

C.R.P. (MD) No. 2013 of 2018

Sundaram Finance Ltd. v. P. Sakthivel

2018 SCC OnLine Mad 3080 : (2018) 5 CTC 801 : (2018) 8 Mad LJ 585 : (2018)
4 LW 691

In the High Court of Madras[±]
(BEFORE G.R. SWAMINATHAN, J.)

Sundaram Finance Ltd., Rep. by its Manager (Legal), 21, Patullos
Road, Chennai - 600 002 Revision Petitioner/Petitioner;
v.

1. P. Sakthivel, Prop: M/s. Gounder Agencies, No. 5/56-Udayar
Gounder Thottam, Avinasilingampalayam, Palanikarai Post,
Avinashi, Tiruppur - 641 654.
2. Chitradevi Respondents.

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Decided on September 17, 2018

For Petitioner: Mr. M.S. Krishnan, Senior Counsel, for Mr. Pon Senthil Kumaran.

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order dated 06.09.2017 passed by the learned Principal District Judge, Karur, in D. No. 3038 in Arb. Case No. VKT/SF/93/20.

The Order of the Court was delivered by

G.R. SWAMINATHAN, J.:— M/s. Sundaram Finance Ltd., is the Revision petitioner herein. It had entered into a loan agreement with the first respondent herein on 07.10.2014.

2. A vehicle was hypothecated in favour of the Revision petitioner as the first charge. The second respondent herein is the guarantor. The loan amount of Rs. 7,38,224/- was repayable in 47 monthly installments. The first respondent, however, committed default. As a result, the hypothecated vehicle was seized on 30.08.2016 and sold. Even after the appropriation of the sale proceeds, the amount due under the contract was Rs. 2,37,932/-. Since the first respondent did not pay the same despite demand, arbitration proceedings were initiated as per Article 22 of the loan agreement. A Claim statement was filed on 19.04.2017 before Sri. V.K. Thirunavukkarasu, a retired District Judge, who was nominated as the Sole Arbitrator to adjudicate the dispute/claim between the parties.

3. The Sole Arbitrator passed an interim order dated 26.07.2017 under Section 17 of the Arbitration and Conciliation Act, 1996, attaching the property of the respondents as they failed to furnish security as ordered by the Arbitral Tribunal on 31.05.2017. A copy of the said order was communicated by the Arbitrator to the learned Principal District Judge, Karur District, for enforcement. The interim order passed by him was also enclosed.

4. After the receipt of the aforesaid order from the Arbitrator, the learned Principal District Judge, Karur, by communication bearing D. No. 3038 dated 06.09.2017, informed him that an Arbitrator is not competent to pass an order of attachment of properties which are not the subject matter of the arbitration. The relevant paragraphs of the said communication read as under:—

"I wish to bring to your kind notice that this Court received a copy of the order passed by you in I.A. No. 27/2017 in Arbitration case No. VKT/SF/93/2017, dated

26.07.2017. you have made a request to nominate a Senior Bailiff to execute the warrant of attachment of property issued by you. You have stated in the order that under Section 17 of the Arbitration and Conciliation Act, Arbitral Tribunals have all the powers of Civil Court and therefore, the Tribunal is empowered to order attachment of the property before the final orders. Under the amended Section 17 of Arbitration and Conciliation Act, Arbitral Tribunals are empowered to pass orders as an interim measure of protection in respect of four specific matters. It is nowhere provided in Section 17 of the Act that an Arbitral Tribunal is empowered to attach properties which are not the subject matter of the arbitration. This Court is of the opinion that you are not competent to pass such orders under Section 17 of the Act."

5. After receipt of the said communication, the Arbitrator sent a reply on 29.11.2017. Since no further action appears to have been taken, the revision petitioner has chosen to move this Court questioning the communication dated 06.09.2017, whereby the learned Principal District Judge declined to give effect to the interim order passed by the Sole Arbitrator.

6. Considering the scope of this civil revision petition, notice to the respondents stands dispensed with.

7. Heard the learned Senior counsel appearing for the Revision petitioner.

8. The Central Act 26 of 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. As observed by the Hon'ble Supreme Court in the decision reported in (2004) 3 SCC 155 (*Firm Ashok Traders v. Gurumukh Das Saluja*), this statute is a long leap in the direction of the alternate dispute resolution systems. It is based on UNCITRAL Model. The parties may agree to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The Arbitral Tribunal can be a Sole Arbitrator or a Panel of Arbitrators. The Arbitral Tribunal also will have the power to grant interim relief. Such a power is conferred by Section 17 of the Act. The said provision originally read as follows:—

"17. Interim measures ordered by arbitral tribunal.- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section(1)."

