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Neutral Citation No. - 2023:AHC-LKO:66805

AFR

Reserved

Court No. - 8

Case :- MATTERS UNDER ARTICLE 227 No. - 3384 of 2023

Petitioner :- Madhyanchal Vidyut Vitran Nigam Ltd. Thru. Managing Director
Respondent :- M/S Shashi Cable Thru. Its Authorized Signatory
Counsel for Petitioner :- Manish Jauhari
Counsel for Respondent :- Amit Kumar Singh,Utkarsh Srivastava

Hon'ble Pankaj Bhatia,J.

1. Heard Sri Manish Jauhari, learned Counsel for the petitioner and Sri J.N. Mathur, learned Senior Counsel assisted by Sri Amit Kumar Singh and Sri Utkarsh Srivastava, learned Counsel for the sole respondent.

2. The short question involved in the present petition pertains to the territorial jurisdiction of the court for execution of an award.

3. The facts in brief are that the petitioner and the respondent entered into an agreement on 29.12.2016 for supply of Conductor through Purchased Order No.3366 and thereafter, in pursuance to the said order, an agreement dated 02.07.2018 was also entered into. In terms of the said agreement, certain payments are to be made on the basis of supply made by the respondent to the petitioner. The dispute occurred with regard to the payment of the pending bill raised by the respondent. An application was moved by the respondent on 18.02.2020 claiming an amount of Rs.15,27,30,879/- along with interest thereupon quantified at Rs.4,88,82,916/- through an application before the U.P. State Micro and Small Enterprises Facilitation Council, Kanpur (in short 'the Council'). The petitioner herein

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put his appearance before the Council situate at Kanpur, Uttar Pradesh and contested the claim. The Council proceeded to pass an award/order vide order dated 27.01.2022 against the petitioner directing to deposit total amount of Rs.9,97,58,764/- in favour of the respondent, which was directed to be paid as per the provisions of the "Act 27/2006" on the delayed payment. The said award is on record as Annexure-5 to the writ petition.

4. It appears that challenging the said award, the petitioner filed an application under Section 19 of The Micro, Small and Medium Enterprises Development Act, 2006 (in short 'the MSMED Act') read with Section 34 of The Arbitration and Conciliation Act, which was registered as Misc. Case No.24 of 2023. The said application was rejected by the learned Judge, Commercial Court, Kanpur vide order dated 18.02.2022 mainly on the ground that predeposit of Rs.75%, , which was required under Section 19 of the MSMED Act, was not paid. Thereafter, the petitioner also filed an application for recall of the order dated 18.08.2022 and ultimately, the same was rejected vide order dated 31.01.2023. The said order dated 31.01.2023 was challenged by filing a petition under Article 227 of the Constitution of India before this Court at Allahabad being Matters Under Article 227 No.3552 of 2023, in which no interim order was passed in favour of the petitioner. In the meanwhile, the respondent filed an application for execution of the award dated 27.01.2022 before the Commercial Court, Lucknow, which was registered as Execution Case No.321 of 2022. The petitioner put in appearance and filed its objection. The said objections were rejected by the Commercial Court, vide order dated 10.03.2023, which has been challenged by the petitioner by filing the instant petition.

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5. The contention of the Counsel for the petitioner is that once the award was delivered at Kanpur, in view of the bar created by virtue of Section 42 of the Arbitration and Conciliation Act, it is only the Court at Kanpur, which could have entertained the execution application and, the Court at Lucknow has no territorial jurisdiction. The Counsel for the petitioner places reliance on the judgment of the Hon'ble Supreme Court in the case of ***State of West Bengal and others vs Associated Contractors; (2015) 1 SCC 32***, wherein, the Hon'ble Supreme Court has held as under:

> *"**11**. It will be noticed that Section 42 is in almost the same terms as its predecessor section except that the words "in any reference" are substituted with the wider expression "with respect to an arbitration agreement". It will also be noticed that the expression "has been made in a court competent to entertain it", is no longer there in Section 42. These two changes are of some significance as will be pointed out later. Section 42 starts with a non obstante clause which does away with anything which may be inconsistent with the section either in Part I of the Arbitration Act, 1996 or in any other law for the time being in force. The expression "with respect to an arbitration agreement" widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to courts which are before, during or after arbitral proceedings made under Part I of the Act are all covered by Section 42. But an essential ingredient of the section is that an application under Part I must be made in a court.*
>
> ***21**. One other question that may arise is as to whether Section 42 applies after the arbitral proceedings come to an end. It has already been held by us that the expression "with respect to an arbitration agreement" are words of wide import and would take in all applications made before during or after the arbitral proceedings are over. In an earlier judgment, Kumbha Mawji v. Dominion of*

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India [1953 SCR 878 : AIR 1953 SC 313], the question which arose before the Supreme Court was whether the expression used in Section 31(4) of the 1940 Act "in any reference" would include matters that are after the arbitral proceedings are over and have culminated in an award. It was held that the words "in any reference" cannot be taken to mean "in the course of a reference", but mean "in the matter of a reference" and that such phrase is wide enough and comprehensive enough to cover an application made after the arbitration is completed and the final award is made (see SCR pp. 891-93 : AIR pp. 317-18, paras 13-16). As has been noticed above, the expression used in Section 42 is wider being "with respect to an arbitration agreement" and would certainly include such applications.

***25.** Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:*

> *(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.*
>
> *(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.*
>
> *(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.*

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(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

6. In the light of the aforesaid, the Counsel for the petitioner argues that the writ petition filed under Article 227 of the Constitution of India deserves to be allowed and the order impugned rejecting the application of the petitioner deserves to be quashed.

