



SC RULING: ARBITRAL AWARD CAN BE EXECUTED IN THE COURT WHERE ASSETS ARE LOCATED WITHOUT OBTAINING A TRANSFER OF THE DECREE FROM THE COURT HAVING JURISDICTION OVER THE ARBITRATION PROCEEDINGS.

Sundaram Finance Limited v. Abdul Samad & Anr. (February 15, 2018)

INTRODUCTION

- 1) Although the Arbitration and Conciliation Act, 1996 (“**Act**”) sets out that an arbitral award may be enforced in the same manner as if it were a decree of the court, there has been some uncertainty on the jurisdiction of the executing court in cases where the assets lie within the territorial jurisdiction of a court other than the court having jurisdiction over the arbitral proceedings in terms of Section 2(1)(e) of the Act. There have been conflicting decisions of different high courts on whether the award-holder has to first file the award in the court having jurisdiction over the arbitration proceedings and then obtain a transfer of the decree to the court where the assets of the judgment debtor are located, or if the award can directly be executed by the court in whose jurisdiction the assets of the award-debtor are situated.
- 2) Recently, this issue arose for consideration before a division bench of the Supreme Court (“**the Court**”) in *Sundaram Finance Limited v. Abdul Samad*¹. The Court examined the conflicting decisions of different high courts on the said issue, and ultimately held that an award may be executed directly by the court having territorial jurisdiction over the award-debtor’s assets, and there is no need for transfer of the decree.

FACTUAL BACKGROUND

- 3) Sundaram Finance Ltd. (“**Sundaram**”) filed an application for execution of an award under Section 36 of the Act (“**Execution Application**”), read with Section 151 and Order XXI Rule 27 of the Code, before the Morena court in Madhya Pradesh (“**Trial Court**”). The Trial Court, relying on the decision of the Madhya Pradesh High Court in *Computer Sciences Corporation India Pvt. Ltd*², returned the Execution Application for want of jurisdiction (“**Order**”), and directed Sundaram to file the Execution Application before the competent court in Tamil Nadu, and obtain a transfer of the decree to the Trial Court at Morena.
- 4) Aggrieved by the Order, Sundaram approached the Apex Court by way of a Special Leave Petition.

OBSERVATIONS AND FINDINGS

- 5) The Court examined Section 38, Section 39 and Section 46 of the Code of Civil Procedure, 1908 (“**Code**”) which authorizes ‘*the Court which passed the decree*’ to execute the decree, transfer the decree, and issue precepts, respectively. The Court then went on to observe that in the case of an award there is no decree passed “*but the award itself is executed as a decree by fiction*”.
- 6) The Court also referred to Section 36 of the Act and observed that (i) an award is to be enforced in accordance with the provisions of the Code in the same manner as if it were a decree; (ii) the enforcement mechanism is akin to the enforcement of a decree, but the award itself is not a decree of the civil court as no decree whatsoever has been passed by the civil court; (iii) the arbitral tribunal renders an award, and since the arbitral 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 Code.
- 7) The Court then affirmed the decision of the Madras High Court in *Kotak Mahindra Bank Ltd.*³, and reiterated that it was rightly observed that “*while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the Act, there was no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award*

¹ Civil Appeal No. 1650 of 2018

² *Computer Sciences Corporation India Pvt. Ltd. v. Harishchandra Lodwal and Anr.*, AIR 2006 MP 34

³ *Kotak Mahindra Bank Ltd. v. Sivakama Sundari & Ors.*, (2011) 4 KLJ 408

was passed should be taken to be the Court, which passed the decree. The said Act actually transcends all territorial barriers.”

- 8) The Court examined the Respondent’s contention that in view of the jurisdictional provision under Section 42 of the Act, the execution application has to first be filed before the court having jurisdiction over the arbitration proceedings, and then transferred. The Court referred to Section 32 of the Act which provides that arbitral proceedings stand terminated once the award is issued, and held that “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”.
- 9) In light of the above, the Court concluded 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”. Consequently, while the Court overruled the decisions of *Computer Sciences Corporation India Pvt. Ltd*⁴ and *Jasvinder Kaur & Anr.*⁵, it upheld the decisions of *Daelim Industrial Co. Ltd*⁶, *Kotak Mahindra Bank Ltd.*⁷, *Maharashtra Apex Corporation Limited*⁸, *Ram Sharan Gurjar & Anr.*⁹, *GE Money Financial Services Ltd.*¹⁰, *Indusind Bank Ltd.*¹¹ and *Sri Chandrashekhar*¹².