9. But then, number of practical difficulties arose in giving effect to an interim order passed by the Arbitral Tribunal. The Delhi High Court had dealt with this issue in the decision reported in (2009) 112 D.R.J. 657 (*Sri. Krishan v. Anand*). In this regard, there are atleast two interesting articles published in (2015) 4 SCC (J) 12 and (2016) 5 SCC J 16 written by M/s. Vikas Singh/Nanda Devi Deka and Sri. Badrinath Srinivasan, respectively. These articles dealt with the interplay between Section 17 and Section 27(5) of the Act.

10. The Law Commission took up the matter and bemoaned the fact that Section 17 of the Act stood seriously compromised because of lack of suitable statutory mechanism for the enforcement of the interim orders of the Arbitral Tribunal. The Commission wanted to provide teeth to the interim order of the Arbitral Tribunal as well as to provide for their enforcement. The Commission therefore recommended certain amendments which would not only give teeth to the orders of the Tribunal, but also make it statutorily enforceable in the same manner as the orders of a Court. Pursuant to the Law Commission's 246th report, amendments were made to Section 17

of the Act. Post amendment, the provision reads as under:—

“17. Interim measures ordered by arbitral tribunal:— (1) A part may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal-

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—
 - (a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - (d) interim injunction or the appointment of a receiver;
 - (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were an order of the Court.”

11. The amended provision came up for consideration before the Hon'ble Supreme Court in the decision reported in 2017 (6) C.T.C. 38 (*Alka Chandewar v. Shamshul Ishrar Khan*). The Honourable Supreme Court observed that the interim orders of the Arbitral Tribunal are now to be deemed to be the orders of the Court for all purposes and would be enforceable under the Civil Procedure Code, 1908, in the same manner as if they were orders of the Court and that Section 17(2) of the Act was enacted for the purpose of providing “a complete solution to the problem”.

12. In the case on hand, two issues arise for consideration. The learned Principal District Judge, Karur, has expressed his opinion that as per Section 17 of the Act, the Arbitral Tribunal is not empowered to attach the properties which are not the subject matter of the arbitration. The second is whether the District Court to which the order of attachment has been sent for enforcement can sit in appeal over it.

13. As rightly contended by the learned Senior counsel appearing for the Revision petitioner, the power of the Arbitral Tribunal to grant interim relief is not less than that of a regular Court, which has the power to grant interim order under Section 9 of the Act. Section 17(1)(b) and (e) of the Act contain expressions that are of great import. The Arbitral Tribunal can pass an order for securing the amount in dispute in the arbitration and can order such other interim measure of protection, as may appear to it to be just and convenient. It is also made clear that the Arbitral Tribunal shall have the same power for making orders as a Court has for the purpose of and in relation to any proceeding before it.

14. Section 94 of C.P.C., states that in order to prevent the ends of justice from being defeated, the Court may direct the defendant to furnish the security to produce any property belonging to him and to place the same at the disposal of the Court or

order the attachment of any property. The expression used is "any property". There is no embargo in the Section that only the subject matter of dispute should be attached. Section 17(1) of Arbitration and Conciliation Act, 1996, should be read along with Section 94 of C.P.C. If so conjunctively read, one can come to the irresistible conclusion that the Arbitral Tribunal can attach a property even though it is not the subject matter of the arbitral proceedings.

15. Next comes the issue of enforceability. As already pointed out, Section 17 of the Arbitration and Conciliation Act, 1996, underwent a drastic amendment. The amendment has a legislative history behind it. The same should be borne in mind while understanding the true import of the provision. Post amendment, any order issued by the Arbitral Tribunal under Section 17(1) of the Act shall be deemed to be an order of the Court for all purposes. It shall be enforceable under the Code of Civil Procedure, in the same manner as if it were an order of the Court.

16. It is true that the Arbitral proceedings are designed to be an alternative dispute resolution mechanism. An arbitrator is not a Court. In the "interpretation Clause" of the Indian Evidence Act, 1872, the "Court" is defined to include all Judges and Magistrates and all persons, except Arbitrators, legally authorised to take evidence. But then, in view of the deeming provision in Section 17(2) of the Act, an Arbitrator's interim order is to be construed as an order of the Court for all purposes.

17. In *East End Dwellings Co. Ltd. v. Finsbury Borough Council* (1952) A.C. 109 (H.L.), it was observed as under:—

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it ... The statute says that you must imagine a certain state of affairs: it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

18. This principle was upheld by the Hon'ble Supreme Court in the decision reported in A.I.R. 1953 SC 244 (*State of Bombay v. Pandurang Vinayak Chaphalkar*). This Judgment has been consistently followed. It has been cited with approval even in a recent decision of the Hon'ble Supreme Court reported in (2018) 3 SCC 343 (*Dhanamma Alias Suman Surpur v. Amar*). Therefore, the District Court to which the Arbitrator transmits an interim award should treat it as if it is one from another Court.

