* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 27th August, 2013.

\+ **RFA 410/2012 & CM No.20988/2012 (for stay)**

ASHOK KALRA ..... Appellant
Through: Mr. V.M. Issar, Adv.

Versus

M/S. AKASH PAPER BOARD PVT LTD & ANR ....Respondents
Through: Mr. V.C. Sharma, Adv.

AND

\+ **RFA 434/2012 & CM No.21070/2012 (for stay)**

ASHOK KALRA ..... Appellant
Through: Mr. V.M. Issar, Adv.

Versus

PRAVEEN JAIN & ANR ..... Respondents
Through: Mr. V.C. Sharma, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. These appeals under Section 96 of the Civil Procedure Code (CPC), 1908 impugn the judgment and decree dated 11th July, 2012 of the Court of Additional District Judge (Central)-01, Tis Hazari Court, Delhi of dismissal of Suits No.241/2011 & 217/2011 respectively filed by the

appellant/plaintiff pursuant to the order of rejection of the plaints filed in the said suits.

2. RFA No.434/2012 was listed subject to the office objection as to the court fees paid thereon.

3. Notice of the appeals was issued. Vide order dated 10th July, 2013 the appeals were admitted for hearing and subject to the deposit by the appellant/plaintiff of the entire balance decretal amount before the Executing Court within one month therefrom, the arrest of the appellant/plaintiff in execution of the arbitration awards challenged in the suits from which these appeals arise was stayed and the Trial Court records requisitioned. The counsel for the appellant/plaintiff on that date also undertook to make up the deficiency in court fees in RFA No.434/2012 and the appeals were posted for hearing for today.

4. The counsel for the appellant/plaintiff states that the entire decretal amount under the awards challenged in the suits has been deposited in the Execution Court.

5. The counsel for the respondents/defendants states that he has not verified the position.

6. The appellant/appellant has however not made up the deficiency in

court fees in RFA No.434/2012. The said aspect will be dealt with later and the counsels have been heard on the appeals.

7. The suits from which these appeals arise were instituted by the appellant/plaintiff pleading:

(i) that the appellant/plaintiff had been purchasing goods from the respondent No.1 in each of the appeals namely M/s. Akash Paper Board Pvt. Ltd. and Mr. Praveen Jain, proprietor of M/s. Akash Paper Agencies since the year 1999-2000, but the appellant/plaintiff realising that the said respondents/defendants were not sending the material as per the specifications and that the material sent was of low quality, ceased his dealings with the respondents /defendants No.1 in the end of the year 2005;

(ii) that the respondents/defendants No.1 in each case however fraudulently and falsely set up a claim of Rs.4,97,593/-0 and Rs.4,12,890/- respectively against the appellant/plaintiff before the respondent No.2 Arbitrator Mr. Ram Bhaj Mittal on the basis of bogus and fabricated invoices when the appellant/plaintiff had not made any purchases thereunder;

(iii) that the respondents/defendants No.1 had in the said fabricated

invoices printed a clause that in case of disputes, the matter will be referred to Paper Merchant Association (Regd.), Delhi of which the respondents /defendants No.1 were a member, for arbitration;

(iv) that invoking the said printed arbitration clause and without issuing any prior notice to the appellant/plaintiff, the claims were filed by the respondents/defendants No.1 before the respondent No.2 Arbitrator;

(v) that the respondents/defendants No.1 intentionally gave incorrect address of the appellant/plaintiff in the arbitration proceedings and thus no notice thereof was received by the appellant/plaintiff;

(vi) that the appellant/plaintiff however upon being telephonically informed of the said arbitration, filed a written statement before the respondent No.2 Arbitrator contesting the claims of the respondents /defendants No.1 and also denying the existence of any arbitration clause;

(vii) that the respondent No.2 Arbitrator however hastily passed awards dated 20th October, 2008 in both the cases, for Rs.3,79,498/- and Rs.4,70,113/- respectively against the appellant/plaintiff;

(viii) that the said awards were never served upon the appellant/plaintiff as the same were also sent at the wrong address as given by the respondents /defendants No.1 in their statements of claim;

(ix) that only when in the last week of March, 2009, some employees of the respondents/defendants No.1 approached the appellant/plaintiff for payment of the awarded amount, did the appellant/plaintiff come to know of the awards and thereafter applied for and obtained copies of the awards and preferred suits, being CSs No.65/2009 & 66/2009 under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the said awards;

(x) that the said suits challenging the awards preferred by the appellant/plaintiff were however dismissed as time barred vide common order dated 30th September, 2010 of the Additional District Judge, Central-10;

(xi) that FAOs No.23/2011 & 24/2011 preferred by the appellant/plaintiff thereagainst to this Court were also dismissed;

(xii) that the appellant/plaintiff filed Special Leave Petition (SLP) Civil Nos.20264/2011 & 20265/2011 thereagainst but which were

also dismissed vide order dated 16th September, 2011 of the Supreme Court;

(xiii) that the main objection of the appellant/plaintiff that there was no arbitration agreement as the invoices containing the arbitration clause were false and fabricated, thus remained to be adjudicated on merits;

(xiv) that there was no arbitration agreement between the appellant/plaintiff and the respondents/defendants No.1 within the meaning of Sections 7 & 8 of the Arbitration Act; thus the awards in pursuance to a non-existence of arbitration clause were fraudulent and of no avail; the said facts remained to be adjudicated in the Section 34 Arbitration Act proceedings and appeals arising from orders thereagainst.

