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ENFORCEMENT OF DOMESTIC ARBITRAL AWARDS

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Introduction

Chapter VIII of the Arbitration and Conciliation Act, 1996 [as amended by the Arbitration and Conciliation (Amendment) Act, 2015] (hereinafter, the “**Act**”) deals with finality and enforcement of arbitral awards. Section 36 (1) of the Act dealing with enforcement of an award states that where the time for making an application to set aside the arbitral award under Section 34 of the Act has expired, then subject to a stay granted by the Court on the operation of the award, such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) (hereinafter, the “**Code**”) as if it were a decree of the court. Section 36 of the Act makes it clear that the arbitral tribunal does not have the power to execute the award itself and for the purpose of enforcement, the award shall be enforced in accordance with the provisions of the Code in the same manner as if it were a decree of the court. Therefore, the enforcement mechanism under the Act is akin to the enforcement of a decree, however, the award itself cannot be said to be a decree as no decree whatsoever is passed by a civil court.¹

Part II of the Code deals with execution of decrees. Section 38 of the Code provides for the Court which may execute the decree.² Order XXI Rule 10 of the Code provides that where the decree holder decides to execute a decree, he shall apply to the Court which passed the decree or if the decree has been sent to another Court, then to such Court for execution.³ Section 39 of the Code provides for transfer of decree. Sub-section (4) to Section 39 was inserted *vide* Section 2 of the Code of Civil Procedure (Amendment) Act, 2002 to specify that the Court which passed a decree shall not be empowered to execute such decree against any person or property outside the local limits of its jurisdiction.⁴

Thus, what is important to understand in the context of an arbitral award is – In which court should the award holder file an execution application to enforce an arbitral award? It is clear from scheme of the Act and more particularly Section 36 thereof that in case of an award, there is no decree which is in existence and it is the award that must be executed as a decree by fiction.⁵ The words ‘as if’ used in Section 36(1) of the Act creates this deeming fiction. Thus, to ascertain which court shall be competent to execute the award, the Act empower the courts to fall back to the provisions of the Code (as if the award were a decree) for the purpose of execution. However, at the same time, this enabling provision is required to be read in the context of the legislative intent behind Section 36 of the Act which is to allow smooth enforcement of arbitration awards.

This thought paper seeks to *firstly* explain as to how the deeming fiction under Section 36(1) of the Act operates to determine the territorial jurisdiction of a court to execute an arbitral award; and *secondly* whether a court which exercises jurisdiction over the seat of the arbitration, can execute an arbitral award even where the award debtor and its asset/property is situated outside the local limits of such court?

¹ *Sundaram Finance Limited v. Abdul Samad and Anr.*, (2018) 3 SCC 622 at ¶ 14

² **Section 38. Court by which decree may be executed** - A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

³ **Order XXI Rule 10. Application for execution** - Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

⁴ **Section 39. Transfer of decree** – (4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.

⁵ *Supra* note 1 (*Sundaram Finance*) at ¶ 10

Territorial Jurisdiction to execute the Arbitral Award – Where would an Execution Application lie?

Before analyzing the jurisdictional competence of a court to entertain the execution application for enforcement of an arbitral award, it is imperative to refer to certain provisions of the Act:

Section 2(1)(e) of the Act defines “Court” as under:

2(1)(e). “Court” means –

- (i) *in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*
- (ii) *in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;]*

Section 34(1) of the Act reads as under:

34. Application for setting aside arbitral award.- (1) *Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

Section 36(1) of the Act is as follows:

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.*

Section 42 of the Act provides as follows:

42. Jurisdiction - *Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.*

The Bombay High Court in the case of *Eskay Engineers, Mumbai v. Bharat Sanchar Nigam Ltd., Mumbai*,⁶ was faced with the question as to whether the expression ‘Court’ for the purpose of Section 34 can be read in a manner which is different from the meaning of the same expression in Section 36? Dr. D. Y. Chandrachud, J, speaking for the Bombay High Court held that the ‘Court’ for the purpose of enforcement of an award under Section 36 of the Act cannot be read at variance with the meaning of the expression under Section 34 of the Act and to do so would be against the underlying legislative object of enactment of the Act.⁷ The Bombay High Court, however, did not address the issue as to whether any other court (except the Section 34 Court) shall also have concurrent jurisdiction to entertain the execution application.

⁶ (2009) 5 Mh.L.J. 565

⁷ *Ibid* at ¶ 10; Section 34 of the Act also uses the expression ‘Court’ as defined under Section 2(1)(e) of the Act.

