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

% ***Date of decision: 9th December, 2024***

\+ **C.R.P. 371/2024 & CM APPL. 71816/2024**

NATIONAL THERMAL POWER CORPORATION LIMITED

Through its Authorised Representative,
NTPC Bhawan, Scope Complex, 9
Industrial Area, Lodhi Road,
New Delhi-110003 .....Petitioner

Through: Mr. Puneet Taneja, Sr. Advocate with Mr. Amit Yadav, Mr. Manmohan Singh Narula & Mr. Anil Kumar, Advocates.

versus

GAMMON INDIA LIMITED

Gammon House,
Veer Sarvarkar Marg,
Prabhadevi, Mumbai-400025 .....Respondent

Through: Mr. Ishan Nager, Advocate.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T ***(oral)***

CM APPL. 71817/2024 *(Exemption)*

1. Allowed, subject to all just exceptions.

2. The Application is disposed of.

C.R.P. 371/2024:

3. The present Revision Petition under *Section 115* of the *Code of Civil Procedure, 1908* has been filed on behalf of the Petitioner/Judgment Debtor against the Order dated 31.07.2024 *vide* which its Objections under Section

47 of the CPC *(hereinafter referred to as the* "Act, 1996"*)* against the Execution of the Award dated 21.10.2004, in the Execution Petition No. 429/2021, has been dismissed.

4. The Respondent/Decree Holder filed the Execution Petition bearing No. 429/2021 on 20.06.2021 before the learned Trial Court for execution of the Award dated 21.10.2004 against which the Appeal Under Section 37 of the Act, filed by both the parties was decided on 06.09.2012.

5. The main Objection taken by the ***Petitioner/Judgment Debtor*** was that the principal amount got paid on 21.07.2007 which was accepted by the Respondent/Decree Holder without any protest. The Execution of the Award dated 21.10.2004 could have been sought ***within three years*** of the date of Award, in terms of *Article 137 of the Limitation Act, 1963*. Therefore, the Execution Petition filed on 23.10.2021, is ***patently barred by limitation.***

6. Learned counsel for the Petitioner/Judgment Debtor has placed reliance on the decisions in the case of *Larsen and Tourbo Limited vs. Maharaji Educational Trust*, 2010 SCC OnLine All 1866, *Arif Azim Company Limited vs. Aptech Limited*, (2024) 5 SCC 313, *Paramjeet Singh Patheja vs. ICDS Ltd.*, (2006) 13 SCC 322 and *Government of India vs. Vedanta Limited (formerly Cairn India Limited) and Ors.*, (2020) 10 SCC 1.

7. ***Learned counsel for the Respondent/Decree Holder*** has vehemently opposed the contentions made on behalf of the Petitioner/Judgment Debtor and has asserted that Section 36 of the Act, 1996 itself provides that the Award is to be executed like a Decree of the Court and therefore, Article 136 of the Limitation Act, 1963 would be applicable which provides that ***the***

limitation for execution of a Court Decree is 12 years. It is further contended that giving the benefit of the COVID-19 Pandemic from 20.03.2020, the Execution Petition has been filed within a period of 12 years and is not barred by limitation.

8. **Submissions heard and record perused.**

9. The Arbitral Tribunal had delivered the ***Award on 21.10.2004*** which was challenged under Section 34 of the Act, 1996 by the Petitioner which was partly allowed *vide* Order dated 26.05.2008 by the Single Judge of this Court. Aggrieved by the said Order of the ld. Single Judge, both the parties preferred Appeals bearing numbers FAO No. 337/2008 and FAO No. 430/2008 which were decided by the Division Bench *vide* Order dated 06.09.2012, upholding the Order of the Ld. Single Judge.

10. The ***points for determination*** which arise are: -

(i) whether the Award is a Decree, and whether the limitation is three years under Article 137, or it is twelve years in terms of Article 136 of Schedule II of the Limitation Act, 1963, for seeking execution of the Arbitral Award; and

(ii) what is the date for reckoning the period of twelve years.

<u>Whether Award is a Court Decree?</u>

11. To consider this ***first question***, it would be relevant to refer to Section 35 and S.36 of the Act, 1996 (as amended w.e.f. 23.10.2015). Section 35 reads as under: -

> *"**35. Finality of arbitral awards -** Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively."*

12. Section 36 of the Act, 1996 (unamended), reads as under: -

*"**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 refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908)* ***in the same manner as if it were decree of the court."***

13. The Apex Court in *Leela Hotels Ltd. vs. Housing and Urban Development Corporation Ltd.*, (2012) 1 SCC 302 held that the Arbitral Award has to be enforced under Code of Civil Procedure in the same manner as it were a Decree of the Court.

