

MANU/TN/3588/2011

Equivalent Citation: 2011(6)CTC11

IN THE HIGH COURT OF MADRAS

C.R.P. (NPD) No. 574 of 2011

Decided On: 26.08.2011

Appellants: Kotak Mahindra Bank Ltd.
Vs.
Respondent: Sivakama Sundari S. Narayana S.B. Murthy

Hon'ble Judges/Coram:
V. Ramasubramanian, J.

Counsels:
For Appellant/Petitioner/Plaintiff: S. Saravanan, Adv.

For Respondents/Defendant: K. Rajendra Prasad, Adv.

Case Note:

Civil - Jurisdiction - Maintainability of Execution petition - Section 37 and Section 38 of Civil Procedure Code, 1860 and Order XXI, Rule 10, 5, 6 of Civil Procedure Code, 1860 (C.P.C) - Assistant Judge returned execution petition filed by Petitioner and calling upon Petitioner to explain as to how execution petition was maintainable without being transmitted through proper channel - Hence, this Revision Petition - Whether, impugned order passed by Assistant Judge was liable to be set aside - Held, Section 38 of C.P.C., Order XXI, Rule 10 of C.P.C. states that holder of decree shall apply to Court which passed decree, for its execution - Further when Court within whose jurisdiction arbitral award was passed, was taken to be Court which passed decree within meaning of Section 37 and Order XXI, Rule 10 of C.P.C., that award holder would be entitled to seek transmission from that Court - Therefore whole procedure of filing an execution petition before Court within whose jurisdiction arbitral award was passed as though it was Court which passed decree, was pathetically misconceived - Thus no Court to which an application for execution of an award was presented, could insist on filing of execution petition first before some other Court and to have it transmitted to it later - However in respect of an arbitration award no Court could know whether an award was partly or fully satisfied, unless it had opportunity to execute award by itself - Hence it was not proper to import provisions of Order XXI, Rules 5 and 6 of C.P.C. and demand an order for transmission - Revision Petition allowed. Ratio Decidendi "Any execution petition shall not be returned if it is permitted under provision of law."

ORDER

V. Ramasubramanian, J.

1. The civil revision petition arises out of a docket order passed by the X Assistant Judge, City Civil Court, Chennai, in an unnumbered execution petition, calling upon the

Petitioner to get the arbitration award secured by them, transmitted from the appropriate Court, so as to enable the X Assistant Judge, to entertain the execution petition.

2. Heard Mr. S. Saravanan, Learned Counsel for the Petitioner and Mr. K. Rajendra Prasad, Learned Counsel for the Respondent.

3. The Respondent holds a credit card issued by the Petitioner herein. On the ground that certain amounts are due from the Respondent, the Petitioner raised a dispute and the same was referred to arbitration before a sole Arbitrator nominated by the Petitioner at Mumbai. The Respondent was set exparte and an award was passed by the Arbitrator on 29.01.2010.

4. Thereafter, the Petitioner filed an execution petition before the X Assistant Judge, City Civil Court, Chennai, for executing the award, in view of the fact that the Respondent resides within the jurisdiction of this Court. But, the said execution petition was returned by the X Assistant Judge, City Civil Court, calling upon the Petitioner to explain as to how the execution petition is maintainable, without being transmitted through proper channel. Though the Petitioner explained that there is no question of transmission and though the contention of the Petitioner is supported by the decisions of the High Courts of Bombay and Delhi, the executing Court posted the matter before Court for maintainability and thereafter, passed an order holding that as per the judgment of the Karnataka High Court, an arbitral award is a decree and that orders of transmission were necessary. Therefore, the Petitioner/award holder is before this Court.

5. It appears that there has been a great deal of confusion about the question of transmission of awards. It has come to light that hundreds of execution petitions are filed in various Courts in the State, with a request to transfer them to other Courts for execution. Even the original side of this court is no exception to this malady. The statistics on the original side of this Court reveal that a total of about 2362 execution petitions were filed between January to June 2011, only with a request to transmit the awards to various other Courts, either within the State or outside the State, for execution. Interestingly, the total number of execution petitions filed in the Original Side of this Court seeking the actual execution of the decrees passed by this Court are only 39 in number (for the entire period from January to June 2011). But, the number of execution petitions filed with a prayer for transmission of the awards were 2362. The statistics is extracted as follows:

Months	Total E.Ps	Transmit E.Ps.	Other E.Ps.
January			
February			
March			
April			
May			
June			
Total			

6. It appears that the practice of filing execution petitions (arising out of arbitral awards) in one court and seeking their transmission to other courts, has caught up with the community of lawyers, on account of a misconception that the court within whose jurisdiction the Arbitral proceedings took place and the award passed, is the

court which passed the decree. If the arbitral proceedings had taken place in Chennai and the judgment debtor resides or carries on business in Bangalore, the execution is laid in the court at Chennai with a request to transmit it to Bangalore, on a misconception that the Chennai court is to be taken to be the court which passed the decree. But there is no basis in law for such a presumption. Therefore, it is high time the controversy is to be put to rest. To do so, it is necessary to have a detailed analysis of the provisions relating to execution contained in the Code of Civil Procedure and the provisions relating to execution contained in the Arbitration Act, 1940, and the Arbitration and Conciliation Act, 1996.

