

(2005) 09 BOM CK 0057

In the Bombay High Court

Case No : Chamber Summons No. 1489 of 2003 and 1030 of 2004 In
Execution Application No. 373 of 2003 In Arbitration Case No. L/160
of 2001-2002

Manmohan Exims Pvt. Ltd.

APPELLANT

Vs

Sarju International

RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 33, 34, 36, 5(2)

Civil Procedure Code, 1908 (CPC) — Section 152, 152

Companies Act, 1956 — Section 51

Citation : (2005) 6 BomCR 249 : (2005) 4 MhLj 721

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Kamal Katna, instructed by Thakordas and Madgaonkar, for the
Appellant; V.R. Walavalkar, instructed by Rakesh Jain, for the Respondent

Judgement

A.M. Khanwilkar, J.—Heard the counsel for the parties. Perused the pleadings.
The Chamber summons taken out by the petitioner is for the following reliefs:

a) that the petitioner may be permitted to amend the pleadings in Arbitration
Case No. L/160/2001-2002 and award/Decree passed therein against the
Respondent namely, M/s. Sarju International Ltd. wrongly mentioned as M/s.
Sarju International.

b) for costs;

c) for such other and further reliefs as the nature and circumstances of the case
may require and this Hon'ble Court may deem fit and proper.

2. The latter chamber summons is taken out by M/s. Sarju International Limited-
third party for the following reliefs:

(a) That the Warrant of Attachment, dated 1.10.2003 issued in the above
Execution Application for attaching Bank Account No. 443 standing in the name

of the Applicants with Canara Bank, Overseas Branch, Mumbai.

(b) That the Warrant of Attachment dated 1.10.2003 seeking to attach the property of the Applicants being Sarju House, 90, MIDC, Andheri (East), Mumbai-400 093 be set aside.

(c) That pending the hearing and final disposal of the present Chamber Summons, the Plaintiffs be restrained from taking any further steps in pursuance of the said Warrants of Attachment referred to in prayers (a) and (b) above being Exhibit "3" and "7" to the Affidavit in Support of the Present Chamber Summons both dated 1.10.2003.

(d) That pending the hearing and final disposal of the chamber summons, the Applicants be permitted to operate the Bank Account No. 443 with Canara Bank, Overseas Branch, Mumbai on such terms and conditions as to this Hon"ble Court may deem fit and proper.

(e) Ad-interim relief in terms of prayers(a) to (d), be granted.

(f) For costs.

(g) For further and other reliefs as the nature and circumstances of the case may require.

3. Both the chamber summonses are heard and disposed of together by this order. At one stage of the hearing, my predecessor felt that the question involved in the present chamber summons will require recording of evidence. However, subsequently when the matter came up before me on August 29, 2005, counsel appearing for the parties fairly accepted that the questions raised in chamber summons No. 1030/2004 can be decided without recording of evidence and if the same fails, the latter chamber summons taken out by M/s. Sarju International Limited will automatically succeed. On the other hand, if the other chamber summons taken out by the petitioner was to be allowed, only then the question of recording of evidence to consider the claim of M/s. Sarju International Limited in chamber summons No. 1489/2003 will become necessary.

4. Accordingly, by consent of both the parties, hearing of chamber summons No. 1030/2004 proceeded on merits. The relevant facts to decide the controversy in issue in the present application is as follows:

The petitioner resorted to arbitration proceedings before the Hindustan Chamber of Commerce against M/s. Sarju International, after giving notice which was admittedly addressed to M/s. Sarju International. The arbitration proceedings culminated in the Award passed in favour of the petitioner on 30th May 2002. The petitioner, thereafter, proceeded with the execution of the said Award by taking out Execution Application No. 373/2003 against the said M/s. Sarju International. The petitioner, however, invited Warrant of Attachment in respect of the Bank account of M/s. Sarju International Limited and of property belonging to M/s. Sarju International Limited being Sarju House situated at 90, MIDC,

