

Reserved on 12.05.2023

Delivered on 18.05.2023

Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 6736 of 2021

Petitioner :- M/S Imagine Fashion Apparels Pvt. Ltd.

Respondent :- Presiding Officer Commercial Court And Another

Counsel for Petitioner :- Puneet Arun

Counsel for Respondent :- Tarun Agrawal, Rishabh Agarwal

Hon'ble Rohit Ranjan Agarwal, J.

1. This writ petition under Article 227 of the Constitution of India has been filed assailing the order dated 12.08.2021 passed by Commercial Court, Jhansi under Order VII, Rule 10 C.P.C. directing the petitioner to take back application for execution of the award dated 22.9.2020 within seven days to be presented before the Court having jurisdiction. A prayer has also been made for setting aside the order dated 21.8.2021 passed by Commercial Court, Jhansi dismissing the Misc. Case No.78 of 2021 for execution under the provisions of Order 7 Rule 11(d) and (f) C.P.C.

2. The petitioner before this Court is a private limited company registered under the provisions of Companies Act, 1956. It is duly registered as a MSME unit under the Micro, Small and Medium Enterprises Act, 2006 (*hereinafter called as "MSMED Act, 2006"*). It is engaged in the business of readymade garments having its principal place of business at Jhansi. The relationship between the petitioner and respondent No.2 is that the petitioner is a supplier and respondent No.2 is buyer. When the dispute arose between the parties, a reference/claim petition was filed by the petitioner before Facilitation Council under Section 18 of the MSMED Act, 2006 claiming principal amount along with interest being Claim Petition No.239 of 2019 dated 15.10.2019. An award was made by the Facilitation

Council on 29.09.2020, allowing claim of the petitioner and directing respondent No.2 to pay principal amount along with interest amounting to Rs.11,01,616/-. Against the award, no objections or application under Section 34 of the Act, 1996 was preferred either by petitioner or respondent No.2 and the award became final.

3. An execution application was moved by the petitioner under Section 36 of the Act of 1996 before Commercial Court, Jhansi, which was registered as Misc. Case No.78 of 2021. An objection was raised by the Munsarim of Commercial Court, Jhansi as to the maintainability of execution proceedings and an objection was invited on 30.07.2021 to which a reply/objection was filed by the petitioner. The Commercial Court, after hearing the parties on application 3C(2) on 12.8.2021 found that the Court at Jhansi did not have territorial jurisdiction to decide the matter and returned the case under Order VII Rule 10 CPC to be presented before appropriate Court within seven days. Thereafter, the Commercial Court on 21.8.2021 found that the time for withdrawing the execution application to be filed before appropriate Court was till 19.08.2021 which the petitioner had failed to do so hence dismissed the execution case under the provision of Order VII Rule 11 (d) and (f) CPC, hence this writ petition.

4. Sri Puneet Arun, learned counsel appearing for petitioner submitted that the award made by Facilitation Council under MSMED Act was put to execution under Section 36 of the Act of 1996 before the Court at Jhansi. According to him, the Court was not correct to pass the orders impugned dated 12.8.2021 and 21.8.2021. According to him, Section 36 mandates that execution proceedings under Section 36 of the Act of 1996 can be made at any place where a decree can be executed. He has relied upon judgment of Apex Court rendered in case of **Sundaram Finance Limited vs. Abdul Samad & Anr. (2018) 3 SCC 622.**

5. According to him, the arbitral proceedings stood terminated by the final award made by the Facilitation Council and no objection having been filed by the respondent No.2, the award was put to execution under Section 36, which provides that the award shall be enforced under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the Court. According to him, as the defendant resides at Jhansi, the execution proceedings were launched at Jhansi.