14. The High Court of Madhya Pradesh, Indore Bench in *Usha Devi vs. Cotton Corporation of India Ltd.*, 2019 SCC OnLine MP 6113, similarly observed that the limitation period for execution of an Arbitral Award is of 12 years.

15. Similar observations have been made by the Madras High Court in *V. Ramaswamy Iyer vs. K. Ramakrishnayya*, MANU/TN/0505/1968.

16. Likewise, the Apex Court in the case of *Hindustan Construction Company Limited and Anr. vs Union of India and Ors.,* (2019) SCC OnLine SC 1520, has held that the raison d'etre for Section 36 is only to make it clear that when an arbitral award is not susceptible to challenge, either because the time for making an Application to set it aside has expired or such Application having been made is refused, *the Award, being final and binding, shall be enforced under the CPC as if it were a decree of the court. This becomes clear when Section 36 and 35 of the Arbitration Act, 1996 are read together.*

17. From the explicit language of Section 36 of the Act, 1996 and above referred judgments, it is evident that an Award is to be treated like a Court

Decree and executed accordingly under Code of Civil Procedure. Therefore, ***the limitation for seeking its execution is of 12 years in terms of Article136 of Schedule II of the Limitation Act, 1963 from the date when the Award attains finality.***

When Does an Award Attain Finality:

18. The ***second aspect*** which thus, arises is whether the Award attains finality on the day it is delivered or whether filing of the Petition under S.34 tantamount to automatic stay of the Award and it becomes final on the date the Petition under S.34 is decided.

19. While interpreting whether the filing of the Petition amounted to stay of the Execution of the Award in terms of S.36 (unamended) of the Act, the Apex Court held in the case of *Fiza Developers and Inter-trade Pvt. Ltd. vs. AMCI (India) Pvt. Ltd.,* (2009) 17 SCC 796, the Apex Court noted: -

> *"20. Section 36 provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under Section 34, or such application having been made, only after it has been refused. Thus, until the disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award."*

20. *National Aluminium Company Ltd. (NALCO) vs Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540 as under: -

> *"10... from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any*

interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. ....

21. This legal position was reiterated in the case of *National Buildings Construction Ltd. v Llyod Insulations India Ltd. (2005)2SCC367.*

22. This implied that as soon as the Petition under S.34 was filed within time, the Award became automatically stayed and was rendered inexecutable till the Petition under S34 was decided. No separate Application for stay was thus required to be filed in such a situation.

23. The Supreme Court in *NALCO* (supra) however, found this situation of *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,* was defeating the very objective of Arbitration Act. Noting 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,* it was expressed *that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."*

24. Taking note of the observations made in *NALCO*, *246th Law Commission of India* recommended *"in order to rectify this mischief, certain amendments have been suggested by the Commission to section36 of the Act, which provide that the Award will not become unenforceable merely upon the making of an application under S.34'.*

25. These recommendations were followed by Amendment of Section 36

w.e.f. 23.10.2015. The amended Section reads as under: -

> ***"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:*
>
> *Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, 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).]*
>
> *[Provided further that where the Court is satisfied that a Prima facie case is made out that,—*
>
> *(a) the arbitration agreement or contract which is the basis of the award; or*
>
> *(b) the making of the award,*
>
> *was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.*
>
> ***Explanation— For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings,***

irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).]”

26. The post-Amendment Section 36 made it clear that mere filing of the Petition under S.34 would not amount to automatic stay of the Award or its execution, unless an Application is filed under S.36(2) and the stay is granted.

