

Present: Sri Utpal Misra (JO Code: WB00659)
Judge, Commercial Court at Alipore
Arb. Execution Case No. 11 of 2023
Renumbered as Misc Ex (Com) 41 of 2023
CNR no. WBSP18-000077-2023

Order No. 13
20.05.2024

In the matter of:

An application under Order
21 Rule 11 read with
Section 151 of CPC, 1908.

And

In the matter of:

A.K. Enterprise Pvt. Ltd.

Vs.

SERI Infrastructure
Finance Ltd.

ORDER

Today is fixed for passing the order of I.A. No. 01 of 2023.

Both sides have filed their respective haziras.

Now, the record is taken up for passing order.

I.A. No. 01 of 2023

1. The instant application has been filed by the award debtor under Section 47 read with Section 151 of the Code of Civil Procedure, 1908.
2. The instant execution case has been filed by the award holder herein for enforcement of an award dated 17th November, 2022. The conspectus of the facts of the case is that in terms of an agreement dated 28th June, 2010 the award holder had carried on jobs of refurbishing and had raised a final bill claiming an amount of Rs. 62,87,581/-. The award holder claimed such amount as counter-claim in the already pending arbitration proceeding filed by the award debtor. Such proceeding culminated in an award in favour of the award holder herein.

3. On the face of the record it is pertinent to mention herein that the award debtor did not prefer any application under Section 34 of the Arbitration and Conciliation Act, 1996.
4. The main contention of the award debtor in the instant interlocutory application is that the instant execution application is not maintainable in view of the order dated 11th August, 2023 passed by the NCLT, Kolkata Bench in C.P. (IB) No. 294/KB/2021 (in the matter of *Reserve Bank of India vs. SREI Infrastructure Finance Limited*).
5. Ld. Counsel for the award debtor has submitted that the award holder could not have filed the present execution application on 16.06.2023 after the passing of the said order dated August 11, 2023. As admittedly NCLT admitted an application filed by the Reserve Bank of India (RBI) vide Order dated 08.10.2021 and initiated Corporate Insolvency Resolution Process against the applicant herein SERI Infrastructure Finance Limited, with the effect that moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (Code) commenced. An administrator was appointed by the applicant. It is repeated that National Company Law Tribunal, Kolkata, through an Order dated 08.10.2021 passed in CP(IB)/295/KB/2021 had admitted the petition filed by the RBI for initiation of the CIRP against the applicant and imposed the Moratorium as per Section 14 of the Code of 2016 and that it was directed that during the period of CIRP, the management of the applicant shall be vested in the Administration Mr. Rajneesh Sharma. The administrator took over the management of the applicant due to its worsening financial condition. The said administrator was looking after the day to day affairs of the applicant. The award holder was quite well aware of such fact of appointment of the Administrator and was also aware that it must have submitted its claim before such Administrator of the applicant herein in order to enable such Administrator to reject or accept the claim of the Award Holder. In the event of acceptance of the claim lodged by the Award Holder, the Administrator would have placed the same before the Committee of Creditors for approval and then as per the Scheme of the Act of 2016 the same should have been made a part of the CIRP or resolution plan. The Moratorium was in place during the said

arbitral reference, and continuation of any Suit or Proceeding in any Court/Tribunal/Forum/Authority against the Corporate Debtor shall be stopped until the completion of CIRP and as such, the said arbitration proceedings, because of the fact that the continuation of the proceedings was continued in violation of Section 14 of the I& B Code, 2016, and an award was passed against the applicant herein. The present said arbitral proceedings filed by the award holder against the applicant, could not and should not had to proceed till such completion of CIRP against the application.