The Karnataka High Court in the case of *I.C.D.S Limited v. Mangala Builders Pvt. Ltd. and ors.*⁸, which was relied upon by the Bombay High Court in *Eskay Engineers*, also held that the Court that exercises the power under Section 34 of the Act alone has the jurisdiction to entertain the enforcement of the arbitral award. The corollary position that only the court which could have entertained the suit can enforce the Award was also upheld.

In a case heard by the Bombay High Court in the matter of *L&T Finance Ltd. v. Abhishek Talwar & Anr.*⁹ the seat of the arbitration was Mumbai. The judgement debtor resided in Delhi. The Court came to the conclusion that since the award was passed in Mumbai, the Bombay High Court shall be treated as the Court which passed the decree under Section 38 of the Code and therefore would be the executing Court as well. It was held that the Bombay High Court shall commence execution and if during the execution proceeding, it is seen that the judgement debtors do not reside nor have properties in Mumbai, the decree shall be transferred to such other court under Section 39 of the Code for enforcement. Thus, the Bombay High Court was of the view that court within whose jurisdiction the award was passed shall be considered as 'Court' which passed the decree for the purposes of Section 38 of the Code.

Under the amended Act as well, Section 36(1) of the Act (as amended) uses the lower case 'court' as opposed to the capitalized 'Court' defined under Section (2)(1)(e) of the Act. Section 34 of the Act also uses the expression 'Court' as defined. The Bombay High Court in the case of *Nandbala Nathala Mayani v. Jaswantrai Chagganlal Mayani and Ors.*¹⁰ has held that for the purpose of enforcement of an award, the expression 'court' used in Section 36(1) of the Act shall be used interchangeably with "Court" as defined under Section 2(1)(e) of the Act and therefore an execution application lies to the court which exercises jurisdiction over the seat of arbitration.

Hence, until recently, the High Courts have been taking the view that for enforcement of an award, the execution application is required to be filed in the principal civil court of original jurisdiction in a district or the High Court, as the case may be, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit i.e. the Section 2(1)(e) Court. The Karnataka High Court in *Mangala Builders* went as far ahead as saying that the Section 2(1)(e) Court or the Section 34 Court *alone* has the jurisdiction to entertain an execution application. The Bombay High Court in *L&T Finance* opined that court within whose jurisdiction the award was passed shall be considered as 'Court' which passed the decree.

However, while an award is deemed to be a decree for the purpose of Section 36 of the Act, there is no deeming fiction that the court within whose jurisdiction the arbitral award was passed should be taken to be the court, which passed the decree. A case in point is the Delhi High Court judgement in *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*¹¹, wherein it was held that the expression 'Court' in Section 36 of the Act may not necessarily be the Court within the meaning of Section 2(1)(e). As observed by the Delhi High Court, the word 'Court' in Section 36 is used to describe the manner of enforcement i.e. as a 'decree of the Court' and not in the context of providing for the Court which will have territorial jurisdiction to execute/enforce the award.¹² The Delhi High Court further observed that the Court where the property of the judgement debtor against which the award is sought to be enforced is situated shall have inherent jurisdiction to entertain an execution application under Section 36 of the Act.¹³ Similar view has been taken by the Madras High Court.¹⁴

⁸ AIR 2001 Kar 364 ¶ 3, 4

⁹ 2015 SCC OnLine Bom 1489 at ¶ 6

¹⁰ 2018 SCC OnLine Bom 1752 ¶ 10

¹¹ (2009) 159 DLT 579. See also *Nandbala Nathala Mayani v. Jaswantrai Chagganlal Mayani and Ors.*, 2018 SCC OnLine Bom 1752

¹² *Ibid* at ¶ 18

¹³ *Ibid* at ¶ 25

¹⁴ *Kotak Mahindra Bank Ltd. v. Sivakama Sundari* (2011) 4 LW 745 (Mad)

The Allahabad High Court in *G.E. Money Financial Services Ltd. v. Mohd. Azaz*¹⁵, after analyzing the scheme of the Act, opined that Sections 38 and 39 of the Code would have no application when enforcing an award and the award can, thus, be filed for execution wherever the judgement debtor resides or carries on business or has properties within the jurisdiction of the said court.

