

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

EC/8/2022

KOTAK MAHINDRA BANK LTD.
VS
JAYMONY DEBNATH AND ORS.

BEFORE :
THE HON'BLE JUSTICE SABYASACHI BHATTACHARYYA
Date : 18^h July, 2024

Appearance:
Ms. Shrayashee Das, Adv.
Mr. Paritosh Sinha, Adv.
Mr. Himangshu Bhow Singhka, Adv.
Mr. Rohan Kumar Thakur, Adv.
...for the award-holder

Mr. Asif Hussain, Adv.
Ms. Sujata Chowdhury, Adv.
Ms. Aia Gaffar, Adv.
...for the judgment-debtors

The Court : Learned counsel for the award-debtors raises an objection as to jurisdiction of this Court to take up the matter and the maintainability of the execution case. On maintainability, it is argued that a previous application filed for execution of the self-same award had been dismissed for default.

It is pointed out that both in the Tabular Statement as well as the averments in the execution petition, the award-holder has wrongly sought to mislead this Court by averring that the previous execution case was withdrawn, whereas the order annexed to the application itself shows that the same was dismissed for non-prosecution.

Learned counsel for the award-holder also takes the court to the relevant paragraph of the affidavit in support of the execution petition where the

relevant paragraph averring that the previous execution case was withdrawn has been affirmed to the effect that it is true to knowledge derived from the arbitrator. As such, on such score alone, the present application ought to be dismissed, both for misleading the Court as well as due to the bar envisaged under Order 21 Rules 105 and 106 of the Code of Civil Procedure.

Learned counsel further points out that Section 36 of the Arbitration and Conciliation Act, 1996 itself provides that the procedure applicable to the execution of the decree is also attracted in case of Section 36.

As regards territoriality, learned counsel for the award-debtors submits that it is an admitted position that the award was passed in Mumbai, which was also the seat of the arbitral proceeding.

Also, the award-debtors reside outside the territorial jurisdiction of this Court in its original jurisdiction. Such position appears from the cause title of the application itself and as such, this Court cannot come within the ambit of "Court" as defined in Section 2(1)(e) of the 1996 Act.

Learned counsel for the award holder, while controverting such arguments, cites *Bhagyoday Cooperative Bank Limited Vs. Ravindra Balkrishna Patel deceased through his legal representatives And Others*, reported at (2022) 14 SCC 417, where it was held by the Supreme Court that the mere dismissal of a first execution application on the ground of default may not result in the decree-holder being precluded from filing a fresh execution petition, provided it is within time.

Learned counsel also relies on *Sundaram Finance Limited Vs. Abdul Samad And Another* reported in (2018) 3 SCC 622, where it was observed by the Supreme Court that an award under Section 36 of the 1996 Act is equated to a decree of the Court for the purposes of execution and only for that purpose.

Thus, while an award passed by the arbitral tribunal is deemed to be a decree under Section 36 of the 1996 Act, there is no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award is passed should be taken to be the Court which passed the decree. It was further held that the 1996 Act actually transcends all territorial barriers.

It is also argued that as per the averments in the present execution application itself, the loan agreement was entered into within the territorial jurisdiction of the Original Side of this Court.

That apart, it is disclosed in the affidavit of assets of the award-debtors that some of the assets lie within the territorial jurisdiction of the vicinity of their residence.

On such ground as well, since the assets are apprehended to be at present within the territorial jurisdiction of the Original Side of this Court, the execution application is very much maintainable before this Court.

With regard to the first objection, as to the maintainability of this application in view of the dismissal of the prior execution case, the award-debtor is justified in arguing that the award-holder could have done well to point out before this Court in the Tabular Statement as well as in its averments in the application that the previous execution petition was not withdrawn, with or without liberty to file afresh, but was dismissed for default. Such omission/error on the part of the award-holder is strongly deprecated.

However, such error on the part of the award-holder cannot be elevated to such an extent that it would be deemed to be intended to deliberately mislead the Court, for the simple reason that the award-holder has also annexed a server copy of the previous order of dismissal in the execution petition itself and has also relied on the same.

From the said order dated November 11, 2019, it transpires that none appeared for either of the parties when the previous execution case bearing EC/233/2019 was dismissed for default.

The provisions of Rules 105 and 106 of Order 21 of the Code of Civil Procedure are nowhere couched in negative language so as to preclude the award-holder/decreed-holder from filing a fresh execution case on the self-same cause of action in case of dismissal for default. Unlike Order 9, there is no such specific bar in Order 21 in respect of an execution case.

It is also to be noted that even in Rule 4 of Order 9, in cases where none of the parties were present at the time of call and the suit was dismissed for default, there is no bar on the plaintiff to bring a fresh suit on the self-same cause of action even if the previous suit was dismissed for default.

Applying such principle, in any event, there is no bar even in the Code of Civil Procedure to prefer a second execution case in such circumstances, as in the present case none of the parties were represented when the dismissal for default occurred.

That apart, this Court is bound by the proposition laid down in *Bhagyoday* (supra), where the Supreme Court, in unambiguous terms, accepted the contention of the appellant herein that mere dismissal of the first execution application on the ground of default may not result in the award-holder/decreed-holder being precluded from filing a fresh execution petition, provided it is within time.

Next coming to the question of territoriality, Clause 24.1 of the agreement between the parties contains a forum selection clause which stipulates that any suit, petition, reference or other filing permitted or required to be made pursuant to the 1996 Act in respect of matters arising out of the

agreement including without limitation, a petition for appointment of an Arbitrator or Arbitrators under section 11 of the said Act shall be instituted only in competent courts at Mumbai.

However, on a careful construction of the said clause ,read in conjunction with Clause 23.1, which subjects disputes and differences between the parties to arbitration in Mumbai, it cannot but be observed that the fetter in the said clauses applies up to the stage of the award being passed in the arbitral proceeding.

The filings etc., contemplated in clause 24.1 are restricted to matters arising out of the agreement. Once the disputes arising out of the agreement culminate in an award, the said restriction is no longer applicable but the award comes within the domain of Section 36 of the 1996 Act.

It is well settled that in case the property sought to be attached etc. in execution of a decree lies outside the jurisdiction of the suit court, precepts can be issued to the Court where the property is lying. Following the said principle, in the present case, a reasonable apprehension has been expressed by the award holder that at least a portion of the assets which can be utilized for execution of the award lie within the original jurisdiction of this Court. That apart, at least a part of the cause of action for the initial proceeding also arose within the jurisdiction of this Court, since the loan agreement was entered into within the original territorial jurisdiction of this Court.

Over and above the aforesaid reasonings, the ratio in *Sundaram Finance* (supra) is also binding on this Court which clearly observes that an award under section 36 is equated to a decree for the purpose of execution only and there is no provision anywhere to hold that the Court within whose jurisdiction

the arbitral award is passed should be taken to be the Court which passed the decree and that the 1996 Act actually transcends all territorial barriers.

Seen from such perspective, this Court has ample jurisdiction to entertain the execution application between the parties.

Hence, the objections taken as to maintainability of the application and as to territorial jurisdiction of this Court are turned down.

The award-debtor no. 3 shall be personally present in Court for being examined by the award-holder on August 8, 2024, when the matter shall next be listed for hearing.

Affidavit of assets filed today be kept on record.

(SABYASACHI BHATTACHARYYA, J.)