FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.207 OF 2017
IN
COMMERCIAL EXECUTION APPLICATION NO.68 OF 2016

National Steel & Agro Industries Limited .. Applicant

In the matter between:

Smart Timing Steel Limited .. Claimant

vs.

National Steel & Agro Industries Limited .. Respondent

Mr.R.D.Soni a/w Mr.Vaibhav Sugdare i/b Ms.Prachi Tatake for the applicant

Mr.Ashwin Shanker a/w Mr.Bimal Rajasekhar and Mr.Vishal Meena for the respondent

CORAM : K. K. TATED, J.
DATE : SEPTEMBER 19, 2017

P.C.:

1. Heard the learned counsel for the parties.

2. This Chamber Summons is preferred by original respondent for setting aside warrant of attachment and/or notice dated 7th of August, 2017 for execution of warrant of sale issued in Commercial Execution Application No.68 of 2016. He submits that the Commissioner for Taking Accounts, High Court, Bombay issued warrant of sale of

immovable property of the applicant i.e. office situated at 621, Tulsiani Chambers, Free Press Road, Nariman Point, Mumbai 400 021 dated 7.8.2017 for recovery of sum of Rs.2,44,54,785/-. He submits that because of dispute between the applicant and respondents, the respondents moved for Arbitration at Hong Kong. He submits that Arbitrator passed final award on 18.8.2014 holding that applicant is liable to pay as under :

> *"**11. Holdings***
>
> *Based on the award above, I hold that:*
>
> *11.1 The tribunal has jurisdiction to determine the Claimant's claim*
>
> *11.2 The Claimant has successfully proven its claims;*
>
> *11.3 The Respondent shall pay to the Claimant the outstanding sum of US$276,000 and*
>
> *11.4 The Respondent shall bear the Claimant's legal costs and the cost and arbitration in the sum of HK$ 516,600; and*
>
> *The Respondent shall pay the Claimant interest as set out in paragraph 10.3 and 10.4 above; and*
>
> *The Respondent shall pay to the Claimant the above sums forthwith."*

3. Yesterday, the matter was argued by both the parties. At the request of advocate for applicant matter was adjourned today just to take instruction whether applicant is ready and willing to deposit entire amount in this court. Today, the learned counsel for the applicant submits that it is not possible for the applicant to deposit entire amount in this court.

4. The learned counsel for the applicant submits that the foreign award in the present proceedings, is not executable by this court on several grounds. He submits that said award was passed by the Arbitrator without any jurisdiction. He further submits that there is no treaty between the two countries i.e. Hong Kong and India for execution of the award passed in Hong Kong. He further submits that Arbitrator failed to follow principle of natural justice at the time of passing award. In support of this contention, the learned counsel for the applicant relies on following grounds as raised by them in affidavit-in-support of Chamber Summons as under:

> *"i) The original petition as filed U/Sec.47 to Sec.49 of the Arbitration Act was misconceived as at no place in the petition, specified applicability of Chapter-I of Part-II of the Arbitration Act. It is submitted that there is no specific averment made as to whether New York Convention applies and/or Geneva Convention applies.*
>
> *ii) It is not specified in the original petition as to compliance of provisions of Second Schedule of the Arbitration Act. As without prejudice and in the alternative, it is the submission of the Deponent herein that the subject award cannot be recognized and/or enforced in adherence to Second Schedule and/or Third Schedule of the Arbitration Act.*
>
> *iii) Sale contract dated 3h May, 2013 specified governing law to be laws of Hong Kong.*
>
> *iv) Any enforcement of the subject award could be made only in accordance with laws of Hong Kong.*
>
> *v) Any alleged enforcement of the subject award could be made only in Hong Kong.*
>
> *ix) Appointment of Arbitrator was coatrary to principles governing Section 11 of the Arbitration Act and thereby the proceeding itself was null and void.*

x) Hearing and written proceedings of the arbitration was not commensurate with the provisions of Arbitration Act and thereby there was no reciprocity in the conduct of proceedings by the Ld. Arbitrator thereby rendering the award null and void. The subject award as rendered at various places stipulates that same was "ad-hoc arbitration" and therefore there is no final enforceable award in view of Arbitration Act. More particularly in paragraph 2.2 and 6.1, relevant extract of which is reproduced hereunder:-

2.2: As this arbitration is an ad hoc arbitration under the UNCITRAL Arbitration Rules (2010) ..

"6.1: As this arbitration is an ad hoc arbitration …........."

