

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

% **Date of decision: 10th October, 2017**

+ **CS(COMM) No.188/2017**

**NATIONAL PROJECTS CONSTRUCTION
CORPORATION**

.... Plaintiff

Through: Mr. Anup J. Bhambhani, Sr.
Adv. with Mr. Rajat Arora &
Mr. Jaypreet Singh, Advs..

Versus

ROYAL CONSTRUCTION CO. PVT. LTD. ...Defendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff, a Government of India enterprise, has instituted this suit, pleading i) that the plaintiff was awarded certain construction works by the State Organization for Food Industry, Baghdad, Iraq; ii) that the plaintiff, vide Agreement dated 29th June, 1982 appointed the defendant as a sub-contractor / associate of the plaintiff for execution of part of the aforesaid works; iii) that owing to certain disputes that arose between the plaintiff and the defendant, the defendant, invoked the arbitration clause in terms of its agreement with the plaintiff, and in which arbitration proceedings, the plaintiff, besides filing the reply to the claim of the defendant, also filed its counterclaim; iv) that the counterclaim No.1 of the plaintiff was for a sum of ID 1,39,811.00

relating to hire charges of equipment; v) that it was the case of the plaintiff therein that the plaintiff was to only provide four dumpers free of cost to the defendant and for any additional dumpers required by the defendant during the course of execution of the works sub-contracted to it, the defendant was to pay hire charges therefor to the plaintiff; however the ex-officials of the plaintiff illegally waived the hire charges for additional dumpers supplied by the plaintiff to the defendant, thereby causing a pecuniary loss to the plaintiff and corresponding pecuniary gain to the defendant; vi) that vide arbitral award dated 10th August, 2002, the claims of the defendant were allowed and the counterclaims of the plaintiff dismissed; vii) that the plaintiff filed OMP No.374/2002 under Section 34 of the Arbitration & Conciliation Act, 1996 with respect to the said award but which OMP was dismissed on 26th May, 2008; viii) that the plaintiff thereafter filed FAO(OS) No.589/2009; ix) that in compliance of the interim order dated 9th March, 2010 in the said appeal, the plaintiff deposited a sum of Rs.1.50 crores in this Court and which amount was released in favour of the defendant; x) that FAO(OS) No.589/2009 was disposed of on 19th May, 2014 and Review Petition No.297/2014

preferred by the plaintiff dismissed on 19th September, 2014; xi) that the plaintiff filed SLP(C) No.35841/2014 which was admitted and converted into Civil Appeal No.2543/2015 which was allowed on 24th February, 2015 and the orders dated 19th May, 2014 and 19th September, 2014 were set aside; xii) that Execution Petition No.131/2015 was filed by one Mool Chand Jain claiming himself to be the Managing Director of the defendant; xiii) that another Execution Petition No.192/2015 has been filed by Ashok Kumar Gaba also claiming to be the Managing Director of the defendant; xiv) both execution petitions seek enforcement of the arbitral award dated 10th August, 2002; xv) that during the pendency of the arbitral proceedings aforesaid, a case titled “CBI Vs. S.K. Relan & Ors.” came to be registered under the Prevention of Corruption Act, 1947 including against one Mr. M.C. Jain, Managing Director of the defendant; xvi) that reference to the said CBI case, is also found in the arbitral award; xvii) that in the aforesaid CBI case, charges were framed against the said Mr. M.C. Jain, Managing Director of the defendant and also against the ex-officials of the plaintiff qua the illegal waiving of hire charges for additional dumper trucks; xviii) that in the aforesaid CBI

prosecution, judgment was delivered on 8th June, 2016 whereby amongst others, Mr. M.C. Jain, Managing Director of the defendant was convicted for offences under Section 120B of IPC read with Sections 5(2) and 5(1)(d) of the Prevention of Corruption Act; xix) that Mr. M.C. Jain, Managing Director of the defendant was also held guilty on the charge of entering into criminal conspiracy to waive the hire charges for additional dumpers and sentenced to rigorous imprisonment for two years with a fine of Rs.20,000/-; xx) that besides Mr. M.C. Jain aforesaid, four officers of the plaintiff were also convicted.

