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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 12.12.2019
Pronounced on : 08.06.2020

+ O.M.P. (EFA) (COMM.) 9/2019, Ex. Appl. (OS) 875/2019

GLENCORE INTERNATIONAL AG Decree Holder
Through: Mr. Gaurab Banerji, Sr. Advocate
with Mr. Sumeet Lall, Mr. Sidhant
Kapoor, Ms. Ananya Pratap Singh,
Ms. R. Chatterjee and Ms. Devyani
Sharma, Advocates.

versus

HINDUSTAN ZINC LIMITED Judgment Debtor
Through: Mr. Prashanto Chandra Sen, Sr.
Advocate with Ms. Anne Mathew
and Mr. Kaustubh Singh,
Advocates.

+ O.M.P. (EFA) (COMM.) 10/2019, Ex. Appl. (OS) 876/2019

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CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

1. O.M.P (EFA) (COMM.) No. 9/2019 has been filed for enforcement of final Award on costs dated 01.05.2018 and final Award on interest on costs dated 06.08.2018 passed by the Tribunal in LCIA No. 142768 (hereinafter referred to as Petition No. I). O.M.P (EFA) (COMM.) No. 10/2019 has been filed for enforcement of final Award on costs dated 01.05.2018, as amended, and final Award on interest on costs dated 06.08.2018 in LCIA No. 142703 (hereinafter referred to as Petition No. II).

2. Arguments were heard and order was reserved on the issue of maintainability of the petitions. Since common questions of law arise in both the petitions, common order is being passed.

3. Brief facts necessary to decide the question of maintainability, shorn of unnecessary details are that the Decree Holder (hereinafter referred to as 'DH') and the Judgment Debtor (hereinafter referred to as 'JD') entered into a Contract on 13.12.2011 for supply 10,000 mts. of MRM concentrate from Australia to India. The Governing Law of the Contract was the Law of England and Wales and the Contract had an Arbitration Clause being Clause 27.2. The Venue of Arbitration was London, United Kingdom and the proceedings were to be conducted in accordance with Rules of the London Court of International Arbitration.

DH and JD entered into another Contract on 28.03.2012 for supply of 25,500 mts. of MRM with an option to purchase further quantity. The law governing the Contract and the procedure and Venue of the Arbitration was similar to the terms in the earlier Contract.

4. Disputes arose between the parties and consequently JD invoked Arbitration on 03.06.2014 under the Contracts, by submitting its request to the Registrar, London Court of International Arbitration.

5. Under two conjoined Arbitrations, arising out of two separate references under the two Contracts, the Arbitral Tribunal passed its final Award being LCIA No. 142703 with respect to the first Contract and LCIA No. 142768 with respect to the second Contract.

6. With respect to LCIA No. 142768, on 17.08.2017 the Tribunal came to a finding that the DH was not in breach of the contract dated 28.03.2012 and also dismissed the claims of the JD for damages. Tribunal thereafter passed a final Award dated 01.05.2018 on costs, as amended, and awarded a sum of GBP 822,582.04, excluding interest, thereof, and reserved its rights to make a further Award as necessary. DH thereafter applied to the Tribunal for an Award for interest on costs. The Tribunal passed its final Award on interest on costs on 06.08.2018.

7. In the meantime, on 03.01.2018, JD filed an application being S.B. Arbitration Application No. 6/2018 before the Rajasthan High Court under Section 34 read with Section 48 of the Act challenging the final Award dated 17.08.2017.

8. With respect to LCIA No.142703, on 17.08.2017 the Tribunal came to a finding that the DH was not in breach of the contract dated 13.12.2011 and also dismissed the claims of the JD for damages. Tribunal thereafter passed a final Award dated 01.05.2018 on costs, as amended, and awarded a sum of GBP 823,162.22, excluding interest, thereof, and reserved its rights to make a further Award as necessary. DH thereafter applied to the Tribunal for an Award for interest on costs. The Tribunal passed its final Award on interest on costs on 06.08.2018.

9. In the meantime, on 09.10.2017, JD filed an application S.B. Arbitration Application No. 28/2017 before the Rajasthan High Court at Jodhpur under Section 34 read with Section 48 of the Act and challenged the final Award dated 17.08.2017.

10. DH contested the said challenge and the Rajasthan High Court by judgment dated 02.05.2019 dismissed both the Applications by a common judgment as non-maintainable. Relevant part of the judgment is as under:-

“In view of the above, it is apparent that the seat of arbitration being at London, United Kingdom, the applications under Section 34 of the Act would not be maintainable. The submissions made by learned counsel for the applicant, cannot be accepted and the preliminary objections raised by the respondents deserve acceptance.

