

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ EFA(OS) No.15/2010

Prem Garg and Ors

.....Appellant through
Mr. Mukul Rohtagi, Sr. Adv.
with Mr.Anshuj Dhingra,
Adv.

versus

Glencore Grain Rotterdam B.V.

..... Respondent through
Mr.Rajiv Nayar, Sr.Adv.
with Ms.Niti Dixit &
Mr.Vidur Bhatia, Adv.

AND

+ EFA(OS) No.16/2010

Ms/Shivnath Rai Harnarain

.....Appellant through
Mr.Amit Chadha, Sr. Adv.
with Mr.Mahendra Rana,
Adv.

versus

Glencore Grain Rotterdam B.V.

..... Respondent through
Mr.Rajiv Nayar, Sr.Adv.
with Ms.Niti Dixit &
Mr.Vidur Bhatia, Adv.

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Date of Hearing: June 04, 2010

Date of Decision: June 11, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE A.K. PATHAK

1. Whether reporters of local papers may be
allowed to see the Judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported
in the Digest? Yes

VIKRAMAJIT SEN, J.

1. These Appeals assail the Order of the Learned Single Judge passed on 19th April, 2010, directing the sale of the shares of Judgment Debtors Nos.2 & 3 held by them in Judgment Debtor No.5. The amounts so realized were to be kept by the State Bank of India in Suspense Account awaiting the orders of the Court. Secondly the Learned Single Judge had disallowed argument on behalf of Judgment Debtors Nos.1 and 4 owing to their failure to make compliance with the orders of the Hon'ble Supreme Court by depositing fifty per cent of the decretal amount. Thirdly, the Learned Single Judge had declined to hear objections pertaining to fraud so far as the Judgment Debtors No.2 and 3 are concerned.

2. M/s.Shivnath Rai Harnarain (India) Company (a dissolved firm) is Judgment Debtor No.1; Mr.Prem Chand Garg (partner of Judgment Debtor No.1) is Judgment Debtor No.2; Mrs.Anita Garg wife of Mr. Prem Chand Garg (partner of Judgment Debtor No.1) is Judgment Debtor No.3; Mr.Brij Mohan Gupta (partner of Judgment Debtor No.1) is Judgment Debtor No.4; and Shri Lal Mahal Limited (a Company incorporated under the Companies Act, 1956 which has

allegedly succeeded Shivnath Rai Harnarain (India) Limited) is Judgment Debtor No.5.

3. Execution Petition No.72/2009 which is under sundry Rules of Order XXI of the CPC read with Section 49 of the Arbitration and Conciliation Act, 1996, seeks enforcement of the Judgment dated 27th November, 2008 passed in CS(OS) No.541/1998. The Decree Holder specifically avers in paragraph 23 thereof that Mr.Prem Garg, Mrs.Anita Garg and Mr.Brij Mohan Gupta are partners of Judgment Debtor No.1; this assertion of fact has not been traversed or controverted in any Reply or Application filed by any of the Judgment Debtors. It is only in the Rejoinder to EA 303/2009 that Judgment Debtor Nos.2 and 3 have denied that they “are admittedly partners of the said concern”.

4. EA.No.95/2009 is an application raising Objections on behalf of Judgment Debtors No.1 and 4 under Section 47 and Order VII Rule 11 read with Section 151 of the Code of Civil Procedure (CPC). It is dated 28.7.2009 and has been filed on that day itself; it has been signed by Mr.Ram Lal, son of Mr.Rikhi Ram, as the authorized signatory of Judgment Debtors No.1 and 4.