6. The Ld. Counsel for the award debtor has further submitted that the mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts the institution or continuation of pending suits of proceedings against the Corporate Debtors (being the applicant herein). After the declaration of the Moratorium under Section 14 of the IB Code, 2016 and public announcement in accordance with provisions of the said Code of 2016 had been made calling for submissions of claims by the creditors of the applicant under provisions of the Code, 2016.
7. He has further submitted that a bare reading of Section 14 makes it clear that the arbitration proceedings must be stayed by an order of moratorium. Commenting on the impact of moratorium on arbitration proceedings, the Supreme Court of India In *Alchemist Asset Reconstruction Co. Ltd. vs. Hotel Guadavan (P) Ltd.* reported in *(2018) 16 SCC 94* held that “The mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against corporate debtors”. Accordingly, the Court expressed its surprise that arbitration proceedings began after the imposition of a moratorium and further held that, “*the arbitration that has been instituted after the moratorium is non est*”. The ratio of Alchemist, was applied by NCLAT in *K.S. Oils Ltd. vs. State Trade Corpn. of India Ltd.*, reported in *2018 SCC Online NCLAT 352*, wherein the NCLT observed that arbitral proceedings pending on the date of

commencement of CIRP cannot proceed during the moratorium. Thus, where arbitration proceedings are initiated after the imposition of moratorium, such proceedings are non est in law. Where arbitration proceedings have been initiated after the declaration of moratorium, the continuation of the arbitration proceedings could depend on whether the claims are (a) for value maximization of assets of CD; or (b) in the nature of a debt recovery action against the CD. Ld. Counsel has further referred to the case of *Jharkhand Bijli Vitran Nigam Ltd. vs. IVRCL Ltd* reported in *2018 SCC Online NCLT 18197* wherein the NCLAT was tasked with determining whether a counterclaim is an arbitration could proceed during the moratorium period. NCLAT held that the counterclaim filed by the creditor would be a proceeding against the CD and hence fall within the ambit of the embargo under Section 14. However, the counterclaim filed by the CD could proceed before the Arbitral Tribunal even during the moratorium period. NCLAT went further, stating that both the claim and counterclaim ought to be heard and decided despite the moratorium. However, Section 14 would apply if the CD was directed to pay damages or any or the amounts as no recovery can take while the moratorium is in place. He has further referred to *SSMP Industries Ltd. v. Perkan Food Processors (P) Ltd.* reported *2019 SCC Online Del 9339*.

8. The Ld. Counsel has also submitted that it is not in dispute that the scope of Section 47 of the CPC, 1908 is microscopic and executing court cannot travel beyond the decree unless the decree is found to be null and void. In fact the decree becomes in-executable only when the court passing it lacks inherent jurisdiction. The grounds shown by the Award Debtor in his application under Section 47 depicts that the learned Arbitrator lacked inherent jurisdiction in passing the said Award. Such arbitral award do not exist in the eyes of law and similarly awards passed while lacking inherent jurisdiction can be said to have never existed. Therefore, the parties would be free to re-agitate the matter. In support of his contention Ld. Counsel has referred to the case of *Sunder Dass vs. Ram Prakash* reported in *1977 AIR 1201*; *Vide Kiran Singh vs. Chaman Paswan* reported in *AIR 1954 SC 340*, *Seth Hiralal Patni vs. Sri Kali Nath* reported in *AIR 1962 SC 199*,

Hiralal Moolchand Doshi vs. Barot Raman Lal Ramchhoddas reported in (1993) 2 SCC 458, *Sushil Kumar Mehta vs. Gobind Ram Bohra* reported in (1990) 1 SCC 193. In respect of submitting the scope of Section 47, Ld. Counsel has referred to the case of *Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman* reported in (1970) 1 SCC 670.

9. Counter argument on behalf of the Award Holder is as follows.
10. The instant application is not maintainable in its form nor in law. The award debtor has not challenged the arbitration award (now in execution) under section 34 of the Arbitration and Conciliation Act, 1996. As such the award debtor has given a go-bye to its right conferred under the statute to seek stay of operation of the arbitration award. An award can only be stayed under the provisions of section 36(3) of the Arbitration and Conciliation Act, 1996 provided the award debtor has challenged the arbitration award under Section 34 of the Act. The award debtor in the grab of the instant application has sought to achieve which what the award debtor has failed to do in view of the non-filing of the application under Section 34 of the Arbitration and Conciliation Act, 1996
11. Withdrawal of Winding up petition by the award holder. The award holder had initially initiated a winding up proceeding under section 434 of the Companies Act, 1956 against the award debtor. In retaliation thereof the award debtor had initiated the arbitration proceeding against the award holder. Such winding up proceeding was withdrawn on consent that the award holder herein will pursue its claim as made under the winding up proceeding in the arbitration initiated by the award debtor. Such fact is recorded in the order dated 25th January, 2018 passed by the Hon'ble High Court in C.P. No. 517 of 2015 as well as the minutes of the 1st, 2nd and 3rd meeting of the arbitration proceeding. As such the award holder could not have participated in the proceeding before the National Company Law Tribunal, Kolkata Bench as any attempt to do so would have been barred by the principles of res judicata.
12. Consent by the award debtor to proceed with the arbitration in spite of moratorium. During the hearing of the 73rd sitting of the arbitration the