8. The appellant/plaintiff in the suits aforesaid sought the reliefs of, (a) declaration that the arbitration awards were illegal, unlawful and without jurisdiction and a nullity and of cancellation thereof; and, (b) permanent injunction restraining the respondents from executing the decree passed on the basis of the said arbitration awards.

9. The respondents/defendants No.1 contested the suits from which

these appeals arise by filing written statements and also filed applications under Order 7 Rule 11 of CPC and to which replies were filed by the appellant/plaintiff.

10. I may at this stage state that the appellant/plaintiff had valued the suits from which these appeals arise, for the relief of declaration at Rs.200/- for the purposes of court fees and at Rs.3,79,498/- and Rs.4,70,113/- respectively for the purposes of jurisdiction and at Rs.130/- for the purposes of court fees and jurisdiction for the relief of injunction. Though the respondents/defendants No.1 neither in the written statement nor in the application under Order 7 Rule 11 of the CPC appear to have taken any objection in this regard, but in my view the said valuation by the appellant/plaintiff was erroneous. The valuation for the relief of declaration, for the purposes of court fees and jurisdiction is to be the same and if the appellant/plaintiff desired to fix the value for relief of declaration for the purposes of court fees at Rs.200/-, the valuation for the purposes of jurisdiction ought to have been the same and in which case the suits should have been tried by the Court of minimum pecuniary jurisdiction i.e. by the Court of the Civil Judge, Delhi. If the appellant/plaintiff desired the suits to be tried by the Additional District Judge (ADJ) as they have been, the

appellant/plaintiff ought to have valued the suits for the purposes of court fees also at Rs.3,79,498/- and Rs.4,70,113/- respectively and paid court fees thereon. (See Section 8 of the Suits Valuation Act, 1887 r/w Section 7(iv) of The Court Fees Act, 1870)

11. Be that as it may, since the ADJ has not rejected the plaints on this ground, though notice of these appeals were issued subject to objection as to the court fees, I am proceeding to decide the appeals on merits without calling upon the appellant/plaintiff to make up the deficiency in court fees.

12. The learned ADJ in the order rejecting the plaints has observed/found/held:

(a) that the Arbitration Act has been enacted as a special statute to deal with commercial arbitration and the matters connected therewith; it is a self contained statute;

(b) that Section 5 of the Arbitration Act bars intervention by any judicial authority, except where so provided in the Act;

(c) that Sections 12 & 13 of the Act provide for the grounds of challenge to the jurisdiction of the Arbitrator and the procedure therefor;

(d) that Section 4 thereof provides for waiver of the rights;

(e) that Section 34 thereof provides for the challenge to the arbitration award;

(f) that the intention of the Legislature in providing special mechanism under the Act is very well reflected in Section 5 of the Act;

(g) that it is settled law that a special statute prevails over the general statute and if a statute provides for a particular thing to be done in a particular manner, it must be done in that manner only and all other ways are forbidden;

(h) that considering the scheme of the Arbitration Act vis-a-vis Section 9 of the CPC, it is clear that the Legislature's intent was to give finality to arbitration proceedings;

(i) that the appellant/plaintiff had availed his remedies as provided under the Arbitration Act, till the last resort and had thereafter engineered the lis in the form of the suits to open another round of litigation—this was an abuse of the process of the Court and an attempt to make the court of the ADJ sit over the judgment of the higher Courts;

(j) that it is the duty of the Court to put an end to frivolous

litigation and finding the suits filed by the appellant/plaintiff to be falling in the said category, the plaint in the suits were rejected under Order 7 Rule 11 of the CPC.

13. The counsel for the appellant has argued that the grounds on which the plaint in the suits filed by the appellant/plaintiff have been rejected were not even urged by the respondents/defendants No.1 in their written statement or in the application under Order 7 Rule 11 of the CPC.

14. Even though the aforesaid contention is found to be correct and the counsel for the respondents today also has not urged any of these grounds and his argument has been that after the awards have been upheld till the Supreme Court, a second round of litigation cannot be started, however the fact remains that the Court is not debarred from on its own, if finding a claim in suit to be barred by any law, to reject the same and to not keep the same pending merely for the reason of the respondents/defendants/opposite parties having not taken any objection to the said effect. This Court in these appeals is now concerned only with the correctness of the reasoning given by the learned ADJ while rejecting the plaints.

