

**In the High Court for the States of Punjab and Haryana
At Chandigarh**

CR-4162-2023 (O&M)
Date of Decision:-18.8.2023

HAFEDPetitioner

Versus

National Collateral Management Services Ltd.Respondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. B.R. Mahajan, Senior Advocate with
Mr. Aman Bahri, Mr. Dinesh Jangra and Ms. Nikita Gill,
Advocates for the petitioner.

Mr. Gaurav Chopra, Senior Advocate with
Mr. Reshebh Bajaj and Mr. Karan Gupta, Advocates
for the Caveator/respondent.

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GURVINDER SINGH GILL, J.

1. Haryana State Co-operative Supply and Marketing Federation Ltd. (HAFED) assails order dated 22.5.2023 (Annexure P-8) passed by learned Additional District Judge, Panchkula vide which objections filed by the petitioner against execution of Arbitration Award dated 12.11.2018, under Section 36 of the Arbitration and Conciliation Act, 1996,(hereinafter referred to in short as ‘the Act’), have been dismissed. The petitioner also assails short order of even date (Annexure P-9) passed pursuant thereto by the same Court, vide which warrants of attachment of property of judgement debtor/petitioner have been issued.

2. The petitioner – HAFED entered into a contract with respondent for warehouse management pertaining to the wheat stocks lying in the warehouse at Faridabad [Faridabad, Ballabhgarh, Palwal, Hodel, Hathin and Hassanpur], Kurukshetra [Shahabad and Pipli], Karnal, Kaithal [Dhand], Panipat and Sonipat [Gohana]. An agreement titled ‘Stock Management Agreement’ was executed on 25.7.2012, which was subsequently extended on 17.7.2013 and 8.5.2014. A dispute having arisen amongst the parties, the respondent invoked arbitration and upon an application under Section 11 of the Arbitration and Conciliation Act, 1996 (in short hereinafter referred to as ‘*the Act*’) having been filed in this Court, a retired Judge of Hon’ble Supreme Court was appointed as sole Arbitrator. The learned Arbitrator passed award dated 12.11.2018 (Annexure P-2), which was later corrected in terms of provisions of Section 33 of the Act on 14.1.2019 (Annexure P-3). Aggrieved by the same, the petitioner preferred a petition under Section 34 of the Act which is presently pending in the Court of learned Additional District Judge, Chandigarh. Although, the learned Court of Additional District Judge, Chandigarh vide order dated 6.8.2021 (Annexure P-1) had stayed the operation of award dated 12.11.2018 but upon a revision filed against said stay order by the respondent, the said order was set aside by High Court vide order dated 22.12.2022 (Annexure P-4). The petitioner had challenged the aforesaid order dated 22.12.2022 (Annexure P-4) in Hon’ble Supreme Court by way of filing SLP but the same was also dismissed on 8.5.2023 (Annexure P-5).
3. In the meantime, the respondent had moved an execution petition (Annexure P-6) before the executing Court at Panchkula on 19.9.2019. The petitioner filed his objections (Annexure P-7) to the same. The learned executing Court

dismissed the objection petition vide order dated 22.5.2023 (Annexure P-8) and further passed a separate order of even date (Annexure P-9) directing that warrant of attachment be issued upon receiving list of property of the Judgment Debtor. Both the said orders dated 22.5.2023 (Annexure P-8 and Annexure P-9) have been assailed in the instant petition.

