

HIGH COURT OF DELHI**Bench: Hon'ble Mr. Justice Prateek Jalan****Date of Decision: 09.11.2023**

O.M.P.(EFA)(COMM.) 1/2018

TAQA INDIA POWER VENTURES

PRIVATE LIMITED & ANR.

..... Decree Holders

Versus

NCC INFRASTRUCTURE

HOLDINGS LIMITED,

..... Judgement Debtor

LEGISLATION:

Section 47 of the Arbitration and Conciliation Act, 1996

Foreign Awards (Recognition and Enforcement) Act, 1961

Subject: Enforcement of a foreign arbitral award and jurisdiction of the Delhi High Court in relation to the enforcement proceedings.**Headnotes:**

Enforcement of Foreign Award – Jurisdiction of Delhi High Court in Enforcement Proceedings – Award debtor's contention of lack of jurisdiction due to non-residency and absence of assets in Delhi – Counter-argument of assets owed to award debtor by a company in Delhi – Court's determination of jurisdiction based on existence of debtor's assets within its domain. [Para 1-6]

Jurisdictional Analysis – Debt Classification and Financial Health – Court's analysis on whether amount owed constitutes an asset of the debtor – Consideration of financial statements and classification of debt as "doubtful" or "written off" – Supreme Court's precedent on interpretation of written off debts and their recoverability – Court's conclusion that existence of debtor's asset within its jurisdiction confers enforcement authority. [Para 7-10]

Policy Against Forum Shopping – Applicability in Enforcement Proceedings – Supreme Court's guidelines on enforcement proceedings location – Relevance of the award debtor's assets location for jurisdiction purposes – Dismissal of concerns regarding forum shopping in enforcement context. [Para 13-14]

Decision – Rejection of Preliminary Objection – Delhi High Court's jurisdiction upheld for enforcement proceedings against the award debtor – Dismissal of applications challenging jurisdiction – Setting date for further proceedings. [Para 15-17]

Referred Cases:

- Salim Akbarali Nanji vs. Union of India – (2006) 5 SCC 302.
- Sundaram Finance Ltd. Vs. Abdul Samad – (2018) 3 SCC 622.

- Motorola INC vs. Modi Wellvest – 2004 SCC OnLine Del 1094.
- Brace Transport Corpn. Of Monrovia vs. Orient Middle East Lines Ltd. – 1995 Supp (2) SCC 280.

Representing Advocates:

For Decree Holders: Mr. Rajiv Nayar & Mr. Ashish Dholakia, Senior Advocates with Mr. Shankh Sengupta, Mr. Ketan Gaur & Mr. Arjun Agarwal, Advocates. For Judgement Debtor: Dr. Amit George, Mr. Jai Sahai Endlaw, Mr. Piyo Harold Jaimon, Ms. Nooreen Sarna, Mr. Rayadurgam Bharat & Mr. Shashwat Kabi, Advocates.

J U D G M E N T

O.M.P.(EFA)(COMM.) 1/2018 & I.As. 5648-50/2018 and 5652/2018 1. The present enforcement proceedings have been filed for enforcement of a foreign award dated 24.01.2018, rendered by a three-member Arbitral Tribunal in an arbitration arising out of a Securities Purchase Agreement dated 19.09.2012 [“the SPA”]. The arbitration was held under the aegis of the Singapore International Arbitration Centre and the seat of the arbitration was in Singapore.

2. The award debtor has raised a preliminary issue as to the jurisdiction of this Court to entertain the enforcement proceedings. Learned counsel for the parties have been heard on this issue, and this judgment will dispose of the preliminary objections, as well as four applications which turn only on this issue (I.As. 5648-50/2018 and I.A. 5652/2018).

A. Submissions

3. The primary contention of the award debtor on the question of jurisdiction is that the award debtor is neither resident, nor does it possess assets within the jurisdiction of this Court, so as to attract the enforcement jurisdiction of this Court.

