

(2013) 09 DEL CK 0530
In the Delhi High Court
Case No : EX. P. 136 of 2010

Vindhya Telelinks Limited

APPELLANT

Vs

Bharat Sanchar Nigam Limited

RESPONDENT

Date of Decision : 02-09-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7), 31(7)(b), 36
Civil Procedure Code, 1908 (CPC) — Section 21, 37, 38, 39, 99
Suits Valuation Act, 1887 — Section 11

Citation : (2013) 09 DEL CK 0530

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Narendera M. Sharma and Mr. Abhishek Sharma, for the Appellant;
Chandan Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.

EA(OS) No. 719/2011 (objections by the judgment debtor)

1. This is an application filed by the Bharat Sanchar Nigam Limited (in short BSNL). By this application, the BSNL/judgment debtor (JD) opposes the execution of the decree with respect of the balance amount outstanding in favour of the decree holder. The decree holder claims realization of amount equivalent to an amount of Rs. 16,84,223/- being, the interest which accrued on the principal amount at the rate of 18% per annum during the period 26.09.2001 till 16.06.2010; when finally the principal amount was paid. The objection is raised by BSNL/JD briefly on two grounds:

(i) First, the amount in issue qua which realization is sought, is below the pecuniary jurisdiction of this court; and

(ii) Second, the decree passed does not award interest much less interest at the rate of 18% p.a. as claimed by the decree holder.

2. The brief background facts and circumstances in which the present application came to be filed are as follows:

2.1 An award was passed in favour of the decree holder by a sole arbitrator. The award is dated 25.09.2001. Before the arbitrator the decree holder had raised three (3) claims. The total value of the three (3) claims was Rs. 1,24,06,626/-. The first claim was valued at Rs. 97,64,547/-. The second claim was valued at Rs. 10,72,758/-. The third claim was, in substance, a consequential claim seeking payment of interest at the rate of 18 % per annum up to the date of award, and thereafter, in terms of Section 31(7) of the Arbitration & Conciliation Act, 1996 (in short the 1996 Act). The arbitrator, vide award dated 25.09.2001, clearly directed payment of monies to the decree holder with regard to the first two claims. In so far as the third claim was concerned, the learned arbitrator directed as follows:

...(3). No interest is admissible for the withheld payment however the interest will be payable if there is inordinate delay in release of the withheld payments after publication of the award and receipt of the same by the petitioner...

2.2 There is no dispute that the principal sums qua the first two claims have been paid.

2.3 As a matter of fact, the first claim was paid prior to the decree holder approaching this court by way of the execution petition, i.e., EX. P. 136/2010. The execution petition was filed on 03.05.2010. For the moment, I would be referring to this execution petition as the unamended execution petition.

2.4 Consequently, at this stage, the decree holder claimed only the principal sum awarded under the second claim equivalent to Rs. 10,72,758/-, alongwith "interest at the rate of 12% per annum for the period 01.01.2001 till the date of institution of the petition, i.e., 30.04.2010". The total amount claimed in the unamended execution petition was a sum of Rs. 21,34,788/-. Interest was also demanded from the date of institution of the unamended execution petition till its realization.

2.5 It is pertinent to note that a back of the envelope calculation would show that the amount of interest factored in the sum of Rs. 21,34,788/- was a sum of Rs. 10,62,030/-; which was much less than what ought to have been factored in, if interest had been calculated at 18% p.a. for the period 26.09.2001 till 02.05.2010; which would come to a figure of Rs. 16,73,502.48/-. If this amount had been claimed, in the first instance, the unamended execution petition would have been clearly within the pecuniary jurisdiction of this court, and if the amount claimed in the action is taken into account, it would only emphasise this aspect in favour of the petitioner with greater vigour. The decree holder, thus, sought to make amends in this regard, as the narration of facts from hereon, would show.

2.6 The notice in the unamended execution petition was issued on 19.05.2010. It

is not in dispute that during the pendency of the unamended execution petition, the principal sum of Rs. 10,72,758/- was paid by BSNL/JD. This is reflected in the order of this court dated 28.07.2010. On the said date the only issue which required adjudication was with regard to payment of interest, if any, on the said amount.

2.7 At the hearing held on 20.12.2010 in so far as interest was concerned, two aspects were noticed: (i) whether the decree holder would be entitled to interest at the rate of 12% per annum, as indicated in the prayer made in the unamended execution petition; (ii) the period for which the interest would run; in other words, from 01.01.2001 or post the date of award, which is 25.09.2001. At this hearing, the counsel for the decree holder having noticed the errors which had, according to him, crept in the unamended execution petition, sought leave to apply for amendment.

