

# Maytas Subhash vs Ircon International Limited on 27 March, 2023

**Author: Yashwant Varma**

**Bench: Yashwant Varma**

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IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP (ENF.) (COMM.) 37/2021, EX.APPL.(OS) 213/2021

(Direction), EX.APPL.(OS) 636/2021 (U.S. 47 CPC)

MAYTAS SUBHASH

..... Decree Holder

Through: Mr. Sayan Ray, Mr. Parag  
Chaturvedi, Advs.

versus

IRCON INTERNATIONAL LIMITED ..... Judgement Debtor

Through: Mr. Chandan Kumar, Ms. K.  
Atri, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% 27.03.2023

1. The present execution is opposed by the respondent on the following four fundamental pedestals.
2. It is firstly contended that the Court is not competent to entertain the present petition in light of the definition of the expression "court" under the Arbitration and Conciliation Act, 1996 [the Act]. It is further submitted that the present proceedings are not such as can be said to be as contemplated under Section 36 of the Act. Learned counsel also additionally submits that for reasons which have been duly elaborated in the written submissions, the Award itself is a nullity and this is a question which can and should be decided by the Court which seeks to execute the same.
3. Learned counsel also urges the contention that the judgment of Sundaram Finance Limited vs. Abdul Samad and Anr. [(2018) 3 SCC 622] is distinguishable on facts and law.
4. Insofar as the last issue is concerned, the Court had in a detailed judgment rendered in Gujarat JHM Hotels Ltd vs. Rajasthali Resorts and Studios Limited [2023 SCC OnLine Del 161] ultimately held that while in terms of the decision of the Supreme Court in State of West Bengal vs. Associated Contractors, [(2015) 1 SCC 32], it is the seat court which is liable to be viewed as being pivotal for the purposes of all filings under the Act, it was essentially faced with the judgment of Sundaram Finance which had held that an execution petitioner could institute proceedings in courts other than those which may be described or accepted to be the seat of arbitration.

5. The issue of seat of arbitration in the present case is raised in light of the jurisdiction clause which reads as follows: -

"All disputes between the parties to the contract arising out of or relating to the contract shall after written notice by either party to the contract to the other party be referred to arbitration as above. Unless the parties otherwise agree such reference shall not take place until after the completion, alleged completion or abandonment of the work or the determination of the contract The venue of arbitration shall be such a place or places as may be fixed by arbitrator(s) in his/their sole discretion. Any suit or application for the enforcement of this arbitration clause shall be filed in the Competent Court at Ghaziabad / Noida. No other court of any other district or Pradesh outside Uttar Pradesh shall have any jurisdictions in the matter. The award of the arbitrator shall be final conclusive and binding on both the parties to the contract."

6. Learned counsels apprised the Court that although the arbitral hearings were conducted at Meerut since the learned arbitrator resided there that would only indicate the said location to be the venue of arbitration. In any case, it was the submission of the respondent that in light of the jurisdictional clause as appearing in the agreement, it would be the courts at Ghaziabad/Noida which alone would be entitled to be viewed and recognized as being the seat court.

7. However and as was noticed hereinabove, Sundaram Finance confers a choice upon the execution petitioner to either approach the seat court and thereafter seek transfer of the execution proceedings or for that matter the drawl of a precept as contemplated under Section 46 of recognized a right enabling the execution petitioner to approach any other court where the assets of the respondent may be situate. It is in the aforesaid light that the present execution petition had come to be instituted before this Court.

8. Insofar as the applicability of the power which is otherwise recognized to inhere in an executing court by virtue of Section 47 of the Code is concerned, this Court in Hindustan Zinc Ltd. vs. National Research Development Corporation [2023 SCC OnLine Del 330] had held as follows: -

"21. It would be pertinent to note that Order XXI of the Code compendiously deals with the subject relating to execution of decrees. Those provisions extend from attachment of properties to sale and auction thereof. It also envisages the trial of questions that may arise in the course of execution as would be evident from the various provisions contained in that chapter such as Order XXI Rule 46C as well as Rules 58 to 63 and 101. As this Court reads those provisions, they clearly appear to be restricted to questions that would be indelibly connected with actions and steps that may be taken by a court in the course of execution of a decree. Even those provisions cannot possibly be construed as extending to a challenge to the validity or correctness of the original judgment and decree that may be rendered. While it may be open the Court to draw sustenance and guidance from the principles underlying the provisions contained in Order XXI in the course of enforcement of an arbitral award, it would be

wholly incorrect to understand or interpret Section 36 as envisaging the adoption of its various provisions. The principles which inform the various provisions of Order XXI can at best only act as a guide for the trial of various questions that may arise in the span of enforcement of an arbitral award.