2. On the basis of the aforesaid pleas, the plaintiff, in this suit, has sought the reliefs of, i) declaration that the arbitral award dated 10th August, 2002 is vitiated by fraud and consequently null and void, *non est* in law, inoperative and incapable of being enforced; ii) direction to the defendant to refund to the plaintiff the amount of Rs.1.50 crores along with interest of 18% per annum; and, iii) permanent injunction restraining the defendant from executing the arbitral award dated 10th August, 2002.

3. It is the contention of the plaintiff in the plaint, i) that the arbitral award aforesaid is premised upon fraudulent transactions and is informed and motivated by corruption between Mr. Mool Chand Jain, Managing Director of the defendant and officers of the plaintiff, as has been held in the criminal case; ii) that in this manner pecuniary loss has been caused to the plaintiff; iii) that the arbitral award has been obtained by suppressing material facts from the Arbitral Tribunal; iv) that the conviction of Mr. M.C. Jain, Managing Director of the defendant and ex-officials of the plaintiff relate to a substantial component of arbitral proceedings particularly the Counterclaim No.1 therein of the plaintiff and which was decided against the plaintiff; v) that the conviction aforesaid is based on fraudulent suppression, concealment and misrepresentation in relation to two critical documents, being letters dated 25th November, 1983 and 30th November, 1985; vi) that “by reason of conviction in criminal proceedings in relation to the same contract / the agreement that was the subject matter of the arbitration proceedings, the higher evidentiary threshold of proof beyond reasonable doubt has been made and as a result, the lower evidentiary threshold of proof of balance of

probabilities applied in the arbitral proceedings is no longer sustainable”; vii) that “as a result of the criminal conviction of the accused persons in relation to the same contract, the award granting the civil claim is no longer valid”; viii) that notwithstanding the decisions rendered in OMP No.374/2002, the arbitral award being vitiated by fraud is liable to be declared as null and void, *non est* in law, inoperative and incapable of being enforced.

4. The suit, for the purpose of court fees and jurisdiction, for the relief of declaration is valued at Rs.200/- and for the relief of recovery of Rs.1.50 crores with interest, ad valorem court fees of Rs.1.60 lacs has been paid and for the relief of permanent injunction, again at Rs.200/-.

5. The suit was listed first on 10th March, 2017 for admission, subject to office objection of court fees, when the following order was made:

“3. The office objection qua court fees subject to which the suit is listed is kept open for adjudication.

4. The plaintiff has sued for i) declaration that an arbitral award, with respect where to the petition filed by the plaintiff under Section 34

of the Arbitration & Conciliation Act, 1996 has been dismissed and appeal and the Special Leave Petition filed to the Supreme Court whereagainst have also been dismissed, is null and void and *non est*; ii) for permanent injunction restraining the defendant from executing the award; and, iii) seeking recovery of the awarded amount which has already been recovered by the defendant. The plaintiff seeks the said reliefs on the ground that the Managing Director of the defendant and certain officials of the plaintiff have been convicted under the Prevention of Corruption Act, 1988 including with respect to transaction subject matter of arbitral award and thus the arbitral award is premised on fraudulent transaction.

5. The senior counsel for the plaintiff at the outset states that the two petitions filed for execution of the arbitral award are pending before the Bench presided over by Justice Vibhu Bakhru and the plaintiff by way of objections in the said execution petitions also has raised the same pleas as raised by way of this suit. He thus states that this suit be also considered by the Bench presided by Justice Vibhu Bakhru.

6. I have however enquired from the senior counsel for the plaintiff as to how this suit is maintainable. If the suit is not maintainable, the question of putting it before the same Bench before which the execution petitions are pending does not arise.

7. Attention of the senior counsel for the plaintiff has been drawn to ***Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd.*** 2009 (109) DRJ 101 and ***Spentex Industries Ltd. Vs. Dunavant S.A.*** 2009 SCC OnLine Del 1666, RFA (OS) No.69/2009 preferred whereagainst was dismissed vide judgment dated 29th October, 2009, ***Kvaerner Cementation India Ltd. Vs. Bajranglal Agarwal*** (2012) 5 SCC 214,

Ashok Kalra Vs. Akash Paper Board Pvt. Ltd. 2013 SCC OnLine Del 3299 and *Vimal Kishor Shah Vs. Jayesh Dinesh Shah* (2016) 8 SCC 788 holding that no such suit with respect to the arbitral award lies.

