

Court No. - 19

Case :- MATTERS UNDER ARTICLE 227 No. - 6380 of 2023

Petitioner :- M/S Agarwal And Company, Kheri Thru.

Proprietor, Prashant Agarwal And Nishant Agarwal And Others

Respondent :- State Of U.P. Thru. Superintending Engineer,
Lakhimpur Kheri And Others

Counsel for Petitioner :- Sushil Kumar Rastogi

Counsel for Respondent :- C.S.C.,Anurag Srivastava

Hon'ble Jaspreet Singh,J.

Heard Shri Sushil Kumar Rastogi, learned counsel for the petitioners. Notice on behalf of the respondents No.1 has been accepted by the office of the Chief Standing Counsel. Shri Uma Shankar and Abul Fazl Jaffrey, learned counsel have put in their appearance on behalf of the respondent-Bank and have also filed their Vakalatnama, which is taken on record.

The instant petition has been preferred under Article 227 of the Constitution of India assailing the order dated 30.09.2022 passed by the Commercial Court, Lucknow to hand-over a demand draft as furnished by the judgment-debtor relating to the decretal amount along with further interest accrued thereon.

The submission of the learned counsel for the petitioners is that a contract was executed between the petitioners M/s. Agarwal and Company and it is a case that it was the sole proprietorship firm. The agreement was with the State of U.P., for carrying certain works which contained an arbitration clause. Apparently, what transpires from the record is that there were some disputes which was referred for arbitration and the sole arbitrator Shri S.N. Dubey by means of his award dated 21.07.1996 had decreed the claims.

It is at this stage, apparently, some dispute occurred between the petitioners, who was claiming the sole proprietorship firm as well as between the private-respondents No.2 and 3, who claimed to be the partners and it was their case that M/s. Agarwal and Company was not a proprietorship but a partnership firm. It also appears that there were certain disputes inter-se the partners, as a result, the execution proceedings remained pending.

During the execution proceedings, the petitioners as well as the

private-respondents No.2 and 3 had also taken their chance by assailing certain order and the matter came up before this Court in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 which came to be decided by a Division Bench of this Court by means of its judgment dated 07.10.2004 passed in F.A.F.O. No.350/2000.

The record also reveals that a petition was also filed before the learned Single Judge at the behest of the private-respondents No.2 and 3 bearing WRIT-C No.100157/1997 which came to be decided for want of prosecution.

The present petitioners also had filed a WRIT-C No.1000479/2002, wherein the order passed by the Executing Court dated 09.10.2001 was assailed whereby the application filed by the private-respondents seeking their impleadment in the execution proceedings was allowed. This writ petition came to be disposed of on 23.03.2022 and the relevant portion of the said order while disposing of the petition is being reproduced hereinafter for ready reference:-

"It is informed at the bar that initially the suit was filed, however the same was dismissed in default for which a restoration application is pending consideration.

In any view of the matter, the executing court cannot decide the entitlement for the dispute inter se between the parties which can be adjudicated only in an appropriate forum in a court of law.

The present petition is disposed off with the directions that the amount deposited and paid by the irrigation department in pursuance to the award passed shall be kept with the State Bank of India.

The dispute in between the partners is said to be pending before the Commercial Court, Lucknow. The final outcome of the said suit shall decide the entitlement of the parties to receive the amount."

Once the said petition came to be disposed of, the proceedings before the Executing Court became alive and it is in this context where there was primarily a dispute raised by the present petitioners alleging the firm as their sole proprietorship whereas the claim of the private-respondents No.2 and 3 being they were partners and in light of the order passed by the learned Single Judge dated 23.03.2022, the clear observation was made that insofar as the amount which was secured by the Court relating to the arbitral amount was to be placed with the respondent No.4 - Bank leaving it open for the parties to get their rights adjudicated and the final outcome of the said suit would determine the entitlement of the party who is to receive the said amount.

It appears that the petitioners had approached the Commercial Court, Lucknow and had made a submission that since there appears to be no suit pending, accordingly, the issue as to whether the petitioners was a sole proprietorship or a partnership does not survive any more and they being entitled to the decretal sum which has been secured the amount be released in their favour.

The Executing Court by means of an order dated 30.09.2022 noticed that since the High Court had already protected the amount and the Executing Court was not entitled to go behind the decree as well as the fact that whether the petitioners is a partnership firm or a sole proprietorship is to be decided in a regular proceedings and cannot be taken note of in the execution, hence, with the aforesaid the observations, the execution proceedings were consigned to record leaving the parties to fend for themselves in the suit.

Apparently, at this stage what appears is the fact that there is no suit which is pending between the parties. Merely because the private-respondents had made an application seeking their impleadment and they were permitted to be impleaded that in itself does not hamper or create any obstacle for the Executing Court to have taken the proceedings to its logical conclusion.

Learned counsel for the respondent No.4 - Bank has drawn the attention of the Court to the Page-136 of the paper-book which is a copy of the contract, which was signed wherein it is indicated that Shri Agarwal had signed for the petitioners firm and it was done in the capacity as a partner. Further, attention has been drawn to Annexure-14, which is a copy of the order dated 09.10.2001 passed by the Executing Court wherein this issue has been prima-facie considered and a finding has been returned that the private-respondents were none other but the partners of M/s. Agarwal and Company.

Needless to say that it was this order which was assailed before the learned Single Judge wherein the petition came to be disposed of by means of the order dated 23.03.2022.

From the perusal of the aforesaid documents as well as the material on record, the position that is obtained is that a prima-facie satisfaction was recorded by the Executing Court insofar as the private-respondents No.2 and 3 being partners of the firm M/s. Agarwal and Company. It is taking overall view that the Executing Court has passed the impugned order protecting the rights subject to ultimate decision to be taken by the regular Court.

The attempt of the petitioners to assail the order passed by the Executing Court that too after delay of more than a year as the impugned order is of the month of September, 2022 and the instant petition does not explain any latches. Apart from the fact it is trite law that what cannot be done directly cannot be done indirectly either. Once, a Coordinate Bench of this Court on 23.03.2022 had passed an order and the relevant portion thereof has been reproduced hereinabove first, without seeking a review or seeking liberty, the petitioners are trying to get the order diluted by assailing it in the instant petition which is legally not permissible.

For the aforesaid reasons, this Court does not find that there is any error muchless any jurisdictional error which may persuade this Court to entertain the aforesaid petition under Article 227 of the Constitution of India. Having said that the Court further observes that in case if any legal forum is available to the petitioners to ventilate their grievance, they are entitled to do so, however, this Court is not inclined to interfere in the petition, which is accordingly **dismissed**.

Order Date :- 20.12.2023

Rakesh/-