4. The learned senior counsel representing the petitioner has assailed the impugned orders on the following grounds :-

- (i) that the executing Court fell in error in applying the procedure envisaged by the amended provisions of the Act as had been amended by the The Arbitration and Reconciliation (Amendment) Act 2015 (hereinafter referred to as 'the Amendment act 2015') whereas arbitral proceedings were initiated before 2015 and were pending at the time when the Amendment Act, 2015 was brought about;
- (ii) that as a matter of fact both the parties had agreed for application of the old Act by making a statement before this Court as recorded in order dated 6.10.2017 (Annexure P-11) passed in Arbitration Application 30 of 2015 and since as per the provisions of Section 36 of the old Act, the operation of Award passed by an arbitrator gets automatically stayed, the executing court can not proceed ahead with execution till objections under Section 34 of the Act are pending;
- (iii) that the Courts at Panchkula would not have any jurisdiction for the purpose of executing the award in question as the award in question was passed at Chandigarh, particularly in view of Section 42 of the Act;

(iv) that a party which had taken advantage/benefit under the old Act would be estopped from getting benefit under amended provisions of the amendment Act, 2015.

5. On the other hand, the learned senior counsel representing the respondent has vehemently argued that the consent, as had been given by both the parties for application of old Act, would be confined only to the arbitral proceedings and that once an award is passed, the arbitral proceedings would stand concluded. It has further been submitted that since the award in question was passed on 12.11.2018 i.e. much after the amendments made in the year 2015, it is the amended provisions of the Act which would apply for the purpose of execution, which are proceedings independent of Arbitral proceedings.
6. It has further been submitted that an award can be executed at any place where the property of the Judgment Debtor is situated. The learned counsel has further submitted that provisions of Section 42 of the Act would not be applicable in the present case inasmuch as the provisions of section 42 are with regard to arbitral proceedings and would not apply to execution proceedings and that an award of an Arbitrator is to be executed like a decree of Court as per procedure mandated under CPC as is specifically provided u/s 36(1) of the Act.
7. This Court has considered rival submissions addressed before this Court.
8. The Arbitration and Conciliation Act, 1996 had undergone several changes, consequent upon amendment Act, 2015. The most significant being the provisions pertaining to stay of award during pendency of a petition under Section 34 of the Act. The relevant provisions pertaining to 'stay' in Section

36 of the Act as it existed before amendment and as it exists post its amendment by the Amendment Act 2015 are reproduced herein-under:

Section 36 <u>before</u> its amendment in 2015	Section 36 <u>after</u> its amendment in 2015
36. Enforcement.— Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court	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 <u>filing of such an application shall not by itself render that award unenforceable</u>, 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: Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, <u>have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).</u> Provided ”

9. The aforesaid juxtaposition of provisions would show that while in the provisions prior to amendment Act of 2015, there would be an automatic stay of operation of amended award as and when any petition under Section 34 of the Act was filed, the said provisions of automatic stay were conspicuously deleted in amended provisions of section 36. The amended provisions of Section 36 of the Act emphasise that mere filing of a petition will not *ipso facto* make the award unenforceable. Although, under sub-section 3 of section 36 of the Act, Court is vested with a power to stay the operation of the arbitral award, but the same is vested in a rather conservative manner. The following restrictions can be discerned with regard to grant of stay under the scheme of amended provisions of Section 36 of the Act:
- (i) filing of application under Section 34 of the Act shall not by itself render the award unenforceable unless the Court grants a stay on a separate application seeking stay of the award.
 - (ii) the stay is not to be granted as a matter of right, but the Court may in its discretion grant such a stay, subject to such conditions, and by recording specific reasons for granting such stay.
 - (iii) while granting such stay, provisions of the CPC regarding stay of money decree needs to be observed by the Court.
10. It has been felt that the concept of automatic stay tends to defeat the very object the Act is supposed to serve i.e. to bring about efficiency in dispute resolution. It was pursuant to severe criticism of the said provision of automatic stay by Hon'ble Supreme Court in National Aluminium Co. Ltd. v. Pressteel & fabrications 2004(1) SCC 540, that the amendments were brought about by the Amendment Act, 2015. The relevant extract reads as under:

“However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the Ministry concerned to Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.”

