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

**Judgment reserved on: 02.04.2024**
**Judgment pronounced on: 01.07.2024**

\+ **OMP (ENF.) (COMM.) 224/2023**

GROWTH TECHNO PROJECTS LIMITED ..... Petitioner
Through: Mr. Manish Vashisht, Sr. Adv. withMr. Vanshay Kaul, Ms. Harshita Nathrani, Mr.Aman Singh, Advs.

versus

ISHWAR INDUSTRIES LIMITED ..... Respondent
Through: Ms. Ekta Mehta, Ms. Zainab Khan,Advs.

**CORAM:**
**HON'BLE MR. JUSTICE JASMEET SINGH**

**J U D G M E N T**

**:JASMEET SINGH, (J)**

1. This is a petition under section 36 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Act') read with Order XXI Rule 10 & 11(2) of the CPC, seeking enforcement of the arbitral award dated 17.07.2007 passed by the learned Arbitrator, Justice P. K. Bahri (Retd.), in Arbitration Case No. 380/2004, titled as '*M/s Ishwar Industries Ltd. v. M/s Growth Techno Projects Ltd.*'

2. The operative portion of the arbitral award reads asunder:

> "*74. In view of the findings given above, I make the award as follows: -*
>
> I. *That M/s. Ishwar Industries Ltd. shall pay to M/s. Growth Techno Project Rs.3,06,32,550/- (Rupeesthree crore, six lac, thirty-two thousand*

*five hundred and fifty) on or before 31st October, 2007.*

II. *That in case of default in paying the aforesaid amount in time given, M/s. Ishwar Industries Ltd. shallpay interest @ 12% per annum on the unpaid amount from the date of the default till payment.*

III. *That the claims of M/s. Ishwar Industries Ltd. are rejected.*

IV. *In view of the peculiar facts, the parties are left to bear their own costs.*"

3. The petitioner/decree holder, by way of the present petition, avers that the respondent/judgment debtor, has not made any payment towards the arbitral award till date and thus, stands liable to pay the awarded amount along with an interest of 12% per annum. The decree holder further submits that at the time of filing of the present petition, a total of 191 months have passed and therefore, calculating the interest @ 12% per annum, the decree holder is entitled to a total amount of Rs. 8,90,79,455/-.

4. The judgment debtor, *per contra*, has objected to the maintainability of the present petition, primarily on the ground that the same is barred by limitation. A brief summary of the submissions made by the judgment debtor in this regard are as under:

a. A bare reading of Section 36 of the Act indicates that an arbitral award shall be enforced in accordance with the provisions of the CPC, in the same manner as if it were a decree of the Court. In this regard, reference has been made to Article 136 of the Schedule to the Limitation Act, 1963, which provides a time period of twelve years to seek execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court. In the instant case, it is averred that the award became enforceable on 17.07.2007, i.e., the date of its passing, or 31.10.2007, i.e., the date

of default by when the awarded amount was to be paid to the decree holder, and therefore, the period of limitation stood elapsed, as on 16.07.2019 or 31.10.2019, which is a period of 12 years from these respective dates. However, since the present execution petition was filed in November 2023, the same is stated to be beyond the period of 12 years and hence, barred by limitation.

b. Petitions/Objections under Section 34 of the Act were filed by both the parties; however, the decree holder withdrew its petitionon 02.02.2024 and it is only the judgment debtor's petition thatremains pending before this Court. Owing to this pendency, the judgment debtor contends that the arbitral award in question, is not final. It is submitted that the CPC contemplates the enforcement of a final award, which would only be the case, once the petitions filed by the judgment debtor under Section 34 of the Act are dismissed/disposed of.

c. Furthermore, reliance is placed on the judgment of the Hon'ble Supreme Court in ***Hindustan Construction Company Limited and Another v. Union of India and Others***, [(2020) 17 SCC 324], to contend that in cases where a petition under Section 34 was filed challenging an arbitral award, even the pre-amended Section 36 of the Act did not provide for an automatic stay on the enforcement of an award, and only contemplated enforcement either upon the expiry of time to make an application under Section 34 of the Act seeking setting aside of the arbitral award, or such application having been made and then being refused.

d. Insofar as the amendment brought in Section 36 is concerned, reliance has been placed on the judgment of ***Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others,***