Andheri (East), Mumbai 400 032. Soon thereafter M/s. Sarju International Limited took out chamber summons No. 1489/2003 for setting aside the Warrant of Attachment. The said chamber summons No. 1489/2003 came to be filed on 18.10.2003. In the said proceedings it was categorically stated on affidavit on behalf of M/s. Sarju International Limited that they have no concern with the Award passed against M/s. Sarju International which is a partnership firm and an independent entity. It is stated that the properties which have been attached belong to the Public Limited Company M/s. Sarju International Limited who is not party to the arbitration proceedings for which reason the execution of the Award as passed cannot proceed against them. The said chamber summons has remained pending in this Court. During the pendency of that chamber summons, the petitioner has now taken out chamber summons No. 1030/2004 on 17th July 2004 asserting that the petitioner had no transaction with M/s. Sarju International (partnership firm). Whereas, all the transactions were entered with M/s. Sarju International Limited-applicants in chamber summons No. 1489/2003. It is stated by the petitioner that before commencement of arbitration proceedings, notice was duly sent though addressed to M/s. Sarju International, was received in the office of M/s. Sarju International Limited as can be seen from the acknowledgement and the seal of the company is put on the acknowledgement. It is stated that inspite of the notice M/s. Sarju International Limited did not choose to participate in the arbitration proceedings. It is also alleged that M/s. Sarju International Limited were fully aware of all the proceedings before the Arbitral Tribunal but consciously stayed away and did not appear before the Tribunal inspite of the service of notice on the Company. This is the substance of the stand taken in the affidavit in support of the chamber summons taken out by the petitioner. On this basis, it is contended that the Award passed against the respondent- M/s. Sarju International was in fact intended against M/s. Sarju International Limited; and it being a case of misdescription, the petitioner be permitted to amend the pleadings in the arbitration case and the Award or the Decree passed against the respondent to mean having been passed against M/s. Sarju International Limited.

5. This stand is resisted by M/s. Sarju International Limited by filing affidavit of Shrawan Kumar Agarwal, who is stated to be the Manager of M/s. Sarju International Limited. At the outset it is stated that M/s. Sarju International Limited is not party to the former chamber summons taken out by the Petitioner for which reason the same is liable to be dismissed. It is further stated that the petitioner was aware about the mistake, if at all it is a mistake, as back as in November 2003 when M/s. Sarju International Limited took out chamber summons No. 1489/2003 questioning the continuation of Warrant of Attachment in respect of their properties. However, no remedial steps were taken to correct the purported mistake. In fact on 25.4.2004 the advocate for M/s. Sarju International Limited sent communication to the counsel for the petitioner clarifying this position. In spite of that no immediate steps were taken, whereas the present chamber summons has been filed only on 17th July 2004. It is

alleged that the petitioner has deliberately not impleaded M/s. Sarju International Limited as party to the arbitration proceedings or in the present proceedings as no outstanding amount is payable to the petitioner at the instance of M/s. Sarju International Limited. In so far as the service of notice on the address of M/s. Sarju International Limited is concerned, it is stated that the notice addressed to M/s. Sarju International, which is a partnership firm, incidentally having its office in the same complex where the registered office of M/s. Sarju International Limited is situated. It is stated that as the notice was not addressed to M/s. Sarju International Limited, it was unnecessary for the Company to enter into any communication with the petitioner and, therefore, even if there is evidence to suggest that the notice has been received by some employee of M/s. Sarju International Limited, that is not enough. It is then stated that the mode of service on the Company as recognised by law is that the notice should be served on the designated Officer of the Company in terms of provisions of Order 29 Rule 2A of C.P.C. read with Section 51 of the Companies Act, 1956. It is submitted that even for that reason, the service of the said notice will be of no avail and cannot bind M/s. Sarju International Limited to respond to the claim of the petitioner. It is further submitted that the proceedings taken out by the petitioner are mis-directed proceedings and not a case of mis-description as is contended. It is stated that description of the respondent has been deliberately mentioned as " M/s. Sarju International" so as to ensure that the matter proceeds ex parte. By the present application, the petitioner seeks to substitute another entity i.e. M/s. Sarju International Limited and if this is the consequence of allowing the application, the court will not countenance the same and the prayer for amendment will have to be rejected.