A full bench of the Bombay High Court in the case of *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Services Limited & ors*¹⁶, observed that for the purpose of enforcement of an award, the meaning of expression 'Court' as ascribed for purpose other than execution cannot be so applied while executing a final award as a decree. It was held that the Section 2(1) of the Act which defines various expressions clarifies that the definitions are to be attributed the necessary meanings unless the context otherwise requires and therefore the expression 'Court' as appearing in Section 36 of the Act cannot ascribe the same meaning as under Section 2(1)(e) of the Act.

Finally, the Supreme Court in *Sundaram Finance Limited v. Abdul Samad and Anr.*¹⁷ has resolved the issue in so far as the manner in which the award can be enforced by the award holder. The Supreme Court, after analyzing the provisions of the Act and the Code, held that there cannot be a deeming fiction that the court within whose jurisdiction the arbitral award was passed should be taken to be the court which passed the decree. It was observed that the Act transcends all territorial barriers and enforcement of an award cannot be strictly confined to provisions of Sections 37 to 39 of the Code.¹⁸ The Supreme Court eventually held that an application for enforcement of an award can be filed anywhere in the country where such decree can be executed without obtaining a transfer of the decree from the court having jurisdiction over the arbitral proceeding. The Supreme Court *inter alia* upheld the view taken by the Allahabad High Court in *G.E. Money Financial Services Ltd. v. Mohd. Azaz*¹⁹, wherein it was held Sections 38 and 39 of the Code would have no application and the award can be filed for execution wherever the judgement debtor resides or carries on business or has properties. It also upheld the view of the Delhi High Court in *Daelim Industries*.

Thus, whilst the Supreme Court settled the issue in so far as the manner in which the award could be enforced by the courts in India, there arose a particular predicament regarding the applicability of Section 42 of the Act vis-à-vis the execution proceedings initiated under Section 36 of the Act, as detailed in the subsequent paragraphs.

The Section 42 Predicament

Section 42 of the Act starts with a non obstante clause and provides that where any application under Part I of the Act has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made only in that Court.

The Supreme Court in the case of *State of West Bengal v. Associated Contractors*²⁰ was *inter alia* concerned with the question as to whether Section 42 of the Act applies after the arbitral proceedings come to an end. The Supreme Court held that the expression "with respect to an arbitration agreement" appearing in Section 42 of the Act are words of wide import and would take in all applications made before, during or after arbitral proceeding are over. The effect of Section 42 of the Act, as explained by the Supreme Court is that where an application under Part I has been made to a Court either before, during or after award is passed by the arbitral tribunal, that Court alone shall have the jurisdiction over all subsequent applications arising out of such arbitral

¹⁵ (2013) 100 ALR 766 at ¶ 10

¹⁶ (2018) 2 Mh.L.J. 329 at ¶ 17

¹⁷ *Supra* note 1

¹⁸ *Ibid* at ¶ 19

¹⁹ *Supra* note 15 at ¶ 10 (GE Money)

²⁰ (2015) 1 SCC 32 at ¶ 11, 21;

proceeding. Thus, as interpreted by the Supreme Court in *Associated Contractors*, Section 42 shall also apply to all applications made after the arbitral proceedings have ended,²¹ which shall include an application filed for execution of the award under Section 36 of the Act.²²

In the case of *SE Investments Ltd. v. Arch Pharamalabs & ors.*²³ before the Bombay High Court, the argument on behalf of the decree holder was that the jurisdiction restriction in Section 42 applies only until the award attains finality and the award can be put into execution anywhere in the country where the judgement debtor has property. Upon relying on the Supreme Court judgement in *Associated Contractors*, the Bombay High Court observed that since the application for interim reliefs under Section 9 of the Act was filed in the Delhi High Court, the mandate of Section 42 shall have to be followed and the execution application can be filed only before the Delhi High Court. The Calcutta High Court in *SREI Equipment Finance Limited v. Akhtar Hussain*²⁴, also held that Section 36 is dependent upon Section 42 of the Act and if an application in an earlier occasion is filed before a Court, the further application can only be entertained by the same Court.

This is where the decision of Supreme Court in *Sundaram Finance* creates/created some difficulty. There appears to be divergence of opinion in the decisions of the Supreme Court in *Associated Contractors* and *Sundaram Finance* on the issue as to whether Section 42 is applicable to an application made before a court after the award is pronounced and/or when an arbitration proceeding is terminated under Section 32 of the Act²⁵.

The two-judge bench of the Supreme Court in *Sundaram Finance* took the opposite view as that of *Associated Contractors* and held that Section 42 of the Act which deals with the jurisdictional issue in respect of arbitral proceedings would not apply to an execution application.²⁶ The Supreme Court held that when an award is made, the arbitral proceedings stand terminated under Section 32 of the Act and therefore Section 42 would not have any relevance. Consequently, the effect of this is that an application for setting aside award under Section 34 shall also not be hit by bar under Section 42, which may have its own ramifications.

