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

+ OMP (ENF.) (COMM.) 164/2021

RAMACIVIL INDIA CONSTRUCTIONS PVT LTD

..... Decree Holder

Through: Mr. Avinash K. Trivedi and Mr.
Anurag Kaushik, Advs.

versus

UNION OF INDIA

..... Judgement Debtor

Through: Ms. Monika Arora, CGSC for
UOI with Mr. Yash Tyagi, Adv.

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CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

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05.12.2022

1. These two enforcement petitions have come to be preferred before this Court for enforcement and execution of the Arbitral Award dated 03 November 2017 passed by the sole Arbitrator Shri Rakesh Mishra.

2. From the record it transpires that against the aforesaid Award, the Judgement Debtor had preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 [**“of the Act”**] before the Dehradun (Commercial) Court. That petition came to be dismissed

with the Court observing that it would not have the requisite jurisdiction to entertain the same. Against the aforesaid order passed by the Dehradun (Commercial) Court, an appeal is stated to have been filed under Section 37 of the Act which is pending consideration before the Uttarakhand High Court today.

3. However, and undisputedly, no restraint on the enforcement of the Award operates in that appeal. The Court takes note of the fact that the Award was rendered way back in 2017 and is yet to be enforced.

4. Ms. Arora, learned CGSC appearing for Union of India, submits that the judgement debtor has raised a serious challenge to the order passed by the Dehradun (Commercial) Court and therefore the enforcement should stand placed in abeyance till such time as that appeal which is pending before the Uttarakhand High Court is decided.

5. An issue of jurisdiction of the Court to entertain the present proceedings was also raised by Ms. Arora. Ms. Arora has placed reliance upon an Office Memorandum [“OM”] dated 05 September 2016 to submit that in terms of clause 2.2, the judgment debtor is obliged to make a deposit of 75% of the Award which may be made in a designated Escrow Account and to be released thereafter subject to the claimant furnishing a bank guarantee.

6. Clause 2.2 of the aforesaid OM reads thus: -

“2.2 In case of claims where the PSU/ Department has challenged the Arbitral Award already announced, 75% of the award may be paid by the PSU/ Department to the contractor/ concessionaire against Bank Guarantee without prejudice to the final order of the Court in the matter under challenge. The payment may be made into a designated Escrow Account with the stipulation that the amount so released will be used, first, for payment of lenders' dues, second, for completion of the project and then for completion of other projects of the same PSU/ Department, as mutually agreed/ decided. Any balance remaining in

the escrow account subsequent to settlement *of* lenders' dues and completion of projects of the PSU/ Department may be allowed to be used by the contractor/ concessionaire with the prior approval of the lead banker and the Department/PSU.”

7. The Court firstly notes that undisputedly the reference to arbitration was made by the competent authority within the territorial jurisdiction of this Court, the arbitral proceedings were held and continued here in Delhi and the Award was also render at Delhi.

8. The Court further notes that the aforementioned Office Memorandum can at best be recognized as an advisory to various Public Sector Undertakings [“PSUs”]. It cannot in any case bind the powers of the Court as conferred by Section 36 of the Act.

9. Reference was then made to the provisions of Section 42 of the Act with Ms. Arora contending that since the appeal is pending before the Uttarakhand High Court, in terms of the provisions made in that section, the enforcement petition should also be instituted before that Court.

10. The Court, however, finds itself unable to sustain the aforesaid submission bearing in mind the fact that Section 42 of the Act prescribes where applications under the aforesaid Part have been preferred or be pending before a Court, all subsequent applications would have to be file before the same court. In the considered opinion of the Court, the appeal which has been instituted before the Uttarakhand High Court would clearly not fall within the ambit of the aforesaid section.

11. The said provision relates to applications filed under the aforesaid Part. The issue even otherwise appears to stand concluded in light of the decision rendered by the Division Bench of the Court in **Vijay Gupta v. Renu Malhotra** [2008 SCC OnLine Del 1379] where it was held that the venue restriction provision as contained in Section

42 of the Act would have no application to enforcement proceedings.

While dealing with the aforesaid issue, the Court in **Vijay Gupta** had observed as follows: -

“15. We have considered the aforesaid submission in the light of various judgments cited by the counsel for the parties. We have already opined that in view of the law laid down in said judgments, particulars whereof are given hereinabove, merely because the High Court appointed the Arbitrator in the application filed under Section 11(6) of the Act would not mean that subsequent proceedings, including execution petition have to be filed in the High Court. If the amount of the award is less than Rs. 20 lakhs the execution petition shall have to be filed before the District Court which has the necessary pecuniary jurisdiction to entertain the same. For this reason, contention mentioned above needs to be rejected. Even if application under Section 11 filed in the year 1998 was because of the reason that this Court had the pecuniary jurisdiction, would be of no avail. All said and done, order for appointment was passed under Section 11 of the Act and it is now a settled law that the expression ‘Chief Justice’ as contained in Section 11 of the Act is not synonymous with the term ‘Court’ as defined in Section 2(e) of the Act. Therefore, benefit of Section 42 cannot be taken on this basis. What remains to be answered is as to whether the execution petition is competent in this Court because on an earlier occasion applications under Sections 27 and 37(2)(b) of the Act were filed in this Court and therefore, all subsequent proceedings would be maintainable in this Court alone by virtue of Section 42 of the Act. No doubt, Section 42 of the Act confers exclusive jurisdiction on this Court over the “arbitral proceedings and all subsequent applications arising out of that agreement.” However, execution application would be competent in this Court only if it is in the nature of “arbitral proceedings”. It has to be relatable to the arbitral proceedings or be termed as ‘application’ arising out of the arbitration agreement. Answer to this has to be in the negative in view of *S.K. Brothers v. Delhi Development Authority* (supra) holding that execution application is neither “arbitral proceedings” within the meaning of Section 42 of the Act or subsequent application arising out of the agreement. No doubt, it is the judgment by a learned Single Judge. However, in arriving at this conclusion the learned Single Judge has relied upon the judgment of the Supreme Court in *Pandey & Co. Builders (P) Ltd. v. State of Bihar* (supra) and stated the position in the following manner:—

“7. The Apex Court in *Pandey & Co. Builders (P) Ltd. v. State of Bihar*, VIII (2006) SLT : IV (2006) CLT 313 (SC) : (2007) 1 SCC 467, has further held that Section 42 only applies to applications and not to appeals under Section 37 of the Act. Applying the same reasoning, Section 42 would also not apply to execution applications. The execution application is not “arbitral proceedings” within the meaning of Section 42 of the Act and is not a subsequent application arising out of the agreement and the arbitral proceedings. In fact, the arbitral proceedings come to an end when the time for making an

application to set aside the arbitral award expires and the execution application is an enforcement of the award which takes the colour of a decree under the CPC, by virtue of the provisions of Section 36 of the Act.”

16. We are in agreement with the aforesaid view and the position in law explained by the learned Single Judge in that judgment. For the aforesaid reasons we hold that the impugned judgment returning the execution petition is perfectly in order and does not call for any interference. We, therefore, dismiss this appeal but leave the parties to bear their own costs.”

12. In view of the aforesaid, the objections which are raised are negatived. In that view of the matter, the Court is of the considered opinion that presently it cannot be said that the enforcement petition has been wrongly instituted before this Court

13. Let the judgement debtor consequently place and deposit the entire amount as due and payable in terms of the Arbitral Award dated 03 November 2017. Let the aforesaid deposit be affected with the Registrar General of this Court within a period of six weeks from today.

14. Let these matters be called again on 30.01.2023.

YASHWANT VARMA, J.

DECEMBER 5, 2022

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