2.8 Accordingly, an application for amendment of the execution petition no. 136/2010 was filed, which was numbered as EA(OS) 79/2011. Notice in the application was issued on 02.02.2011. On behalf of BSNL/JD, notice was accepted on that date. Despite BSNL/JD being granted time, no reply was filed. Consequently, the amendments sought by the decree holder were allowed, and the amended execution petition was taken on record. The said order was passed on 20.07.2011. In the amended execution petition, the decree holder has thus, inter alia, claimed, as indicated right in the beginning of this order, a sum of Rs. 16,84,223/- for the period 26.09.2001 to 16.06.2010.

3. On 21.11.2011, for the first time, the BSNL/JD filed its objections to the execution of the decree, which is subject matter of the captioned application. It is in this context, that the learned counsel for the parties advanced their arguments.

4. Mr. Sharma, learned counsel for the decree holder, submitted that amendment to the execution petition having been allowed, the decree holder is entitled to interest as claimed at the rate of 18% per annum. It was Mr. Sharma's contention that even if no rate of interest was indicated in the award, the decree holder would be entitled to interest at the statutory rate as provided in Section 31(7)(b) of the 1996 Act. Mr. Sharma contended that there can be doubt that the decree holder had claimed interest at the rate of 18% per annum in its statement of claims, the learned arbitrator though, while returning a finding in respect of the same had indicated that interest would be payable to the decree holder if there was inordinate delay in release of the withheld amount after the publication of the award. Mr. Sharma contended that since the award was passed on 25.09.2001, and the withheld amount was released only after the institution of the unamended execution petition in 2010, there has been "inordinate delay", and hence, the decree holder was entitled to interest. In support of his submission Mr. Sharma sought to place reliance on the judgment of the Supreme Court in the case of State of Haryana and Others Vs. S.L. Arora and Company,

4.1 In so far as the second objection raised by the BSNL/JD was concerned, Mr. Sharma stated that when, the unamended execution petition was filed, this court, apparently, had jurisdiction as the claim made was for a sum exceeding the pecuniary jurisdiction of this court. The fact that in the meanwhile a part of the decretal amount was paid, would not result in this court losing jurisdiction at this stage, when no objection to the same was taken by BSNL/JD, in the first instance. He further submitted that the amendment relates back to the date of institution of the initial action and, therefore, the pecuniary jurisdiction of the court will have to be examined keeping in mind the amendment ordered by this court. For this purpose, reliance was placed on the judgment of a Single Judge of this court passed in Harish Kumar Chaudhary Vs. Vimal Wadhawan and Another,

5. On the other hand, Mr. Chandan Kumar, learned counsel for the BSNL/JD, argued that since the amount of which the realization is sought under the decree is less than the pecuniary jurisdiction of this court, this court cannot proceed further in the amended execution petition.

5.1 On the issue of interest, it was Mr. Chandan Kumar's submission that a bare perusal of the decree would show that no interest has been awarded in favour of the decree holder.

REASONS

6. Having heard the learned counsels for the parties and perused the record, what clearly emerges is that when notice was issued in the first instance in the unamended execution petition on 19.05.2010, no objection to the pecuniary jurisdiction of this court was taken. It is pertinent to note that on that date BSNL/JD was represented by Mr. Chandan Kumar. The facts, as detailed out above, would also show that the principal amount qua the second claim was paid during the period when, the unamended execution petition, was pending adjudication before this court. It is also not in dispute, as it cannot be, that at the stage when, amendment was sought qua the execution petition, no objection was taken to the amendment by BSNL/JD.

6.1 An important fact to be borne in mind, is that, in the instant case, the decree is an award passed by an arbitrator under the 1996 Act. The award, which is a decree, is thus executable in terms of Section 36 of the 1996 Act read with the provisions of the Code.

6.2 Given this background, in my view, the principle which applies to an original action, i.e., a suit qua pecuniary jurisdiction will be applicable to an award which has transmuted into a decree.

6.3 Unlike subject matter jurisdiction, territorial or pecuniary jurisdiction does not go to the root of the jurisdiction of a court. If a court lacks subject matter jurisdiction, then the decree is a nullity and therefore, an objection to its execution can be taken at any stage. As a matter of fact, an objection to a decree, which is a nullity, can be taken even in collateral proceedings. [See Kiran

Singh and Others Vs. Chaman Paswan and Others, A decree may be nullity for reasons other than for reasons of competence of the court, which passed the decree qua the subject matter. To cite an example, where the defendant dies prior to the decree being passed without his legal representatives being brought on record or where a defendant is sued as major while he is a minor without his guardian being brought on record. [see Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, and Seth Hiralal Patni Vs. Sri Kali Nath,

6.4 The fine distinction between subject matter jurisdiction and territorial and pecuniary jurisdiction has found legislative expression in Section 21 and Section 99 of the Code of Civil Procedure, 1908 (in short the Code) and Section 11 of the Suits Valuation Act, 1887. Therefore, if no objection is raised in the first instance, a decree cannot be overturned on the ground of lack of territorial jurisdiction or pecuniary jurisdiction, if the court was otherwise competent to try the cause unless it results in failure of justice. The principle, in my view, cannot be any different in execution proceedings of the like nature.