4. Dr. Amit George, learned counsel for the award debtor, submitted that in the original enforcement petition, the award holders have sought to invoke the jurisdiction of this Court only on the ground that the SPA was executed in New Delhi. It has been asserted that this Court would have original jurisdiction to decide the questions forming the subject matter of the arbitral award if the same had been the subject matter of a suit, relying upon the explanation to Section 47 of the Arbitration and Conciliation Act, 1996 [“the Act”]. He points out that, only in an additional affidavit dated 30.09.2021, have the award holders suggested that the award debtor has assets within the jurisdiction of

this Court. For this purpose, the award holders have contended that the award debtor is owed an outstanding sum of Rs. 1,95,70,100/- plus interest of Rs. 1,08,38,000/- from an entity by the name of Himalayan Green Energy Private Limited [“HGEPL”], which has its registered address at *B-392, S/F, Chitranjan Park, New Delhi-110019*, within the jurisdiction of this Court. They have placed on record a copy of the master data of HGEPL, as available on the database of Ministry of Corporate Affairs, Government of India and its financial statements for the years 2018-19 and 2019-20¹.

5. Dr. George submitted that the jurisdiction of this Court cannot be founded upon the transaction relating to HGEPL, as the award debtor has written off the debt several years ago, on the ground that HGEPL is a defunct company which would not be able to pay its debts. Dr. George clarified that, although HGEPL is a partial subsidiary of the award debtor, the award debtor has taken a call not to pursue its claims against HGEPL, as the aforesaid subsidiary was unable to activate its only business - running an alternative energy project in Sikkim - due to adverse regulatory provisions.

6. Mr. Rajiv Nayar and Mr. Ashish Dholakia, learned Senior Counsel for the award holders, on the other hand, submitted that the debt of HGEPL has not been written off by the award debtor, but only treated as “doubtful”. Without prejudice, they argued that the question of whether the award debtor has written off the debt or not, is not dispositive of the issue as to whether it has an asset available within the jurisdiction of this Court. They submitted that, factually, HGEPL continues as a going concern and shows the debt due to the award debtor in its balance sheet. Learned Senior Counsel relied upon a judgment of the Supreme Court in *Salim Akbarali Nanji vs. Union of India*² to submit that the classification of a debt as a bad debt or a written off debt, in the hands of a creditor, cannot be determinative of this question.

B. Analysis

7. The question of jurisdiction, for the purpose of the present enforcement proceedings, turns upon a determination as to whether the award debtor possesses any assets within the jurisdiction of the Court. It is clear from the judgment of the Supreme Court in *Sundaram Finance Ltd. vs. Abdul Samad*³ that an award holder can proceed in enforcement in any Court which has

¹ Two other contentions have been raised in the pleadings. The first relates to the award holders’ dues from a company by the name of Cube Highways and Infrastructure Private Limited arising out of sale of shares in another company (Western UP Tollway Limited) registered within the jurisdiction of this Court. The final contention concerns amounts due to award holder No. 1 under the SPA which was executed in New Delhi. Neither of these grounds were pressed in the course of hearing, as recorded in the order dated 19.09.2023.

jurisdiction over the award debtor's assets. Three judgments of this Court also deal with this issue:

(a) In *Motorola INC vs. Modi Wellvest*⁴, it was held that availability of assets of the judgment debtor within the jurisdiction of this Court, at the time the execution petition was filed, would be sufficient to proceed with the execution petition. It was specifically held that the quantum of assets available and their sufficiency for the purposes of the decree are irrelevant:

*"13. The second plea of the judgment debtor is that no bank accounts of the JD or any amount therein existed in Delhi today. It is not in dispute that the bank accounts existed when this execution petition was filed and had about Rs. 50,000/- in them. While in the pleadings an attempt was made by the judgment debtor to obfuscate the issue by pleas which while averring that bank accounts no longer existed in Delhi, nevertheless omitted to give the dates of closure of the accounts, the learned senior counsel for the JD, Shri Andharujina, however, very fairly stated that the bank accounts in Delhi were closed during the pendency of this execution petition. **Consequently when at the time of filing of this execution petition, assets of the JD in the form of monies were available in bank accounts in Delhi, the jurisdiction of this Court to proceed with this execution was established. Whether the amount available in the bank account was sufficient to satisfy the decree or that the account stood closed during the execution proceedings in my view are not considerations which have any bearing on the applicability of Section 47***

² (2006) 5 SCC 302.

³ (2018) 3 SCC 622, Section 5B (paragraphs 5.3 to 5.9), read with paragraphs 20 and 21. ⁴ 2004 SCC OnLine Del 1094.

to enable the availability of and indeed the maintainability of the present execution proceedings under Section 47 of the 1996 Act.