6. Per contra, Sri Rishabh Agarwal, learned counsel appearing for respondent No.2 submitted that though the initial order passed by Commercial Court, Jhansi on 12.8.2021 was against the mandate of the Apex Court rendered in **Sundaram Finance Limited (supra)** but thereafter the Commercial Court had proceeded to dismiss the application as the order dated 12.8.2021 was not complied in view of Order VII Rule 11 (d) and (f) C.P.C., which amounts to decree, as defined in Section 2(2) C.P.C. and thus is an appellable order under Section 96 C.P.C. According to him, the order dated 21.8.2021 is an appellable order and no writ petition lies under Article 227 of the Constitution against the said order. Reliance has been placed upon decision of Apex Court in **Sayed Ayaz Ali vs. Prakash G.Goyal and others (2021) 7 SCC 456 (Para 19)**, which is extracted hereasunder :

“The definition of “decree” in Section 2(2) “shall be deemed to include the rejection of a plaint”. Hence, the order of the trial court rejecting the plaint is subject to a first appeal under Section 96 CPC. The writ petition filed by the appellant was liable to be rejected on that ground. We therefore affirm the judgment of the High Court rejecting the writ petition, though for the above reason leave it open to the appellant to pursue the remedy available in law.

7. I have heard the counsel for the parties and perused the material on record.

8. The matter relating to filing of execution application under the provisions of Code of Civil Procedure for enforcement of the award as per the provisions of Code before the Court having jurisdiction is no more *res integra* and the law having been settled in the case of **Sundaram Finance Limited (supra)**, the order passed by the Commercial Court on 12.8.2021 returning back the execution application to be filed before the Court at Kanpur where the Facilitation Council is situated and the award was made is totally against the dictum of the Apex Court in **Sundaram Finance Limited (supra)**.

9. Section 32 of the Act of 1996 clearly provides that arbitral proceedings shall be terminated by final arbitral award. Once the award was made by the Facilitation Council in the year 2020, and no objection having been filed under Section 34 of the Act, the execution proceedings were rightly launched by the petitioner as per provisions of the Code of Civil Procedure, 1908 as if the award was a decree of the Court.

10. Filing of execution by the petitioner before the Commercial Court where the defendant resides is well within the meaning of Section 36 and the dictum of the Apex Court in case of **Sundaram Finance Limited (supra)**. The Court below was not correct in invoking the power of Order VII, Rule 10 C.P.C. and directing for return of the application within 7 days to be presented before the Court where the award was made. The order dated 12.8.2021 is patently erroneous in view of Section 36 and the law laid down by the Apex Court. The subsequent order dated 21.8.2021 was passed by the concerned court due to non compliance of the earlier order dated 12.8.2021 and the proceedings were dismissed under Order VII Rule 11 (d) and (f) C.P.C. The said order is a consequential order.

11. The argument raised at the behest of respondent counsel cannot be accepted in the present scenario, though it is settled law that order passed on application under Order VII Rule 11 C.P.C. is a decree within the meaning of Section 2(2) C.P.C. and the first appeal would lie under Section 96 C.P.C. However, in the present case, the basic order dated 12.8.2021 is totally against the provision of the Act as well as the law laid down by Apex Court.

12. Once it is found that the execution application itself was maintainable before the Court at Jhansi, the order passed by Commercial Court on 12.8.2021 returning back the case invoking provision of Order VII, Rule 10 C.P.C. is patently wrong and is set aside. Once the order dated 12.8.2021 is set aside, the consequential order dated 21.8.2021 is liable to be set aside, as it was passed due to non compliance by the petitioner in taking back his execution application for presentation before the Court at Kanpur.

13. This Court finds that the law in regard to moving the execution application has already been settled by Apex Court in case of **Sundaram Finance Limited (supra)** and provisions of Section 36 of the Act of 1996 is clear to the extent that provisions of Code of Civil Procedure, 1908 are applicable for enforcement of the award and the award shall be treated as decree. Once the said provisions are there, filing of execution case by the petitioner at the place where respondent No.2 resides is within the territorial jurisdiction as provided under the Act and the order passed by Commercial Court refusing to entertain execution application is totally erroneous.

14. Considering the facts and circumstances of this case this Court finds that both the orders dated 12.08.2021 and 21.08.2021 are totally illegal and without jurisdiction and against the mandate of the Apex Court and are thus hereby set aside.

15. The writ petition succeeds and is hereby allowed. The Commercial Court, Jhansi is directed to restore the execution case and proceed the same strictly in accordance with law.

Order Date :- 18.5.2023

Kushal