8. Attention of the senior counsel for the plaintiff is also drawn to *Shanti Kumar Panda Vs. Shakuntala Devi* (2004) 1 SCC 438 and to *Kishan Singh Vs Gurpal Singh* (2010) 8 SCC 775 holding that merely because of a contrary finding in a criminal case the outcome of the civil proceedings cannot be affected.

9. The senior counsel for the plaintiff states that he has not examined the judgments aforesaid and seeks adjournment to address thereon.

10. List on 24th March, 2017.”

6. On 24th March, 2017, the following order was made:

“1. The senior counsel for the plaintiff in response to the queries made on and as recorded in the order dated 10th March, 2017 has been heard further at length.

2. He has contended that the judgments to which his attention was drawn on 10th March, 2017 are in the context of interference with the arbitral proceedings and in which context it was held that a suit does not lie; per contra here the arbitration proceedings have culminated and it is now only the award which is in execution as a decree; thus the said judgments would have no application.

3. The senior counsel for the plaintiff in response to the query, whether the order of conviction is relatable to the contract subject

matter of award, has drawn attention to pages 109, 129, 147, 157, 205 and 211 of the order of conviction. With reference to page 147, it is stated that the contract subject matter of the conviction order and arbitral proceedings is the same.

4. The conviction order at page 211 in para 110 records that had the plaintiff brought it to the notice of the learned Arbitrator that letter dated 30th November, 1985 was written by the accused D.K. Sharma (the then Chief Project Manager, AL EDAWIYAH Project, Iraq of the plaintiff) was without any authority and was not in consonance with Clause 73 of the Agreement, then the observation of the learned Arbitrator would have been different.

5. I have enquired from the senior counsel for the plaintiff, whether the plaintiff took a plea before the Arbitral Tribunal of the letter dated 30th November, 1985 being without authority and if not, why the said plea was not taken, specially when it appears that the prosecution was underway even at the time of the arbitral proceedings. I have further enquired, whether the plaintiff had entrusted the conduct of the arbitral proceedings also to the same officials who were under prosecution with reference to the Agreement subject matter of arbitration.

6. I may in this regard notice that though in para no.21 of the plaint, pleas have been taken of the award having been obtained by suppressing material facts from the learned Arbitrator and the award having thus been obtained fraudulently but there is no clarity as to which official of the plaintiff was conducting the arbitral proceedings and why the requisite pleas, which the conviction order has observed if had been taken, the outcome of the Arbitral Tribunal may have been different, were not taken therein.

7. A plea of fraud is required to be supported by particulars as per Rule 4 of Order VI of the CPC.

8. The senior counsel for the plaintiff though has referred to *Ramesh Kumar Vs. Furu Ram* (2011) 8 SCC 613 under the Arbitration Act, 1940 but the same is in the context of the arbitral award being not genuine being collusive and sham. Unless it is the specific plea of the plaintiff that its officials conducting the arbitration were also in collusion with the defendant, it appears that the said judgment if at all applicable under the new law would also not apply.

9. Attention of the senior counsel for the plaintiff has also been drawn to grounds (i)&(iii) of Clause A of Sub-section (2) of Section 34 and to grounds (ii) of Clause B of the aforesaid Sub-section read with Explanation-1. They suggest that the pleas as sought to be taken could have been taken in proceedings under Section 34 of the Act. If such pleas could have been taken under Section 34 of the Act, the question would again arise whether the plaintiff after having not taken the said pleas or having taken the said pleas and failed therein, can maintain the suit.

10. Since the plaintiff has also sought recovery of monies from the defendant, it has also been enquired whether the defendant has any assets inasmuch as if the defendant has no assets from which the recovery sought can be made, the plaintiff would again be spending good money after bad.

11. The plaintiff to revert on all the said aforesaid aspects on 1st May, 2017 as sought.”

7. On 1st May, 2017 adjournment was sought on behalf of the plaintiff and thereafter on 17th May, 2017 the following order was made:

“1. The senior counsel for the plaintiff, in pursuance to the queries raised on 24th March, 2017, has stated:

- a. that the arbitral proceedings were not entrusted to the same officials of the plaintiff who have been convicted;
- b. that it was not the plea of the plaintiff in the arbitral proceedings that the author of the letter dated 30th November, 1985 was not authorised to write so; the plea taken was that what was stated in the letter was a proposal;
- c. that the same pleas were not taken in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996;
- d. that the effect of the letter dated 30th November, 1985 is of IQD 139811 on the arbitral award;
- e. that the plea of criminality was not taken in the arbitral proceedings;
- f. that particulars of fraud in accordance with the Order IV Rule 4 of the CPC have been pleaded in paras 8 and 21 of the plaint;
- g. that order on the objections preferred in the proceedings for execution of arbitral award have been reserved.