6. After hearing the counsel for the parties and considering the pleadings as well as several decisions cited across the bar, I have no hesitation in taking the view that the application taken out by the petitioner being chamber summons No. 1030/2004 ought to fail. shall now proceed to record the reasons for the same conclusion.

7. In the first place, there can be no difficulty in accepting the argument canvassed on behalf of the petitioner that the Award passed in arbitration proceedings can straight away be enforced before the Court in view of purport of Section 36 of the Arbitration and Conciliation Act, 1996. Section 36 of the New Act reads thus:

"36. Enforcement- Where the time for making an application to set aside the arbitral award u/s 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

8. From the plain language of the abovesaid position it is obvious that the Award passed by the Arbitral Tribunal can be enforced as if it were a decree of the Court. It necessarily follows that the Court will have power to amend such a decree or Award as in the present case, in exercise of powers under Sections 152

and 153 of the Code of Civil Procedure, if the stand of the petitioner that the mistake as occurred in the pleadings and proceedings is clerical mistake was to be accepted.

9. Indeed, the counsel for the Company contends that this Court is exercising powers of executing Court and it is well settled that the Court executing the decree cannot go behind the decree. Reliance is placed on the decision of the Apex Court reported in *Topanmal Chhotamal Vs. Kundomal Gangaram and Others*, . There can be no difficulty in conceding to the proposition expounded in the said decision. However, the question is, whether the decree can be amended by the executing Court. Such power is invested in the executing Court in terms of Sections 152 and 153 of the C.P.C. which position cannot be doubted. In that sense, counsel for the petitioner has justly relied on the decision of the Calcutta High Court reported in *Hemanta Kumar Ghose and Others Vs. Rajendra Mondal and Others*, wherein it is observed that an executing Court cannot go behind the decree but where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution. As mentioned earlier, by virtue of Section 36 of the Act of 1996, this Court will have to enforce the decree as if it were a decree of the Court. Viewed in this perspective, if the petitioner succeeds in persuading that the mistake which is now sought to be corrected is a clerical mistake, then there should be no difficulty in accepting the request so as to correct the Award and permit amendment in the execution proceedings to bring on record M/s. Sarju International Limited as the respondent for enforcement of the Award against the Company.

10. Counsel for the Company, however, contends that the power to amend the Award as well as the appropriate amendment in the execution application can be exercised by this Court, even so, in the fact situation of the present case, such power ought not to be exercised in favour of the petitioner. This submission is canvassed relying on the provisions of Section 33 of the Act of 1996 which reads thus:

33..Correction and interpretation of award; additional award- (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties

. (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

. (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under Sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the

arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause(a) of Sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under Sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, given an interpretation or make an additional arbitral award under Sub-section (2) or Sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

11. Indeed, the above provision enables the party to the arbitral proceedings to apply for carrying out corrections or errors which are clerical or typographical or other errors of similar nature occurred in the Award within the specified time. The objection on behalf of the Company is that admittedly the petitioner has failed to avail of the said remedy and that Section 33 provides for specified time. It is argued that in such a case the Petitioner cannot be heard to request the Court to accept the request of the petitioner so as to permit amendment during the pendency of the execution proceedings. The argument seems to be attractive. However, there is nothing in the above provision which curtails the power of the Court to allow corrections of mistakes of the nature provided in Sections 152 or 153 of the Code of Civil Procedure. It would have been a different matter if there was an express provision to curtail such powers of the Court. That is not so. Viewed in this perspective, the objection taken by the Company that the Court should be slow to permit amendment at the stage of execution proceedings does not commend to me.

12. The next question that arises for my consideration is: Whether the mistake of describing the name of the respondent can be stated to be a case of misdescription as is canvassed on behalf of the petitioner or substantive change suggested by way of amendment so as to bring new entity on record. If the Court was to hold that the attempt of the petitioner is to substitute the party then indeed, counsel for the company would be justified in relying on the decisions reported in *M.B. Sirkar and Sons Vs. Powell and Co.*, and another decision reported in AIR Cal 770 in the case of *Neogi Ghose & Co. v. Sardar Nehal Singh and Anr.* However, in my opinion, the change suggested by the petitioner is on account of misdescription of the party, namely, respondent to the