XXXX

XXXX

XXXX

XXXX

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.***²³(b) In *Glencore International AG vs. Hindustan Zinc Ltd.*⁶, the Court followed the

² Emphasis supplied.

³ SCC OnLine Del 2410. [SLP(C) 9405-9406/2020, directed against this judgment, was dismissed by an order of the Supreme Court dated 06.11.2020].

view taken in *Motorola INC*⁴⁵, and also relied upon the judgment of the Bombay High Court in *Wireless Developers Inc. vs. Indiagames Ltd.*⁸ and the relevant extract from “*Law and Practice of International Commercial Arbitration*” by Redfern and Hunter (1986 Edn.) to uphold jurisdiction of the Court upon a finding that the judgment debtor had assets therein.

(c) *Motorola INC*⁶ and *Glencore International AG*⁷⁸ were followed in *Rishima Sa Investments LLC vs. Shristi Infrastructure Development Corporation Limited*¹¹, wherein the location of assets of the award debtor has been held sufficient to attract jurisdiction of this Court in enforcement.

8. Applying these judgments to the present case, it is undisputed that the registered office of HGEPL is located within the jurisdiction of this Court. However, the question which requires determination is as to whether the amount owed by HGEPL to the award debtor constitutes an asset of the award debtor, despite the fact that the award debtor claims that the debt has been written off by it.

9. To my mind, the submission of the award debtor erroneously equates the writing off of the debt in the award debtor’s accounts, with its obliteration as an amount legally due to the creditor⁹. One of the primary purposes of financial statements of any entity is to provide a realistic picture of its economic health to its shareholders, creditors, other stakeholders, as also to those proposing to transact with it. The manner in which accounts are to be prepared is the subject matter of extensive accounting standards, which *inter alia* prescribe for the manner in which debts must be classified, so that the picture presented regarding the financial position of the company is realistic. However, even if a debt is written off in the accounts, this does not mean that the debt becomes altogether unrecoverable. It would be open to the creditor, if so advised, to pursue its debtor, and it would be no defence for the debtor to assert that the creditor has written off the debt. In such circumstances, it cannot be said that the debt has, in fact or in law, been obliterated or extinguished.

10. The aforesaid analysis is supported by the judgment of Supreme Court in *Salim Akbarali Nanji*¹³. The appellant before the Supreme Court was

⁴ Supra (note 4).

⁵ SCC OnLine Bom 115.

⁶ Supra (note 4).

⁷ Supra (note 6).

⁸ SCC OnLine Del 3341. [SLP(C) 4689-4693/2021, directed against this judgment, was dismissed by an order of the Supreme Court dated 09.04.2021].

⁹ I do not propose to enter into the controversy as to whether the HGEPL debt has been treated as “written off” or “doubtful” in the books of the award debtor, as I am of the view that the same conclusion would follow, even if it is treated as written off. ¹³ Supra (note 2).

a shareholder in a bank. He challenged a decision of the Reserve Bank of India to permit the bank to write off debts amounting to Rs. 120 crores, which had, over the years, turned into non-performing assets. The Reserve Bank of India, in its counter affidavit, took the position that write-off is an internal accounting procedure to clean up the balance sheet of the bank, and does not affect the right of the bank to proceed against the borrowers to collect the dues. The Court held as follows:-

“17. The submission proceeds on the assumption that the bad debts written-off cannot be recovered. In fact and in law it is not so. Despite writing-off the debt is still recoverable by the Bank. The affidavit filed by the Bank also discloses the steps which are being taken to realise the dues from the debtor. Some amounts have been recovered over the years though the figure does not appear very impressive. Even so, steps are being taken to recover the dues whenever possible and Respondent 6 Bank has furnished particulars of the various proceedings pending for recovery of such debts. The write-off is only an internal accounting procedure to clean up the balance sheet, and it does not affect the right of the creditor to proceed against the borrower to realise his dues. Moreover, it does give some benefit to the Bank under the income tax laws because after write-off tax is payable only on the amount recovered as and when recovery is made...”¹⁰

11. Dr. George argued that there was virtually no possibility of the debt due from HGEPL to the award debtor being repaid at any time in future. For this purpose, he placed reliance upon the nature of HGEPL as a special purpose vehicle for a project in Sikkim which has since been shelved, and upon its financial statements. He also drew my attention to a section entitled “Textual information (35)” (“Description of other accounting policies relevant to understanding of financial statements [Text Block]”) in the financial statements of HGEPL for the financial year 2018-19, to show that HGEPL has been assumed to be a going concern only due to certain orders of the High Court of Sikkim. The oral and written submissions advanced on behalf of the award debtor thus seek to emphasis the precarious financial position of HGEPL and the virtual impossibility of the award debtor recovering any amount from it.

