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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CHAMBER SUMMONS (L) NO. 875 OF 2014
ALONG WITH
CHAMBER SUMMONS (L) NO. 236 OF 2015
AND
CHAMBER SUMMONS (L) NO. 492 OF 2015
IN
EXECUTION APPLICATION NO. 581 OF 2010**

Swarup Group of Industries & Anr. ...Applicants

In the matter of:

National Agricultural Co-operative Marketing
Federation of India Limited ...Plaintiff/Judgment Creditor

Vs.

Swarup Group of Industries & Anr. ...Defendants/Judgment Dbtrs.

Mr. Y.K. Tiwari a/w. Shashipal Shankar for Judgment Creditor

Mr. Dinyar Madon, Sr. Advocate a/w. Mr. Ashish Mehta,
Trishla Yelve & Mr. Nikhil Mallelwar i/b. Ashish Mehta
for Applicants

Mr. Cherag Balsara a/w. Mr. Parimal K. Shroff,
Mr. D.V. Deokar, Mr. Pinakin Modi, Mr. Subodh Joshi &
Mr. Salim Sayed i/b. Mr. Salim Sayed for Intervener/Obstructionist

CORAM : MRS. ROSHAN DALVI, J.

Date of reserving the Judgment : 24th April, 2015

Date of pronouncing the Judgment : 30th April, 2015

JUDGMENT:

1. The above chamber summonses have been taken out by the award debtors (defendants) in the suit essentially for

staying the execution of the above award which is an interim award passed by consent of the parties and for other ancillary reliefs.

2. The interim award was passed on 3rd December, 2008.
3. The above execution application has been taken out in this Court on 16th July, 2009 since the consent award (which could not be challenged) was not challenged.
4. Another application was also taken out for raising the attachment levied in the above execution proceeding and an order has been passed to facilitate and direct execution of the above interim consent award.
5. The attachment sought to be raised, was not raised (except on one unit with which the parties have no dispute).
6. Since the attachment was not raised, it continued and would culminate into sale of the attached properties, both movable and immovable. The execution would accordingly proceed.
7. Thereafter the final award came to be passed on 31st December 2013. That final award has been challenged on 31st March, 2014. Such challenge would be within the

statutory period of limitation under Section 34(3) of the Arbitration and Conciliation Act, 1996 (the Act).

8. However the challenge is stated to be not only to the final award, but also to the interim award passed 6 years before on 3rd December 2008. Accordingly the Interim Consent Award is now stated to be challenged after it was accepted by the parties and after execution had proceeded and was not challenged by the award debtor.
9. The petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 was to challenge the interim consent award passed 8 years prior to such challenge and the final award passed 3 months prior thereto.
10. The petition under Section 34 of the Act was filed in the High Court in Delhi after the execution thus proceeded and the aforesaid applications were made by both the award holder and the award debtor in this Court. The filing of the petition for challenging the award in the Court at Delhi is in a Court without jurisdiction. Under Section 42 of the Arbitration and Conciliation Act, 1996 an application challenging the award after the execution of the award has commenced would have to be made as a subsequent application arising out of arbitral proceedings only in the Court in which the execution application is made and in no

other Court (See in the case of **State of West Bengal & Ors. Vs. Associated Contractors (2015) 1 SCC 32**). Consequently the order of the Delhi High Court be it only an order of the admission of the petition, is without jurisdiction.

11. The challenge came to be admitted by that Court on 5th February, 2015. It has been kept for hearing on 25th August, 2015 under the order dated 5th February 2015. The order of the Delhi High Court does not show that it was present to the mind of the Court that the interim consent award has been passed 6 years prior thereto. No reasons for admitting are shown. The order only shows that the plaintiff was represented in “the previous hearings”.
12. On which date there were previous hearings is not shown by the award debtor / applicant herein.
13. It is argued by Mr. Madon that the award debtor was heard in 2014 (it is not known on which date) and that the petition was kept for hearing of the plaintiff/award holder on 11th July 2014. It is 7 months after such hearing / hearings that the petition came to be admitted as aforesaid and the hearing date is given after another 7 months.
14. Pending such challenge the above chamber summons have been taken out by the award debtor. The earliest of the

chamber summonses is the above chamber summons No. 875 of 2014 filed on 16th June 2014 followed by chamber summons No.236 of 2015 filed on 9th February, 2015 and chamber summons No.492 of 2015 filed on 4th April 2015 for essentially the same reliefs of stalling and staying the execution.