7. Section 38 of the Code of Civil Procedure states that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 37 of the Code defines the expression "Court which passed the decree", to include (i) the Court of first instance where the decree was passed by a Court of appellate jurisdiction, and (ii) the Court which would have had the jurisdiction to try the suit, if the Court of first instance had ceased to exist or ceased to have jurisdiction to execute it.

8. Section 39(1) of the Code enables the Court which passed a decree to send it for execution to another Court of competent jurisdiction. This may be done on an application of the decree holder and it may be done if any of the four contingencies in Clauses (a) to (d) of Sub-section (1) of Section 39 arises. They are:

(a) If the judgment debtor resides or carries on business within the local limits of jurisdiction of such other Court;

(b) If the judgment debtor has no property within the local limits of jurisdiction of the Court which passed the decree, but has property within the local limits of the jurisdiction of the other Court to which it is sought to be transferred;

(c) If the decree is for sale or delivery of immovable property situate outside the local limits of jurisdiction of the Court which passed the decree; and

(d) If the Court considers it fit to transfer the decree for any other reason to be recorded in writing.

9. Sub-section (2) of Section 39 enables the Court which passed a decree to transfer it to any Subordinate Court, even of its own motion, without an application by the decree holder. Sub-section (3) of Section 39, which was inserted by Act 104 of 1976, creates a deeming fiction. It says that if a Court to which an application for the transfer of the decree is made, has jurisdiction to try the suit in which the decree was passed, then it could also be deemed to be a Court of competent jurisdiction. Sub-section (4) inserted under Amendment Act 22 of 2002, places an embargo upon a Court which passed the decree to execute such a decree against any person or property outside the local limits of its jurisdiction.

10. Section 41 of the Code imposes an obligation upon the executing Court to inform the Court which passed the decree, about the completion of execution or about the failure to execute the decree along with the attending circumstances. Section 42(2)(a) empowers the Court to which a decree is transferred, to send it to some other Court for execution. For this purpose, the transferee Court would have the same power as that of the Court which passed the decree. Sub-section (4) of Section 42 contains two

limitations to the power of the Court to which a decree is sent for execution. Since we are not concerned with the same, I am not referring to it.

11. Section 43 provides for execution of decrees passed by any civil Court established in India or outside India, to which the provisions of this Code do not extend. Section 44 empowers the State Government to declare by notification in the Official Gazette that the decrees of any Revenue Court in any part of India to which the provisions of Code of Civil Procedure would not apply, be executed within the State as if they had been passed by Courts in that State. Section 44-A indicates the procedure to be followed for execution of decrees passed by a Court in reciprocating territories. Section 45 declares that a Court in any State will be entitled to send a decree for execution to any Court established by the authority of the Central Government outside India. Section 46 speaks of precepts.

12. In tune with Section 38 of the Code of Civil Procedure, Order XXI, Rule 10 of the Code states that the holder of a decree shall apply to the Court which passed the decree, for its execution. The application may also be made to the Court to which such decree has been sent under the provisions contained in the Code. Rule 6 of Order XXI requires the Court forwarding a decree for execution to another Court, (i) to send a copy of the decree, (ii) to send a certificate recording satisfaction or non satisfaction of the decree, and (iii) to send a copy of any order for the execution of the decree or a certificate to the effect that no such order had been passed. The mode of transfer is prescribed by Rule 5 of Order XXI. It says that where a decree is to be sent for execution to another Court, the Court which passed such decree shall send it directly to such other Court, irrespective of whether such Court is situate in the same State or not.

13. A comprehensive analysis of the various provisions of the Code of Civil Procedure, dealt with in the preceding paragraphs, would show that every decree of a civil Court is liable to be executed primarily by the Court which passed the decree. Therefore, an application for execution is expected to be filed in the first instance, only in the court which passed the decree. It is only in cases where the Court which passed the decree is unable to execute it, that the provisions for the transfer or transmission of such decree and the procedure prescribed therefor, come into play.

14. Keeping this fundamental aspect in mind, if we now have a look at the provisions of the Arbitration and Conciliation Act, 1996, it is seen that the award passed by an Arbitral Tribunal is liable to be enforced under Section 36 of the Act, in the same manner as if it is a decree of the Court, in terms of the provisions of the Code. In other words, an award passed by the Arbitral Tribunal is equated to the decree of a Court, for the purpose of execution and only for that purpose. In so far as foreign awards are concerned, they are also equated to the decrees of Courts under Section 58 of the 1996 Act.