15. The crux of the arguments of the counsel for the appellant/plaintiff is that a fraud has been played by the respondents/defendants No.1 by

engineering a situation in which the appellant/plaintiff has been deprived of being heard on merits by any judicial authority. It is contended that though the appellant/plaintiff in challenge to the awards went till the Supreme Court, the only matter for consideration at each of the three successive stages was whether the challenge to the awards was within time or not. It is contended that in view of the proviso to Section 34(3) of the Act limiting the time for preferring the objections and the respondents/defendants on merits having engineered the situation to ensure that the appellant/plaintiff learnt of the awards after such time, the appellant/plaintiff has been deprived of having his objections/challenge to the awards considered on merits.

16. The argument appears to be that fraud vitiates everything and the conduct of the respondents/defendants No.1 is fraudulent and the Civil Court has remedy therefor. It is contended that Section 5 of the Arbitration Act does not bar the jurisdiction of the Civil Court and in the absence of any specific bar, the Civil Court would have jurisdiction. Reliance in this regard is placed on ***Sahebgouda Vs. Ogeppa*** AIR 2003 SC 2743 and ***Ram Kanya Bai Vs. Jagdish*** AIR 2011 SC 3258.

17. Comparison of the language of Section 5 of the Act is also made with

the language of Section 32 of the old Arbitration Act of the year 1940 to show that the same specifically barred jurisdiction of a Civil Court in the matter of existence, effect or validity of an arbitration agreement or an award. It is contended that in comparison, Section 5 only bars intervention and where it is the case that fraud has been practiced, the substantive rights of the appellant/plaintiff under Section 9 of the CPC to approach the Civil Court have not been barred/closed.

18. The arguments, though attractive, lack in merit. The appellant/plaintiff in the present case admittedly participated in the arbitration proceedings. Not only so, the appellant/plaintiff also challenged the awards made in the said arbitration proceedings. Section 34(3) of the Arbitration Act provides for the period of three months from the date of receipt of the arbitral award for challenging the same and the proviso thereto empowers the Court to, if satisfied that the person making such challenge was prevented by sufficient cause from making the challenge within the said period of three months, permit making the same within a further period of 30 days. It was thus open to the appellant/plaintiff to in the proceedings under Section 34 of the Arbitration Act establish that the appellant/plaintiff had received the arbitral awards within three months or maximum four

months prior to making the challenge. The language of Section 34(3) of the Act does not make the period of limitation provided therein to commence running from the date of making of the award. What is receipt of the award by the party to the arbitration is also no longer *res integra* and has been exhaustively dealt with in ***Union of India Vs. Tecco Trichy Engineers & Contractors*** (2005) 4 SCC 239, ***Kailash Rani Dang Vs. Rakesh Bala Aneja*** (2009) 1 SCC 732, ***State of Maharashtra Vs. A.R.K. Builders Private Ltd.*** (2011) 4 SCC 616 and ***Banarsi Krishna Committee Vs. Karmyogi Shelters Private Ltd.*** (2012) 9 SCC 496. Thus, if there were any merit in the contention of the appellant/plaintiff that the respondents/defendants No.1 had mischievously created circumstances for the appellant/plaintiff to have not received the awards, it was for the appellant/plaintiff to prove and establish so in the Section 34 Arbitration Act proceedings and had the appellant/plaintiff succeeded in doing so, the objections/challenge under Section 34 of the Act would have been entertained and which permits a challenge on the ground of non-existence of the arbitration agreement. The dismissal of the applications filed by the appellant/plaintiff under Section 34 of the Arbitration Act and the confirmation of the said order by this Court as well as by the Supreme Court shows that the appellant/plaintiff has not been

able to establish that it had received the arbitral awards within three or four months prior to making of the applications under Section 34 of the Arbitration Act. The appellant/plaintiff cannot have a second round by way of a suit in this regard. The fraud in serving the award now alleged, ought to have been established in the Section 34 proceedings and the judgments therein on the premise that the appellant/plaintiff had been served with the awards and had not preferred objections thereto within the prescribed time, bind the appellant/plaintiff and cannot be re-opened in the suits from which these appeals arise.

19. As far as the bar to the jurisdiction of the Civil Court is concerned, need is not felt to elaborate as the Supreme Court as far back as on 21st March, 2001 in a short judgment i.e. ***Kvaerner Cementation India Ltd. Vs. Bajranglal Agarwal*** (2012) 5 SCC 214 held as under:

> *"1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.*

2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to' rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-section (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."

This Court following the same in ***Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd.*** 157 (2009) DLT 712 and ***Spentex Industries Ltd. Vs.***

Dunavant SA MANU/DE/4166/2009 held the suits as the present one to be not maintainable. The appeal preferred in ***Spentex Industries Ltd.*** (supra) was dismissed vide judgment dated 29th October, 2009 in RFA No.69/2009.

20. I am therefore unable to find any error in the order of the learned ADJ of holding the suits from which these appeals arise to be not maintainable and rejecting the plaints therein.

21. The appeals are resultantly dismissed; however for the reason of the respondent No.1/defendant having not taken the plea on which the rejection has been ordered, no order as to costs.

22. In view of the dismissal of the appeals, the earlier order dated 10th July, 2013 to the effect that the amount deposited by the appellant/plaintiff be not released to the respondents, stands vacated.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

AUGUST 27, 2013
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