

(2017) 03 DEL CK 0268

In the Delhi High Court

Case No : 75 of 2013

KHANNA TRADERS Vs SCHOLAR PUBLISHING HOUSE P. LTD. & ORS

Date of Decision : 28-03-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 47](#), [Section 47\(1\)](#), [Order 21 Rule 41](#) - Questions to be determined by the Court executing decree -
Questions to be determined

Citation : (2017) 03 DEL CK 0268

Hon'ble Judges : Rajiv Sahai Endlaw

Bench : SINGLE BENCH

Advocate : Biji Rajesh, J.P. Sengh, Chirag Jamwal, Ajay Upadhyay, Sana Ansari, Manisha Mehta

Judgement

1. Execution as a decree is sought of an Arbitral Award dated 21st December, 2006 of Mr. Ram Bhaj Mittal, sole Arbitrator, Paper Merchants Association (Regd.), Delhi, of recovery of Rs.3,44,28,861/- with interest @ 12% per annum from the date of the Award till the date of realisation, in favour of Khanna Traders and against "Scholar Publishing House Pvt. Ltd. and others".

2. In the execution petition, besides Scholar Publishing House Pvt. Ltd., Mr. Ramesh Ranade, Mr. Rajesh Ranade, Mr. Satish Ranade and Mr. Inderjit Sharma have been impleaded as judgement debtors (JDs).

3. Notice of the execution petition was issued.

4. EA No.39/2014 has been filed by the decree holder (DH) Khanna Traders under Order XXI Rule 41 of the Code of Civil Procedure, 1908 (CPC) seeking a direction to the JDs to file affidavits of their income tax, assets, debts, bank lockers etc.

5. EA No.40/2014 has been filed by the DH for arrest of the JDs No.2 to 5.

6. These applications came up before the Court on 17th January, 2014 when inter alia the following order was passed: "..... A perusal of the award shows

that the same does not address the issue as to how judgment debtor nos.2 to 5 have been made personally liable. The judgment debtor no.1 is a private limited company. Liability cannot extend to the shareholders/directors of a company unless it is a case where the shareholders/directors have extended their personal guarantee or have personally made themselves liable. Prima facie, it appears to me that it is open to judgment debtor nos.2 to 5 raise the aforesaid aspect even in these proceedings, as, to that extent, the award may be a nullity. Learned counsel for the parties seeks further time to address the court on this particular aspect. Adjourned to 14.03.2014."

7. The hearing was adjourned from time to time and in the meanwhile execution against some of the assets / properties proceeded. However, the decree still remains unsatisfied.

8. On 2nd September, 2016, the counsel for the DH and the senior counsel for the five JDs were heard on the issue raised in the order dated 17th January, 2014 and orders thereon reserved.

9. On going through the file, no reply is found to have been filed by the JDs No.2 to 5 to these applications. The JDs No.2 to 5 however in their reply to the execution petition have pleaded (i) that the JDs No.2 to 5 are the Directors of the JD No.1;

(ii) that DH had business dealings with the JD No.1;

(iii) that disputes arose between DH and the JD No.1 regarding supply of paper and recovery of payment;

(iv) that DH initiated arbitration proceedings before the sole Arbitrator against JD No.1 and its Directors JDs No.2 to 5;

(v) that the sole Arbitrator passed ex-parte Award not only against JD No.1 but also against JDs No.2 to 5;

(vi) that JD No.1 filed OMP No.148/2007 under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act, 1996) for setting aside of the ex-parte Award dated 21st December, 2006;

(vii) that vide order dated 29th November, 2012, OMP No.148/2007 was dismissed;

(viii) that JD No.1 preferred FAO No.184/2013 which was also dismissed vide order dated 19th July, 2013;

(ix) that JD No.1 filed SLP (CC) No.2610/2014 before the Supreme Court and of which notice was issued on 21st February, 2014; (x) that JD No.1 is distinct from the members namely JDs No.2 to 5 of the JD No.1 company who are not liable for the debts of JD No.1;

(xi) that ex-parte Arbitral Award dated 21st December, 2006 is prima facie illegal and null and void, as the dispute was between DH and JD No.1 and JDs No.2 to 5

could not have been made liable for the debts of JD No.1. Reliance in the said reply itself is placed on *Saraswat Trading Agency Vs. Union of India* AIR 2004 Cal 267 to contend that a decree which is a nullity in the eyes of law is no decree. Reference in the reply itself is also made to Section 47(1) of CPC.

