

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

Decided on: 10.10.2013

+ **EFA (OS) 36/2011, C.M. 19322/2011 (for stay)**

SHRI SATISH KUMAR JHUNJHUNWALA..... Appellant

Through : Mr. Rakesh Tiku, Sr. Advocate
with Mr. Amit Panigrahi and Mr. Tushar
Roy, Advocates.

versus

UNION OF INDIA AND ORS. Respondents

Through : Mr. J.M. Kalia, Advocate, for
UOI.

Mr. Debasish Moitra, Advocate, for Resp.
No.3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This is an appeal from an order allowing an application under Order XXI Rule 50(2) of the Code of Civil Procedure (“CPC”) by the decree holder seeking leave to proceed with execution proceedings against the partners of the judgment debtor’s firm.

2. The facts leading to the decree in this case, and the execution proceedings are that a contract dated 15.10.1986 was entered into between M/s. Binode Engineering & Mechanical Works, a registered firm, (“*the judgement-debtor firm*”) and the Union of India for the supply of 3850 tonnes of cast iron sleeper plates. Due to certain disputes in the course of the performance of the contract (the details

of which are not relevant at this stage of the execution proceedings), the matter was referred to arbitration in 1996 (through a letter dated 21.12.1996). The award was passed on 25.03.1998 in favour of the Union of India, the decree-holder, for an amount of ₹ 81,31,371/- (₹ 35,36,750/- towards the value of scrap and ₹ 45,94,621/- towards interest at the rate of 12% per annum on the value of the scrap from 01.09.1988 to 31.12.1996) and against the judgement-debtor firm. The award was then made a rule of Court under Section 17 of the Arbitration Act, 1940 in CS (OS) 815A/1998 on 15.03.2004, after dismissing objections raised by the judgement debtor firm.

3. Around the same time as the award, the judgement-debtor firm became non-functional due to differences between the partners. Subsequently, the Union of India sought to initiate execution proceedings against Satish Kumar Jhunjhunwala (the petitioner/appellant), an admitted partner of the firm at the time of signing of the contract, in Execution Case No. 119/2008 before this Court. This case was then transferred to the High Court of Calcutta by an order dated 17.04.2007, to facilitate execution against the property of Mr. Jhunjhunwala. Before the Calcutta High Court, Mr. Jhunjhunwala took the plea that the proceedings against him were not maintainable as the recovery could only be against the firm as such, and not against its partners. In the meantime, an application, EA No. 471/2008, filed for stay of the decree under Order XXI Rule 26 of the CPC by the judgement-debtor firm was also rejected by this Court. Subsequently, the Union of India filed an application under Order

XXI Rule 50(2) CPC, before a Single Judge of this Court in order to satisfy the decree as against the properties of Mr. Jhunjhunwala by obtaining leave to proceed against his assets. The Single Judge granted leave under Order XXI Rule 50(2), leading to the present appeal.

4. Learned senior counsel for Mr. Jhunjhunwala, Mr. Rakesh Tiku, made a three-fold submission: *first*, that since Mr. Jhunjhunwala was neither provided notice of the underlying suit (either before the arbitral tribunal or at the time of filing of the award under Section 14 of the Arbitration Act before this Court) or of the execution proceedings, until the stage at which the proceedings reached the Calcutta High Court, making his assets liable would amount to creating a liability unfounded in the decree itself, which an executing court cannot do. Secondly, the learned senior counsel argued that the words “*execute such decree against any person, other than such a person as is referred to in clause (b) or clause (c) of sub-rule (1) of Rule 50 of Order XXI*” are to be read in contradistinction to the persons, i.e. partners, referred to in clauses (b) and (c), and thus, do not refer to partners of the firm at all, but rather to other persons. Finally, the learned senior counsel argued that after transferring the decree, the transferor court, i.e. this Court, has no jurisdiction in respect of the proceedings. Mr. Tiku also argued that Rule 50 in using the words “[c]ourt which passed the decree” envisaged the Court that heard the underlying matter and passed the decree (an expression of liability), and *not* the same Court, i.e. this Court, sitting in its

execution powers. Thus, although the present application seeking leave was filed before the Single Judge of the Delhi High Court (the Court which passed the original decree in the matter as well), the argument states that the application must lie to the same court, i.e. the same bench or judge, that heard the underlying matter. For this, learned senior counsel placed reliance on a decision of the Patna High Court, *Kalu Ram and Ors. v. Sheonand Rai Jokhi Ram*, AIR 1932 Pat 323, and a decision of the Madras High Court, *Pottiswami, alleged partner of Pottiswami and Brothers v. Salt Sulaiman (Mitta)*, AIR 1942 Mad 501.