[(2018) 6 SCC 287] to contend that the said amendment will not create a fresh period of limitation from the date of the amendment, i.e., 23.10.2015. It is further averred that this judgment also did not hold that the limitation to execute an award passed pre-amendment, would begin from the date of the amendmentcoming into force,i.e., 23.10.2015, and/or that the amendment will create a freshperiod of limitation, thereby, not excluding the period during which an automatic stay operated on the awards passed before 2015.Relying on ***Hindustan Construction (supra),*** it is also averred that the amendment in Section 36 of the Act has been held to be clarificatory in nature while finding that the unamended Section 36 did not contemplate any automatic stay.

e. It is also averred that the decree holder's interpretation of starting the limitation from the date of the amendment, i.e., 23.10.2015, would imply that the amendment rendered a fresh cause of action for enforcement of awards passed before the amendment where there was no stay. This interpretation would run contrary to the law as there is no concept of 'cause of action' in an enforcement petition and the same would lead to a situation where domestic awards passed before the amendment, would have a fresh period of limitation, starting from 23.10.2015, irrespective of expiry of the time period to seek enforcement as prescribed under Article 136 of the Limitation Act, 1963.

f. It is submitted that the doctrine of merger does not apply to the instant case as the petition filed by the judgment debtor under Section 34 of the Act is pending, and there is no order of this Court merging the arbitral award with the proceedings under Section 34. It is the case of the judgment debtor that in arbitrations, it has been

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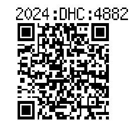
held that Court proceedings in relationto the arbitral proceedings are independent and would not be viewed as a continuation of arbitralproceedings but would be viewed separately.

g. Decree holder has also preferred a petition under Section 9 of the Act being O.M.P. (I) (COMM.) 21/2023, wherein this Court, *vide* Order dated 27.01.2023 has restrained the judgment debtor from creating any third party rights in its immovable property, thereby, securing the awarded amount.

5. Decree holder, while responding to the arguments of the judgment debtor on the issue of maintainability has contended as under:

a. There was no occasion available to the decree holder earlier to file an enforcement petition as, as per the scheme of the then Section 34 of the Act, the moment a petition impugning the arbitral award was be filed, an automatic stay would come into operation. This position changed only after the amendment in 2015, which was also applicable to petitions under Section 34 of the Act filed before the said amendment. The enforcement of the award would now be permissible if no stay was granted by the court which was seized of the objections filed under Section 34 of the Act, and thus there is no question of the enforcement petition being barred by limitation. In this context, reliance has been placed on the judgment of ***Fiza Developers and Inter Trade Private Ltd. v. Amci (India) Private Limited and Another,***[(2009) 17 SCC 796], wherein the Hon'ble Supreme Court has categorically held asunder:

> *"**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."*

Similarly, reference has also been made to the judgment of ***National Aluminium Co. Ltd. v. Pressteel& Fabrications (P) Ltd. and Another***,[(2004) 1 SCC 540], wherein the Hon'ble Supreme Court held asunder:

> *"**10**. .... But then we noticed from the mandatory language of Section 34 (sic Section 36) [Ed. : As clarified in para 31 of Hindustan Aluminium Co. Ltd. v. Union of India, reported at (2020) 17 SCC 324.] of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. ...."*

b. While addressing the reliance placed on the judgment of ***Kochi Cricket (supra),*** it is submitted that the disability to file an enforcement petition during the pendencyof objections filed under Section 34 of the Act was removed only w.e.f. 23.10.2015, i.e., after the amendment. Therefore, the enforcement petition falls within limitation as the time period of twelve years under Article 136 of the Schedule to the Limitation Act, 1963, has not elapsed since 23.10.2015.

c. While addressing the issue of expiry of time period of twelve years prescribed under Article 136 of the Schedule to the Limitation Act, 1963, is concerned, it is submitted that Article 136 of the Limitation Act is in two parts.The first part states that the execution of any money decreewill take place only once the Decreeor an Order becomes enforceable. The second part, however, further provides

that the Decree becomes enforceable, only where the Decree or a subsequent Order directs payment of money in respect of which the execution is sought.It is averred that the second part isbased on the doctrine of merger whereby Orders passed by the first Court, would subsume inthe final Order, which would then be the Order qua which the execution could be filed.Therefore, the second part completely rules out the objection of limitation raised bythe judgment debtor that the decree is enforceable only from the date of Order passed by thefirst Court. Reliance has been placed on the case of ***North Delhi Municipal Corporation v. Tarun Kumar Jain,*** [2021 SCC OnLine Del 3331], ***Ravinder Prakash Punj v. Punj Sons Pvt. Ltd. and Others***, [2012 SCC OnLine Del 4678].