11. Having regard to the significant change brought about by the amendment, the question as to whether it would be the amended or the pre-amended provisions which would be applicable in a given case would be of humongous significance as in case the old pre-amended provisions were to apply, the impugned award would get automatically stayed whereas under the new Act, the Decree Holder would have to make out a case for seeking such relief. Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 defines the situations and the proceedings to which the amended provisions are to apply. Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 reads as under :-

“26. Act not to apply to pending arbitral proceedings.—

Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

12. A perusal of the aforesaid provisions of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 would show that the old procedure would apply to arbitral proceedings in case such proceedings had commenced

prior to amendment of the Act unless both the parties consent for application of amended provisions.

13. In the present case, the respondent had moved an application in this Court i.e. Civil Misc. No. 20823-CII of 2017 in Arbitration Application No. 30 of 2015 wherein the following order was passed on 6.10.2017 (Annexure P-11):-

*“Present: Mr. Rakesh Gupta, Advocate,
for the applicant-petitioner.*

*Mr. Puran Singh Rana, Advocate,
for the respondent.*

* * * *

CM-20822-CII-2017 (for exemption)

The application is allowed subject to all just exceptions.

CM-20823-CII-2017

Both the parties state that they proceeded on the basis that the old Act applied and that the old Act does apply.

The application is disposed of by recording the stand taken by both the parties, namely, that the old Act applies.

(S.J. VAZIFDAR)

06.10.2017

CHIEF JUSTICE”

14. The aforesaid order dated 6.10.2017(Annexure P-11) shows that both the parties had consented that the old Act would apply. In other words, the parties specifically exercised their option in terms of provisions of Section 26 of the Amendment Act, 2015, to the effect that ‘arbitral proceedings’ be governed by the pre-amended Act.
15. The next material question would be as to what is to be construed by ‘arbitral proceedings’ i.e. when do the arbitral proceedings commence and when do such proceedings conclude. Sections 21 and 32 of the Act would shed light on the commencement and conclusion of arbitral proceedings. Sections 21 and 32 of the Act are reproduced herein-under :-

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

32. Termination of proceedings.—

- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—
 - (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
 - (b) the parties agree on the termination of the proceedings, or
 - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.”

16. While the language of Section 21 of the Act is very clear inasmuch as the word ‘commence’ has been used therein to indicate that the proceedings can be said to commence when a request for referring a dispute to arbitration is made, the term ‘termination of proceedings’ has been clarified to mean that the proceedings shall stand terminated upon passing of final award unless the same are terminated at an earlier stage, either upon withdrawal of the claim or upon a mutual agreement amongst the parties or the Arbitrator otherwise deems it unnecessary or unenforceable to continue with such proceedings.

17. Hon’ble Supreme Court in (2018) 3 SCC 622 Sundaram Finance Limited versus Abdul Samad and another, while interpreting Sections 32 and 42 of

the Act made it amply clear that the arbitral proceedings stands concluded with the passing of the award and that Section 42 of the Act has no relevance with the same and that Section 42 of the Act does not apply to execution application which is not an arbitral proceedings. The relevant extract from the said judgment is reproduced herein-under :-

“17. However, what has been lost sight of is Section 32 of the said Act, which reads as under:

“32. Termination of proceedings.—

- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
- (2) The arbitral tribunal shall

The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

18. It is in the aforesaid context that the view adopted by the Delhi High Court in *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.* records that Section 42 of the Act would not supra apply to an execution application, which is not an arbitral proceeding and that Section 38 of the Code would apply to a decree passed by the Court, while in the case of an award no court has passed the decree.

19. The Madras High Court in *Kotak Mahindra Bank Ltd. v. Sivakama Sundari* referred to Section 46 of the said Code, which spoke of precepts but stopped at that. In the context of the Code, thus, the view adopted is that the decree of a civil court is liable to be executed primarily by the Court, which passes the decree where an execution application has to be filed at the first instance. An award under Section 36 of the said Act, is equated to a decree of the Court for the purposes of execution and only for that purpose. Thus, it was rightly observed that while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the said Act, there was 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. The said Act actually transcends all territorial barriers.