In view of the above discussion, the applications filed by the applicant under Section 34 of the Act against the impugned Arbitral Awards dated 17.08.2017 are not maintainable, the same are therefore, dismissed.”

11. An appeal was filed by JD before the Division Bench of the Rajasthan High Court against the said judgment and is stated to be pending.

12. On 18.03.2019, DH sent a legal notice to the JD requesting for payment of costs and interest on costs, under the final Awards, in both the matters. Since payments were not made by the JD, Petitioners took recourse to the present proceedings.

13. It is averred in the petitions that the Awards have been made in London, UK to which New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 applies, under Section 44 of the Act and the Awards are thus Foreign Awards. It is averred that the Awards are final and binding on the parties and enforceable in India as prescribed under Chapter-I of part-II of the Act, as a Decree of this Court. It is further averred that the JD has its office in Delhi. The assets/properties including bank accounts, which are sought to be attached in the present proceedings, are within territorial jurisdiction of this Court and hence the applications are maintainable.

14. Since the JD has raised a preliminary objection on the territorial jurisdiction of this Court, it is necessary to first encapsulate the objections taken by the JD. Mr. Prashanto Chandra Sen, learned Senior Counsel for the JD, contends that the only asset identified by the DH in the jurisdiction of this Court, for the purpose of enforcement, is a property on the first floor in Scope Complex, Lodhi Road. The said property is not

owned by the JD but is on Lease, where the Lessor is the Govt. of India. The assets of the JD are located in Rajasthan and there are no assets in Delhi. JD is only using the leased premises, as its Liaison office. It is argued that the onus is on the DH to identify the property for the purpose of execution as held by this Court in *M.L. Gupta v. Aerens Gold Souk International Ltd. & Anr.*, 2018 SCC OnLine Del 7621. The Court has clearly held that it is not open to a holder of a decree for money, instead of, furnishing the particulars required in the application for execution, straightaway ask for examination of the JD in a Court to disclose its assets. It is argued that DH cannot embark on a roving and fishing enquiry and file a petition, in any Court, with the hope that it may be able to identify certain properties in a particular jurisdiction. It is contended that in the case of *Krishna Gopal Saha v. Nityananda Saha & Ors.*, 1982 SCC OnLine Cal 221, Court has held that the basic requirements of Section 60(1) of the CPC have to be fulfilled before the property in question can be attached or sold in execution of the decree and one of the said basic requirement is that the property sought to be attached must belong to the JD and he must have disposing power, which he may exercise for his own benefit. Therefore, the submission is that the property sought to be attached being a property on Lease and not owned by the JD, is not within its disposing power.

15. The next contention of the learned Senior Counsel, without prejudice to the objection of territorial jurisdiction, is that an application to decide the enforceability of the Award is already pending in the High Court of Rajasthan. Section 49 of the Act provides that once a particular

Court decides the enforceability of an Award, the Award shall be deemed to be a decree of that Court. The Act thus, contemplates a Single Executing Court. Since the issue of enforceability is sub-judice before Rajasthan High Court, where the assets of the JD are located, it is that Court which would be the executing Court and once the Court is satisfied that the Award is enforceable, then the Award holder can seek transfer of the proceedings to this Court under Sections 38 & 39 CPC. It is further argued that even assuming without conceding that the said proceedings are not maintainable in the Rajasthan High Court under Section 34 of the Act, it is still open to the Court to go into the enforceability of the Award under Section 48 of the Act and an application under Section 48 of the Act, has been filed. Reliance is placed on the judgments of the Supreme Court in the case of *Bharat Aluminum and Co. v. Kaiser Aluminium and Co.*, (2012) 9 SCC 552 (BALCO) and *LMJ International Limited v. Sleepwell Industries Company Limited*, (2019) 5 SCC 302.

16. It is further contended that even assuming that this Court has jurisdiction, even then, on principles of comity, this Court ought to await the decision of the petition pending in the Rajasthan High Court. It is argued that even the Act does not contemplate two Courts within one Country, determining whether the Award is enforceable or not. This would defeat the purpose of the Act, which is to expedite determination of enforceability of the Award and then for the same Court to execute it. In *LMJ (supra)* Supreme Court has held that Section 48 of the Act does not envisage piecemeal consideration on the issue of maintainability of

the execution case in a Foreign Award, in the first place and then the issue of enforceability thereof.