27. This aspect was considered in detail by the Apex Court in *Hindustan Construction Company Limited and Anr. vs Union of India and Ors.,* (2019) SCC On Line SC 1520, wherein the Apex Court observed that Section 36 even as originally enacted (prior to its Amendment in 2015) is not meant to do away with Article 36(2) of the UNCITRAL Model law, but is really meant to do away with *the two bites at the cherry doctrine* in the context of Awards made in India, and the fact that enforcement of a final Award when read with Section 35, is to be under CPC, treating it as if it were a Decree of the court. It is clear that the Judgments in *NALCO, National Buildings Construction Corporation Ltd and Fiza Developers* have laid down the law incorrectly and further observed *“it is also clear that the amended Section 36 being clarificatory in nature, merely restates the position that the unamended Section 36 does not stand in the way of the law as to grant of stay of a money decree under the provisions of the CPC.”*

28. It was further observed that to state that an Award challenged under Section 34 becomes inexecutable merely by virtue of such challenge being made because of the language of Section 36, is plainly incorrect. Section 36 was enacted for a different purpose. When read with Section 35, all that Section 36 states is that

enforcement of a final Award will be under the CPC and shall be executed in the same manner as if it were the Decree of the Court. However, its plain language did not leave any room for doubt as to the manner in which the Award of the learned Arbitrator was to be accepted.

29. It further noted that to read in Section 36 something negative that where the time for making the Application under Section 34 has not expired and therefore, the Application being made within time an automatic stay ensues is to read something in Section 36 which is not there at all. It was thus, concluded that Section 36 never intended an automatic stay because of filing of the Petition under Section 34. However, by way of the Amendment, 2015 this proposition of law has become absolutely clear that unless an Application for stay is filed under Sub-Section (2) of Section 36 and a stay is granted, mere filing of a Petition under Section 34 does not tantamount to an automatic stay of the Award nor does it operate as a stay on Execution.

30. The connected aspect which arises is the ***retrospectivity of the Application of the Amended Section 36***. This aspect was also dealt by the Apex Court in the case of *Hindustan Construction Company Ltd* (supra) wherein while referring to *the case of Board of Control for Cricket In India v Kochi Cricket Private Ltd and others.* (2018) 6 SCC OnLine SC 232 it was observed in the context of Section 26 of the Amendment Act, 2015 *(which was replaced by insertion of Section 87 in the Act by way of the Amendment Act, 2019)* that Section 26 bifurcated the proceedings into two sets of proceedings-arbitral proceedings themselves and Court proceedings in relation thereto. The Amendment was held to be prospective in nature and will apply to those arbitral proceedings and Court proceedings in relation thereto that are commenced on or after the Amendment Act, though in

regard to the arbitral proceedings the parties may agree to be governed by the law prior to the amendment came into force.

31. It is now well settled that after the Amendment Act, 2015 which came into force on 23.10.2015, the amended S.36 would apply and there is no automatic stay of the Execution proceedings unless an Application is filed under S.36(2) and a stay is granted by the Court. This has also been so held in the case of *Union of India v Parmar Construction Company (2019) 15 SCC 682.*

32. **The crucial question which now commands attention is the date on which the Award became final, in order to reckon the date from which the 12 years are to be calculated.**

33. The Award in this case was passed on 21.10.2004, and with correction on 07.12.2004. The said Award was challenged in Section 34 proceedings and this being a case of 2005, the Award was stayed. Thus, according to the *unamended* S.36, the Award got automatically stayed till the Petition under Section 34 was decided on 26.05.2008. *Thus, the limitation period for seeking execution of the Award has to be calculated from 26.05.2008, which is also not disputed by the parties.* The Execution Petition could only be filed within 12 years of the said date i.e. by 25.05.2020.

34. In between world was struck by Covid-19 Pandemic virtually bringing the entire world to a halt from *15.03.2020 till 28.02.2022.*

35. The Supreme Court in *In Re: Cognizance for Extension of Limitation*, Suo Motu Writ Petition (Civil) No. 03 of 2020 has held *"that in computing the period of limitation for any Suit, Appeal, Application or Proceeding, the period from 15.03.2020 till 28.02.2022 shall be excluded."* In case the

period of limitation was expiring during this period of relaxation, the Supreme Court held that *"...notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021, - In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply".*

36. The limitation period was expiring during the Pandemic period which was to be excluded *from 15.03.2020 till 28.02.2022. The* Execution Petition was filed on 23.10.2021, which is within the period of limitation.

37. In so far as the contention of the Petitioner/Judgement Debtor in regard to having made the payment to the Petitioner in 21.07.2007 which was accepted without protest is concerned, it is a contention on merits which may be agitated in the Execution proceedings itself.

38. In view of aforesaid discussion, there is no infirmity in the Order dated 31.07.2024.

39. Accordingly, the present Revision Petition along with pending Application(s), if any, is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

DECEMBER 9, 2024
S.Sharma