It is apposite to mention here that the Supreme Court in *Sundaram Finance* does not notice the three-judge bench judgement in *Associated Contractors*, which may have possibly led to somewhat contrary view being taken by the Supreme Court. To that extent the *Sundaram Finance* judgment could be said to be per incuriam. However, it cannot be overlooked that *Sundaram Finance* dealt specifically in the context of enforcement of an arbitral award under Section 36 of the Act while *Associated Contractors* laid down the law in a general sense and specifically in the context of Section 34 of the Act. Nowhere in *Associated Contractors* did the Supreme Court render

²¹ *Ibid* at ¶ 21 (Associated); See also *Eskay Engineers, Mumbai v. Bharat Sanchar Nigam Ltd., Mumbai*, (2009) 5 Mh.L.J. 565 at ¶ 10; *Abhishek Talwar v. L&T Finance Ltd.*, (2015) 3 AIR Bom R 179 at ¶ 14

²² *Supra* note 6 (*Eskay Engineers*) at ¶ 10; See also *L&T Finance Ltd. v. Abhishek Talwar* 2015 SCC OnLine Bom 1489 at ¶ 7; *Shree Harivansh Securities Private Limited v. Nikko Stock Broker Pvt. Ltd.*, (2018) 1 Mah LJ 374 at ¶ 9;

²³ (2017) 4 AIR Bom R 317 at ¶ 15

²⁴ 2016 SCC OnLine Cal 472 at ¶ 28(v)

²⁵ **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.

²⁶ *Supra* note 1 (*Sundaram Finance*) at ¶ 17; See also *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*, (2009) 159 DLT 579 at ¶ 16; See also *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Services Limited & ors.* (2018) 2 Mh.L.J. 329 at ¶ 18

an observation in the context of Section 36 of the Act and hence did not consider the legal effect thereof.²⁷

It would be interesting to see how courts, while deciding jurisdiction for enforcement of an award, would consider *Sundaram Finance* a smaller bench strength (two judge) and *Associated Contractors* (three judge).

A full bench of the Bombay High Court in the case *Gemini Bay (Supra)*,²⁸ have sought to distinguish *Associated Contractors* in so far as execution of an award is concerned. The Bombay High Court observed that the term 'application' under Section 42 would include an application under Section 34(2) or Section 36(2) and (3) of the Act which are filed after the arbitration proceedings are over. Since Section 36(1) of the Act does not refer to an application, the same is not hit by Section 42 of the Act.²⁹ Similar view has been expressed by the Calcutta High Court in *BLA Projects Private Limited v. Asansol Durgapur Development Authority*,³⁰ wherein the Calcutta High Court considered both *Associated Contractors* and *Sundaram Finance* to conclude that since no application for enforcement of an award is envisaged under Section 36 of the Act, Section 42 of the Act would not have any applicability. The Calcutta High Court held that the court which entertains an execution application derives its source of power from Order XXI of the Code rather than Section 36 of the Act and hence it is not an 'application' within the meaning of Section 42 of the Act.³¹

While this is an interesting interpretation of *Associated Contractors* to harmonize the seemingly conflicting views, the same unfortunately does not take into account *Sundaram Finance's* dicta that any application post termination of arbitral proceeding shall not be hit by Section 42 of the Act. This implies that even an application under Section 34 or Section 36(2) and (3) of the Act shall not be bound by jurisdictional restriction under Section 42 of the Act. This interpretation may limit the scope of Section 42 which shall go against the letter and spirit of the Act of quick and speedy disposal. Even otherwise, it may be contended that an application filed by an award holder to execute a decree is in furtherance of Section 36 of the Act and hence within the scope of Section 42.

Thus, while the judgement of *Sundaram Finance* settled the position in relation to the manner of enforcement of an award is concerned, it opened a Pandora's box in so far as applicability of Section 42 of the Act to post award applications is concerned. As of now, there is a vacuum which needs to be filled by the Supreme Court to resolve the seemingly conflict between its decisions in *Associated Contractors* and *Sundaram Finance*.

Can an Execution Application be filed in Court within whose Jurisdiction neither Judgement Debtor nor its Assets/Properties are situated?