17. Mr. Gaurab Banerji, Learned Senior Counsel for the Petitioner, responding to the arguments on maintainability, submits that the legal position is crystal clear. By virtue of the Commercial Courts Act, 2015, and the Amendment Act, the Commercial Division of a High Court, where the assets of the opposite party lie, shall have jurisdiction for applications relating to enforcement of an Award, where the subject matter is money. Attention is drawn to Explanation to Section 47 of the Act in this regard. It is argued that this Court in the case of *Motorola Inc. v Modi Wellvest [2005 (79) DRJ 173]*, following the judgment of the Supreme Court in *Brace Transport Corporation v. Orient Middle East Lines [1995 Supp (2) SCC 280]* held that the only relevant factor to establish territorial jurisdiction is the location of assets and property of the JD. The subject matter of the Award herein being money, the questions forming the subject matter of the Award would be a question relating to money i.e. assets of the JD. Post the 2015 Amendment to the Act, petitions under Section 47 of the Act are to be now filed only before the High Court. Reliance is placed for this proposition on the judgment in the case of *Precious Sapphire v. Amira Pure Foods Private Ltd., 2018 SCC OnLine Del 12699* and *Trammo DMCC v. Nagarjuna Fertilizers, 2017 SCC OnLine Bom 8676*.

18. Learned counsel submits that it has been clearly stated in para 7 of the Petition that the JD has its office at New Delhi and the address has also been mentioned being, First Floor, Core-6, Scope Complex Lodhi

Road, New Delhi. In the list of assets, the description of the property has been furnished. It is also mentioned that all the assets of the JD including moveable property such as cars, bank accounts, fixed deposits, etc. are at Delhi. Other assets such as office furniture, machinery, computers, TV sets, refrigerators etc. are lying at the office premises at Lodhi Road. It is submitted that there is no specific denial on affidavit to any of these averments. Rather in the application filed by the JD, it is specifically mentioned in para 6.11 that the JD does not have any assets in the territorial jurisdiction of this Court, other than an 'Administrative Office'. In the rejoinder to the application, an attempt has been made to improve the said averment to state that the asset is a small liaison office with only 3-4 employees and is on lease from the Govt. of India with no disposing power on the said property.

19. It is contended that the premises are non-residential in nature and are not subject to the Rent Control Law. It is well settled that interest in property can be attached by a DH and sold in execution under Section 60 CPC. In ***Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi, (1975) 2 SCC 105***, Supreme Court has held that Section 60 CPC refers to any other saleable property, moveable or immovable, whether the same is or is not held in the name of the JD. Right to occupation of a flat is property, both attachable and saleable. A Full Bench of the Bombay High Court considered the interest of a tenant of a non-residential premises under the Maharashtra Rent Control Act and held it was liable to attachment and sale, in the case of ***Tangerine Electronics Systems Pvt. Ltd v. Indian Chemicals, 2004 (2) Mh.L.J. 305***. Again, in the recent judgment in the

case of *Hill Properties Ltd. v. Union Bank of India*, (2014) 1 SCC 635, Supreme Court relying on *Ramesh Himmatlal Shah (supra)* reiterated this position of law and held that the right or interest to occupy any flat is a species of property and hence has a stamp of transferability and can be attached by a Warrant of Attachment.

20. Learned Senior Counsel distinguishes the judgment in the case of *Krishna Gopal Saha (supra)* and argues that the said judgment was distinguished by a Division Bench of the same High Court in *M/s. Anirban Chit Fund (P) Ltd. & Insulation Materials Manufacturing Company Pvt. Ltd. v. Commissioner, Sanchaita Investments*, 1987 SCC OnLine Cal 221, where the Court observed that the enumeration under Section 60 of the CPC, of the properties which are attachable is not exhaustive. It was held that where the tenancy was not a residential tenancy, the exemption granted to residential tenancy from attachment under Section 60(1) (kc) of CPC would not apply. In the present case, JD has not shown any Statutory Bar to the disposition of a Leasehold interest and the tenancy is not a residential tenancy, so as to be exempted under Section 60 CPC. Even otherwise, there is no denial that JD has moveable assets within the jurisdiction of this Court and even if the assets are not sufficient to satisfy the decree, this aspect will not be relevant at this stage to decide the maintainability of the present proceedings, as held in the case of *Motorola Inc. (supra)*.