CONCLUSION

- 10) Under the Arbitration Act, 1940, an award was not *ipso facto* considered a decree executable by the court. The award-holder was required to first file the award in court, and a decree had to be passed thereon before it became executable. This requirement was done away with under the present Act, and arbitral awards were made executable as if they were a decree of the court. However, the interpretation taken by the Madhya Pradesh and Himachal Pradesh High Courts effectively meant that, in cases where the assets of award-debtor were situated within the territorial jurisdiction of a court other than the court having jurisdiction over the arbitral proceedings, the award would still have to be filed before the court having jurisdiction over the arbitral proceedings and then transferred to the executing court. This interpretation ran contrary to Section 32 of the Act, and made the process of execution in such cases more cumbersome. The Court has rightly overruled these decisions, while upholding the letter and spirit of the Act, and providing some much needed clarity on this issue.

PREVIEW TO NEXT WEEK’S UPDATE

BOMBAY HC RULING: SECTION 34(5) IS DIRECTORY AND NOT MANDATORY IN NATURE; AMENDMENT ACT APPLICABLE ONLY TO PROCEEDINGS IN RELATION TO WHICH NOTICE OF ARBITRATION WAS ISSUED AFTER THE AMENDMENT ACT WAS PASSED

Global Aviation Services Private Limited v. Airport Authority of India (21 February 2018)

- 1) In *Global Aviation Services Private Limited v. Airport Authority of India*¹³, the issues which primarily arose for consideration before the Bombay High Court (“the Court”) were (i) whether the requirement to issue notice to the respondent under Section 34(5) of the Act before filing an application to set aside an arbitral award is mandatory in nature; and (ii) applicability of the Arbitration and Conciliation (Amendment) Act, 2015 (“Amendment Act”) to

⁴ *Supra* at note 2

⁵ *Jasvinder Kaur & Anr. v. Tata Motor Finance Ltd.*, 2013 SCC OnLine HP 3904

⁶ *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*, 2009 SCC OnLine Del 511

⁷ *Supra* at note 3

⁸ *Maharashtra Apex Corporation Limited v. V. Balaji G. & Anr.*, 2011 (4) LW 745

⁹ *Kotak Mahindra Bank Ltd. v. Ram Sharan Gurjar & Anr.* (2012) 1 RLW 960

¹⁰ *GE Money Financial Services Ltd. v. Mohd. Azaz & Anr.* 2013 SCC OnLine All 13365

¹¹ *Indusind Bank Ltd. v. Bhullar Transport Company*, 2012 SCC OnLine P&H 21674

¹² *Sri Chandrashekhar v. Tata Motor finance Ltd. & Ors.*, (2015) 1 AIR Kant R 261


¹³ Commercial Arbitration Petition No. 434 of 2017 with Notice of Motion No. 488 of 2017

arbitrations and arbitration related court proceedings.

- 2) While the Respondent contended that the Court must dismiss arbitration petitions which are filed without issuing prior notice under Section 34(5), the Court held that a vested and substantive right i.e. to challenge an arbitral award could not be taken away merely on the ground of failure to issue notice under section 34(5). The Court further held that the procedure prescribed under Section 34(5) could be complied with even after the arbitration petition is filed by the petitioner under the said provisions or as set out in the High Court (Original Side) Rules.
- 3) With respect to the second issue, the Court held that the provisions of the Amendment Act would only apply to those proceedings in which the notice of arbitration has been received by the other party after the Amendment Act came into force i.e. after 23 October 2015. Further, the provisions of the Amendment Act would be applicable to cases where notice invoking arbitration was issued prior to 23 October 2015 only if the parties have agreed under the arbitration agreement to be governed by not only the Act, but also by statutory amendments thereto. The Court also went on to clarify that the date of filing the arbitration petition under Section 34(1) is irrelevant while determining the applicability of the Amendment Act.

A detailed analysis of this judgment will be part of our next update.

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