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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL JURISDICTION**

**APPEAL NO. 770 OF 2011
IN
EXECUTION APPLICATION NO.681 OF 2011
IN
ARBITRATION PROCEEDINGS NO.5094 T 00357 10
(International Centre for Dispute Resolution, United States)**

Wireless Developers Inc, a company
Incorporated under the laws of
United States and having its registered address
At 2875, Northwind Drive, Suite 200,
East Lansing, MI 48823.

...Appellant

Vs.

Indiagames Ltd, a company
incorporated under the provisions of the
Companies Act, 1956 and having its address
at Vishwaroop IT Park, Vashi International
Info-Tech Park, Above Raghuleela Mall,
11th floor, Sector 30A,
CIDCO, Vashi, Navi Mumbai-400 705

...Respondent

Mr. Venkatesh Dhond, Sr. Advocate with V. Desai and
Prateek Bagaria i/b. Nitish Desai Asso. for Appellant
Mr. Chirag Balsara, with Varun M. i/b. M/s. Rajani Asso. for Respondent

**CORAM : MOHIT S. SHAH, C.J. AND
MRS. ROSHAN DALVI, J.
RESERVED FOR ORDER : 09 JANUARY 2012
PRONOUNCEMENT OF ORDER: 30 JANUARY 2012**

JUDGMENT (Per Roshan Dalvi, J)

1. The appellant has obtained an award of the Arbitral Tribunal in the

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USA against the respondent which it seeks to enforce and execute. The appellant took out application under Order 21 Rule 22 of the Code of Civil Procedure 1908 for obtaining leave of the Court to execute the foreign award. The parties had appeared before the Arbitrator. After the initial negotiations the respondent did not participate in the arbitration proceedings. Instead it sought to invoke arbitration separately. For the absence of the respondent despite service of notices a final award came to be passed on 7 December 2010.

2. The respondent sought to challenge aforesaid foreign award in a petition filed in this Court under Section 34 of the Arbitration and Conciliation Act 1996 (the Act). The petition filed in this Court was returned to the respondent for filing in the Court having jurisdiction. The respondent stated that it had sought leave under clause 12 of the Letters patent to file the petition in this Court though the cause of action had accrued at Navi Mumbai in the Thane District where the agreement between the parties was entered into and where the immovable properties of the respondent are situate. It was shown to Court that leave as claimed by the respondent was not obtained. Consequently, the Court could not exercise jurisdiction upon the respondent's own claim. The petition under Section 34 of the Act is now pending hearing before the Court at Navi Mumbai in Thane District to which it was sent.

3. The appellant has sought to enforce the aforesaid award on the ground that a movable property of the respondent being a bank account in ICICI Bank is within the jurisdiction of this Court and the appellant must file its execution application, as all other applications against decrees of the Court are filed, in what is known as the Executing Court which would be the Court, not where the cause of action arose, or the respondent resides

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or carries on business, or where the respondent may have immovable properties, but where the respondent would have the property which is sought to be attached in execution of the award. This is because only the Court within whose jurisdiction the property which is sought to be attached is situate would be able to execute a decree or an award and hence such Court would have territorial jurisdiction in an execution application.

4. The learned single Judge under the impugned order held that this Court does not have territorial jurisdiction. The learned single Judge considered that it was the appellant's own case that the respondent cannot challenge the award in this Court because it lacked territorial jurisdiction which caused the learned single Judge not to accept the case of the appellant that this Court would have territorial jurisdiction as an Executing Court.
5. The territorial jurisdiction of the Court in Arbitration Petitions for challenge of awards under Section 34 of the Act read with the territorial jurisdiction of the Executing Court for enforcement of foreign awards under Section 48 of the Act would have to be considered.
6. It is contended by Mr. Dhond on behalf of the appellant that the territorial jurisdiction of the Courts in an arbitration and in enforcement of the award are different and even differently defined in the Act and considered in the judgment of this Court and the Supreme Court. He drew our attention to Sections 2(e) and explanation to Section 47 of the Act. Section 2(e) is in Part-I Chapter I of the Act which defines a Court thus:

“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;”

7. The explanation to Section 47 thus:

*“**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.”*

(emphasis supplied by underlining)

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

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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.