21. In so far as the contention of the JD regarding the pending proceedings in the Rajasthan High Court is concerned, learned Senior Counsel for the Petitioner contends that firstly, it is even doubtful in law

whether a composite petition can be filed under Section 34 and Section 48 of the Act. Supreme Court in *Hindustan Petroleum Co. Ltd. v. Videocon Industries Ltd.*, (2012 SCC Online Del 3610) has held that Part-I and Part-II of the Act operate in different spheres. Section 34 is for setting aside of an Arbitral Award, while Part-II deals with enforcement of certain Foreign Awards and thus, while proceedings under Section 34 of the Act are like a Sword to challenge the Award to have it set aside, proceedings Section 48 of the Act are only like a shield against the Foreign Award. It is further submitted that the Single Judge of the Rajasthan High Court has already dismissed the petitions by a judgment dated 02.05.2019, on ground of maintainability as the seat of Arbitration was London and the governing law was English Law. Though an Appeal is pending, but it is not correct for the JD to submit that proceedings under Section 48 of the Act are pending.

22. Learned Senior Counsel submits that there is no legal impediment for this Court to proceed under Section 48 of the Act for enforcement of the Award and the petition is maintainable. Reliance is placed on the judgment in *Eitzen Bulk A/S v. Ashapura Minechem Limited and Another*, [(2016) 11 SCC 508] where *Ashapura Minechem Limited* had filed a petition against *Eitzen Bulk* under Section 34 of the Act, before the Court in Gujarat and subsequently, *Eitzen Bulk* filed an application for enforcement under Section 47 of the Act, before the Bombay High Court. Contention of *Ashapura Minechem Limited* was that in view of Section 42 of the Act, the application ought to have been made before the Gujarat Court. This contention was rejected by the Bombay High Court on the

ground that Section 42 is in Part-I of the Act and since Part-I itself has no application to a Foreign Award, Section 42 of the Act would have no application either. This view of the Bombay High Court was upheld by the Supreme Court. It is also argued that the emphasis by the learned Senior Counsel for the JD on Section 49 of the Act is also misplaced. The stage for Section 49 of the Act i.e. execution of the decree would come only after the stage when the objections are considered and cannot be a ground to prevent the Court from entertaining the present petition.

23. In view of the above submissions, it is submitted that the JD be called upon to file its reply/objection under Section 48 of the Act, rather than the piecemeal approach which the JD is adopting and has been deprecated by the Supreme Court in **LMJ (supra)**.

24. I have heard the learned Senior Counsels for the parties and examined their respective contentions.

25. Petitioner has filed the present enforcement petitions having foreign awards in its favour. The Judgment Debtor/Respondent has filed an application objecting to the maintainability of the petitions on the ground that no part of cause of action in respect of the subject matter of the Award has arisen within the jurisdiction of this Court. Since the assets of the JD are not located within the jurisdiction of this Court, there is lack of territorial jurisdiction to entertain the petitions.

26. Petitioners have sought to enforce the Awards on the ground that the JD has an immoveable property within the Territorial Jurisdiction of this Court, where it admittedly runs its business and is using the same as

an Administrative Office and also has various Bank accounts, within the jurisdiction of this Court. In the application filed by the JD objecting to the jurisdiction, it is significant to note that while a categorical stand has been taken with respect to the immovable property, that the premises are owned by the Government and the JD is using the premises as an Administrative Office only as a Lessee, but there is no denial to the averment of the Petitioner with respect to the Bank Accounts or other moveables. The stand of the JD in the application is as under:

“6.11 The Petitioner/Decree holder is well aware of the fact that the Applicant does not have any assets in the territorial jurisdiction of this Hon'ble Court other than an administrative office which is evident from the list of assets given by the Petitioner/Decree holder itself. By arraying the administrative address of the Applicant, the Petitioner/Decree holder with an ulterior motive has filed the present proceedings before this Hon'ble Court. Even the Petitioner/Decree holder is aware of the same which is evident from the documents filed by the Petitioner/Decree holder.”