**ANALYSIS AND CONCLUSION**

6. I have heard learned counsels for both the parties.

7. The issue that arises for consideration of this Court is whether the period of limitation is to start from the date of the passing of the arbitral award, i.e., 17.07.2007, or from the date of the amendment to Section 36 of the Act, i.e., from 23.10.2015.

8. It is imperative to examine the provision of Section 36 of the Act, both pre-amendment and post-amendment. For ready reference, the same is reproduced asunder:

> *"**Pre-amended provision***
> ***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 been refused, the award shall be enforced under the Code of CivilProcedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.*
>
> ***Amended provision***

*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 ofsub-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 werea 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), ona 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 theprovisions for grant of stay of a money decree under the provisions of the Codeof Civil Procedure, 1908 (5 of 1908).”*

9. From a bare perusal of the aforesaid provisions, it is clear that sub-section (2) of the post-amendment Section 36establishes that filing of an application/objection under Section 34 would not, by itself, render the award as unenforceable. However, as far as the wordings ofthe pre-amendment Section 36 is concerned, the judgments of ***National Aluminium(supra)*** and ***Fiza Developers(supra)*** have clearly held that there is an automatic stay on the enforcement of an arbitral award, the moment an application under Section 34 of the Act is filed.

10. The Legislature *vide* the Arbitration and Conciliation (Amendment) Act, 2015, inserted Section 26 to the Act, which has been extracted asunder:

> *"**26**. Act not to apply to pending arbitral proceedings.*
> *Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the partiesotherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

11. In 2018, the Hon'ble Supreme Court in ***Kochi Cricket (supra)*** was concerned with the construction of the aforesaid Section and held that as per the scheme of Section 26, it was clear that the Amended Act, as a whole, was prospective in nature and would applyonly to those arbitral proceedings as well as Court proceedings that commenced, on or after the time when the Amendment Act came into force, as understood by Section 21 of the principal Act.[1]

12. Insofar as the fate of the petitions filed under Section 34 of the Act, prior to the amendment of 2015 is concerned, it was held that the words "*has been*" in Section 36(2) of the Amended Act were indicative of the fact that the amendment also referred to Section 34 petitions filed before the commencement of the Amendment.[2] In paragraph 62 of the said judgment, the Hon'ble Supreme Court held as:

> *"**62**. ..... Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment-debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act."*

13. Thereafter, despite the finding of the Hon'ble Supreme Court regarding the applicability of the amended Section 36 to the Section 34 applications filed before the amendment, the Legislature in 2019, once

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[1] Para 39, Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others, [(2018) 6 SCC 287]

[2] Para 65, Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others, [(2018) 6 SCC 287]

again changed this position of law *vide* the Arbitration and Conciliation (Amendment) Act, 2019, whereby Section 26, inserted in 2015 was omitted and Section 87 was added to the principal Act. It reads as under:

> *"87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—*
>
> *(a) not apply to—*
>
> *(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;*
>
> *(ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;*
>
> *(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings."*

14. The Hon'ble Supreme Court in ***Hindustan Construction (supra)*** held that the deletion of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, as well as the insertion of Section 87 of the Arbitration and Conciliation (Amendment) Act, 2019 was manifestly arbitrary and therefore, were struck down for being violative of Article 14 of the Constitution of India. The Hon'ble Supreme Court, while considering the Srikrishna Committee Report dated 30.07.2017, held as under:

> *"60. The Srikrishna Committee Report is dated 30-7-2017, which is long before this Court's judgment in Kochi Cricket case [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 :*