15. But the fact that an Arbitral Tribunal is not bound by the Rules of Procedure formulated in the Code, is made clear by Section 19(1) of the Arbitration and Conciliation Act, 1996. Therefore, an Arbitral Tribunal is not a Court. Hence it follows that the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the "1996 Act") elevates an award to the level of a decree, for the purpose of execution. But, it does not elevate the Arbitral Tribunal to the status of a civil Court.

16. It is important to note that under the 1996 Act, an award can be executed directly without a seal of approval by a civil court. The 1996 Act made a total departure in this

regard, from the provisions contained in the Arbitration Act, 1940, (hereinafter referred to as the "Act of 1940"). The difference between the provisions of the 1996 Act and the provisions of the Act of 1940, may be summarised as follows (insofar as the issue on hand is concerned):

(i) Under Section 14(2) of the 1940 Act, the arbitrators are obliged to file a copy of the award into Court and the Court is obliged to give notice to the parties about the filing of the award. After it is so filed, the Court is empowered to modify or correct an award, in terms of the provisions of Section 15. The Court also has the power to remit the award under Section 16 of the 1940 Act. If the Court sees no reason to remit the award, or if the Court sees no reason to set aside the award (either after the expiry of the time for filing an application to set aside the award or after the dismissal of any such application), the Court shall pronounce a judgment under Section 17. A decree is to follow such judgment under Section 17. Thus, an arbitral award became executable under the 1940 Act, only after a judgment was pronounced by a Court under Section 17 and it was also followed by a decree. But, under the 1996 Act, the award automatically becomes a decree in terms of Sections 36 and 58;

(ii) As pointed out earlier, Section 19(1) of the 1996 Act liberates Arbitral Tribunals from the rigors of the provisions contained in Code of Civil Procedure and the Indian Evidence Act. The role of the Court, even while dealing with an application under Section 34, has been restricted by the 1996 Act. The only place where some role is assigned to a Court is in Section 27 of the 1996 Act (apart from Sections 8, 9, 11, 34 and 45). By virtue of Sub-section (3) of Section 27, the Court to which a request for assistance in taking evidence is made, is entitled to follow its own rules for taking evidence. Thus, Section 27(3), read with Section 19(1) of the 1996 Act, gives a clear indication that while the Arbitral Tribunal can formulate its own procedures, the civil Court could follow its own, whenever it is approached (a) either for the grant of interim measures, (b) or for any assistance in taking evidence, or (c) for execution. In contrast to these provisions of the 1996 Act, Section 41 of the 1940 Act makes the provisions of the Code of Civil Procedure apply to all proceedings before the Court as well as to all appeals under the Act.

17. Once it is seen that an award of the Arbitral Tribunal is deemed to be a decree, by virtue of Section 36 of the 1996 Act, it follows as a corollary that the Arbitral Tribunal is in the position of a Court which passed the decree (though it may not be the same). But, no application for execution can be presented to an Arbitrator, by the holder of an award, under Order XXI, Rule 10, on the ground that the Arbitral Tribunal is the Court which passed the decree. Therefore, the provisions of Section 38 and Order XXI, Rules 5, 6 and 10 of the Code of Civil Procedure cannot be applied to an Arbitral Tribunal. To put it differently, it is only when an award holder is entitled to file an execution petition before the Arbitral Tribunal itself under Order XXI, Rule 10, (treating it as a Court which passed the decree) that the provisions of Order XXI, Rules 5 and 6 would come to play.

18. If no application for execution can be filed before the Arbitral Tribunal, by treating the Arbitral Tribunal as the Court which passed the decree, the Arbitral Tribunal cannot also order the transfer of the decree (or award) to any other Court for its execution. Similarly, there is no provision either in the Code or anywhere else, to treat a court, within whose jurisdiction the Arbitral proceedings took place, as the court which passed

the decree. It is only when a court within whose jurisdiction the arbitral award was passed, is taken to be the court which passed the decree within the meaning of Section 37 and Order XXI, Rule 10 of the Code that the award holder would be entitled to seek transmission from that court.

19. While the award passed by an arbitral tribunal is deemed to be a decree of a civil court under Section 36 of the 1996 Act, there is 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. Therefore, the whole procedure of filing an execution petition before the court within whose jurisdiction the arbitral award was passed, as though it is the court which passed the decree, is pathetically misconceived.