27. The next ground on which the JD objects to the present petitions is that no cause of action has arisen within the territorial jurisdiction of this Court inasmuch as the contracts between the parties were signed outside the jurisdiction, the seat of arbitration was not Delhi and that Rajasthan High Court is seized of the petitions filed by the JD under Section 34 read with Section 48 of the Act. It is also the stand of the JD that the assets of the JD are mostly in Rajasthan. Relevant paras in this regard from the Rejoinder to the application are as under:

“2. That the Respondent reiterates that this Hon'ble court does not have the territorial jurisdiction to entertain and adjudicate upon the present lis in as much as none of the assets of the Respondent are within the jurisdiction of this Hon'ble Court. The only "asset" mentioned within the territorial jurisdiction of this Hon'ble Court is the office space mentioned at 1st floor, Core 6, Scope Complex, 7 Lodhi Road, New Delhi- 110003. However, the said "asset" is a small administrative/liason office with only 3-4 employees. The said "asset" is on lease to the Respondent from the Government of India, therefore, the Respondent does not have disposing power over the said property. Thus, the said "asset" is not liable for attachment in execution of the Awards. It is reiterated that the Respondent does not have any other assets within the territorial jurisdiction of this Hon'ble Court.

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6. That the Petitioner is indulging in a roving and fishing enquiry by filing the present proceedings before this Hon'ble Court. The list of assets filed by the Petitioner itself show that the assets of the Respondent are mostly located outside the territorial jurisdiction of this Hon'ble Court.”

28. In order to deal with the preliminary objection of the JD, it is necessary to examine certain provisions of the Act and CPC. Section 2 (1) (e) which is in Part-I Chapter 1 of the Act is as under:

“2. Definitions:-

(e) “Court” means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-

matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes.”

Explanation to Section 47 is as under:

“Explanation. – In this section and all the following sections of this Chapter, “Court” means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes.”

29. Bombay High Court in the case of ***Tata International Ltd., Mumbai vs. Trisuns Chemical Industry Ltd., Kutch 2002 (2) BomCR 88***, while examining the issue of enforcement of a Foreign Award and where an objection to territorial jurisdiction of the Court was taken, dealt with the distinction and the interplay between the two provisions mentioned above. It was held that these two provisions relate to two different aspects. In an Arbitration, the Court considers the subject matter of the arbitration while in the enforcement of an Award, it is the subject matter of the Award which is the relevant factor. Bombay High Court held as under:

“4. We then come to the issue as to the meaning of the expression subject matter of the Award and whether that would mean also subject matter of the arbitration proceedings. This is important because under Section 2(e) the expression with reference to the expression Court means

the subject matter of the arbitration. The subject matter of the arbitration would include contracts. The subject matter of an Award cannot include a contract as adjudication in respect of the claims under the contract has been done and has resulted into an award. The subject matter of the Award therefore, is liable to be construed to mean what is the relief finally awarded by the Award. It may be in the form of money, it can be for specific performance, or the like. Under the Foreign Awards (Recognition and Enforcement) Act, 1961, the said issue was in issue before the Apex Court in the case of Brace Transport Corporation of Monrovia Bermuda v. Orient Middle East Lines Ltd. Saudi Arabia and Ors., 1993(4) Sca 33. Two paragraphs from the judgment may be reproduced.

“14. It was then submitted by Dr. Ghosh that the subject matter of the award was money and the 1st and 2nd respondents had money in the jurisdiction of the Bhavnagar Court in the form of part of the purchase price of the said vessel payable to them by the 3rd and 4th respondents.”

“15. This being an award for money its subject matter may be said to be money, just as the subject matter of the money decree may be said to be money.”

It is therefore, clear that in respect of an award for money, subject matter can be said to be money. In other words, therefore, petition for enforcement of the foreign award can be filed in the Court where the party may have money. This is important consideration considering a party need not be tied down as in the case of Part I where the subject matter is the subject matter of the arbitration. In other words, if the party has a foreign award in its favour, it can seek to enforce the award in any part of the country where it is sought to be enforced as long as money is available or suit for recovery of money can be filed. In my opinion, therefore,

expression subject matter of the award to the explanation under Section 47 is different from the expression subject matter of the arbitration under Section 2(e) of Part I of the Act.

A foreign award if allowed to be enforced is a deemed decree. It can be enforced anywhere that the respondents may have money. In other words it is in the nature of forum hunting. The expression subject matter of the award and the subject matter of the arbitration agreement are two different and distinct expressions. In respect of a foreign award, if the expression subject matter of the award was to mean the same thing as the subject matter of the arbitration agreement, in most cases there would be no Court available where the award could be enforced as the entire cause of action in respect of the subject matter of the arbitration could be the foreign country. Merely because in the instant case, the contract was entered into in India cannot result in a different interpretation. The expression as the explanation itself permits forum hunting if that expression can be used. After considering all these provisions a similar view was taken in Arbitration Petition Lodg. No. 427 of 2001 in the case of Naval Gent Marline Ltd. v. Shivnath Rai Harnarain (I) Ltd. and Ors., decided on 5th July, 2001 in which at the ad interim stage, apart from other issues, the issue as to the meaning of the expression "subject matter of the award" was in issue and has been similarly answered.