10. No rejoinder is found to have been filed to the reply aforesaid.

11. It was the contention of the senior counsel for JDs No.2 to 5, (a) that the Arbitral Award as a decree is liable to be set aside on the ground of fraud and collusion;

(b) that the Arbitrator had no jurisdiction against JDs No.2 to 5;

(c) that reference also to arbitration was not sought against JDs No.2 to 5;

(d) attention was invited to the letter dated 28th July, 2006 of DH to the General Secretary, Paper Merchants Association (Regd.) invoking arbitration against JD No.1 only and in which no reference was made to JDs No.2 to 5;

(e) attention was similarly invited to the letter dated 29th July, 2006 of the Paper Merchants Association (Regd.) to DH appointing Mr. Ram Bhaj Mittal as the Arbitrator to settle the dispute;

(f) that there was no basis before the sole Arbitrator for passing the Award against JDs No.2 to 5 also who were merely the Directors of JD No.1 against which reference to arbitration was sought. The senior counsel for JDs No.2 to 5 referred to:

(I) *Union of India Vs. M/s Jagat Ram Trehan and Sons* AIR 1996 Delhi 191 where a Division Bench of this Court negated the contention that an Arbitral Award must be objected to in accordance with the provisions of the Arbitration Act (in that case of the year 1940) and that it was not open to raise the question in execution proceedings and held that Section 47 of CPC applies to execution proceedings taken pursuant to a decree making an award a rule of Court and it is open to the Executing Court under Section 47 to declare that the award is passed without jurisdiction and therefore the decree passed thereupon is null and void and not executable. Finding that the award in that case was passed after the Arbitrator had relinquished office as Arbitrator, the award was declared as null and void in execution proceedings;

(II) *Gram Panchayat of Village Naulakha Vs. Ujagar Singh* (2000) 7 SCC 543 in which it was held that under Section 44 of the Indian Evidence Act, 1872, a party can, in a collateral proceeding, set up a defence that a decree or order obtained by the opposite party against him was passed by a Court without jurisdiction or was obtained by fraud or collusion and it is not necessary to bring an independent suit for setting aside of the decree or order; and,

(III) *Jagat Ram Trehan & Sons Vs. Union of India* 2001 (3) Arb. LR 41 (SC) dismissing the appeal preferred against *Jagat Ram Trehan and Sons* supra. 12. Per contra, the counsel for DH filed copies of judgments in:

(A) Gurpreet Singh Vs. Union of India (2006) 8 SCC 457 but application whereof to the controversy herein is not understandable;

(B) Deepa Bhargava Vs. Mahesh Bhargava (2009) 2 SCC 294 where, while holding that the Executing Court cannot reduce the rate of interest on the ground of the same being in the nature of penalty and unreasonable, it was reasoned that Executing Court has no jurisdiction to travel beyond the decree;

(C) Coal Linker Vs. Coal India Limited (2009) 9 SCC 491 holding that where the Arbitrator has not granted interest for post award period, the Executing Court has no jurisdiction to go beyond the award to grant interest for the period for which it was not granted;

(D) Housing & Urban Development Corporation Ltd. Vs. Leela Hotels Ltd. ILR (2010) I Delhi 76 which is also not found to be of any relevance to the controversy at hand;

(E) State Bank of India Vs. M/s Indexport Registered (1992) 3 SCC 159 where, while holding that if the decree as per its tenor was executable simultaneously against all the judgment debtors, the Executing Court cannot interpret otherwise, it was observed that the Executing Court cannot go beyond the decree and the objection that the decree was first liable to be executed against the principal debtor ought to have been taken in the suit;