22. In summation, it must be held that a challenge to an award on the ground that it is a "nullity" or is otherwise illegal can be addressed only in proceedings that may be initiated in accordance with Section 34 of the Act. The grounds on which an award can possibly be assailed are comprehensively set out in Section 34(2). A challenge mounted on those lines in proceedings duly instituted under Section 34 alone can be recognised to be the remedy available to a judgment debtor. The Act neither envisages nor sanctions a dual or independent challenge to an award based on the various facets of nullity as legally recognised being laid in enforcement proceedings. The conclusion of the Court in this respect stands fortified from a conjoint reading of Sections 5, 35 and 36 of the Act as well as the precedents noticed hereinabove.

The aforesaid statement of the law would necessarily be subject to the caveat which is liable to be entered in respect of foreign awards By:NEHA Signing Date:28.03.2023 18:50:39 and which are governed by Part II of the Act. Insofar as enforcement proceedings are concerned, while the Court would be obliged to deal with all questions that may relate to or arise out of steps that may be taken in the course of execution, it would be wholly incorrect to understand the scope of those proceedings as extending to the trial of questions touching upon the merits of the award."

9. However, learned counsel for the respondent would contend that the Division Bench of our Court in *Union of India vs. Jagat Ram Trehan & Anr.* [1996 SCC OnLine Del 20] had held as follows:-

"21. That question is whether a plea that the award is void can be raised in execution proceedings. On this question respondent contended that the award must have been objected to under Sections 17, 30 and 33 or by appeal against the order rejecting objections and if that was not done, it was not open to raise the question in execution proceedings. This contention, in our view, is not correct. That Section 47 applies to execution proceedings taken pursuant to a decree making an award a rule of Court cannot be doubted. The decided cases, referred to below, also hold it is open to the executing court under Section 47 to declare that the award is passed without jurisdiction and that therefore the decree passed thereupon is also null and void and not executable. (See in this connection: *Ran Singh v. G.A. Coop Service Society* (AIR 1976 P & H 94 (FB)); *Sabawwa Vanmappa v. Basappa Andanappa* (ILR 1955 Bombay 386); *E.D. Sasson and Co. Ltd. - Shivji Ram - Devi Das - Judgment-debtors* (AIR 1929 Lahore 228); *Gopi Ram Jaithu Ram v. Rami Das Sri Kishan* (AIR 1934 Lah. 49) and *Donald Graham & Co. v. Kewalram and others* (AIR 1921 Sind 132). We have therefore no hesitation in holding that this EA is maintainable under Section 47 to declare the award and the consequent decree as nullities."

10. Reliance was also placed on a judgment rendered by the Bombay High Court in Maharashtra State Electricity Distribution Company Limited vs. Godrej and Boyce Manufacturing Company Limited [2019 SCC OnLine Bom 3920] where the following observations came to be made: -

"99. It is thus clear that the express authority of a partner is mandatory for submitting a dispute relating to the business of firm to arbitration. The respondent has not placed reliance on any authority given by the said Electropath Services (India) Private Limited authorizing the respondent to submit the dispute relating to as contemplated under section 19(2)(a) of the Indian Partnership Act, 1932. The respondent could not invoke any alleged implied authority to sue the petitioner and submit the dispute relating to the joint venture to arbitration. The so called express authority relied upon by the respondent in the joint venture agreement as well as the power of attorney does not empower the respondent to refer the dispute relating to the joint venture to arbitration."

11. The aforesaid issues would clearly warrant further consideration.

12. Consequently, let this petition be called again on 10.07.2023.

YASHWANT VARMA, J.

MARCH 27, 2023 neha