Proceeding on the assumption that Section 42 of the Act shall not be applicable to execution applications as held in *Sundaram Finance*, there may be instances where an execution application is filed in a Court where the judgement debtor or its assets/properties is situated but which is not the Court as defined under Section 2(1)(e) of the Act.

The Supreme Court in *Sundaram Finance* has held that the Act transcends all territorial boundaries and an execution application can be filed in any court where the award is capable of being executed. However, what the Supreme Court has not dealt with in *Sundaram Finance* is the

²⁷ *BLA Projects Private Limited v. Asansol Durgapur Development Authority*, 2019 SCC OnLine Cal 1868 at ¶ 43, 44

²⁸ *Supra* note 16 (Gemini Bay)

²⁹ *Ibid* at ¶ 21

³⁰ *Supra* note 27 (BLA Projects) at ¶ 47, 50, 52

³¹ *Ibid* at ¶ 53

question – whether a court within whose jurisdiction neither the judgement debtor resides or any of its assets/properties is located is empowered to entertain an execution application for enforcement of the award?

Section 39(4) of the Code prohibits the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The Supreme Court in the case of *Mohit Bhargava v. Bharat Bhushan Bhargava and ors.*,³² after considering the effect of the amendment in the Code, *inter alia* held that an executing court cannot proceed against the property situated outside its jurisdiction except in a case falling under Order XXI Rule 3 of the Code.

As stated above, *Sundaram Finance* has *inter alia* upheld the views of the Delhi High Court in *Daelim Industries* and the Allahabad High Court in *G.E. Money* to the effect that only for the purpose of execution, there is a deeming fiction that operates and Section 38 and 39 of the Code shall not have any applicability as far as enforcement of an arbitral award is concerned. However, *Daelim Industries* also refers to Section 39(4) of the Code and observes that whilst territorial jurisdiction for filing a suit is determined by cause of action, residence of defendant, locus of property etc. (Section 16 to 20 of the Code), the territorial jurisdiction for execution is determined only by locus of judgement debtor or its asset/property. The Supreme Court in *Sundaram Finance* does not deal with the aspect of applicability of Section 39(4) while exercising jurisdiction to enforce an arbitral award. Hence, the question remained – In view of the bar under Section 39(4) of the Code, can a court enforce an award even where the judgement debtor and its assets/properties are not within that court's jurisdiction?

This question came up before the Bombay High Court in *Global Asia Venture Company v. Arup Parimal Deb and ors.*³³. In this case, the arbitration was seated in Mumbai, however, the judgement debtors and their assets were all outside Mumbai. The contention on behalf of the decree holder was that while the Court under Section 2(1)(e) is empowered to hear a challenge to an award under Section 34, there is no reason why such Court shall be divested of its jurisdiction at the stage of enforcement of the award. The submission on behalf of the judgement debtors was that an application for enforcement of an award can *only* be filed in the court where the judgement debtors or its assets are situated in terms of Section 39(4) of the Code.

The Bombay High Court, while relying on the expression that 'the Act transcends all territorial barriers', as used in *Sundaram Finance*, held that Section 39(4) is a limitation of territoriality and hence, the Court exercising jurisdiction over the seat of the arbitration shall continue to retain jurisdiction for enforcement of an arbitral award.³⁴ The Bombay High Court further held that the restrictions contained in the Code cannot be made to apply to the enforcement of arbitral awards as that would be wholly contrary to statutory intent of the Act for rapid and quick enforcement.³⁵ The Bombay High Court based its reasoning on the principle that the jurisdiction of the Section 2(1)(e) Court cannot be ousted once the award is put into execution and logically, Section 2(1)(e) Court shall always have the necessary jurisdiction to entertain an execution application irrespective of the situs of the judgement debtor or its assets/properties.

The Bombay High Court, while adjudicating on this issue, did not have the benefit to advert to the Delhi High Court judgement in *Daelim Industries* (approved in *Sundaram Finance*), wherein it was *inter alia* observed that for the purpose of execution, only the locus of judgement debtor or its asset/property is relevant. The judgment of the Delhi High Court in the case of *State Trading Corporation of India Ltd. v. Global Steel Holdings Limited*³⁶, was also not brought to the notice of the Bombay High Court, wherein it was *inter alia* held that where neither the judgement debtors nor their properties are located within the jurisdiction of the Delhi High Court, it cannot assume jurisdiction for enforcing the award against the assets/properties of judgement debtors.