9. This is much like the provisions in the Code of Civil Procedure (CPC) with regard to execution of decrees and orders. Section 51 thereof enumerates the powers of the Court to enforce the execution which may be by delivery of any property, attachment and/or sale of the property, arrest and detention of the judgment debtor, appointment of a receiver or in any other manner as required in the case.

Under Order 21 Rule 3 where the immovable properties of the judgment debtor fall within the local limits of two or more Courts any one of them may execute the decree by attachment and/or sale. A Court may even transfer a decree to another Court for execution under Order 21 Rule 5 and 6 of the Code. It would then be executed in the Court to which it is sent under Order 21 Rule 8 thereof.

10. The CPC does not define an Executing Court. It is, therefore, left to the judgment creditor to apply in a Court for execution by application in the Court passing decree, if it could be executed by that Court and by applying for transfer of the decree, if it could be executed by another

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Court. The choice of the Court is left to the judgment creditor under Order 21 Rule 10 of the CPC which runs thus:

“10. Application for execution. – *Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.”*

The decree holder may make an application for an attachment of a movable property belonging to the judgment debtor under Order 21 Rule 12 of the CPC and the Executing Court to which such an application is made would have to follow the procedure under Order 21 Rule 17 of the CPC upon receiving such application. The proviso to Rule 17 of Order 21 relates to a money decree obtained by the judgment creditor or the decree holder.

Upon these preliminary measures being undertaken the Executing Court would issue process for execution under Order 21 Rule 24 of the CPC.

It may be convenient to set out the relevant parts of the necessary provisions relating to execution of orders and decrees in the CPC to understand the concept of the procedure for execution which run thus:

Section 51. Powers of Court to enforce execution. – *Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree –*

- (a) by delivery of any property specifically decreed;*
- (b) by attachment and sale or by sale without attachment of any property;*

- (c) by arrest and detention in prison [for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section];
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:”

Order 21:

“Courts executing decrees

3. Lands situate in more than one jurisdiction. – Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

[**5. Mode of transfer.** – Where a decree is to be sent for execution to another Court, the Court which passed such decree shall send the decree directly to such other Court whether or not such other Court is situated in the same State, but the Court to which the decree is sent for execution shall, if it has no jurisdiction to execute the decree, send it to the Court having such jurisdiction].

6. Procedure where Court desires that its own decree shall be executed by another Court. – The Court sending a decree for execution shall send –

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

8. Execution of decree or order by Court to which it is sent – Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

10. Application for execution. – Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer

thereof.

12. Application for attachment of movable property not in judgment debtor's possession – Where an application is made for the attachment of any movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

“17. Procedure on receiving application for execution of decree – (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, [the Court shall allow] the defect to be remedied then and there or within a time to be fixed by it.

(1-A)

(2)

(3).....

(4)

Provided that , in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.”

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

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“Court having jurisdiction”.

12. The conclusion of the Court in the case of **Tata International Ltd.** (supra) in para 4 was in line with this reasoning and runs thus:

“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 respondent may have money. In other words it is 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.”

Consequently, in that case when the money award was sought to be executed in this Court, though it was not even averred that the respondent had money within the jurisdiction of this Court, it was held that there was absent of subject matter of the award within the territorial jurisdiction of this Court and hence this Court had no jurisdiction to hear and decide the petition for enforcement of the foreign award under Section 47 of the Act.

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.