arbitration proceedings. This is so because it is common ground that all transactions have been effected by the petitioner only with M/s. Sarju International Limited. This position is not refuted in the affidavit as filed on behalf of M/s. Sarju International Limited before this Court. In that sense, M/s. Sarju International Limited was fully aware that the grievance of the petitioner in the notice addressed albeit to M/s. Sarju International was infact directed or intended against M/s. Sarju International Limited. For the proceedings taken out by the petitioner were in relation to transactions between the petitioner and M/s. Sarju International Limited. In such a situation, it will be natural to accept that the amendment sought by the petitioner is on account of misdescription of the party as M/s. Sarju International, a partnership firm instead of M/s. Sarju International Limited. Counsel for the petitioner had rightly placed reliance on the decisions reported in AIR 1933 Bom 200 in the case of Bharmal Tilokchand v. Bai Vishnabai and Ors., AIR Cal 381 in the case of National Industries v. Sassoon Rice Mills Ltd., A.I.R. 1923 Bom 452 in the case of Saraspur Manufacturing Company v. B.B. and C.I. Railway Compan, Radhe Lal and Another Vs. East Indian Railway and Others, and 1952 2 All E.R. 21 of F Queen's Bench in the case of Springate v. Questier. Counsel for the Company rightly argues that in all these cases the defendant was appearing before the Court but under wrong name. Further in all these cases, the Court proceeded on the finding that amendment was necessary as it was a case of mis-description of the party. Such course was adopted to do substantial justice between the parties. However, the above finding will be of no avail to the petitioner. This is so because the application taken out by the petitioner will have to be rejected on accepting the argument of the Company inter alia, that the present application suffers from unexplained delay and laches. The Warrant of Attachment in respect of the assets of the Company was issued on 1.10.2003. Soon thereafter in October 2003 the Company took out chamber summons No. 1489/2003 asserting that it had no connection with the arbitration proceedings taken out by the petitioner against M/s. Sarju International, which is a partnership firm. Besides, the advocate for the Company sent communication to the petitioner's advocate on 25.4.2004 which also re-iterates the above position. However, the present chamber summons has been taken out only on 17.7.2004. In the affidavit in support filed along with the chamber summons, the only case made out for such delay is the assertion which can be seen from paragraph 6, "I say that the claimants were only then alerted of the mistake inadvertently committed by them earlier." In the first place, this assertion is no explanation at all, much less providing for the foundation or material fact relevant to the point in issue. No details are offered as to how the Petitioner was alerted of the mistake and by whom and when. Besides, no explanation whatsoever is offered as to why mistake was not rectified during the pendency of arbitration proceedings. In any case why remedial steps were not taken immediately after October 2003 when chamber summons came to be filed on behalf of the Company asserting that the Award passed against M/s. Sarju International, a partnership firm was not binding on the Company. Besides, the Company has not been made party to the

present chamber summons taken out by the petitioner, which by itself is a ground for rejecting the present chamber summons. Moreover, in the reply affidavit filed on behalf of the Company, it has been clearly asserted that the petitioner deliberately named M/s. Sarju International, a partnership firm, as respondent in the arbitration proceedings and that intentionally did not take steps to correct the record inspite of bringing on record the fact that the Award cannot bind the Company which position was made known more than a year before institution of the present chamber summons. In spite of that no attempt is made to bring on record the circumstances which prevented the petitioner to take out present chamber summons in earlier point of time or for that matter, to explain the circumstances so as to counter the allegations made on behalf of the Company that it was deliberate attempt of the petitioner to implead M/s. Sarju International as a party to the arbitration proceedings instead of the Company M/s. Sarju International Limited. I find substance in the stand taken on behalf of M/s. Sarju International Limited, the company, which is a separate legal entity, that as the notice regarding arbitration proceedings was directed against M/s. Sarju International, a partnership firm and the Company was not made party to the said proceedings, it was not necessary for the Company to enter appearance in the said proceedings even assuming that the Company had knowledge of pendency of such proceedings. To support this submission, reliance is placed on the exposition in the case which in fact has been pressed into service on behalf of the petitioner, in the case of Saraspur Manufacturing Company (supra). At page 453 of the said report, the Division Bench of this Court has observed that if the Company was not a party, no appearance should have been entered. In the present case, neither any appearance was entered by or on behalf of the Company herein. That position was taken as notice was not addressed to the Company but a partnership firm coupled with the fact that the same was not served on the designated officer of the Company. In such a situation even if knowledge of pendency of proceedings can be attributed to the Company, it will be of no avail to the petitioner.

