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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P.(EFA)(COMM.) 5/2019
RISHIMA SA INVESTMENTS LLC (MAURITIUS)

..... Petitioner

Through: Mr.Rajiv Nayyar, Sr. Adv. with
Mr.Raj Shekhar Rao, Mr.Abhimanyu
Chopra, Ms.Anshika Mishra,
Mr.P.Shroff, Mr.Sourabh Seth, Advs.

versus

SHRISTI INFRASTRUCTURE DEVELOPMENT CORPORATION
LIMITED & ANR. Respondents

Through: Mr.Neeraj Kishan Kaul, Sr. Adv. and
Mr.Akhil Sibal, Sr. Adv. with
Mr.A.K.Mishra, Mr.Harshad Pathak,
Mr.Shivam Pandey, Ms.Samriddhi
Hota, Mr.Diwakar Maheshwari,
Mr.Karun Mehta, Mr.S.Misra, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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30.05.2019

CAV 608/2019

As the learned counsel for the respondents appears on advance notice,
the caveat stands discharged.

IAs 8262-63/2019 (Exemptions)

Allowed, subject to all just exceptions.

OMP(EFA)(COMM) 5/2019

1. Issue notice. Notice is accepted by Mr.A.K.Mishra, Advocate on behalf of the respondents. He prays for and is granted four weeks to file reply.
2. The learned senior counsels appearing for the respondents have raised a preliminary objection on the territorial jurisdiction of this Court to

entertain the present petition. They submit that the Agreements between the parties which led to the dispute that has been adjudicated by the Award in question were executed in Kolkata; the registered office of the respondents is also in Kolkata and the land in relation to which the Agreements were executed is also in Kolkata. They submit that therefore, in terms of the Explanation to Section 47 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), it would only be the High Court of Calcutta that would have the jurisdiction to entertain the present petition.

3. They further submit that the petitioner had also filed an application under Section 9 of the Act before the High Court of Calcutta, which has not been disclosed in the present petition. They submit that apart from there being a concealment of this vital fact, in terms of Section 42 of the Act, this petition can be filed only before the High Court of Calcutta.

4. On the other hand, the learned senior counsel for the petitioner submits that this issue is no longer *res integra*. Placing reliance on the judgment of this Court in *Motorala INC v. Modi Wellvest*, 2004 SCC OnLine Del 1094 he submits that this Court has held that an application under Section 47 of the Act can be filed, in case where the Award is in relation to money, where the money is situated or can be recovered from the Judgment Debtor. He further places reliance on the judgment of the Bombay High Court in *Tata International Ltd., Mumbai v. Trisuns Chemical Industry Ltd., Kutch* 2001 SCC OnLine Bom 905, in support of his submission.

5. In view of the judgments cited by the learned senior counsel for the petitioner, I am *prima facie* in agreement with the learned senior counsel for the petitioner that this Court would have territorial jurisdiction to entertain

the present petition.

6. As far as the objection of the learned senior counsels for the respondents relying upon Section 42 of the Act is concerned, in view of the judgment of the Supreme Court in *Sundaram Finance Limited v. Abdul Samad and Another*, (2018) 3 SCC 622, I again do not find much force in the said objection.

7. The learned senior counsels for the respondents have further submitted that as on today the Arbitral Award has not become enforceable inasmuch as the respondents have a period of 90 days from the receipt of the Award to challenge the same in terms of Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as the 'UNCITRAL Model Law'). In this regard they place reliance on Section 48(1)(c) of the Act to contend that the Award which has not yet become binding on the parties cannot be enforced under Section 49 of the Act.

8. *Prima facie* I do not find any merit in the above submission. Article 34(3) of the UNCITRAL Model Law reads as under:-

“Article 34: Application for setting aside as exclusive recourse against arbitral award

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(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.”

9. The above provision merely gives a period of three months to the aggrieved party to challenge the Award by making an application for setting aside the same. Unlike Section 36 of the Act which states that the Award

would become enforceable only when the time for making such an application has expired or where such an application has been made, unless the Court grants an order of stay of the portion of the Award, there is no such similar provision drawn to my attention as far as the law of arbitration in Singapore or the UNCITRAL Model Law is concerned.

10. The learned senior counsels for the respondents further contended that as held by the Supreme Court in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2001) 6 SCC 356, the Foreign Award would become enforceable only where it passes the stage of scrutiny under Section 48 of the Act and only when the Court decides that the Foreign Award is enforceable, can it proceed to take further effective steps for execution of the same. They submit that unless the Award passes through these steps, no interim order can also be granted in favour of the petitioner.

11. I am unable to agree with the said submission of the learned senior counsels for the respondents. Section 48 of the Act gives the circumstances where the enforcement of a Foreign Award may be refused at the request of the party against whom it is invoked. As on date, the respondents are yet to file any application claiming such grounds. Unless such grounds are established, the Court has to *prima facie* assume that the Foreign Award that has been produced before it is capable of being enforced and therefore, grant interim protection in favour of the petitioner producing such an Award and seeking enforcement of the same.

12. The learned senior counsels for the respondents have further raised an objection on the Award being not enforceable as being violative of the Foreign Exchange Management Act, 1999 and Section 74 of the Indian Contract Act, 1872. The submissions so made would have to be considered

once the respondents file a proper application under Section 48 of the Act. At this stage, the Award in question directs the respondents to pay the following amounts to the petitioner:-

“(1) Shristi Infrastructure Development Corporation Limited is ordered, by way of specific performance, to pay to Rishima SA Investments LLC within 28 days of this Award, the sum of INR 761 crores pursuant to clause 17.2 of the Share Subscription and Shareholders Agreement, as at March 31,2019.

2) The Tribunal orders, by way of specific performance, Shristi Infrastructure Development Corporation Limited to pay to Rishima SA Investments LLC within 28 days of this Award a further sum pursuant to clause 17.2 of the Share Subscription and Shareholders Agreement, being 25% IRR to the date of this Award in an amount to be agreed between the parties, or, failing agreement, to be determined by the Tribunal.

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(4) If for any reason the awards in (1) and/or (2) above are declared unenforceable in whole or in part by any court or tribunal, Shristi Infrastructure Development Corporation Limited shall pay to Rishima SA Investments LLC the sum of INR 160.2 crores pursuant to clause 14.2 of Share Subscription and Shareholders Agreement (or such lesser sum as shall be sufficient to satisfy the awards in (1) and (2) above, after taking account of any amounts paid by Shristi Infrastructure Development Corporation Limited pursuant thereto) upon delivery by Rishima SA Investments LLC to Shristi Infrastructure Development Corporation Limited of executed transfers and any other title documents relating to its shares in Shristi Hotel Private Limited.”

13. In view of the above, the respondent no. 1 is directed to file an affidavit of its assets in Form 16A Appendix E of Code of Civil Procedure, 1908 within a period of four weeks from today. The respondents are further restrained from creating any third party interest or parting with the possession of Westin Hotel, Rajarhat, Kolkata.

14. List on 8th August, 2019.

Dasti.

NAVIN CHAWLA, J

MAY 30, 2019/rv