2. The senior counsel for plaintiff has been heard further.

3. Order on admissibility of the suit reserved.”

8. The plaintiff filed IA No.11183/2017 for disposal of the application for interim stay pleading that in the execution proceedings aforesaid, vide order dated 12th September, 2017, the plaintiff had been directed to, within eight weeks, deposit Rs.1,26,32,320/- in enforcement of the arbitral award. The said application came up on 22nd September, 2017 when it was disposed of observing that the order reserved on 17th May, 2017 will be pronounced prior thereto.

9. First, the ambiguity in the pleadings of the plaintiff needs to be clarified. As would be evident from above, it is incongruous that if the appeal of the plaintiff to the Supreme Court was allowed and the judgment of the Division Bench of this Court dismissing the appeal preferred by the plaintiff against the dismissal of its OMP was set aside, why is the arbitral award being enforced. The correct position, as transpires from the order dated 19th May, 2014 in FAO (OS) No.598/2009, is that the appeal was pressed limited to the rate at which the Arbitral Tribunal awarded interest, and the challenge to the arbitral award on other grounds was given up; the Division Bench reduced the interest from that awarded of 12% per annum from the date of commencement of arbitration proceedings till the date of

payment, to 6% per annum and fixed the date of conversion of the USD amount into Indian rupees as the date of the arbitral award. Needless to state, the review preferred and which was dismissed, was also confined to the aforesaid aspects. The Supreme Court held that the Division Bench could not have altered the rate of interest and the date of conversion from that contained in the arbitral award. It is for this reason that the arbitral award is being enforced in the execution petitions aforesaid.

10. The answer (recorded in para 1 of the order dated 24th March, 2017 reproduced above) of the senior counsel for the plaintiff in response to the query contained in paras 6 and 7 aforesaid of the order dated 10th March, 2017 makes it abundantly clear that the plaintiff, in the present suit, is seeking declaration / setting aside of the arbitral award dated 10th August, 2002 having (vide Section 36 of the Arbitration Act) the force of a decree of the Court. Such a suit for cancellation or setting aside of a decree is envisaged by Article 59 of the Schedule to the Limitation Act. Section 44 of the Indian Evidence Act, 1872 also entitles any party to a suit or other proceeding to show

that any judgment, order or decree was delivered by a Court not competent to deliver it or was obtained by fraud or collusion.

11. The first question which arises for consideration is, whether the arbitral award having the force of and executable as a decree of the Court can also be cancelled or set aside as a decree of the Court.

12. I was in ***Khanna Traders Vs. Scholar Publishing House P. Ltd.*** 241 (2017) DLT 145 (and against which no appeal is found to have been preferred) concerned not with an identical but an allied question i.e. whether objections under Section 47 of the CPC are entitled to be considered in execution of an arbitral award as a decree of the Court. A) Relying on ***Union of India Vs. Jagat Ram Trehan*** AIR 1996 Delhi 191 [and appeal preferred whereagainst was dismissed in ***Jagat Ram Trehan & Sons Vs. Union of India*** 2001 (3) Arb. LR 41 (SC)], where a Division Bench of this Court negated the contention that an arbitral award must be objected to in accordance with the provisions of the Arbitration Act (in that case of the year 1940) and that it was not open to raise question in execution proceedings and held that Section 47 of the CPC applies to execution proceedings taken pursuant to a decree making an award the rule of

the Court and it is open to the executing Court under Section 47 of the CPC to declare that the award is passed without jurisdiction and therefore the decree passed thereupon is null and void and non-executable, and B) holding that the observations in ***MSP Infrastructure Ltd. Vs. M.P. Road Development Corporation Ltd.*** 2014 SCC OnLine SC 1002 and in ***Bharti Cellular Limited Vs. Department of Telecommunications*** (2012) 192 DLT 729 to the effect, that the judgments of civil law would not apply to a proceeding under the special law as the Arbitration Act, apply to only the proceedings provided for under the Arbitration Act and cannot be extended to proceedings for execution of arbitral award, it was held that objections under Section 47 CPC, in execution of arbitral award as a decree, can be entertained.