5. The learned counsel for the Union of India submits that as on the date of filing the application, more than ₹3,50,00,000/- was legally recoverable as a decretal amount, and as of today, the amount stands close to ₹5,00,00,000/-. Learned counsel submits that even though the decree was transferred under Section 39, CPC to the Calcutta High Court, this Court as the transferee court retains the power to grant leave to execute the decree against partners of the firm under Section 42, CPC. Accordingly, the jurisdiction of this Court is established. Further, learned counsel submits that the judgment-debtor firm named Mr. Jhunjunwala, the appellant/petitioner, as a partner in the partnership deed submitted to the Railway Board vide letter dated 11.05.1987 at the time of awarding the contract. Moreover, in similar terms, the judgement-debtor firm at the time of the contract awarded in its favour furnished a General Power of Attorney executed by all the partners, including Mr. Jhunjunwala, in a letter dated 13.10.1987.

Thus, it is submitted that given that Mr. Jhunjhunwala does not fall within the various sub-clauses of sub-rule (1) of Rule 50, but that his liability as a partner is established contemporaneously with the awarding of the contract through documents admitted to by the judgement-debtor firm itself, this case is fit for grant of leave to proceed against his assets.

6. Before addressing the arguments raised by the parties, and the discussion, it is helpful to extract certain provisions of the CPC. Firstly, Order XXI Rule 50 reads:

“50. Execution of decree against firm— (1) Where a decree has been passed against a firm, execution may be granted —

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 30 of the Indian Partnership Act, 1932 (9 of 1932).

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and

determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2) the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

(5) Nothing in this rule shall apply to a decree passed against a Hindu Undivided Family by virtue of the provision of rule 10 of Order XXX.”

7. Section 37, CPC reads as follows:

“37. Definition of Court which passed a decree.- The expression “Court which passed a decree”, or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to, include-

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

[Explanation - The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any

area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.]”

8. Section 39, CPC provides that:

*“39. **Transfer of Decree:** (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction-*

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

[(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]”

9. Section 42, CPC, which is relevant for purposes of this appeal, reads as follows:

“42. Powers of Court in executing transferred decree:

(1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the provisions of sub-section (1) the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree, namely:-

(a) power to send the decree for execution to another Court under section 39; (b) power to execute the decree against the legal representative of the deceased judgment-debtor under section 50;

(c) power to order attachment of a decree.

(3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Courts to which a decree is sent for execution any of the following powers, namely-

(a) power to order execution at the instance of the transferee of the decree;

(b) in the case of a decree passed against a firm, power to grant leave to execute such decree against any person other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI.”

10. In this case, the “court which passed the decree” was the Delhi High Court, i.e. the Court which made the arbitral award in question a rule of Court under Section 17 of the Arbitration Act, 1940. In execution proceedings pursuant to the decree, which were also seized of by this Court, the matter was transferred under Section 39, CPC given that the assets sought to be utilized in the execution of the decree were situated in the jurisdiction of the Calcutta High Court. However, in the proceedings before the Calcutta High Court the question of the liability of Mr. Jhunjhunwala came to the fore. Concededly, Mr. Jhunjhunwala did not appear in his own name under Rule 6 or 7 of Order XXX, nor did he submit to on the pleadings, nor was he adjudged as a partner, nor was he served with a summons as a partner at any stage of the proceedings. The mandate of Order XXI, Rule 50 (1) clearly excluded automatic recovery against his assets. Rather, the Union of India, the judgement-holder, was required to obtain leave under sub-rule 2. Here, Mr. Jhunjhunwala’s argument that sub-rule (2), if read as against sub-rule 1, does not refer to partners of the firm, but to third persons, is unappealing. Clauses (b) and (c) of sub-rule 1 do not exhaust all categories of partners that may be proceeded against, such that it could be said that sub-rule (2) only deals with third persons. Indeed, clauses (b) and (c) only concern *certain* categories of partners who have either admitted liability, or have been put on notice and failed to tender a reply, such that they can