13. Indeed, counsel for the petitioner, has placed reliance on the decision of our High Court in the case of S.H.Salaskar and Ors. v. M.Chatterji reported in 2003 (Supp.) B.C.R. 167 as well as on extracts from Legal Maxims by Herbert Broom (Tenth Edition), Legal maxims by Herbert Broom (Tenth Edition) that a party was sued by a wrong name, and suffered judgment to go against him without attempting to rectify the mistake, he could not afterwards, in an action against the sheriff or false imprisonment, complain of an execution issued against him by that name. Reliance is also placed on the dictum at page 84 of this book, where an irregularity has been committed and where the opposite party knows of the irregularity, it is a fixed rule observed by all the Courts that he should come in the first instance to avail himself of it and not allow the other party to proceed to incur expense. It is not reasonable afterwards to allow the party to complain of that irregularity of which if he had availed himself in the first instance, all that expense would have been rendered unnecessary. Reliance placed on the above

authorities will be of no avail to the petitioner in the fact situation of the present case.

14. As already found earlier, the petitioner application suffers from delay and laches. The *ex parte* Award has been passed on 30th May 2002. The petitioner was put to notice that the Company was resisting the Award as not binding on it because the same was not against the Company. This stand was stated in the affidavit filed in chamber summons No. 1489/2003 as back as in October 2003. However, no steps were taken by the petitioner to correct the mistake for almost a year. That too without offering any explanation for the delay and laches. I find substance in the argument of the Company that if the petitioner is allowed to amend the proceedings at this belated stage, the petitioner would in fact reap the benefit of its own wrong. In the first place, the primary responsibility was of the petitioner to ensure that proper party was made to the proceedings. That has not happened. At this distance of time, if the amendment was to be granted, even if it is to be accepted as a case of mis-description, it will cause serious prejudice to the Company as the statutory remedy available to the Company has become time barred. The Company has acted on the assumption that the proceedings taken out by the petitioner are mis-directed and it is not necessary to respond to such proceedings. At this distance of time if the amendment as prayed by the applicants is to be granted it would cause untold prejudice to the Company. Be that as it may, it is well established that the litigant who invokes equitable relief is expected to act with despatch. The petitioner having slept over the matter for about one year cannot be heard to contend that the Company cannot be allowed to take advantage of its own wrong of ignoring the proceedings. As mentioned earlier, inspite of specific objection taken in the reply filed opposing the present chamber summons, the petitioner has not chosen to implead M/s. Sarju International Limited as party to the present chamber summons. Besides, no explanation is offered as to what prevented the Petitioner to take out this application at the earliest. On this ground the chamber summons must fail.

15. Taking overall view of the matter, I am not inclined to accept the prayer made in chamber summons No. 1030/2004 at the instance of the petitioner. Accordingly, the said chamber summons is dismissed with costs.

16. As a consequence of this order, it necessarily follows that there is no Award or Decree pending against M/s. Sarju International Limited which can be put in execution against the Company as such. It is not the case of the petitioner that M/s. Sarju International Limited had stood guarantor for the transactions undertaken by M/s. Sarju International, a partnership firm against whom Award has been passed. If it is so, it is not open to execute the decree against M/s. Sarju International Limited. On this count alone the Warrant of Attachment issued in respect of the Bank account as well as immovable assets of the Company will have to be set aside. Accordingly, the said Warrant of Attachment are set aside. The chamber summons taken out by the Company being Chamber

Summons No. 1489/2003 therefore succeeds with costs.

17. As the Company succeeds in the chamber summons for setting aside Warrant of Attachment, the Commissioner shall proceed to take accounts so as to assess the damage suffered by the Company on account of wrongful attachment of the Bank account as well as the immovable assets of the Company and take appropriate steps in that behalf as may be permissible in law.

18. Ordered accordingly.