In the instant case, defendants do not have their office or carry on business within the jurisdiction of this Court. The Offices are either at Gandhidham or Ahmedabad. It is not averred in the petition that the respondents have any money within the jurisdiction of this Court. In these circumstances, to my mind in the absence of the subject matter of the Award being within the jurisdiction of this Court, this Court would have no jurisdiction to hear and decide this petition."

30. The issue of territorial jurisdiction of a Court in the context of Sections 47 and 48 of the Act again came up before the Bombay High Court in *Wireless Developers Inc. vs. India Games Ltd. 2012 (2) ALLMR 790*. Relying on the judgment in case of *Tata International (supra)*, the Court observed that the distinction drawn stands to reason and logic. At the stage of arbitration, the subject matter could be a contract and therefore, the place where the Contract was entered into or such related issues would be material to decide the jurisdiction. However, once arbitration is concluded, and the stage is of enforcement then the question that has to be examined is the subject matter of the Award. Where the Award is a money Award, the enforcement would lie in a Court which is able to enforce the Award. Thus, where the properties, moveable or immovable, are located would be the place of enforcement of the Award and issues such as the residence or the place of business of the Respondent would be of little use. Relevant part of the judgment is as under:

“8. This concept has been explained by a single Judge of this Court in the case of Tata International Ltd. Vs. Trisuns Chemical Industry Ltd. 2002 (2) B.C.R. 88. In that case also a foreign award was sought to be enforced in a Court which the respondent claimed, lacked territorial jurisdiction. In paragraph 2 of the judgment, the Court considered the distinction between the aforesaid two provisions relating to the subject matter of the two aspects: in an arbitration the Court would consider the subject matter of the arbitration; in the enforcement of the award the Court would consider the subject matter of the award as the determining factors. This stands to reason and logic. The subject matter of the arbitration may be a certain contract, a certain property

etc., The territorial jurisdiction of the Court would be where the contract was entered into or where the some or all the properties of the respondent would be. Once the arbitration is concluded and has to be enforced it is the subject matter of the award which would have to be seen. That would be whether the award is a money award (analogous to a money decree in a litigation) or a declaration or other relief with regard to a contract or a property. The award would have to be filed for its enforcement in a Court which would be able to enforce that award. It would be futile to file it where a cause of action may have arisen, if the respondent would have no properties in that jurisdiction. Similarly it would be of little use to file it where the respondent resided or carried on business. It would have to be filed where the respondent would have properties, movable or immovable, which could be attached and sold in execution of the award.”

31. In the case of ***Brace Transport Corporation of Monrovia, Bermuda vs. Orient Middle East Lines Ltd., Saudi Arabia & Ors. 1995 Supp (2) SCC 280***, Supreme Court was considering the enforcement of a Foreign Award under the Foreign Awards (Recognition & Enforcement) Act. One of the provisions under consideration before the Court was Section 5(1) of the said Act which reads as under:

“Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.”

32. The Court placed reliance on certain passages from “Law and Practice of International Commercial Arbitration” by Redfern and Hunter

(1986 Edn.), which, in my view, are relevant to the present case and are extracted hereunder:

“A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets, legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the State or States in which the property or other assets of the losing party are located.

In other words, the place of arbitration will have been chosen as a neutral forum. It will be rare for the parties to have assets situated within this neutral country; and the award if it has to be enforced, must generally be enforced in a country other than that in which it was made. This is why it is so important that international awards should be recognisable and enforceable internationally and not merely in the country in which they are made; moreover, unlike the place of arbitration, the place of recognition and enforcement will not be chosen by or on behalf of the parties. It will depend upon the circumstances of each particular case.

Where it becomes necessary to enforce an international award, the position is different. The first step is to determine the country or countries in which enforcement is to be sought. In order to reach this decision the party seeking enforcement needs to locate the State or States in which the losing party has (or is likely to have) assets available to meet the award.”

33. Finally, the Supreme Court in the context of an Award for money held as under:

“16. This being an award for money its subject-matter may be said to be money, just as the subject-matter of a money-decree may be said to be money.

