Act would apply to applications made after the arbitral proceedings had come to an end, provided that they were made under Part-1 of the statute. Only exception to such principle were applications under Section 8 and 11 of the said Act. Mr. Dutta submits that the execution has been filed after the arbitral proceeding and as such, Clause 'f' of paragraph 25 of the judgment in Associated Contractors (supra) would squarely apply.

The decision in ***Sundaram Finance Limited versus Abdul Samad and Another*** reported in ***(2018) 3 SCC 622*** was distinguished by Mr. Dutta on the ground that Associated Contractors (supra) was not considered by the Apex Court, in the said decision. Secondly, Associated Contractors (supra) was a decision by a Bench of larger composition and ought to be followed by this Court. Associated Contractors (supra) did not make a distinction with regard to the applicability of Section 42 in execution proceedings. In Associated Contractors (supra) all applications filed before, after and during an arbitration proceeding would have to be filed before the same court. An execution proceeding, being a proceeding initiated after the arbitration concluded, could not be instituted before a court other than the court before which the application under Section 9 of the said Act had been filed.

Mr. Suman Dutt, learned advocate appearing on behalf of the opposite party, submits that Associated Contractors (supra) did not deal with applications for execution of an award, while deciding the scope of Section 42 of the said Act. He refers to paragraphs 16, 17 and 20 of the said decision and submits that the Hon'ble Apex Court rendered the decision in respect of applications filed under Part-1 of the said Act. Section 42 of the Act dealt with issues of jurisdiction in respect of arbitral proceedings. Reliance was placed on the decision of **Sundaram Finance Limited (supra).**

The learned counsel also relies on a decision of this Court in the matter of ***BLA Projects Pvt. Ltd. versus Asansol Durgapur Development Authority*** passed in ***C.O. 1898 of 2019,*** and submits that a similar point as has been raised by Mr. Rajarshi Dutta, was raised before a learned coordinate Bench. The learned Judge discussed the ratio of Associated Contractors (supra) and Sundaram Finance Limited (supra) and arrived at a conclusion that paragraph 25 of the decision in Associated Contractors (supra) would clearly indicate that the Hon'ble Apex Court had held that Section 42 would apply to applications made under part-1. According to the learned Judge, Section 36 of the Act was an enabling provision, by which an award holder could seek execution of the award. The modalities for such proceeding had to be in accordance with the Code of Civil Procedure. Thus, an application for execution was filed under the provision of the Code of Civil Procedure and was not an application under Part-1 of the said Act.

With regard to the contention of Mr. Rajarshi Dutta that the verification was not in terms of Order 6 Rule 15A of the Code of Civil Procedure, this Court is of the view that such defect is a curable one, as the defect does not go to the very root of the application for execution of the award. In the matter of ***Harji Engineering Works Pvt. Ltd. verus Hindustal Steelworks Construction Ltd.*** reported in ***AIR 2022 Cal 18,*** a similar point was decided. Her Lordship had held that the provision with regard to verification of pleadings in a commercial suit was directory and not mandatory. The relevant portion is quoted below:-

> *"17. The above discussion may be seen in addition to the general inclination of a court to treat procedural lapses with kindness unless a party disentitles itself to such benevolence by reason of its conduct or by operation of law. Without taking the avowed object to quick resolution of commercial disputes away from the 2015 Act, rules of procedure cannot be given precedence in a manner so as to defeat the substantive rights of the parties unless specifically prohibited by law. In the present case, Sub-rule (5) of Order VI Rule 15A can be passed into service in aid of the defendant. If a purposive interpretation is given to the various provisions contained therein, the discretion conferred on a court in the matter of striking out a pleading which is not verified by a Statement of Truth cannot be seen as a speed-breaker in the momentum of the Act."*

Mr. Suman Dutt submits that Order 6 Rule 15A deals with verification of pleadings. Order 6 Rule 1 of the Code of Civil Procedure defines pleadings as plant and written statement. Thus, an application under Order 21 of the Code, would not be a pleading as contemplated under the provisions of the Code of Civil Procedure and Order 6 Rule 15A of the Code, would not apply.

Having considered the rival contentions of the parties, this Court is of the view that the learned court below had not committed any error in directing the award debtor to secure the arbitral award by furnishing a bank guarantee of the full amount with interest. Although, it was an application made by the award holder, the law is clear that unless the amount was secured, the execution would proceed. Either way, if the award debtor wants to press his application under Section 34 of the said Act and desires that the proceeding under Section 36 be stayed till the rights are decided, entire arbitral award would have to be furnished or else the execution will proceed.

The issue of jurisdiction and bar under Section 42 has been answered by the Hon'ble Apex Court in **Sundaram Finance Limited (supra)**. Application for execution of an award is not an application within Part-1 of the Arbitration and Conciliation Act. According to the Hon'ble Apex Court, Section 42 applied to those applications arising from the arbitration agreement and the arbitration proceedings, but not to a proceeding which stood terminated upon making of the final award. Section 32 of the said Act was discussed and it was held that an arbitral award passed by an Arbitral Tribunal was deemed to be a decree under Section 36 of the Act and there was no deeming provision 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. For enforcement of an award the execution case could be filed anywhere in the country, where such decree could be executed, and there was no requirement to obtain a transfer of the decree from the court which would have the jurisdiction over the arbitral proceedings.

In the case in hand, the jurisdiction of the commercial court has been invoked on the basis of the subject mater of the dispute, the quantum of the arbitral award, the territorial jurisdiction of the court over assets of the award debtor.

Under such circumstances, the point raised by Mr. Rajarshi Dutta is not entertained by this Court. The Court also does not find that the issue of incorrect verification of the application goes to the very root of maintainability of the execution case.

Accordingly, the revisional application is dismissed.

The petitioner is at liberty to raise all points available at the time of hearing, apart from the question of applicability of Section 42 of the said Act, which has been decided here.

The observations in this order shall not influence the learned court below while deciding the execution case.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)