6.5 Let me briefly examine the provisions of the Code with regard to execution of a decree obtained in a suit which, in the context of the limited issue arising in the present case, would in my opinion, apply *mutatis mutandis*, to execution of an award, which has morphed itself into a decree, in terms of provisions of Section 36 of the 1996 Act.

6.6 u/s 38 of the Code a decree can be executed by the court, which passed it, or by the court to which it is sent for execution. u/s 39 of the Code, situations are adverted to when a court which passed a decree may on an application of a decree holder, transfer the decree for execution to another court; albeit a court of competent jurisdiction. Sub Section (2) of Section 39, as a matter of fact, empowers the court which passed the decree to send it, on its own motion, for execution, to any subordinate court of competent jurisdiction.

6.7 If it was a decree passed by an appellate court pursuant to adjudication in a suit, the expression: "court which passed the decree", u/s 38 of the Code read with Section 37 would mean the appellate court, as it would be in such a situation "the court of first instance". Where, however, the court of first instance ceases to exist or to have jurisdiction to have the decree executed, it would be the court, which could have passed the decree, at the point in time when execution application is preferred. In other words, had the jurisdiction to try the suit.

6.8 Therefore, in a suit in which a decree is passed, it is not difficult ordinarily to identify the court of first instance. It is when situation arises on account of change of territorial jurisdiction of the court or variation of its pecuniary jurisdiction, that at times litigants have attempted to take recourse to clause (b) of Section 37 of the Code. A Division Bench of this court has interpreted the expression appearing in clause (b) of Section 37 "where the court of first instance has ceased to exist" to mean "abolition or total extinguishment of the

court which passed the decree". This meaning was given in the context of a situation arising where during the course of execution the pecuniary jurisdiction of the court was altered. The court held: that merely because the pecuniary jurisdiction of the court was altered, it could not be said that it ceased to exist. [See Gulab Chand Sharma Vs. Saraswati Devi and Others, and Pearey Lal and Sons (Pvt.) Ltd. Vs. Jamuna Properties (P) Ltd. and Others, Also see: Abdus Sattar Vs. Mohini Mohan Das and Others, and Choudhary Raghunandan Singh Vs. Narain Das Bal Kishun Das and Another,

7. Therefore, having regard to the facts and circumstances of this case, in particular, the fact that no objection was taken in the first instance to the pecuniary jurisdiction of this court, and having regard to the fact that there is no demonstrable prejudice caused to the BSNL/JD, the objection with regard to pecuniary jurisdiction is rejected. [see Mantoo Sarkar Vs. Oriental Insurance Co. Ltd. and Others, and Ramagouda Malagouda Patil and Others Vs. Bhajarang Tukaram Bhojane and Others,

7.1 Therefore, as a logical corollary, given the finding of the fact that a part of the decree was satisfied during the pendency of the execution proceeding; would not, in my view, result in a situation whereby this court is deprived of its jurisdiction to proceed further.

8. The second objection raised by the BSNL/JD, that no interest has been awarded in favour of the decree holder in the decree/award, which is sought to be executed, is in my view, also, untenable. As is indicated in my narration of facts hereinabove, the decree holder had demanded interest at the rate of 18% per annum. The learned arbitrator, in a, not too happily worded direction, in substance, directed payment of interest by BSNL/JD, in case, there was an inordinate delay in payment of the amount awarded in favour of the decree holder. Undoubtedly, the executing court has powers to interpret the decree having regard to the pleadings, documents and in this case, the law on the subject, if there is the slightest ambiguity. [See Topanmal Chhotamal Vs. Kundomal Gangaram and Others,

8.1 Though, the learned arbitrator, did not stipulate the rate of interest; in my view, as rightly contended by the counsel for the decree holder, interest will run from the date of the award at the statutory rate provided u/s 31(7)(b) of the 1996 Act.

8.2 The observations of the Supreme Court in the case of S.L. Arora & Company, in my opinion, support this course of action. The relevant observations in this behalf are extracted hereinbelow.

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...In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract, as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest

is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum....

...34. Thus it is clear that Section 31(7) merely authorizes the Arbitral Tribunal to award interest in accordance with the contract and in the absence of any prohibition in the contract and in the absence of specific provision relating to interest in the contract, to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the award is silent about interest from the date of award till the date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till the date of payment....

(emphasis supplied)

9. Thus, having regard to the discussion above, the captioned application is dismissed.

Ex. P. 136/2010

10. Issue warrants of attachment for a sum not exceeding Rs. 16,84,223/- qua the account maintained by BSNL/JD with Punjab National Bank, ECE House, K.G. Marg, New Delhi; being: A/c No. 1120002102311107. List on 12.12.2013.