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19. It is now for the appellant to ascertain where the monies were so held and, if they were held within the jurisdiction of the Bhavnagar court, to apply for an amendment of the jurisdiction paragraph of its application to the Bhavnagar court accordingly. The Bhavnagar court would then, after notice to the parties, consider whether or not the amendment should be allowed. It would, ordinarily having regard to the object of the said Act and the fact that these events have transpired after the application to it was filed, allow the amendment. Thereafter it would determine whether the averment in the amendment is correct. In the event that it came to the conclusion that the first and second respondents had monies within its jurisdiction, it could be said to have jurisdiction to take the award on file under Section 5 of the said Act and it would proceed thereafter under the subsequent provisions of the said Act.”

34. The reasoning for the observation made by the Court is easily discernible from Para 13 of the said judgment. The arbitration can be at a neutral Forum between the two parties and the assets may or may not be at either of the two places. This is the Forum where parties to an Arbitration Agreement agree to the arbitration proceedings being held and is the subject matter of arbitration. However, if an enforcement of the Award is filed, it is maintainable only where the properties/assets of the

JD are located, which may or may not be the chosen place of the parties for subject matter of arbitration.

35. In *Wireless Developers (supra)*, Bombay High Court also examined the provisions of CPC with regard to execution of decrees and orders. The Court examined Section 51 CPC which enumerates powers of the Court to enforce execution by delivery of any property, attachment and/or sale of the property, arrest and detention of the JD, appointment of a Receiver or any other manner as may be required in the case. Order XXI Rules 3 and 10 CPC were also considered and the Court held as under:

“11. A reading of these provisions show that the CPC had not laid down the jurisdiction of an Executing Court. It cannot be since an Executing Court would be a Court which would be able to issue a process of execution within the limits of its territorial jurisdiction only, if the property or the person which is the subject-matter of the decree is found and available within such territory. It can attach a property which is within its territorial jurisdiction. It can detain a judgment debtor who lives within its territorial jurisdiction. It can appoint receiver of a property also which is only within its territorial jurisdiction. It would have nothing to do with the residence or the business of the parties or the place where the cause of action in the suit in which the decree came to be passed was. Hence if it has no property that it can attach and sell, it would transfer the decree to the Court where any property of the judgment debtor is found as the “Court having jurisdiction”.”

36. In the case of *Motorola (supra)*, a Coordinate Bench of this Court relying on the judgment in *Brace Transport (supra)* and the various provisions of Order XXI CPC clearly held that the only relevant factor in

execution of the Award is the location of the assets or the property of the JD and not the JD itself. Relevant paras read as under:

“19. The DH is also right in contending that the present action for execution of the award is not action against personam of the JD and not even against the title of the shares but is for an attachment and sale of the assets of the JD. The only relevant factor is the location of the assets or the property and not the JD itself and in the present case the DH is right in contending that the location of the assets in question, i.e., shares and bank accounts, is in Delhi and this Court thus has jurisdiction.

20. Finally the position of law now is well settled as per the judgment of the Hon'ble Supreme Court in Brace Transport Corporation's case (supra) wherein it has been held that a party seeking enforcement of an international award will be able to go forum shopping and locate the assets of the losing party for executing the award. Thus it is open to the DH to locate the assets of the losing party that is the judgment debtor which have been found to be in New Delhi in the form of both bank accounts and shares of Spice Communications Ltd.”

37. It needs to be noticed that in ***Wireless Developers (supra)***, the Appellant had an Arbitral Award which was a Foreign Award in its favour and filed an application for its execution. Respondent had challenged the Award in a petition filed under Section 34 of the Act. The Appellant had sought enforcement on the ground that the Bank Account of the Respondent was within the jurisdiction of the Bombay High Court. Learned Single Judge did not entertain the enforcement petition on the

ground of lack of territorial jurisdiction. In a challenge before the Division Bench, the Bench observed as under:

“13. The case of the parties to this litigation is wholly different. The appellant claims that there is money within the territorial jurisdiction of this Court which would satisfy the foreign award obtained by the applicant in an arbitration proceeding held in the USA. The subject matter of the award which is a money award, being money is within the territorial jurisdiction of this Court and consequently, under the explanation to Section 47 of the Act this Court having jurisdiction over the subject matter of the award would be the correct Executing Court in enforcement of the foreign award obtained by the appellant under Section 48 of the Act.