20. In *Daelim Industrial Company Ltd. v. Numaligarh Refinery Ltd.* [decided by a learned Judge of the Delhi High Court on 13.3.2009 - E.A. No. 105 of 2009 in Ex. No. 242 of 2008], an objection was raised to the territorial jurisdiction of the Delhi High Court to entertain an execution petition. The objection was on the basis that the arbitration proceedings were held and order pronounced at Calcutta and that the award was challenged successfully before a District Court in Assam. However, the High Court of Guwahati set aside the judgment of the District Court and partly upheld the award. The Supreme Court partly modified the judgment of the High Court. Therefore, it was contended by the award debtor that the Delhi High Court had no jurisdiction. It was also contended that the decree had to be transmitted. Repelling the said contention, the learned Judge of the Delhi High Court held that in the absence of applicability of the mandate of Section 38, Code of Civil Procedure, the Court within whose jurisdiction the property of the judgment debtor is situate, would have jurisdiction to entertain the execution. For coming to the said conclusion, the learned Judge of the Delhi High Court also held that even Section 42 of the 1996 Act would not stand in the way. The Court also drew inspiration from the fact that some of the orders of the Company Law Board were also intended to be enforced through a Court, without orders for their transmission.

21. Therefore, it is clear that no Court to which an application for execution of an award is presented, can insist on the filing of the execution petition first before some other Court and to have it transmitted to it later. It appears that the High Court of Bombay has also adopted the same view, though not by a very elaborate order.

22. The issue can be looked at from a different angle also. Section 20(1) of the 1996 Act entitles the parties to an arbitration agreement to agree upon the place of arbitration. However, if there was no such agreement on the place of arbitration, it is left to the choice of the Arbitral Tribunal to determine the place of arbitration, in terms of Section 20(2). But, such determination shall be made, having regard to the circumstances of the case, including the convenience of the parties. Sub-section (3) of Section 20 also gives a leverage to the Arbitral Tribunal to meet at any place it considers appropriate, either for consultation or for hearing the witnesses, experts or parties or for the inspection of documents or goods.

23. Therefore, the 1996 Act transcends all territorial barriers. Consequently, it is open to the parties to a dispute, to choose, for instance, Bangalore or Bombay as the venue of arbitration, despite both parties being at Chennai. In case it happens and an award is passed at Bangalore or Bombay, would it be necessary for the award holder to file an execution petition before the Bangalore or Bombay Court and get it transmitted to Chennai in terms of Order XXI, Rules 5 and 6? I do not think so. Take for instance a case where an arbitration takes place outside the country, in terms of Part II of the 1996 Act. Is it possible for an award holder to seek a Court in London to transfer the

award for execution to a Court in India?

24. There is no provision under the 1996 Act (i) either to make the Arbitral Tribunal come within the meaning of the expression "Court which passed the decree"; (ii) or to provide for the transmission of the awards from one Court to another for the purpose of execution. Complicating the issue further, it appears that the award holders also seek a certificate from this Court that the award has not been satisfied by the award debtor. It is only a Court which passed the decree that would be competent and that would be able to give a certificate of the said nature. The Court which passed the decree would always know the extent to which the decree got satisfied through the same Court. It would also know the extent to which the decree was satisfied in some other Court to which the decree was transmitted, in view of the provisions of Section 41 of the Code. But, in respect of an arbitration award, no Court can know whether an award was partly or fully satisfied, unless it had the opportunity to execute the award by itself.

25. In the absence of any provision in the 1996 Act, requiring a Court to pass a decree in terms of the award (except in terms of Section 34) and in the absence of any provision in the 1996 Act making the Arbitral Tribunal a Court which passed the decree and in the absence of any provision anywhere making the court within whose jurisdiction an award was passed as the court which passed the decree, it is not open for any executing Court (i) either to demand transmission from any other Court; (ii) or to order transmission to any other Court.

26. It must be noted that any award passed by the Registrar of Chits under Section 69 of the Tamil Nadu Chit Funds Act, 1982, is also made executable by a civil Court, as if it is a decree of Court, by virtue of Section 71 of the Act. No demand is made for the transmission of those awards. Therefore, it is not proper to import the provisions of Order XXI, Rules 5 and 6 and demand an order for transmission. This principle shall apply not only to the case on hand where the X Assistant Judge, City Civil Court, Chennai, has made such a demand, but would also apply to every other Court, including the Original Side of this Court. Neither the Court to which an execution petition is presented can demand the same to be transmitted from some other Court, nor an award holder entitled to approach any other Court seeking transmission, except in cases where only part satisfaction is recorded in execution by one Court and the remaining portion is required to be executed as against the property situate within the jurisdiction of any other Court.

27. The civil revision petition is, accordingly, allowed. The impugned order is set aside. The Petitioner is directed to re-present the execution petition before the X Assistant City Civil Court, Chennai. The X Assistant City Civil Court shall number the execution petition, without insisting upon a transmission order and proceed with the execution petition if it is in order otherwise. There shall be no order as to costs.

28. The Registry is directed to return the original execution petition to the Learned Counsel for the Petitioner to enable him to re-present it.

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