(F) Bhawarlal Bhandari Vs. Universal Heavy Mechanical Lifting Enterprises (1999) 1 SCC 558 where, while holding that the objection that the Arbitral Award was filed in the Court of Arbitrator four years after being passed and was barred by limitation and thus a nullity, having not been taken by way of Section 30 of the Arbitration Act, 1940, cannot be taken in execution of the award; it was again observed that Executing Court cannot go behind the decree, unless it is shown that it was passed by a Court inherently lacking jurisdiction and thus was a nullity; it was also observed that if the decree was passed beyond the period of limitation, it would be an error of law or at the highest, a wrong decision which can be corrected in appellate proceedings but not in execution;

(G) Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman (1970) 1 SCC 670 laying down that an Executing Court cannot go behind the decree and must take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or on facts; however when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the Executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction; finding that the question whether the Court of Small Causes had jurisdiction to entertain the suit against the defendant therein depended upon

the interpretation of the terms of the agreement of lease and the user to which the land was put at the date of the grant of the lease and which required determination of facts, the objection was held to be not entertainable in execution;

(H) Morgan Securities & Credits Pvt. Ltd. Vs. Morepen Laboratories Ltd. 2006 (91) DRJ 618 holding that the objection that the rate of interest awarded by the Arbitral Tribunal was illegal and which was not raised under Section 34 of the Arbitration Act could not be taken by way of objections under Section 47 of CPC;

(I) Morepen Laboratories Ltd. Vs. Morgan Securities & Credits Pvt. Ltd. 2008 (105) DRJ 408 (DB) dismissing the appeal preferred against the former;

(J) S.S. Fasteners Vs. Satya Paul Verma AIR 2000 P&H 301 holding that the objection that the judgement debtors were protected tenants and not licensees as held by the Arbitral Award could not be taken in execution proceedings;

(K) Anil Mehra Vs. M/s East India Weaving Ltd. ILR (2001) I Delhi 345, which is not found to have any relevance to the present controversy;

(L) Fuerst Day Lawson Limited Vs. Jindal Exports Limited (2011) 8 SCC 333 which also is not found to have any relevance to the present controversy;

(M) M/s. MSP Infrastructure Ltd. Vs. M.P. Road Devl. Corp. Ltd. 2014 SCC OnLine SC 1002 holding that though a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the Court which decided the matter since the order of such a Court is a nullity but it must be remembered that this position of law has been well settled in relation to civil disputes in Courts and not in relation to arbitrations under the Arbitration Act, 1996; Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so; Parliament, in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted; accordingly, contention that a party to an arbitration proceedings is entitled to raise objections under Section 34 of the Arbitration Act, 1996 with regard to the jurisdiction of the Arbitral Tribunal, after the stage of submission of the written statement, was rejected;

(N) Gas Authority of India Ltd. Vs. Ketki Construction

(I) Ltd. (2007) 5 SCC 38, which is not found to have any relevance to the present controversy;

(O) Bharti Cellular Limited Vs. Department of Telecommunications (2012) 192 DLT 729 holding in the context of Section 34 of the Arbitration Act, 1996 that the lack of inherent jurisdiction of the Arbitrator to adjudicate the dispute has to necessarily be pleaded specifically and that if all the grounds of challenge are not taken to the impugned Award at the time of filing of the objection under Section 34 and are permitted to be raised at any time (during the pendency of Section

34 proceedings) and by way of amendment thereof then the legislative intent behind prescribing a maximum time of limitation under the proviso to Section 34(3) of the Arbitration Act, 1996 would be defeated;

(P) M/s Chandermani Pvt. Ltd. Vs. M/s Dower Fabrics 2014 SCC OnLine Del 1674, which is not found to have any relevance to the present controversy;

(Q) Sushma Jain Vs. M/s Naveen Board Co. 2014 SCC OnLine Del 905 which also is not found to have any relevance to the present controversy.