award debtor argued that the arbitration proceeding be closed in view of an order of moratorium dated 8th October, 2021 passed by the National Company Law Tribunal. In the 74th sitting of the arbitration arguments were advanced on behalf of the contesting parties with regard to the effect of the moratorium on the arbitration proceeding. In the said meeting the contesting parties were directed to file their notes on argument on the issue of moratorium. However on the next sitting a letter was handed over to the Learned Arbitrator containing an instruction from the Administrator to continue with the arbitration proceeding.

13. The award debtor having consented to participated and proceed with the arbitration inspite of the subsisting moratorium cannot take the stand in the execution case that the arbitration award is a nullity since the arbitration continued without any authority because of subsisting moratorium.
14. In such facts and circumstances the application of the Award Debtor under section 47 read with section 151 of the Code of Civil Procedure, 1908 be dismissed with costs.
15. This Court heard the contentions of both sides and also perused the decisions as submitted by the parties.
16. This Court takes on consideration of the following cases, *Indian Oil Corporation Limited &Anr. vs. The Commercial Court &Anr¹*, *The State of Tripura &Anr. vs. Shri Ashes Deb²* and *The State of U.P. & 5Ors. vs. Shri Raj Veer Singh³*.
17. On perusal of the instant case the seminal question, which is to be decided, is that whether there will be any application of the stipulation as provided in Section 47 of the CPC in the instant execution case which was arose for execution of an arbitral award.
18. The cases as cited by the decree holder need to be averred herein so as to fuse the issue in question.
19. In the case of *Indian Oil Corporation Limited (supra)* the Hon'ble Court viewed as follows:

45. So far as present case is concerned, position is same as discussed in the matter of Larsen & Tubro Limited (Supra). Petitioner had full occasions to raise

¹Neutral Citation No. 2023:AHC:176040.

²Arising out of CRP 85 of 2022.

³Neutral Citation No. 2024:AHC:66171.

all these issues while filing appeal in Section 34 of New Act, 1996 and FAFO, but the same has never been raised. Therefore, by way of objection under Section 47 of CPC, he cannot be permitted to raise this issues nullifying the provision of Section 36 of Act, 1996.

46. Again the very same issue of filing of objection under Section 47 of CPC came before this Court in the matter of Bharat Pumps and Compressors Ltd. (supra) and Court following the ratio of law laid down by this Court in the matter of Larsen & Tubro Limited (Supra) has held as follows:-

"22. The Arbitration Act, 1940 is self-contained, complete code and section 47 thereof is in pari-materia with section 36 of the Arbitration & Conciliation Act, 1996. Section 20 thereof, provides for challenging the appointment of an Arbitrator. The revisionist never challenged appointment of the Arbitrator under section 20 thereof. Sections 30/33 and 37 of the Arbitration Act, 1940, read with Article 119 of the Limitation Act, give provision for an application to be filed within 30 days of notice of award; however, no such application within the said period was filed by the revisionist.

23. The arbitration award by way of friction is executed as decree, but it is not a decree as defined under section 2(2) of CPC and therefore, the objection under section 47 of CPC, which was filed only in execution of decree (as defined under section 2(2) CPC), is not maintainable in the proceedings seeking execution of award."

47. This Court has again taken view that arbitral award is not a decree under Section 2(2) of CPC, therefore, objection filed under Section 47 of CPC is not maintainable.

48. To conclude this point on the basis of undisputed fact, objection under Section 47 of CPC filed against the arbitral award is not maintainable as the same is not a decree under Section 2(2) of CPC. Further, arbitral award can be executed invoking Section 36 of New Act, 1996 alongwith the provisions of CPC in the same manner as if it is decree of the Court.