15. In the first of the aforesaid chamber summons an ad-interim order has been passed by Justice Mr. Dhanuka on 8th July, 2014. It is stated in the order itself that the execution application is filed for execution of the interim award dated 3rd December, 2008 passed by consent of the parties.
16. It was contended by the award debtor that the interim award was challenged along with the final award within the time prescribed under Section 34(3) of the Act and the petition has been part-heard and has been kept on board on 11th July 2014 for hearing the submissions of the judgment creditor. Whatever be their statements which were made by judgment debtor before this Court has not been substantiated by showing a single noting of the Delhi High Court that the petition was either adjourned to that date or was heard and adjourned on that date. Mr. Madon would argue that what has been set out by Justice Mr. Dhanuka (which is a statement of Counsel on behalf of the judgment debtor herein) showed that the petition was extensively heard and argued. That

argument itself appears to be erroneous. It is argued that since the petition is filed also challenging the consent terms award it should not be allowed to be executed.

17. The aforesaid order of Justice Mr. Dhanuka dated 8th July, 2014 directs that there have been interim orders passed in the above execution application (which is more specially the aforesaid order dated 21st March, 2013) which would continue to remain in force pending the disposal of the challenge under Section 34 of the Act.

18. Consequently the ad-interim order in the above chamber summons (L) No. 875 of 2014 dated 8th July, 2014 allows and directs the Commissioner for taking accounts to proceed with obtaining the valuation report in respect of the properties in question, but not to proceed with the sale till the next date.

19. The next date to which this chamber summons was adjourned was 30th July, 2014. On 30th July, 2014 it was adjourned to 24th September, 2014 and the ad-interim order was continued. Thereafter it has not been continued. However Mr. Madon would argue that the same position prevails until today when the chamber summons has come up for hearing. Mr. Madon relied upon the judgment in the case of **Govinda Bhagoji Kamable And Ors. Vs. Sadu Bapu**

Kamable 2004(6) Bom CR 55 = 2005(1) MhLJ 651 in which Justice A.S. Oka considered the ad-interim orders passed pending the returnable date of the application and the ad-interim orders passed up to the next date of hearing specifying the next date in the order. He held that the two apply in different circumstances.

That was the case in which the notice was made returnable on a specified date. In the meanwhile ad-interim relief was granted in terms of a particular prayer. The Court observed that :

“The first part of the order records that the notice is issued to the respondents and 9th December 2002 is fixed as the returnable date of the notice. From the plain reading of the order, it is very clear that the order of ad-interim stay was not limited to any particular date....”

The Court further observed in the different situation:

“Whenever this Court intends to grant ad-interim relief limited to a particular date, it is always mentioned in the order very specifically that the ad-interim relief will be operative till a particular date”.

20. The Court considered the dictionary meaning of the term “in the meanwhile” and held that it would be up to the happening of a particular event, which would be the hearing of the application after the service of the notice and hence the order passed in the meanwhile would operate till the

application was heard since on the returnable date it may or may not be heard. However the Court specified that when the ad-interim relief was to operate up to a specific date the position will be different.

21. In this case the direction not to proceed with the sale till 24th September, 2014. Thereafter there has been no such restraint or injunction. Hence the Commissioner is free to proceed with the sale after 24th September 2014 and is free even now.

22. The Commissioner for taking accounts has done the required valuation and has drafted the terms and conditions for sale. The judgment debtor's Advocate took time to sign the draft terms and conditions after the Commissioner showed it to the judgment debtor. Hence the Commissioner for taking accounts has adjourned his meeting to 27th April, 2015 for the award debtor to settle the terms and conditions so that the proclamation and sale notice could be finalized and the sale would proceed.

23. It is argued by Mr. Madon that Justice Mr. Dhanuka had essentially stayed the same because the execution cannot proceed in view of the challenge to the interim and the final award. It may be mentioned that such an order is only an ad-interim order and the very application being the chamber

summons is for hearing today.

24. It is, therefore, only a question of law which would have to be decided to allow the execution to proceed or to stay it as the final relief in the above chamber summons.

25. Under Section 34(1) of the Act an arbitral award can be challenged by an application made under Section 34(2) of the Act. Such application has to be made within 3 months or a further period of 30 days under Section 34(3) of the Act and the proviso thereto.