5. The learned Counsel for the applicant submits that apart from that, Claimant failed to comply the provisions of section 47 and 48 of the Arbitration and Conciliation Act, 1996. He submits that as per the provisions of section 47(1)(b) of the said Act, it is mandatory on the part of the claimant to place on record either the original award or copy thereof duly authenticated in the matter required by law in the country in which it was made. He submits that in the present proceedings, claimant placed on record photocopy of the final award. Along with the said photocopy, they placed on record certificate issued by Notary Public, Hong Kong Special Administrative Region. He submits that even in the Notary Certificate Exhibit-C at page 223, it is specifically used the word "purported" to be taken as the final award. Hence, the Execution Application filed by the claimant respondent for executing the award dated 18.8.2014 is not maintainable before this court. In support of the word "purport", the learned counsel for the applicant relied on dictionary meaning which is as under:

*"**Purport verb** this work purports to be authoritative: claim,*

> *profess, pretend; appear, seem, be ostensibly, pose as, impersonate, masquerade as, pass for. noun the purport of his remarks:gist, substance, drift, implication, intention, meaning, significance, sense, essence, thrust, message"*
>
> *"Purported. Reputed; rumoured."*

6. The learned counsel for the applicant further relies on the Apex Court judgment in the matter of ***Azimunnissa and others vs. The Deputy Custodian, Evacuee Properties, District Deoria and others, AIR 1961 SC 365.*** He submits that in this authority the word 'purport' is explained by the Apex Court. He submits that the word 'purport' shows that same may or may not be final. In support of this contention he relies on paragraph 20 of the said judgment which reads thus:

> *"20. The word "purport" has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable; Dicker v. Angerstein 3 Ch D 600 at p.603. Purporting is therefore indicative of what appears on the face of it or, is apparent even though in law it may not be so. This means that at the time when the Act purported to vest the property in dispute in the Custodian even though the power was not exercisable, s. 8(2-A) by giving a retrospective effect to s. 8(2) of the Act makes the vesting as if it was vesting under s. 8(2) of the Act and therefore the attack on the ground of invalidity cannot be sustained. By s. 5 of U. P. Ordinance 1 of 1949 the property of Khatoon Bibi who became an evacuee' under s. 2(c)and her property ' evacuee property' under s. 2(d) was vested in the Custodian of Evacuee Property of the province of U. P. That Ordinance was allowed to lapse. By Central Ordinance XII of 1949 as subsequently amended the vesting of evacuee property was deemed to be under that Ordinance, which in its turn was repealed under s. 55 of Ordinance XXVII of 1949 which was a valid piece of legislation. By s. 8(2) of that*

Ordinance the vesting under the previous Ordinance was deemed to be under that Ordinance as if it was in force on the date of the vesting. Ordinance XXVII of 1949 was repealed by the Act which contained provisions as to vesting in s. 8(2), which was similarly worded as the corresponding provision of the Ordinance and therefore by a fiction of law the original vesting was to be treated as if the Act was in force when the first vesting took place. The High Court of Allahabad in Azimunnissa's case, (S) AIR 1957 ALL 561 held the vesting to be invalid because upto the time of Ordinance XII of 1949 and even Ordinance XX of 1949 legislative competence was lacking, and even by the deeming provisions in s. 8(2) of Ordinance XXVII of 1949 or Act XXXI of 1950 there was no valid vesting, because the original vesting was bad. We think it unnecessary to decide as to whether the deeming provision of s. 8(2) of the Act or of Ordinance XXVII of 1949 was sufficient to give validity to the vesting. Section 8(2-A) as introduced into the Act, in our opinion, makes the vesting valid, because it gives validity to the vesting which purported to have taken place as a result of Ordinance XXVII of 1949 even though it was only apparently so and was not so in law, because that is what 'purport' implies.

7. The learned counsel for the applicant submits that even the apex court in the matter of **Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and Others, 1970 (1) SCC 670** has held that validity of the decree can be challenged at the time of Execution Application. If the decree / award itself is null and void then there is no question of execution of the same. In support of this contention, he relies on paragraph 7 of the said judgment which reads thus:

"7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection

> *appears on the face of the record : where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In Jnanendra Mohan Bhaduri & Anr. v. Rabindra Nath Chakravarti,* L.R. 60 I.A. 71 *the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution pro-ceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction."*

8. On the basis of these submissions, the learned counsel for the applicant submits that this Hon'ble Court be pleased to allow the Chamber Summons in terms of prayer clause (a) which reads thus:

> "(a) that this Hon'ble Court be pleased to raise and/or set aside warrant of attachment and/or notice dated 7th of August, 2017 for execution of warrant of sale issued in Commercial Execution Application No.68 of 2016."