19. The Hon'ble Delhi High Court in the decision reported in (2016) 234 D.L.T. 175 (*Lanco Infratech Ltd. v. Hindustan Construction Company Ltd.*), observed that while under the unamended Section 17 of the Act, there was no specific power for the Arbitral Tribunal to order interim measures to secure the amount in dispute, that power has been expressly provided under the amended Section 17(1)(ii)(b) of the Act. The other important change is in Section 17(2) which states that the interim order passed by the Arbitral Tribunal would be enforceable as if it were an order of a Court under the CP.C. This makes it explicit that the purpose of these changes was to bring the powers of the Arbitral Tribunal under Section 17 of the Act on par with that of the Court under Section 9 of the Act. In the amended forms both Section 9 and Section 17 read alike. This is therefore a significant change.

20. A Civil Court has the power to order arrest or attach a property. If the person concerned resides within the territorial jurisdiction of the court concerned or if the property to be attached lies within its local limits, then the court will straightaway proceed to enforce the same. But, where the person to be arrested is residing outside its local limits or where the property is situated beyond its territorial jurisdiction, the court which passed the order will send it to the District Court within whose territorial jurisdictional limits the person resides or the property is situated. The procedure is laid

down in Section 136 of the Civil Procedure Code and it reads as under:

"136. Procedure where person to be arrested or property to be attached is outside district - (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction, such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court, or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, the copy of the warrant of arrest or of the order of attachment and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras (or Bombay), as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court."

21. Since the Arbitral Tribunal cannot in any event enforce the interim order passed by it on its own, it has to necessarily knock the doors of the District Court. In this case, the venue of the Arbitral Tribunal is at Chennai. Even if the property attached is located in Chennai, the Arbitral Tribunal could not have enforced the order of attachment on its own. It will have to seek the assistance of the Principal District and Sessions Judge, Chennai. Therefore, whenever the Arbitral Tribunal passes an interim order under Section 17 of the Act, it has to follow the procedure laid down under Section 136 of CPC. Whenever the District Judge receives communication from another Court for enforcement in terms of Section 136 of CPC, he will immediately forward the order to the Nazir section for implementation. The recipient court will have not have any difficulty because the process fee would have been remitted in the court which passed the order. But, in the case of an Arbitral Tribunal, there is no scope for receiving the process fee. It will have to be necessarily remitted only in the court by the party in whose favour the interim order has been passed. In the very nature of things, this remittance will have to be made in the Nazir section of the District Court.

22. These are days when we do come across acts of forgery and fraud committed even in respect of orders of court. Therefore, it is directed that the process fee in such cases should be remitted by a counsel who is practising before the District Court to which the order of the Arbitral Tribunal is communicated. Of course, the counsel who is remitting the process fee in the Nazir section will have to hold Vakalat and he will have to authenticate the genuineness of the interim order transmitted by the Arbitral Tribunal. But then, there is no necessity to take out an application in the form of an I.A. before the court. What is to be performed is a pure ministerial act. No judicial order is warranted from the District Court for implementing the interim order passed by the Arbitral Tribunal under Section 17 of the Act. The District Court is only

discharging a ministerial responsibility and cannot sit in appeal over the order passed by the Arbitral Tribunal. Since such an interim order is appealable in view of Section 37(2)(b) of the Act, there is a built-in safeguard also.

23. The learned Senior Counsel expresses his grievance that a uniform approach is not adopted by all the District Courts in Tamil Nadu. While some courts proceed to implement the interim order as contemplated under Section 17(2) of the Act r/w Section 136 of CPC, many do not. He passed on a copy of a formal application in the form of an I.A. filed by a counsel before the District Court in Madurai in one such case.

24. This Court, therefore, reminds all the District Courts that an interim order issued by the Arbitral Tribunal shall be deemed to be an order of the court. This is for all purposes. It shall be enforceable under CPC in the same manner as if it were an order of the Court. The expression "for all purposes" is significant. This Court calls upon all the District Courts to take note of the legislative amendment and the decision of the Hon'ble Supreme Court reported in 2017 (6) CTC 38 (*Alka Chandewar v. Shamshul Ishrar Khan*) and give effect to the interim order passed by the Arbitral Tribunals accordingly.

25. The communication impugned in this Civil Revision petition is set aside. The Civil Revision petition stands allowed as prayed for. No costs.

† Madurai Bench

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