7. Sri J.N. Mathur, learned Senior Counsel appearing on behalf of the respondent, on the other hand, argues that law with regard to the jurisdiction, where the execution can be entertained, came up for consideration before the Hon'ble Supreme Court in

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the case of ***Sundaram Finance Limited vs Abdul Samad and another; (2018) 3 SCC 622*** wherein the Hon'ble Court had the occasion to consider the mandatory provisions contained in Section 42 of the Arbitration and Conciliation Act and it was held that the mandatory provisions contained in Section 42 have to be read in the light of Section 32 of the said Act. The conclusions recorded by the Hon'ble Supreme Court are as under:

> *"**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."*

8. In response to the said judgment cited by the Counsel for the respondent, the Counsel for the petitioner argues that in the case of *Sundaram Finance Limited (supra)*, the Hon'ble Supreme Court did not consider the judgment rendered in the case of *State of West Bengal (supra)* and thus, the judgment of *State of West Bengal (Supra)* being delivered by three Judges Bench would be applicable and to that extent, the judgment in the case of *Sundaram Finance Limited (Supra)* would be *per incuriam.*

9. Sri J.N. Mathur, learned Senior Counsel draws my attention to the subsequent judgment rendered in the case of ***Cheran Properties Limited vs Kasturi and Sons Limited and others; (2018) 16 SCC 413***, wherein the Hon'ble Supreme Court had the occasion to consider the issues in the light of the judgment of the Hon'ble Supreme Court in the case of *State of West Bengal (Supra)* as well as the judgment of *Sundaram Finance*

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Limited (Supra), the Hon'ble Supreme Court after considering both the judgments held as under:

> *"**39.** The reliance which has been sought to be placed on the provisions of Section 42 of the 1996 Act is inapposite. Dr Singhvi relied on the decision in State of W.B. v. Associated Contractors [State of W.B. v. Associated Contractors, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] . The principle which was enunciated in the judgment of this Court was as follows : (SCC p. 46, para 24)*
>
> > *"24. If an application were to be preferred to a court which is not a Principal Civil Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction to decide questions forming the subject-matter of an arbitration if the same had been the subject-matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject-matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court."*
>
> *The conclusion of the Court is in the following terms : (SCC pp. 46-47, para 25)*
>
> > *"25. … (a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.*

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(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without

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> *subject-matter jurisdiction would be outside Section 42."*

40. *More recently in Sundaram Finance Ltd. v. Abdul Samad [Sundaram Finance Ltd. v. Abdul Samad, (2018) 3 SCC 622 : (2018) 2 SCC (Civ) 593 : (2018) 2 Scale 467] , this Court considered the divergence of legal opinion in the High Courts on the question as to whether an award under the 1996 Act is required to be first filed in the court having jurisdiction over the arbitral proceedings for execution, to be followed by a transfer of the decree or whether the award could be filed and executed straightaway in the court where the assets are located. Dealing with the provisions of Section 36, Sanjay Kishan Kaul, J. observed thus : (SCC p. 632, para 14)*

> *"14. … The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said code in the same manner as if it were a decree. It is, thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the Arbitral Tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code."*

Explaining the provisions of Section 42 the Court held that : (SCC pp. 632-33, paras 16-17)

> *"16. … The aforesaid provision, however, applies with respect to an application being filed in court under Part I. The jurisdiction is over the arbitral proceedings. The subsequent application arising from that agreement and the arbitral proceedings are to be made in that court alone.*

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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 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.' "

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. …"

Consequently, in the view of the Court, the enforcement of an award through its execution can be initiated anywhere in the country where the decree can be executed and there is no requirement of obtaining a

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transfer of the decree from the court which would have jurisdiction over the arbitral proceedings.”

10. Although the said judgment *Cheran Properties Limited (Supra)* was referred by the Hon’ble Supreme Court to Larger Bench in the case of ***Cox and Kings Limited vs SAP India Private Limited and others; (2022) 8 SCC 1***, on the following issues:

> *“**104**. In view of the above discussion, respectfully, I am of the opinion that the questions that are sought to be referred to a larger Bench deserve further elaboration. With all the humility at my command, the following substantial questions of law also arise for authoritative determination by a larger Bench in addition and in conjunction with those formulated by Hon'ble the Chief Justice:*
>
> > ***104.1**. (A) Whether the Group of Companies doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision?*
> >
> > ***104.2**. (B) Whether the Group of Companies doctrine should continue to be invoked on the basis of the principle of “single economic reality”?*
> >
> > ***104.3**. (C) Whether the Group of Companies doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?*
> >
> > ***104.4**. (D) Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies doctrine into operation even in the absence of implied consent?”*

11. The issue with regard to the jurisdiction of the executing court was neither doubted nor was referred.

12. From the judgments delivered by the Counsel for the parties and referred above, the Executing Court having jurisdiction to

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execute the award can be any court anywhere in the Country, where the decree can be executed and thus in view of the law expounded in the case of *Cheran Properties Limited (Supra),* I have no hesitation in holding that the objection of the petitioner that the Court at Lucknow had no jurisdiction loses its relevance and is worthy of rejection. Thus, on the ground of jurisdiction, the argument of the Counsel for the petitioner cannot be sustained as there is no error or infirmity in the order impugned dated 10.03.2023 passed by the Commercial Court, Lucknow and the same is upheld.

13. In view of above, the writ petition is dismissed with directions to the Commercial Court-Ist, Lucknow to expeditiously conclude the execution proceedings, in accordance with law.

Order Dated:13.10.2023
akverma **(Pankaj Bhatia,J.)**