13. I have considered the controversy.

14. As would immediately be evident from the judgments cited by respective counsels, the legal position is that an objection that the Court which passed the decree had no jurisdiction to pass the same can be taken under Section 47 of CPC in execution proceedings provided the said objection is evident on the face of the record and does not require any determination of facts. Such an objection has been distinguished from objections of other illegalities committed by the Court passing the decree viz. of awarding a high rate of interest, not awarding interest without giving any reasons therefor, not making the decree executable first against the principal debtor and making it executable simultaneously against principal debtor as well as guarantors etc., which cannot be taken in execution proceedings. What further emerges from the aforesaid judgments is that an objection that the Court which passed the decree had no jurisdiction to pass the same can be taken in execution proceedings only if it appears on the face of the record and does not require any determination of facts, not otherwise.

15. What has to however be adjudicated is, whether the said law applies to proceedings for execution of arbitral awards also particularly in the light of observations in MSP Infrastructure Ltd. and Bharti Cellular Ltd. supra cited by the counsel for DH.

16. Though the observations in both judgments supra to the effect that Parliament has enacted special rule of law to deal with arbitrations and contrary to general law on the subject, the said rule does not entitle an objection of jurisdiction to be taken at any time and that an objection as to jurisdiction cannot be permitted to be taken beyond the time prescribed therefor under Section 34 of the Arbitration Act, 1996, are of a very wide ambit but in my opinion are to be understood in the context of the facts in which they were made. The context in MSP Infrastructure Ltd. was, whether petition under Section 34 of the Arbitration Act, 1996 on the ground of lack of jurisdiction can be preferred, even before the Arbitral Award has been announced and during the pendency of the arbitral proceedings and immediately after such an objection has been raised before the Arbitral Tribunal and in Bharti Cellular Ltd. was whether a plea of Arbitral Tribunal not having jurisdiction can be taken after the time prescribed for filing a petition under Section 34 and by way of amendment thereto. In both cases, objection of lack of jurisdiction in Arbitral Tribunal was sought to be taken in a manner in direct contravention of provisions of the

Arbitration Act, 1996 i.e. by seeking to prefer a Section 34 petition during pendency of arbitral proceedings or by taking objection under Section 34 beyond the time prescribed in the Arbitration Act, 1996 therefor.

17. Here, however we are not concerned with any proceedings under the Arbitration Act. The proceedings under the Arbitration Act end on the challenge if made to the Arbitral Award being dismissed or on the challenge being not made within the prescribed time. Though under the Arbitration Act, 1940, the Arbitral Award was required to be made a rule of the Court and a decree but Section 36 of the Arbitration Act, 1996, after the said time confers the Arbitral Award with a status of a decree to "be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court".

18. In my view, the observations MSP Infrastructure Ltd. and Bharti Cellular Ltd. *supra* to the effect that the judgments of civil law would not apply to a proceeding under special law as the Arbitration Act, apply to only the proceedings provided for under the Arbitration Act and cannot be extended to the proceedings for execution of an Arbitral Award, as if it were a decree of the Court. Once the Arbitration Act, 1996 itself has conferred on the Arbitral Award the status of a decree of the Civil Court and made the same executable in accordance with the provisions of CPC, I see no reason to apply the aforesaid observations made in an entirely different context i.e. to execution proceedings. To interpret so would be a violation of the express provision of Section 36(1) of enforcement of the Arbitral Award in accordance with the provisions of the CPC in the same manner as if it were a decree of the Civil Court. If the intent of the legislature while enacting the Arbitration Act, 1996 had been to exclude objections of the nature permitted to be taken under Section 47 of the CPC in execution proceedings in execution of arbitral awards, for the reason of time limited for taking thereof under Section 34 of the Arbitration Act, 1996 or otherwise, it would have provided so and which has not been done. In the absence of any prohibition, the rights under the CPC cannot be taken away.