5. Three separate Replies have been filed by the Judgment Debtors against EA.No.303/2009 by which the Decree Holder had prayed for attachment of the assets of Judgment Debtors Nos.2 to 5. Judgment Debtors No.1 and 4 i.e. M/s.Shivnath Rai Harnarain (India) Company and Mr.Brij Mohan Gupta have together filed one Reply; Judgment Debtors No.2 and 3 namely Mr.Prem Chand Garg and Mrs.Anita Garg have filed one Reply; and Judgment Debtor No.5 has filed its Reply separately. We have perused the records of Suit No.541/1998 since it had been submitted that Judgment Debtor No.2 has, as an affiant, acknowledged that he was a partner of Judgment Debtor No.1. Judgment Debtor No.2 has deposed that he "had been one of the partners in the defendant since the deponent had been dealing with the matter personally, therefore, deponent is swearing in this affidavit in that regard. The deponent is, therefore, conversant with the facts of the case and is competent to swear this affidavit".

6. The Objection by Judgment Debtors No.1 and 4 in their Reply filed on 13th August, 2009 is three fold viz., (i) that the Decree Holder has not placed on record the Award which the Decree Holder seeks to execute nor has the Decree Holder placed on record a certified copy of the Award, copy of the

award on record is only, “copy of the copy”; (ii) the Award has not been stamped in accordance with the Indian Stamp Act, 1899 and, therefore, cannot be executed under Section 35 of the Stamp Act; and (iii) under Section 49 of the Arbitration and Conciliation Act, 1996, which mandates that if the Court is satisfied the foreign Award is enforceable the Award shall be deemed to be a decree of the Court, the word “that Court” refers to the Court in whose jurisdiction the foreign award was passed. An independent objection taken by Judgment Debtor No.4 is that he was neither a party to the arbitration nor to the suit and no Award or Judgment or Decree has been passed against him. Judgment Debtors No.2 and 3 have adopted and relied on the objections already filed on behalf of Judgment Debtors No.1 and 4, which does not contain any pleadings alleging fraud. Reply filed on behalf of Judgment Debtor No.5 raises Objections regarding the validity of the Arbitration Agreement and that the Arbitration proceedings that were held were vitiated by fraud.

7. On the very same day on which Judgment Debtor No.5 had filed its Reply i.e. 18th August, 2009, a ‘Short Reply’ also came to be filed on behalf of Judgment Debtor Nos.2 & 3, praying, inter alia, that time be granted to them for filing

detailed Objections to Execution Petition No.72/2009. There is no Order extending or granting them such accommodation.

8. On 23rd September, 2009, additional Objections on behalf of Judgment Debtors No.1 and 4 vide EA.No.522/2009 came to be filed in which various grounds were pleaded in an effort to show that the Award suffers from fraud and that there was noncompliance of the Conditions envisaged by Section 47 of the A&C Act.

9. A perusal of the record of the Executing Court discloses that a Rejoinder has been filed on behalf of Judgment Debtors Nos.2 & 3. It was in this context that Mr.Mukul Rohtagi, Learned Senior Counsel appearing for the Appellant/Judgment Debtors No.2 and 3, has argued that the Learned Single Judge committed an error in disallowing his clients from canvassing the aspect of fraud. He sought to rely on the statement made in the 'Short Reply' filed on behalf of Judgment Debtors Nos.2 & 3, which states that "without prejudice, the answering Judgment Debtors adopt and rely on the objections already filed on behalf of Judgment Debtor Nos.1 and 4 as part of this reply, however, answering Judgment Debtors reserve their right to file a

detailed/parawise reply to the present application after the adjudication of their objections.”

10. To put the record right, the Objections asserting that the Award had been procured by fraud have been taken by Judgment Debtors Nos.1 & 4 on 23rd September, 2009. It would thus amount to an anachronism to hold that an Objection raised subsequently could be adopted by another party in its Reply already filed anterior thereto. In these premises, the Learned Single Judge did not commit any error in refusing to permit Judgment Debtors Nos.2 & 3 to attack the Award on the ground of fraud. We fail to appreciate any reason why this ground could not have been directly taken by Judgment Debtors Nos.2 & 3 at any time prior to the passing of the impugned Order. No effort whatsoever has been undertaken by Judgment Debtors Nos.2 & 3 even to file a detailed Reply. There is no room therefore for the Appellate Court to find fault with and set aside the view of the Execution Court on this score. We are of the opinion that this issue is meritless and deserve to be dismissed and is hereby dismissed.