³² (2007) 4 SCC 795 at ¶ 7, 8

³³ 2018 SCC OnLine Bom 13061

³⁴ *Ibid* at ¶ 13

³⁵ *Ibid* at ¶ 15, 16

³⁶ AIR 2015 Del 100 at ¶ 26, 30 and 38

Irrespective, it is unlikely that the Bombay High Court would have altered the view taken since it based its reasoning on the principle that the Act transcends all territorial barriers and party autonomy shall prevail over territorial restrictions contained under the Code.

Thus, the Bombay High Court has opined that the Court exercising jurisdiction over the seat of arbitration shall always have the jurisdiction to execute an award under Section 36 of the Act notwithstanding the limitations under Section 39(4) of the Code. While this is a laudable step in ensuring that the legislative intent behind the Act is achieved through quick, effective and speedy enforcement of the award, it does not advert to the practical difficulties that may arise while a court attaches properties situated in different cities/states which may need some local assistance.

It is apposite to mention here that the aforesaid judgement of the Bombay High Court was carried into appeal before a division bench of the Bombay High Court which was dismissed on the preliminary ground of maintainability.³⁷ The judgment debtors challenged the order of the division bench before the Supreme Court. The Supreme Court has stayed the execution proceeding in respect of assets situated outside Mumbai.³⁸ Thus, it would now be interesting to see what the Supreme Court holds to resolve the conflict between the territorial restriction imposed under Section 39 (4) of the Code vis-à-vis the transcending territorial nature of arbitration proceedings.

Conclusion

Section 36 of the Act is an enabling provision that allows the courts to execute an award 'as if' it were a decree of the court. This deeming fiction created by the statute has been subject to some scrutiny by the courts in India resulting into varied interpretations on the manner of enforcement, the place of enforcement and the jurisdiction of different courts etc. The Supreme Court in *Sundaram Finance* settled the position on the manner of enforcement by holding that for the purpose of Section 36 of the Act, there is no court which passed the decree and the execution application can be directly filed anywhere in the country where the award can be executed. The Supreme Court purposefully interpreted the enabling provision under Section 36 of the Act keeping in mind the legislative intent which was to allow smooth enforcement of arbitration awards to be executed as decrees. It is hoped that the courts in India consistently follow *Sundaram Finance* while executing arbitral awards in letter and spirit and insistence must not be on following the rigours of the Code.

While *Sundaram Finance* cemented the scheme for enforcement of awards, there is a seeming conflict with the Supreme Court decision in *Associated Contractors* in relation to applicability of Section 42 of the Act to post award applications. In case *Associated Contractors* is followed while enforcing awards, then an application for executing an award shall first have to be filed only in the Section 42 Court. This is not ideal and goes against the scheme and purpose of the Act since the Section 42 Court shall have to transfer the decree to the court where it can be executed. In case *Sundaram Finance* is followed, the scope of Section 42 of the Act shall be considerably narrowed down considering that all post award applications including applications under Section 9, Section 34 and Section 36 (2) and (3) of the Act shall have to be filed only in the Section 42 Court which may lead to incongruous results. This shall also go against the legislative intent of enacting Section 42 of the Act which was to ensure that only one court exercises jurisdiction over arbitral proceedings and all applications arising thereto. To resolve this possible conflict, it is imperative that the Supreme Court decides the issue and definitively put the controversy to rest.

The Supreme Court is also currently seized of the issue as to whether an award can be executed by a court in whose jurisdiction the judgement debtor or its assets/properties are not situated. The

³⁷ *Arup Deb and ors. v. Global Asia Venture Company and Anr.*, Commercial Appeal No. 356 of 2019 in Chamber Summons No. 706 of 2017 in Commercial Execution Application No. 58 of 2017 along with Notice of Motion (L) No. 695 of 2019, decided on August 19, 2019 (Bom HC)

³⁸ Order dated October 18, 2019 passed in Special Leave Petition (C) No. 24144/2019

Supreme Court shall hopefully be pronouncing the judgement on the interplay between the territorial restrictions as contained in Section 39(4) of the Code with the territorial transcending nature of arbitration proceedings. In the event the Supreme Court comes to conclusion that the court exercising jurisdiction over the arbitration proceeding is empowered to execute the award irrespective of the situs of the judgement debtor or the assets/properties of the judgement debtor, it would be a game changer in so far as enforcement of arbitral awards in India is concerned. However, this would have to be considered in the backdrop of practical challenges that may be faced by executing courts in attachment of assets/properties which are not within the territorial jurisdiction of such court.

This paper has been written by Ranjit Shetty (Senior Partner) and Rahul Dev (Associate).

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