Conclusion:

20. We are, thus, unhesitatingly of the view that the enforcement of an award through its 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.”
18. The construction of Sections 32 and 42 of the Act and the meaning propounded to the same by Hon’ble Supreme Court in Sundaram’s case (supra) well defines that while ‘arbitral proceedings’ commence upon a request made by the party for referring the matter to Arbitrator, the same would conclude upon passing of an arbitral award or termination of such proceedings at any earlier date and that execution proceedings are not part of ‘arbitral proceedings’. Hon’ble Supreme Court in Sundram’s case (supra) spoke approvingly of the view adopted by the Delhi High Court in Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd. (2009) 159 DLT 579, wherein it was held that execution proceedings can not be said to be part of arbitral proceeding. Thus, if in the present case, the parties had consented for application of the old Act, as is recorded in order dated 6.1.2017 (Annexure P-11) passed by this Court, such consent essentially has to be confined to ‘arbitral proceedings’ and cannot be extended to the execution proceedings, as is contended by learned counsel for the petitioner. There can be no estoppel against law unless law itself provides for any deviation. The deviation provided in section 26 of Amendment Act 2015 on the basis of consent of parties as regards application of old provisions is confined to ‘arbitral proceedings’ only.
19. Further, it also stands settled that Section 42 of the Act would have no application to execution proceedings and the same is relevant only for the

purpose of the arbitral proceedings or applications made in that regard and not to the execution proceedings. The contentions raised in this regard by learned counsel for the petitioner, thus, cannot be accepted.

20. Hon'ble Apex Court in Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. (2018) 6 SCC 287, while dealing with question as regards applicability of the amended Arbitration and Conciliation Act, 1996 to an application instituted under Section 34 of the pre-amended Act, held as under:

“39. From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made under Section 36, will be governed by Section 34 as amended and Section 36 as substituted. But, what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions? To answer this question, we have necessarily to decide on what is meant by “enforcement” in Section 36. On the one hand, it has been argued that “enforcement” is nothing but “execution”, and on the other hand, it has been argued that “enforcement” and “execution” are different concepts, “enforcement” being substantive and “execution” being procedural in nature.

42.Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.”

21. As far as the contention of the petitioner pertaining to maintainability of the execution petition at Panchkula is concerned, the said matter is no longer *res integra* and Hon'ble Supreme Court in Sundaram's case (supra) has authoritatively held that an award is to be executed in the same manner as a decree of the Court in accordance with provisions of C.P.C. and that a petition

for execution of award of an Arbitrator can be filed before the Court where the assets of the Judgment Debtor are situated and there is no need for transfer of decree. The relevant extract from the said judgment reads as under :

20. We are, thus, unhesitatingly of the view that the enforcement of an award through its 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.”

22. In view of the discussion made above, this Court has no hesitation in holding that in the present case the “arbitral proceedings” having come to an end with the passing of the award and an execution petition having been filed, the statement of the parties made during the course of arbitral proceedings regarding application of pre-amended provisions would not bind the parties in any manner with regard to execution of award as the execution proceedings would commence after passing of the award and which commenced much after the amendments were made in the year 2015 in the Act. Section 42 of the Act would not, in any manner, be relevant for the purpose of execution proceedings. The award in question being in the nature of a money decree is not ordinarily be stayed. It will not be out of place to mention that the petitioner is trying to avail of two parallel remedies for getting stay inasmuch as he had also moved a stay application before the Court at Chandigarh where his petition under Section 34 of the Act is pending. Though, the Court at Chandigarh had granted stay initially but the said order was subsequently set aside by the High Court and the order of High Court was also affirmed by Hon’ble Supreme Court.

23. No convincing ground has been shown to this Court so as to justify stay of impugned award which is in the nature of a money decree. As such, the impugned orders dated 22.5.2023 (Annexure P-8 and Annexure P-9) do not call for any interference and the same are hereby upheld.
24. The petition is sans merit and is hereby dismissed.

18.8.2023

kamal

(GURVINDER SINGH GILL)
JUDGE

Whether speaking /reasoned	Yes / No
Whether Reportable	Yes / No