be proceeded against. Other individuals, or more specifically, other partners, may be proceeded against under sub-rule (2) after their liability is established in the manner provided for in the sub-section. Consequently, Mr. Jhunjhunwala's second argument also falls, i.e. given that he was not party to any proceedings before the arbitral tribunal, or the decreeing Court, executing the decree against his assets would amount to creating liability, which is an impermissible activity for an executing court. This argument also, in the Court's opinion, misses the core of Rule 50, the import of which is to ensure if individual partners have not been involved in the proceedings, -in which case they would be covered under clauses (b) or (c) of sub-rule 1, -their assets may *still* be utilized in the execution proceedings if the '*court which passed the decree*' grants leave after hearing the individual on the question of his liability vis-à-vis his relationship with firm. That is precisely the stage of proceedings that this case is currently at, i.e. determining whether Mr. Jhunjhunwala was a partner at the time of signing the contract between the judgement-debtor firm and the Union of India, such that – in consonance with the general principle laid out in Section 25 of the Partnership Act – he can be made personally liable. Accordingly, unless the claim of the decree-holder that the decree should be passed against the partners personally has been decided against the decree-holder by the decreeing court, in which case the executing court is bound by the limitation placed on the decree itself and cannot execute it against the partners personally, the same question can be raised through an application under rule

50(2). (See, *Topanmal Chhotamal v. Kundomal Gangaram and Ors.* AIR 1960 SC 388.)

11. In this regard, the learned Single Judge relied upon the partnership deed submitted by the judgement-debtor firm to the Railway Board vide letter dated 11.05.1987 at the time of awarding the contract, which names Mr. Jhunjunwala as a partner. This established his liability at the relevant time, i.e. at the time of signing the contract, and is sufficient cause to grant leave. Neither before the learned Single Judge, nor in the present appeal proceedings has Mr. Jhunjunwala raised any questions as to this document, or even generally as to his partnership at the time of signing the contract, and thus, his liability.

12. Rather, the primary argument put forward by Mr. Jhunjunwala is that the present application seeking leave under sub-rule (2) has not been made to the '*court which passed the decree*', and thus, being improperly made, is liable to be dismissed. This argument, however, is not persuasive. The Court which passed the decree in this case was this Court, in its original jurisdiction under Section 17 of the Arbitration Act, 1940. The present execution application was filed before a Single judge of this Court. The argument that the proper forum for the application is the original side of this Court which passed the decree, and not another bench of this Court hearing execution matters draws a non-existent distinction. Sub-rule (2) requires only that the application be filed before the Court which passed the decree, and does not draw any further distinctions. Here,

the application was made to the learned Single Judge as the Court which passed the decree, and was seized of the execution proceedings. Furthermore, to claim that this Court, after transferring the decree, does not retain the power to grant leave, is contrary to the express terms of Section 42, which states that the transferee court does not obtain the power to grant leave to execute such decree against any person other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI. Rather, the necessarily implication must remain that such a power is retained by the Court which '*passed the decree*', and in this case, the Court which transferred the matter, i.e. this Court. The reliance placed here on the decisions in *Kalu Ram* (supra) and *Pottiswami* (supra) is incorrect, as in those cases the Court to which the application seeking leave was made was the *transferee* court, which is *not* the 'court which passed the decree' [as is made amply clear by Section 42(4)(b)] which in this case is the Calcutta High Court, and not this Court.

13. The appellant had sought to urge that there was no material to arrive at a finding that he could be fastened with the liability of the firm, given that there had been a reconstitution. In this regard, the Court observes that this contention had been examined by the learned Single Judge, who took into consideration precisely the same objection, made on behalf of the other judgment debtors and the firm and held that there was nothing to indicate that the document of 1992, relied upon in that regard, had ever been notified or put to the decree holder Union of India. The learned Single Judge referred to provisions

of Section 32(2) of the Partnership Act, which provides that a retiring partner may be discharged from any liability to a third party for acts of the firm done before his retirement “*by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.*” This Court is in full agreement with the reasoning of the learned Single Judge, as there is no material forthcoming to substantiate that the appellant ever mentioned to the Union of India, let alone showed that any implied agreement could be inferred through its conduct with him, about its awareness of the arrangement. Therefore, he continued to remain liable for the acts of the firm, of which he was undoubtedly a partner when the transaction with the Union of India took place, which led to its (firm’s) liability, crystallizing in the award that later culminated in a decree of this Court.

14. In the light of the foregoing reasons, this Court finds no reason to interfere with the impugned judgment and order of the learned Single Judge. The appeal being devoid of merit is accordingly dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

OCTOBER 10, 2013