49. Therefore, in light of facts of the case, provisions of law as well as pronouncements made by the Apex Court as well as this Court, I found no good reason to interfere with the impugned orders. Writ petition lacks merit and is, accordingly, dismissed with the cost of Rs.1,00,000/- to be paid by the petitioners to respondent no.2.

20. In the case of the *State of Tripura & Anr. (supra)* the Hon'ble Court viewed held that:

[13] In the scheme of the Arbitration Act, a challenge against an arbitral award can be made by taking recourse to Section 34 of the Arbitration Act and that too on the grounds set out under Sub-Section (2-A) of section 34 of the Act. It has surfaced from the record that the present petitioner against whom the arbitral awards were made did not prefer any application under Section 34 of the Act. After the time prescribed for filing such application expired, the respondent award holder approached the Court by filing a petition under Section 36 for enforcement of the arbitral award. Only then, the petitioner-State against whom the arbitral awards were passed raised objection under Section 47, CPC. Section 5 of the Arbitration Act clearly provides that "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part", which implies that the only remedy available to the aggrieved party against whom an arbitral award is passed, is Section 34 of the Arbitration Act. Obviously, the petitioner-State did not avail such remedy to resist the execution within the time prescribed under the -11- CRP No.85 of 2022 CRP No.86 of 2022 law. Petitioner raised objection to resist the execution only by filing an application under Section 47, CPC despite the specific remedy available under Section 34 of the Arbitration Act. In view of the prohibition imposed under Section 5 of the Act, objection except under Section 34 of the Act is not entertainable.

21. Recently, the Hon'ble Allahabad High Court in the case of *The State of U.P. & 5Ors(supra)* depicted salient principles as follows:

- a. The jurisdiction of an executing court under Section 47 of the CPC, 1908 is limited to matters pertaining to execution of the decree. Validity of a decree cannot be looked into by the executing court unless the decree suffers from inherent lack of jurisdiction. Role of an executing court is akin to a microscopic inspection hole, as held by the Hon'ble Supreme Court in Dhurandhar Prasad Singh (supra).
- b. The repercussions of either wrongly accepting or rejecting objections can significantly impact the parties involved and potentially compromise the integrity of the execution procedure. Given the limited jurisdiction of the executing court under Section 47 of the CPC, 1908, it is crucial to precisely define the issues falling within its domain. Courts should ensure that objections raised under Section 47 of the CPC, 1908 relate strictly to matters concerning the execution, discharge, or fulfilment of the decree and do not overstep into substantive rights or legal matters beyond the decree's boundaries. Moreover, courts should uphold the principle of finality when dealing with objections under Section 47 of the CPC, 1908.
- c. Courts must be mindful of execution proceedings under Section 47 of the CPC, 1908 being used as a means to unnecessarily obstruct the execution proceedings. Meritless, and frivolous objections under Section 47 of the CPC, 1908 must be dealt with strongly.
- d. Language of a statute is the primary consideration while interpreting a statute. Words used in a statute are the expression of the will of the legislature. Courts are obligated to give effect to the literal meaning of the words used in a particular provision unless the same leads to absurdity.
- e. The intent behind plain meaning rule is to respect the separation of powers. By adhering to the literal meaning of the words used in a statute, courts refrain from encroaching upon the domain of the legislature. Intention of legislature is best reflected in the words used by it as propounded by the Hon'ble Supreme Court in Nagar Palika Nigam (supra).
- f. Plain meaning rule is not an absolute principle and must be used in light of the broader context and purpose of the statute.
- g. The phrase "as if it were" is used to suggest a hypothetical scenario implying that something is being treated in a manner akin to a particular situation even if it is not actually the case. It is used to establish a legal fiction or create a presumption, where a condition is deemed to exist for the purpose of legal analysis, even if it does not actually exist.
- h. In Section 36 of the Act, the phrase providing for the execution of an arbitral award as if it were "a decree of the court" indicates that an arbitral award is to be executed in a similar manner as a decree passed by a court. This legal fiction is created for the limited purpose of executing an arbitral award through the court's enforcement powers.
- i. An arbitral award is not in reality a decree of the Court as defined under Section 2(2) of the CPC, 1908. Therefore, objections under Section 47 of the CPC, 1908 cannot be allowed in proceedings under Section 36 of the Act. Allowing objections under Section 47 of the CPC, 1908 to be raised in execution proceedings under Section 36 of the Act will undermine the finality and binding nature of arbitral awards.
- j. Once objections are dismissed under Section 34 of the Act, and appeal under Section 37 of the Act also stands adjudicated, an arbitral award attains finality. Any objections regarding the validity of an arbitral award are impermissible under Section 36 of the Act.
- k. Execution proceedings, far from being a battleground for a rematch on the merits of the arbitral award, serve as the denouement of the legal drama - a final act in which the award holder claims their just reward. Like the closing scene of a play, execution proceedings bring the curtain down on the dispute, allowing the parties to turn the page and move forward. To raise objections under Section 47