11. We shall now consider the second ground in which Section 47 of the CPC had been invoked in the pleadings, and

Order XXI Rule 50 of the CPC has additionally been pressed in the course of the vehement arguments articulated by Learned Senior Counsel for the Appellant. Section 47 mandates that any question relating to the execution, discharge or satisfaction of a decree shall be raised in execution proceedings and not by way of a separate suit. It is trite that the Executing Court is not permitted to go behind the decree and, therefore, the scope of inquiry before it is 'microscopic and lies in a narrow compass' as has been opined in *Dhurander Prasad -vs-Jai Prakash University*, (2001) 6 SCC 534.

12. Sub-Section (3) of Section 47 of the CPC contemplates that where a question arises whether any person is or is not representative of the relevant party such question shall, for the purposes of this Section, be determined by the Court. The word "Court" has not been defined in the CPC although "Foreign Court" finds mention in Section 2 thereof and "Court which passed a Decree" has been defined in Section 37 of the CPC. Mr.Mukul Rohtagi had endeavoured to persuade us that questions revolving around the legal status of Judgment Debtors Nos.2 & 3 viz., whether they were partners of Judgment Debtor No.1 at the appropriate time,

would have to be raised either before the Arbitral Tribunal which held its proceedings and pronounced its Award in London, or in the appropriate Court in London. It seems to us that there is no basis for raising the controversy regarding jurisdiction of this Court since Section 49 of the Arbitration and Conciliation Act, 1996 enunciates that once the Court is satisfied that the Foreign Award is enforceable then the Award shall be deemed to be a Decree of that Court. In other words, it is beyond cavil that on the dismissal of the Objections by the Learned Single Judge in terms of Order dated 27th November, 2008, it is the Original Side of this Court that would hold sway over this controversy. We may, however, record in this regard that we accept the arguments of Mr. Mukul Rohtagi, that the Appellants would have had to had anticipate the dismissal of their Objections if they were to be expected to raise the grounds of attack predicated on Section 47 and Order XXI Rule 50 of the CPC before the learned Single Judge who was to rule on the Objections to the Award. Consequently, we agree that the grounds emanating from these provisions could correctly have been raised only in Execution proceedings. As already mentioned, an Affidavit of Shri Prem Garg, Judgment Debtor No.2 and Appellant No.1

before us was filed as evidence by way of Affidavit by the Appellant in Suit No. 541 of 1998. In Paragraph 1 of the Affidavit the Deponent has stated on oath and by way of affirmation that "the Deponent had been one of the Partners in the Defendant. Since the Deponent has been dealing with the matter personally, therefore, the Deponent is swearing in this Affidavit in that regard." Judgment Debtor No.2 cannot controvert that he was a partner of Judgment Debtor No.1.

13. The Deed of Dissolution of Judgment Debtor No.1 dated 31st March, 1998 clearly records the name of the four Partners, viz. Prem Chand Garg, Smt. Ram Bai, Smt. Anita Garg and Shri Brij Mohan Gupta and appears to be signed by all four of them. In light of the depositions made in the said Affidavit and the Dissolution Deed there is no manner of doubt that the Appellant 1 and 2 were the Partners of the Firm at the relevant time.

14. The Respondent has also relied extensively on *Gambhir Mal Pandiya -vs- J.K. Jute Mills Co.*, AIR 1963 SC 243 to buttress its argument that an execution can be carried out against the partners of a Judgment Debtor Firm even if they were not parties to the Suit as partners or not even summoned during the suit as Partners. Order XXI Rule 50

further makes it clear that the partner of a firm can raise limited objections against the execution sought against him, and the grounds would include fraud or that they were not the partners at the relevant point in time and that is why they are not liable.