14. In the case of **Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Ltd., Saudia Arabia & Ors. AIR 1994 SC 1715** the enforcement of a foreign award under the Foreign Awards (Recognition and Enforcement) Act (45 of 1961) was considered. That was a case of a foreign money award. The respondent owned a vessel which was sold to a partnership firm in Bhavanagar in the State of Gujarat for being broken in the port of Alang. The vessel was beached at Alang. The application for enforcement of the award was filed in the Court of the Civil Judge Senior Division at Bhavanagar. The award holder applied for attachment of the sale proceeds of the vessel and injunction against its transfer pending the execution under Order 38 Rule 5 of the CPC (as an attachment before judgment).
15. Under Section 5(1) of the Foreign Awards Act any person interested in a foreign award is entitled to apply to the Court having jurisdiction over the subject matter of the award that the award be filed in Court. This provision is analogous to the provision contained in the explanation to Section 47 of the Arbitration Act which also shows a Court for the purpose of enforcement of an award to be a Court having jurisdiction over the subject matter of the award.



16. It is observed in para 13 of the judgment in the case of **Brace Transport (supra)** quoting from the Law and Practice of International Commercial Arbitration by **Redfern and Hunter (1986 edition)** (at pages **337 and 338**) that :

“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.”

It is this observation which has been followed with approval in the case of **Tata International Ltd. (Supra)**.

17. The reasoning for this observation is also set out in para 13 of the judgment in the case of **Brace Transport (supra)** : The arbitration between the parties would be in a neutral forum. They may not have any assets therein. The award cannot, therefore, be enforced there. That would be the forum agreed by the parties or where the subject matter of the arbitration was. Instead the enforcement of the award must be in a country where the properties of the judgment debtor would be. It is, therefore, held that foreign awards must, therefore, be recognisable and enforceable intentionally and the place of such enforcement would not be chosen by the parties, but would depend upon the circumstances of each particular case.

It is, therefore, further observed:

“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.

In that case the respondents had no asset there except the ship which was sold to the partnership firm and beached at the place where the award was sought to be enforced.

18. The Court observed the analogy between an award for money in arbitration and a money decree in a litigation in para 16 of the judgment thus:

“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”.

The Court, therefore, directed the Bhavnagar Court to take the award on file under the provisions of Section 5 of the Foreign Awards Act and proceed in accordance with the subsequent provisions under the Act for enforcement of the award.

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.

21. Such enforcement would be under Section 48 of the Arbitration Act upon compliance of the three requirements of filing the original award, the certified copy of the original agreement and the evidence showing that it is a foreign award under Section 47 thereof. Under Section 48 of the Act the award can be refused to be enforced inter alia if the enforcement was contrary to the public policy of India.

22. Mr. Balsara on behalf of the respondent contends that the foreign awards sought to be executed by the appellant is an ex-parte award in which the respondent was not heard and, therefore, is liable to be set aside and refused to be enforced as such awards are held to be against the public

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policy in India. For setting aside the said award the respondent filed an application under Section 34 of the Act. That application came to be filed in this Court on the premise that a part of the cause of action arose within the territorial limits of this Court's jurisdiction. The respondent claimed to have taken leave under Clause 12 of the Letters patent. The Petition having been served upon the applicant herein it was shown that the leave was not obtained. Consequently, upon the respondent's own showing in his petition the Court would not have the territorial jurisdiction. Hence the respondent's application has been returned to the competent Court for filing. That is the Court in which the arbitration agreement is stated to have been executed and where the immovable properties of the respondent lie i.e., in Vashi, Navi Mumbai, District: Thane. Consequently, that petition has been filed and is pending in the Thane Court.

23. It is contended on behalf of the respondent that the award cannot be enforced until that application is decided. That stands to reason. If the award is enforced before the application to set it aside is heard that application would become infructuous without the respondent being heard. It is contended on behalf of the applicant that the various exceptions for refusal of the enforcement of the award under Section 48 would themselves act as a shield against the respondent and the respondent would be entitled to show this Court as the Executing Court having territorial jurisdiction why the application for enforcement of the foreign award should be refused including his plea that the award is against public policy in India because it was passed in the absence of the respondent and is accordingly stated to be an ex-parte award.