9. On the other hand, the learned counsel for the claimant vehemently opposed the present Chamber Summons. He submits that the objection raised by the advocate for applicant is not maintainable in law. He submits that first objection raised by the advocate for applicant is about treaty between the two countries i.e. Hong Kong and India. He submits that Government of India issued Government Gazzette dated 24.3.2012 which reads thus:

> *"SO 580(E)- In exercise of the powers conferred*

by clause (b) of Section 44 of the Arbitration and Conciliation Act, 1996(26 of 1996), the Central Government, being satisfied that reciprocal provision have been made, hereby declares the People's Republic of China (including Hong Kong Special Administrative Region and the Macao Special Administrative Region of the People's Republic of China) to be a territory to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, set forth in the First Schedule to the said Act, applies for the purpose of any award of the nature referred to in that section made on or after the 19h day of March, 2012."

10. In support of this contention, the learned Counsel for the claimant placed on record photocopy of the said Gazzette. He submits that in view of the Gazette dated 24.3.2012 objection raised by the applicant about the treaty between the two countries is not maintainable.

11. The learned counsel for the Claimant submits that Notary Public, Hong Kong issued a certificate dated 4.5.2015 certifying the final award dated 18.8.2017 passed by the Arbitrator. He submits that, that is a practice in Hong Kong where Notary Public issued certificate to that effect. Therefore, there is no question of not relying on certificate issued by the public notary. He submits that as per section 47(1)(b) of the Arbitration and Conciliation Act, the claimant can place on record copy of award duly authenticated in a manner required by law of the country in which it was made. He submits that as per law of the Hong Kong public notary issued certificate and same is placed on record before this court. He further submits that when they moved before this court by way of Arbitration Petition No.997 of 2016, the applicant filed their Affidavit-in-Reply. In that Affidavit-in-Reply, applicant failed to raise the present issue. He further submits that after hearing both the

sides, this court (Coram: K.R.Shriram, J.) by order dated 15.11.2016 allowed the Arbitration Petition No.997 of 2016 and granted prayer clause a and b of that petition which reads thus:

> *"(a) For an order and direction that the Arbitration Award dated 18th August 2014 be enforced as a decree of this Hon'ble Court against the respondent;*
>
> *(b) For an order and direction that the respondent discloses and declares its assets."*

12. The learned Counsel for the claimant submits that at this stage in the Execution Application, applicant cannot raise such type of objection. The learned Counsel for the claimant further submits that this Hon'ble Court after considering the submissions made by both the parties, passed order on 15.11.2016 in Arbitration Petition No.997 of 2016 and allowed the same. He submits that in any case, they have to recover from the claimant more than Rs.2,44,00,000/-. Just to avoid the said payment, applicant has raised these objections which are not maintainable as per the provisions of the Arbitration and Conciliation Act, 1996. Hence, there is no substance in the present Chamber Summons and same is required to be dismissed.

13. I have heard both the sides. For considering the submissions made by both the parties, it is necessary to reproduce sections 47 and 48 of the Arbitration and Conciliation Act, 1996 which reads thus:

> *47. Evidence.—*
>
> *(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—*

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India. Explanation.—In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India. Explanation.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

14. Apart from that, the Apex Court in the matter of Brakewel Automotive Components (India) vs. P.R. Selvam Alagappan, (2017) 5

SCC 371 held that the executing court under section 47 of the Code of Civil Procedure, 1908 usually should not interfere in the execution proceedings unless and until the jurisdiction point is raised and same is satisfied by the applicant. Paragraph 21 to 23 of the said order reads thus:

> "21. As it is, Section 47 of the Code mandates determination by an executing court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof.
>
> *22. Judicial precedents to the effect that the purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric . This Court, amongst others in Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and others, 1971 (1) SCR 66 in essence enunciated that only a decree which is a nullity can be the subject matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt:*
>
> > *"6. A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.*
> >
> > *7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution*

proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

23. Though this view has echoed time out of number in similar pronouncements of this Court, in Dhurandhar Prasad Singh vs. Jai Prakash University and others, AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executabilty of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree inexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree inexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view.

15. The apex court in the matter of ***Punjab State Civil Supplies Corporation Limited and Another vs. Atwal Rice and General Mills, represented by its partners, 2017(8) SCC 116*** held that objection of the fact pertaining to the merits of the controversy not capable of being tried in execution proceedings. Paragraph 18, 19, 20, 29, 30 reads thus:

"18. In other words, the arbitral award has been given the status of a decree of the Civil Court and, therefore, it is enforced like a decree of the Civil Court by applying the provisions of Order 21 of the Code and all other provisions, which deal with

the execution of the decree of the Civil Court.