*(2018) 3 SCC (Civ) 534] . Whatever uncertainty there may have been because of the interpretation by different High Courts has disappeared as a result of Kochi Cricket [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] judgment, the law on Section 26 of the 2015 Amendment Act being laid down with great clarity. To thereafter delete this salutary provision and introduce Section 87 in its place, would be wholly without justification and contrary to the object sought to be achieved by the 2015 Amendment Act, which was enacted pursuant to a detailed Law Commission Report which found various infirmities in the working of the original 1996 statute. Also, it is not understood as to how "uncertainty and prejudice would be caused, as they may have to be heard again", resulting in an "inconsistent position". The amended law would be applied to pending court proceedings, which would then have to be disposed of in accordance therewith, resulting in the benefits of the 2015 Amendment Act now being applied. To refer to the Srikrishna Committee Report (without at all referring to this Court's judgment) even after the judgment has pointed out the pitfalls of following such provision, would render Section 87 and the deletion of Section 26 of the 2015 Amendment Act manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act. This is for the reason that a key finding of Kochi Cricket [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] judgment is that the introduction of Section 87 would result in a delay of disposal of arbitration proceedings, and an increase in the interference of courts in arbitration matters, which defeats the very object of the Arbitration Act, 1996, which was strengthened by the 2015 Amendment Act."*

15. The law of limitation is based upon the principle of *vigilantibus non dormientibus jura subveniunt*which means that the law assists those

who are vigilant and not those who are sleeping or found wanting to pursue their claims. The objective of the Limitation Act is to put an end to the right or remedy that has not been exercised or availed for a fixed period of time as prescribed under law. The Hon'ble Supreme Court in ***PathapatiSubbaReddy (Died) By L.Rs. and Othersv. Special Deputy Collector (LA)***, [2024 SCC OnLine SC 513], has laid down the principles governing the law of limitation, as under:

> "***7.*** *The law of limitation is founded on public policy. It is enshrined in the legal maxim "interest reipublicaeut sit finislitium" i.e. it is for the general welfare that a period of limitation be put to litigation. The object is to put an end to every legal remedy and to have a fixed period of life for every litigation as it is futile to keep any litigation or dispute pending indefinitely. Even public policy requires that there should be an end to the litigation otherwise it would be a dichotomy if the litigation is made immortal vis-a-vis the litigating parties i.e. human beings, who are mortals.*
>
> ***8.*** *The courts have always treated the statutes of limitation and prescription as statutes of peace and repose. They envisage that a right not exercised or the remedy not availed for a long time ceases to exist. This is one way of putting to an end to a litigation by barring the remedy rather than the right with the passage of time."*

16. Hence, the question that arises for determination is that whether the decree holder was found wanting to approach the Court within the time prescribed under law. In the present case, the judgment debtor filed his Petition/Objection under Section 34 of the Act being O.M.P. No. 607/2007 (now re-numbered as O.M.P. (COMM) No. 106/2017) on 30.10.2007. In view of the unamended Section 36 and the judgments of the Hon'ble Supreme Court in ***National Aluminium(supra)*** and ***Fiza Developers(supra)***, the award was 'inexecutable' and 'unenforceable', and

the enforceability of the arbitral award was puton hold in view of the then existing legal position.The award,however, only became enforceable on 23.10.2015, when the amended Section 36 was notified.It is only then that the decree holder became entitled to enforce the arbitral award against the judgment debtor.Prior to the said date, the enforceability of the arbitral award was eclipsed as the decree holder stood *de jure* barred from moving an enforcement petition. This disability was only cured/clarified by the judgment of the Supreme Court in ***Hindustan Construction (supra).***

17. In this context, reference also needs to be made to Section 15(1) of the Limitation Act, whereby, it is settled that in any suit or application seeking execution of a decree, the period of limitation is to exclude the time where any stay had been granted on the execution of the said decree. Section 15(1) of the Limitation Act reads as:

> *"**15**. Exclusion of time in certain other cases.—(1) In computing the period of limitation of any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."*

18. The Hon'ble Supreme Court in ***Anandilal and Another v. Ram Narain and Others***, [(1984) 3 SCC 561], has opined as under:

> *"**11.** Agreeing with the Full Bench, we are inclined to the view that the word "execution" in Section 15(1) embraces all the appropriate means by which a decree is enforced. It includes all processes and proceedings in aid of, or supplemental to, execution. We find no rational basis for adopting a narrow and restricted construction on a beneficent provision like the one contained in Section 15(1). There is no reason why Section 15(1) should be given a restricted meaning as allowing the benefit to a decree-holder where there is a complete or absolute stay of execution and not a partial stay i.e. a stay*