19. Moreover, the observations aforesaid in MSP Infrastructure Ltd. and Bharti Cellular Ltd. have to be harmonised with Jagat Ram Trehan *supra* which is a judgment on the proposition that a plea of lack of jurisdiction of the Arbitral Tribunal even if not taken by way of opposition to making the same rule of the Court, can be taken under Section 47 of the CPC in proceedings for execution thereof.

20. I thus hold that the objection of the JDs No.2 to 5, if falls within the confines of Section 47 of the CPC, is entitled to be considered in accordance with the judgments cited by the senior counsel for the JDs No.2 to 5 and Vasudev Dhanjibhai Modi *supra* cited by the counsel for DH.

21. I find a Co-ordinate Bench of this Court in Bijendra Kumar Vs. Pradeep Kumar to have also held that if an arbitral award is based on an illegal and void

agreement, objection in that regard can be taken in proceedings for execution thereof, if not decided in proceedings under Section 34 of the Arbitration Act, 1996 and if the Executing Court finds merit therein, can dismiss the execution proceedings.

22. There appears to be a divergence of opinion in the High Court of Bombay in this respect. While in *I.T.C. Ltd. Vs. Hanuman Vitamin Food Ltd.* 1999 (2) LJ 345 and in *Jaimal Shah Vs. Ila Pandya* 2001 (2) Mh. LJ 297 it was held that such objections can be taken in proceedings for execution of arbitral awards, in *R.K. Textiles Vs. Sulabh Textiles Pvt. Ltd.* (2002) 4 Mh.L.J. 678 it was held that the plea that there was no arbitration agreement, cannot be entertained in execution proceeding.

23. The next question to be considered is whether the objection of the JDs No.2 to 5 of the Arbitral Tribunal not having jurisdiction against them owing to (a) the dispute being between the DH and the JD No.1 only, (b) reference to arbitration having been sought by DH against JD No.1 only, (c) reference to arbitration by the institution agreed upon by the parties being Paper Merchants Association (Regd.) having been made against JD No.1 only, is apparent from the face of the record.

24. The Arbitral Award records (i) that DH had filed the "aforesaid" claim petition with the Paper Merchants Association (Regd.) and the Arbitrator was appointed as a sole Arbitrator to decide the disputes;

(ii) that summons were issued to both the parties but despite service of summons, none appeared on behalf of the JDs who were proceeded against ex-parte;

(iii) that DH filed its evidence by way of affidavit;

(iv) that it was the claim of the DH that JDs had business dealings with DH and had been purchasing goods from the DH on credit basis;

(v) that there is a clause in the bills raised by the DH on the JDs which reads "in case of any dispute including non-payment of this bill the same shall be referred to the Paper Merchants Association for arbitration and judgment given by the arbitrator shall be final and binding";

(vi) that DH had claimed that there is an outstanding balance of Rs.3,17,04,615/- which had been confirmed by the JDs;

(vi) that the DH had also claimed interest @ 12% per annum;

(vii) that the Arbitrator had seen the books of accounts of the DH and the bills / invoices filed by the DH in support of his claim petition and found that the bills / invoices clearly show that there is an arbitration clause between the parties and that DH is the member of the Paper Merchants Association (Regd.);

(viii) that the bills / invoices issued by DH had been duly received and

acknowledged by the JDs;

(ix) that the rates and terms mentioned on all the bills / invoices had been acknowledged and accepted by the JDs;

(x) that the statement of accounts had been "signed by the Director and confirmed by the defendants"; and,

(xi) that the JDs had never taken any objection with regard to the bills / invoices.

25. DH has also filed before this Court the letters dated 28th July, 2006 and 29th July, 2006 which also bear out that the reference sought by the DH to arbitration was against JD No.1 only and not JDs No.2 to 5 and the reference made by Paper Merchants Association (Regd.) to sole arbitration of Shri Ram Bhaj Mittal was of disputes of DH against JD No.1 only and not against JDs No.2 to 5.