26. Under Section 36 of the Act, which deals with enforcement of the awards the award has to be enforced by the Court when the period of limitation for its challenge has expired **OR** the challenge having been made has been refused. Section 36 runs thus:

**“CHAPTER VIII
FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS**

36. Enforcement – *Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908).....”*

27. Consequently on a plain reading of Section 36 the Court must enforce the award and must allow the execution to proceed if the award is not challenged within 3 months and a

further 30 days of the passing of the award. The Court also must enforce the award and must allow the execution to proceed if the challenge to the award has been refused / rejected / dismissed.

28. In this case the time for challenging the interim consent award dated 3rd December 2008 has expired since 2nd April, 2008. The execution application itself has been filed after such period of limitation expired. Mr. Madon would argue that because an application to set aside the award has been filed (albeit after 6 years of the award becoming executable and sought to be executed) and has not been refused, but has been admitted and kept for hearing, the execution application must be stayed and the sale cannot proceed.

29. This argument calls for the interpretation of the Section. The expression **OR** in Section 36 would show that if one of the two contingencies mentioned therein applies to a case the enforcement must be made. Hence upon the mere expiry of the special period of limitation under Section 34(3) of the Act the award becomes enforceable and has to be enforced. The enjoinder of the Court is in the expression “shall be enforced”.

30. Mr. Madon’s argument would show that the other requirement also has to be complied after the period of

limitation has expired. Hence even if years after the period of limitation has expired an award is challenged and the challenge is not heard on merits and not refused and even if stay of the execution is not granted therein, Mr. Madon would argue that the automatic stay of the execution must ensue.

31. This would be wholly against not only the tenor of the section, but the spirit of the Act. Such misconceived interpretation would set at naught the very process of arbitration. It would result in and encourage challenge wholly barred by the law of limitation to rule the roost. The Act has been enacted to speed up alternative dispute resolution by the process of arbitration and conciliation. Such speeding up would include not only the conduct of the arbitration but the result of such conduct. It would, therefore, merit and demand an expeditious disposal of the challenge to the arbitration and the execution of the award in arbitration. Consequently the right of challenge to an award under Section 34 has been given within the special period of limitation much shorter than the general period of limitation granted to challenge decrees by way of appeals.

32. The challenge to an award after the execution application is taken out, movable and immovable properties are attached, interim orders are passed and after the judgment debtor himself concedes, even partly, to a particular

act in execution is an exercise wholly dishonest and lacking in bonafides, distinctly to defeat and delay not only the claim of the award creditor but the spirit of the very legislation under which it was passed.

33. The argument of Mr. Madon would mean and imply that either if the period has not expired or if the application has not been refused the execution cannot proceed. In fact the two contingencies are set out in the alternative not for the award not to be executed, but for the award to be enforced by the expression “shall be enforced”. Hence the two contingencies under section 36 are for enforcement of the award and not for stay of the award. This is made clear in the title of the Section itself.

34. Since one of the contingencies is to apply, and the first of the contingencies applies in this case, the award has to be enforced and the execution has to be directed to proceed.

35. It may be mentioned that if a stay of the execution has to be obtained it would be obtained not from the executing Court, but from the Court hearing the challenge to the award. For obtaining the stay notice to the award creditor would have to be issued. The award creditor would have to be heard and an order on merits considering the claim of the judgment debtor would have to be passed. A mere admission

of a petition 7 months after it is filed and keeping it on board 7 months thereafter for hearing would not show the Court having considered the application for stay of an arbitration award passed 6 years earlier and the merits thereof.

36. Consequently it is seen that the interim consent award has become executable. It has to be enforced. It has not been challenged within the period of limitation. It has also not been challenged thereafter to show that it could have been challenged at the distance of time that it has been, alongwith the final award. It has been accepted by the award debtor and allowed to be executed. The challenge is far too delayed. In fact the real challenge is to the final award which is not even sought to be executed. In the same application the interim award has been also sought to be challenged. The Court hearing the challenge to the award has not stayed the execution. The parameters of Section 36 for enforcing the award are satisfied.

37. Hence the execution must proceed. All the above chamber summonses are wholly misconceived and are dismissed with costs of Rs.1 lakh each.

38. On the application of the Advocate of the award debtors for stay of this order, it is ordered that the date of sale shall not be fixed by the Commissioner for taking accounts until 12th June, 2015.

(ROSHAN DALVI, J.)