15. We are of the view that the scope of enquiry under Rule 50 Order XXI of the CPC is limited to the fact as to whether the person against whom the execution is sought was a partner when the cause of action accrued against the firm and against the Decree Holder, but the person may question the decree on the ground of collusion, fraud or the like but not have a fresh adjudication on the question of liability. In this case the argument of fraud is for the first time articulated by the Judgment Debtors Nos. 2 and 3 in the Appeal. We cannot appreciate why this argument could not have been raised before the learned Execution Court which was the appropriate forum to adjudicate and pronounce on this issue.

16. As regards the second argument which is also raised orally for the first time before us that the Appellants were not the Partners of the firm and therefore not liable also deserves to be rejected outrightly. There is not even a smattering of

this plea ever taken in any of the pleadings filed by the Appellants. Moreover, it is totally contrary to their own Affidavit filed before the Court and the Dissolution Deed of the firm.

17. In light of these facts, we find no infirmity with the Order of the learned Singe Judge in debarring the Judgment Debtors Nos. 2 & 3 from raising the plea of fraud. Unfortunately, apart from the *en passant* denial of their status as partners of Judgment Debtor No.1 firm in the Rejoinder of Judgment Debtors Nos.2 & 3, a perusal of the impugned Judgment discloses that this ground had not been urged before the Execution Court and it runs counter to the contents of the affidavit of Judgment Debtor No.2 in Suit No.541/1998. It is essentially a mixed question of law and fact raised for the first time in the Appeal before us. Regretfully, and fatally for the Appellants, this controversy has not even been articulated in the Memorandum of Appeal before us. Normally, we would be loathe to take too severe or technical and procedural approach had it been palpably clear to us that justice would become the casualty. Procedure is a handmaiden of justice and if this plea is countenanced by us at the appellate stage, we would only be obstructing the

execution of a decree. The cynic quips that it is invariably easier to win a decree than it is to execute it. This trend needs to be reversed otherwise procedural punctilio shall indubitably emasculate justice. No other argument has been raised before us. We may very briefly deal with one aspect of the case which was fleetingly mentioned and that is the allegation that Judgment Debtor No.5 had succeeded Judgment Debtor No.1. The legal position is that a firm is only a compendium of its partners who remain liable even to the extent of all their personal assets till the time all the creditors are satisfied.

18. Owing to this legal position Order XXX of the CPC enables the filing of a suit or *lis* in the name of the firm, which otherwise could become fraught with jural irregularity. That very Order, however, empowers a party to seek a disclosure of the details of the partners of the firm. It is a wise lawyer, endowed with foresight, who ensures that all details pertaining to partners of the embattled firm have already been clarified in the Trial itself. Otherwise, the prudence that finds expression in Order XXI Rule 50 will rightly delay the execution of the decree that may have come to be passed. There is incalculable mischief that can be

orchestrated by a cunning Decree Holder by attaching and selling assets of persons who, at the relevant time, were not partners of the Judgment Debtor firm. If the Execution Court harbours serious and well founded doubts on this issue, it would be discharging its judicial obligations by clearing the grounds. We think it inconceivable that a person against whom execution proceedings have been initiated on the platform of his/her being a partner in the Judgment Debtor firm would not, at the very threshold, bring this fact to the attention of the Court. Having said all this, so far as the case in hand goes, we find that the position is not shrouded with any uncertainty as to the factum of Judgment Debtors Nos.2 & 3 being partners of Judgment Debtor No.1. Allowing a formal invocation of Order XXI Rule 50 at this belated stage of the litigation would tantamount to our being privy to sacrificing justice at the purposeless and pedantic prompting of procedure. The dissolution or metamorphism of the firm into a corporate company does not alter/dilute/diminish or extinguish the rights of creditors to proceed against the personal assets of any or all of the erstwhile partners.

19. It is for these manifold reasons that we find the Appeals to be devoid of merit. They are calculated only to delay the Decree Holder from enjoying the fruits of the Decree. In the circumstances of the case, however, we decline from passing any orders as to costs.

(VIKRAMAJIT SEN)
JUDGE

June 11, 2010
AKA/TP

(A.K. PATHAK)
JUDGE