of the CPC, 1908 in the execution proceedings would be akin to attempting to rewrite the script of a play after the final curtain call - a futile endeavour that serves only to prolong the agony of litigation and delay the inevitable conclusion.

l. Writ jurisdiction under Article 226 and Article 227 of the Constitution of India cannot be invoked to challenge an arbitral award. The Act is a complete code in itself and any challenge to the validity of an arbitral award has to be raised within the mechanisms provided by the Act itself. Only under exceptional circumstances, a writ court can interfere with an arbitral award or execution proceedings under Article 226 and Article 227 of the Constitution of India.

m. Parties' failure to raise timely objections under Section 34 and Section 37 of the Act will not entitle them to raise these grounds at a later stage by invoking the writ jurisdiction under Constitution of India. Writ jurisdiction is extremely limited and cannot be treated as a second chance at the cherry.

n. As pointed out in *Rahul S. Shah v. Jinendra Kumar Gandhi*; (2021) 6 SCC 418, there is steady rise of proceedings akin to a retrial at the time of execution causing failure of realization of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the executing court and the decree-holder is deprived of the fruits of the litigation and the judgment-debtor, in abuse of process of law, is allowed to benefit from the subject-matter which he is otherwise not entitled to. In such cases, courts are duty bound to impose costs as a deterrent in order to ensure that litigants do not abuse the judicial system with frivolous and vexatious matters. Judicial resources are extremely limited and frivolous matters which unnecessarily take up the valuable time of the court deserve to be dealt with stringently.

22. So, it is crystal clear from the aforesaid judgments of the Hon'ble Courts that an arbitral award is not a decree as defined under Section 2(2) of the CPC, 1908. Therefore, objections under section 47 of the CPC, 1908 which are specifically applicable to execution of decrees, are not maintainable against arbitral awards. The courts have constantly emphasized the self-contained nature of the Act. Section 36 of the Act deals with enforcement and does not provide for challenges to the merits of the arbitral awards. Challenges on the grounds of nullity or illegality can only be raised in proceedings under section 34 of the Act, which sets forth specific grounds for challenging arbitral awards. Allowing challenges on the merits in enforcement proceedings would undermine the legislative intent and the procedural framework established by the Act.

23. So, it can be safely concluded from the above referred observations of the Hon'ble Courts that objections available under Section 47 of the CPC, 1908 will not be available under Section 36 of the Arbitration and

Conciliation Act since an arbitral award is not in reality a decree of the court but is merely treated as one of the limited purposes of enforcement. The key distinction between court decrees and arbitral award lies in their origin and nature. Court decrees are orders or judgements issued by a Court of law, following adversary proceedings and adjudication by a Judge. In contrast, arbitral awards the decisions rendered by private arbitrators chosen by the parties to a dispute, pursuant to an arbitration agreement. They arise from contractual agreements between the parties and are not issued by a Court of law. While they may have the same legal effect as court decrees once enforced, they are fundamentally different in origin and nature.

24. So, considering all, the application being no. I.A.01/2023 filed by the Judgment-debtor stands rejected on contest without any order as to costs.

Fix the matter on 27.06.2024 at 10:30 a.m. for further order.

Parties to act on the basis of the downloaded copy of this Order.

Dictated and corrected by me

Sd/-
Judge, Commercial Court at Alipore,
For South 24 Parganas, PurbaMedinipur,
Paschim Medinipur&Jhargram

Sd/-
Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Medinipur,
Paschim Medinipur&Jhargram