24. Mr. Balsara on behalf of the respondent has drawn our attention to the judgment in the case of **Venture Global Engineering Vs. Satyam**

Computer Services Ltd. (2008) 4 SCC 190 in which it is held that though Section 34 is a part of part I of the Act which contains general provisions otherwise dealing with Indian Awards, it would apply equally to foreign awards under Part II of the Act there being no analogous provision in Part II for challenging the foreign arbitral award and for having it set aside. It is held in that judgment that the provisions of Part I of the Act would apply to all arbitrations and to all proceedings relating thereto. For arbitrations held in India Part I would compulsorily apply. For international commercial arbitrations held out of India Part-I would apply unless the parties by agreement, express or implead, would exclude all or any of the provisions of the Part I. In that case the laws or rules chosen by the parties would prevail and any provision so executed by the parties or which are contrary to the rules and laws which would prevail would not apply. It is observed that when a judgment debtor wants to challenge the award as being against the public policy in India he cannot be deprived of such rights under Section 34 to set aside the award.

25. In paragraph 33 of the judgment it is observed that the applicability of Section 34 (which is in Part I of the Act) to foreign international awards would not be inconsistent with Section 48 of the Act or any other provisions of Part II. The judgment further observes (as in the case of **Brace Transport (Supra)** that the award could be enforced against the properties of the judgment debtor in India even when the judgment debtor resides abroad, but not by depriving him of his rights under Section 34 to invoke the public policy in India to set aside the award.

26. We may mention that Section 48 itself sets out various grounds upon which enforcement of a foreign award may be refused including that the enforcement would be contrary to the public policy in India under sub-



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clause 2(b) thereof. Consequently, the rights of the judgment debtor under Section 34 and Section 48 (2)(b) are similar. He would be heard on merits of his claim that the foreign award is against public policy of India. There would, therefore, be substantial justice upon the merits of the claim to hear the award holder and the judgment debtor in enforcing and having set aside the award respectively in a single application. In view of the specific provision under Section 48(2)(b) another application in another Court under Section 34 of the Act would not be required to be agitated. It can be fruitfully done by one Court hearing either an application under Section 48(2)(b) of the award holder and under Section 34 of the judgment debtor. In view of what has been held by the Supreme Court in the case of **Venture Global (supra)** we hold that both the applications of the parties hereto be decided by one Court.

27. This Court is seen to have the territorial jurisdiction as an Executing Court. It was in this Court that the respondent also initially filed its application under Section 34 of the Act to set aside the foreign award obtained by the appellant. The application under Section 34 which was initially filed here and which was returned to the Court in Thane District for filing would be required to be re-presented to this Court if the respondent seeks to agitate it. Even if the respondent does not seek to agitate, the respondent would be heard on merits by its claim in the Execution Application No.681 of 2011 by the learned single Judge of this Court under Section 48(2)(b).

28. In the result the appeal succeeds. The impugned order of the learned single Judge of this Court dated 20 October 2011 is set aside. It is declared that this Court has territorial jurisdiction to proceed with the Execution Application No.681 of 2011 as an Executing Court, it having the subject



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matter of the foreign award which is sought to be enforced, being the bank account in ICICI Bank within its territorial limits. The application under Section 34 of the Arbitration and Conciliation Act 1996 at present pending before the Court in Thane District shall be returned by the competent Court in Thane District where it is pending for being re-presented to this Court and shall be disposed off by the learned single Judge of this Court along with the Execution Application No.681 of 2011.

CHIEF JUSTICE

ROSHAN DALVI, J.

At this stage, after the judgment is pronounced, learned Counsel for Appellant requests for stay of the operation of this judgment in order to have further recourse in law. In the fact and circumstances of the case we are not inclined to accede to the request, as such the request is declined.

CHIEF JUSTICE

ROSHAN DALVI, J.