19. Coming to the facts of the case, we find that firstly, the award is under the Act; Secondly, the award was challenged under Section 34 by the respondents before the Additional District Judge but the challenge failed vide order dated 03.11.2012 of the Additional District Judge, Jalandhar; Thirdly, the order dated 03.11.2012 attained finality 10 because the matter was not pursued by the respondents in appeal to the High Court; Fourthly, the award, in consequence, also attained the finality by virtue of Sections 35 and 36 of the Act; Fifthly, the award was and continues to be binding on the appellant and the respondents; Sixthly, the award acquired the status of a decree of the civil court by virtue of Section 36 of the Act; Seventhly, the award has to be enforced for recovery of the awarded amount from the respondents like a decree of the civil court under the Code.

20. It is a well-settled principle of law that the executing Court has to execute the decree as it is and it cannot go behind the decree. Likewise, the executing Court cannot hold any kind of factual inquiry which may have the effect of nullifying the decree itself but it can undertake limited inquiry regarding jurisdictional issues which goes to the root of the decree and has the effect of rendering the 11 decree nullity (see- Kiran Singh & Ors. vs. Chaman Paswan & Ors., AIR1954 SC 340).

29. Order 21 Rule 1 of the Code prescribes the modes of paying money under the decree. Subclause(a) provides that the decreetal money has to be deposited in Court or by postal money order or through Bank. Clause(b) provides that amount, if paid out of court, then it has to be by postal money order or through Bank or by any mode where payment is evidenced in writing. If the payment is made under clause(b) then clause(c) prescribes the procedure as to how the money has to be paid and what details are required to be given by the judgment debtor in support of making payment.

30. Order 21 Rule 2 of the Code deals with the cases where the judgment debtor makes the payment of decreetal amount either full or part out of the Court to the decree holder.

30.1 Clause(1) empowers the decree holder to apply to the 20 executing Court to get the amount received from the judgment debtor certified from the Court and it is only when the Court certifies the amount to have been paid, it can be adjusted against the decreetal sum.

30.2 Clause (2) empowers the judgment debtor to apply to the executing Court and get the certification done by the Court of the amount paid by them to the decree holder after notice to the decree holder.

30.3 Clause (2-A) provides that no payment made by the judgment debtor shall be adjusted unless he ensures compliance of sub clause (a) or (b) or (c).

30.4 Clause (3) provides that if the Court does not certify the payment made by the judgment debtor then such payment shall not be recognized by any Court executing the decree for the purpose of giving adjustment to the judgment debtor against the decretal amount."

16. Considering the provisions of the Arbitration and Conciliation Act, 1996 and the law laid down by the Apex Court now I have to consider the submissions made by both the parties.

17. It is to be noted that in the present proceedings, the applicant participated in Arbitration Proceedings. On behalf of them their manager was present before the Arbitrator. After hearing both the sides, Arbitrator passed award dated 18.8.2014 at Hong Kong. As there is a treaty between Hong Kong and India, the said award can be executed in India by following due process of law.

18. In the present proceedings, initially the claimants filed Arbitration Petition No.997 of 2016. In that petition, after hearing both the sides this court by order dated 15.11.2016 held that Arbitration award dated 18.8.2014 can be executed in Indian Court as a decree of this court against the applicant. At that time, the applicant has not raised of this objection. Apart from that, as on today, the claimant have to recover more than Rs.2,45,00,000/- from the applicants.

19. Considering these facts and the law laid declared by the apex court in the matter of ***Brakewel Automotive Components (India) vs. P.R. Selvam Alagappan*** (Supra) ***and Punjab State Civil Supplies Corporation Limited and Another vs. Atwal Rice and General Mills, represented by its partners*** (Supra), I am of the opinion that applicant failed to make out any case to entertain the present Chamber Summons.

20. Hence, Chamber Summons stands rejected with costs.

21. At this stage, the learned counsel for the applicant seeks stay of this order for four weeks. It is to be noted that the present Chamber Summons is preferred by the applicant for setting aside the warrant of attachment and sale issued by the Prothonotary and Senior Master in Execution Application No.68 of 2016. As the Chamber Summons is dismissed there is no question of stay of this order. Apart from that, applicant is not in a position to deposit entire amount in this court.

22. Considering these facts, the oral request for stay of this order is rejected.

(K.K.TATED, J.)