12. Be that as it may, the fact remains that the entity is still in existence and that certain amounts are due from it to the award debtor. The award debtor, thus, has an asset in the form of an amount receivable from HGEPL, regardless of the actual likelihood of recovery. I am of the view that a detailed factual determination of these issues is not called for in the context of adjudication of the question of jurisdiction in enforcement proceedings. For

¹⁰ *Ibid.*; emphasis supplied.

this purpose, the nature of the particular asset of the award debtor, which is located within the jurisdiction of the executing Court, is irrelevant. An award holder is entitled to elect any Court within which assets of the award debtor are available, howsoever diminished their value may be.

13. The apprehension expressed by the award debtor in the written submissions that such an approach would lead to “forum shopping” is also misplaced. The judgment of the Supreme Court in *Brace Transport Corpn. of Monrovia vs. Orient Middle East Lines Ltd.*¹⁵ [under the Foreign Awards (Recognition and Enforcement) Act 1961] cites an extract from “*Law and Practice of International Commercial Arbitration*” by Redfern and Hunter (1986 Edn.) which is reproduced below:

“...In the *Law and Practice of International Commercial Arbitration* by Redfern and Hunter (1986 Edn.) it is said (at pages 337 and 338):

“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

¹⁵ 1995 Supp (2) SCC 280.

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...”¹¹

The policy concerns which militate against forum shopping in the context of substantive civil proceedings do not apply to enforcement proceedings, where the award holder is entitled to proceed against the assets of the award debtor in any and every jurisdiction in which such assets are located.

14. The two judgments relied upon by Dr. George - *Indore Malwa United Mills Ltd. vs. State of M.P.*¹² of the Supreme Court and *Jethabhai Hirji and Jethabhai Ramdas vs. Commissioner of Income-tax*¹³, a Division Bench decision of the Bombay High Court - both arise in the field of taxation. The Supreme Court in *Indore Malwa*¹⁴ held that an irrecoverable debt is a “bad debt” which could be deducted as a trading loss while computing the profits of the company. The Bombay High Court, in *Jethabhai Hirji*²⁰, held that the

¹¹ *Ibid.*; emphasis supplied. A similar view is expressed in the 7th edition of Redfern and Hunter on International Arbitration (2022 Edn.); paragraph 11.27.

¹² AIR 1965 SC 1272.

¹³ (1979) 120 ITR 792.

¹⁴ *Supra* (note 17). ²⁰ *Supra* (note 18).

question of when a bad and doubtful debt can be written off is a factual determination, the onus of which is on the assessee. These authorities have clearly elaborated on the concept in the specific context of computation of tax dues. They cannot, in my view, assist the award debtor in its endeavour to suggest that the debt due to it is no longer an asset in its hands, as a matter of general civil and commercial law. In fact, in *Jethabhai Hirji*¹⁵, the creditor continued to pursue recovery of debt, despite writing off.

15. For the aforesaid reasons, I am of the view that HGEPL's debt remains an asset in the hands of its creditor - in the present case, the award debtor - and can legitimately form the basis of jurisdiction in enforcement proceedings against the award debtor. Whether the award holder is ultimately able to realise its dues through the aforesaid asset is a question which would arise subsequently, but cannot inform the Court's decision on jurisdiction. Consequently, this Court has jurisdiction to entertain the enforcement proceedings and determine the award debtor's objections on merits.

C. Conclusion.

16. The preliminary objection of the award debtor is, therefore, rejected and I.As. 5648-50/2018 and I.A. 5652/2018 stand dismissed.

O.M.P.(EFA)(COMM.) 1/2018 & I.As. 3457/2018, 3459-3461/2018, 7905/2019

17. List the enforcement proceedings, alongwith the pending applications, on 04.12.2023 before the Roster Bench for further proceedings.

© All Rights Reserved @ LAWYER E NEWS

*Disclaimer: Always compare with the original copy of judgment from the official website.

¹⁵ *Ibid.*