*which makes the decree altogether inexecutable. Nor can we subscribe to the proposition that in cases of partial stay, the benefit under Section 15(1) can be had only where an execution application is directed against the same judgment-debtor or the same property, as against whom an execution was previously stayed. Stay of any process of execution is therefore stay of execution within the meaning of the section. Where an injunction or order has prevented the decree-holder from executing the decree, then irrespective of the particular stage of execution, or the particular property against which, or the particular judgment-debtor against whom, execution was stayed, the effect of such injunction or order is to prolong the life of the decree itself by the period during which the injunction or order remained in force.The majority view to the contrary taken by some of the High Courts overlooks the well settled principle that when the law prescribes more than one modes of execution, it is for the decree-holder to choose which of them he will pursue."*

In the present case, due to the filing of a Petition/Objection under Section 34 of the Act by the judgment debtor, an automatic stay on enforcement of the arbitral award came into play, whereby, the decree holder remained bereft of the right to seek the said enforcement. Therefore, considering Section 15(1) of the Limitation Act and the findings of the Hon'ble Supreme Court in***Anandilal (supra),*** I am of the view that time period starting from filing of the Petition/Objection under Section 34 of the Act till the amendment to the Act in 2015, stands excluded from the counting of limitation period for the enforcement of the arbitral award, as prescribed under law.

19. The argument of the judgment debtor regarding a fresh cause of action arising after the promulgation of the amendment in 2015 is *prima facie* rejected on the ground that the amendment of 2015 did not intend to begin a fresh period of limitation for enforcement of the awards prior to

2015, but in fact, only removed the stay operating on these awards upon filing of a Petition/Objection under Section 34 of the Act. I am of the view that in the present case, the limitation period for enforcement of the arbitral award commenced from 17.07.2007 and continued till 30.10.2007, i.e., the date of filing of thePetition/Objection under Section 34 of the Act by the judgment debtor. Thereafter, during the period from 30.10.2007 till 23.10.2015, i.e., the date of the amendment, an automatic stay was operational. It is only on 23.10.2015, when the amendment to Section 36 of the Act was notified, the limitation period seeking enforcement of the arbitral award resumed instead of starting afresh. In light of these circumstances, I am of the view that no fresh cause of action arose upon the promulgation of the amendment in 2015, and the same was only a revival/restoration of the ongoing limitation period, before filing of the Petition/Objection under Section 34 of the Act. Hence, the limitation period for seeking enforcement of the arbitral award, only resumed from 23.10.2015 and did not start afresh from the said date. In this view of the matter, this enforcement petition filed on 30.10.2007, is within a period of 12 years, as mandated under Article 136 of the Schedule to the Limitation Act.

20. With regards to the applicability of the doctrine of merger, I am of the view that the same is not applicable. The Petition/Objection filed by the judgment debtor under Section 34 of the Act has not been decided yet, and there is no Order of this Court merging the arbitral award with the proceedings of this Court. For these reasons, the argument of judgment debtor that the date of passing of the arbitral award in question, i.e., 17.07.2007, is to be taken as the effective date from which the period of limitation for seeking enforcement of the said award is to commence, is accepted. However, in light of the above discussion, I am also of the view

that the period from 30.10.2007 till 23.10.2015, stands excluded for calculation of the period of limitation.

21. Hence, it cannot be said that the decree holder was sleeping over his rights or found wanting in approaching the Court for enforcement of the arbitral award. For the said reasons, I am of the view that the present enforcement petition is within the limitation period and the objections of the judgment debtor to the maintainability of the present petition are devoid of merit.

22. Even Article 136 of the Schedule to the Limitation Act, 1963, states that the period of limitation is 12 years from the date when the decree or order becomes enforceable. Prior to 23.10.2015, the arbitral award dated 17.07.2007 was unenforceable. Accordingly, the objections of the judgement debtor are dismissed.

23. It is directed that the judgment debtor shall deposit a sum of Rs 8,90,79,455/, along with awarded interest, with the Registrar General of this Court within a period of 4 weeks from today.

24. List along with O.M.P. (COMM.)106/2017 on 29.07.2024.

**JASMEET SINGH, J**

**JULY 01, 2024**

Click here to check corrigendum, if any