26. DH has also filed before this Court the claim petition filed after the appointment of the sole Arbitrator by the Paper Merchants Association (Regd.) and in which besides JD No.1, JDs No.2 to 5 were impleaded as respondents No.2 to 5. In the said claim petition, JD No.1 is described as a private limited company in the business of publishing of school text books and the DH is described as a sole proprietorship of Mr. Chiman Lal Khanna carrying on business of supply of paper; a long business association has been claimed of supply and sale of paper for publishing the books; reference is also made to a complaint under Section 138 of the Negotiable Instruments Act, 1881 filed by DH against the "respondent"; there is no specific plea qua JDs No.2 to 5 and it is not the case that JDs No.2 to 5 gave any personal guarantee and there is no plea of piercing of the corporate veil.

27. The DH has also filed before this Court the affidavit by way of evidence filed before the sole Arbitrator and in which the JD No.1 is described as a private limited company and JDs No.2 to 5 as its Directors. There is no evidence in the said affidavit also of entitlement of DH to award against JDs No.2 to 5.

28. It is quite evident from the face of the record that the sale of paper were made by the DH to JD No.1, the bills / invoices containing the arbitration clause were in the name of JD No.1, the account in the books of the DH was in the name of the JD No.1 and in accordance with the arbitration clause on the bills / invoices, reference of disputes to arbitration was sought by the DH from the Paper Merchants Association (Regd.) against JD No.1 and the Paper Merchants Association (Regd.) made the reference of dispute between DH and JD No.1 to Mr. Ram Bhaj Mittal aforesaid.

29. It is also evident on the face of record that DH, without seeking reference of arbitration from Paper Merchants Association (Regd.) against JDs No.2 to 5, in the claim petition filed before Mr. Ram Bhaj Mittal, appointed as sole Arbitrator by Paper Merchants Association (Regd.), impleaded JDs No.2 to 5 besides JD No.1 as respondents but in the claim petition also did not disclose the basis of its claim against JDs No.2 to 5 or any arbitration agreement with JDs 2 to 5.

30. The Arbitral Tribunal owes its jurisdiction to the arbitration agreement. The arbitration agreement in the present case is contained on the bills / invoices but which have been raised by DH on JD No.1. From the arbitration clause contained on the said bills / invoices, JDs No.2 to 5, even though Directors of JD No.1, did not become privy to the arbitration clause. It has thus but to be held that Mr. Ram Bhaj Mittal, the sole Arbitrator appointed by Paper Merchants Association (Regd.) was neither authorised by Paper Merchants Association (Regd.) to adjudicate the disputes between DH and the JDs No.2 to 5 nor under any agreement had such jurisdiction.

31. It is not the case of the DH that the question of jurisdiction of the Arbitral Tribunal vis-a-vis the JDs No.2 to 5 was raised in the proceedings under Section 34 of the Arbitration Act, 1996 or in appeals thereagainst for it to be held that though capable of being taken under Section 47 CPC, is barred by res judicata.

32. I am thus of the view that the objection of the JDs No.2 to 5 in the present case falls within the ambit of the judgments cited by the senior counsel for the JDs No.2 to 5 as well as within the ambit of Vasudev Dhanjibhai Modi supra cited by the counsel for DH, and is entitled to succeed.

33. Accordingly, the execution petition, insofar as against JDs No.2 to 5, is dismissed declaring the Arbitral Award against the JDs No.2 to 5 to be without jurisdiction.

34. Resultantly, EAs No.39/2014 & 40/2014 of DH are dismissed. EX.P. 75/2013 & EA No.975/2014 (u/O-XXI R-4), CrI.MA No.8650/2014 (of DH u/S 340 CrPC), EAs No.1103/2015 (u/O-XXI R-11(2) CPC), 1104/2015 (u/S 151 CPC), 1105/2015 (u/O XXI R-41 CPC), & 239/2016 (u/O XXI CPC)

35. List on 15th May, 2017 for further proceedings.