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19. It is clear from a reading of the aforesaid provisions defining the Court and the aforesaid two judgments and considering the reason and logic behind the distinction as also the analogous provisions with regard to enforcement of decrees that since the appellant claims that it can execute the Award within the territorial jurisdiction of this Court that itself bestows this Court with the territorial jurisdiction, it having within its territorial limits the subject matter of the award which is money in the form of the bank account. Mr. Dhond on behalf of the appellant contended that it is for the appellant to take its own choice to recover the monies and if the appellant finds that there are no monies in the said account the appellant may be constrained to make another application for enforcement of the Award, much like another application for execution of a decree under the CPC wherever another property of the respondent may be found for execution and enforcement of the Award.

20. *This, therefore, settles the territorial jurisdiction aspect under the application for execution made by the appellant. The notice issued under Order 21 Rule 22 would, therefore, be entitled to be issued by this Court having territorial jurisdiction for the enforcement of the award. The impugned order refusing to exercise jurisdiction on the ground that merely because the bank account of the respondent was within its territorial jurisdiction is, therefore, incorrect and must be set aside. This Court would have to exercise its jurisdiction to enforce the award.*”

38. Reading of the aforesaid judgments along with the provisions of CPC and the Arbitration & Conciliation Act, 1996, leads to a *prima facie* conclusion that this Court would have territorial jurisdiction to entertain the petition. Mr. Banerjee is right in his contention that the subject matter of the Award is money and the JD has its assets within the territorial jurisdiction of this Court. The Award holders have made a categorical averment in the petitions that the JD has an Administrative Office in Delhi, as also some moveable properties lying in those premises. It is also averred that the JD has Bank Accounts in Delhi. Significantly, the JD in its application, objecting to the maintainability, has admitted that there is an Administrative/ liaison office, though on a Lease from the Government. There is no document on record at present to corroborate the stand that the premises are on Lease. Insofar as the averment of Bank Accounts or other movables are concerned, there is not even a denial. In any case, in present times, there is a Centralized Banking Systems and Accounts can be operated from any part of the country.

39. In the case of *Brace Transport (supra)*, Court had specifically brought out that a Foreign Award is a deemed decree when allowed to be enforced and can be enforced anywhere depending on the location of the assets of the JD or where his money lies. In fact, the words used were that it is in the nature of “**Forum Hunting**”. Paras 13 and 19 of the judgement in *Wireless Developers (supra)* are relevant in this regard where the Court has clearly observed that it is for the Award Holder to locate the money of the JD and in case after filing the Application it is unable to find money, it can file another application at another place and locate another property. Explanation to Section 47 was also relied upon by the Court. Learned Senior Counsel for the Petitioner is also right that there is a difference in the subject matter of Arbitration and subject matter of the Award. Judgment in the case of *Wireless Developers (supra)* clearly decides this issue and the relevant paras have been extracted in the earlier part of the judgement.

40. Insofar as the argument of the JD that it has challenged the Awards under Section 34 read with Section 48 of the Act and the appeal is pending before the Rajasthan High Court, suffice would it be to state that pendency of those proceedings cannot come in the way of the Petitioners enforcing the Award before this Court. This issue is no longer *res integra* and has been settled by the Supreme Court in *Eitzen Bulk (supra)*. In the said case, *Ashapura Minechem Ltd.* had filed a petition against *Eitzen Bulk* under Section 34 of the Act before the Court in Gujarat and *Eitzen Bulk* had filed an application for enforcement of the Foreign Award before the Bombay High Court. Contention of *Ashapura* was that in view

of Section 42 of the Act, the application for enforcement ought to have been made before the Gujarat High Court. Bombay High Court rejected the contention of *Ashapura* on the ground that Section 42 is in Part I of the Act and since Part I itself had no application to a Foreign Award, Section 42 would have no application. This view of the Bombay High Court was upheld by the Supreme Court. Insofar as the issue of maintainability of the petition under Section 34 filed by the JD in Rajasthan High Court is concerned, the said issue is irrelevant to the present controversy in these petitions.

41. In view of the above, the JD is directed to file an Affidavit in Form 16-A, Appendix 'E' CPC and disclose all its assets moveable & immovable and tangible/intangible within a period of five weeks from today. Documents relating to the immovable property alleged to be on lease at the address given above would also be filed by the JD, along with the Affidavit. Depending on the disclosure in the Affidavits, the issue of territorial jurisdiction of this Court would be finally decided. Response, if any, to the said affidavit, be filed by the Petitioner/Award Holder within a period of ten days thereafter.

42. List the petitions on 13.07.2020.

JYOTI SINGH, J

JUNE 8th, 2020
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