13. I now find, Supreme Court in ***Jai Narain Parasurampuriah Vs. Pushpa Devi Saraf*** (2006) 7 SCC 756 to have been also concerned with a decree consequent to arbitral award (under the 1940 Act) and the averment of the same being fraudulent & collusive. Without however any discussion on, whether the Arbitration Law is a self contained code, the challenge thereto under Section 44 of the

Evidence Act was held to be maintainable. I also find, Supreme Court in ***Ramesh Kumar*** supra cited by senior counsel for the plaintiff to have held, that a suit for declaration that the judgment and decree in terms of arbitral award (under the 1940 Act) to be null and void as the same was result of fraud and misrepresentation, to be maintainable. It was held, that the High Court erroneously proceeded on the basis that the suit was only for declaring the arbitration agreement and the arbitral award to be invalid and which was not maintainable. It was held, that the challenge to the arbitration agreement and arbitral award was made only to establish judgment and decree in terms thereof to be vitiated with fraud. Thus, Sections 32 and 33 of the Arbitration Act, 1940, were held to be not a bar to the maintainability of the suit.

14. Though the Arbitration & Conciliation Act, 1996 has overhauled the law relating to arbitration, but I am unable to find the same to be affecting the ratio of judgments aforesaid holding challenge to the arbitral award, though under the 1996 Act itself having force of a decree without requiring a judgment and decree to be drawn by the Court in terms thereof, as under the 1940 Act, under Section 44 of the Evidence Act to be maintainable. Even under the

1996 Act, A) vide Section 36(1), the arbitral award has force of a decree, only after expiry of time prescribed for setting aside thereof under Section 34 and is executable “in the same manner as if it were a decree of a Court”; B) vide Section 34 thereof, recourse before a Court for setting aside of a arbitral award is permissible; and, C) vide Section 5 thereof, intervention by judicial authority is prohibited, only qua “matters governed by this part” i.e. Part I – Part I does not govern execution of arbitral award as if it were a decree of civil Court. In my opinion, the differences in the 1940 & 1996 Act, howsoever substantial, do not make any change in the law relating to challenge if any under the civil law to the arbitral award as if it were a decree of a Court.

15. Once objections under Section 47 of the CPC have been held to be maintainable in execution of arbitral award as a decree of the Court, notwithstanding the remedy available under Section 34 of the Arbitration Act, so would a suit for setting side of arbitral award as a decree of the Civil Court be maintainable.

16. The present is not a case of the arbitral award having force of a decree having been delivered by an Arbitral Tribunal not competent to deliver it. The ground urged by the plaintiff is, of fraud and collusion.

17. However, the fraud or collusion as a ground for setting aside of a decree, has to be in obtaining the decree. The fraud, that will enable the Court to set aside the decree at the instance of a party to the decree, must be a fraud which is extraneous to the decree. The fraud which entitles a party to the decree to have the decree set aside must have prevented the party from defending the claim in the manner most to his advantage. The fraud contemplated is an intrinsic collateral act unconnected with the matters adjudicated upon, by which a litigant is prevented from appearing and placing his case before the Court at trial. The fraud on the ground of which a decree can be set aside is not a plea of fraud on the merits of the case which could have been raised in adjudication.

18. The Full Bench of the Madras High Court in ***Kadirvelu Nainar Vs. Kuppuswami Naiker*** AIR 1919 Mad 1044 held that the fact that a decree was obtained by perjured evidence or by suppression of

evidence, is not a fraud extraneous to the decree and therefore no suit will lie to set aside the decree on that ground.

19. A Division Bench of the High Court of Bombay, in ***Bhikaji Mahadev Gund Vs. Balvant Ramchandra Kulkarni*** AIR 1927 Bom 510 cautioned that though a Court has jurisdiction to set aside a decree obtained by fraud, yet, if the second suit practically amounts to re-hearing of the first, it should not be heard. It was held that if a decree is passed on basis of perjured evidence, it cannot be open to opponent to start a new action on the allegation that that evidence was wrongly believed and that if it was so permitted, it would be the end of the doctrine of *res judicata*. A Division Bench of the High Court of Bombay in ***Shripadgouda Venkangouda Aparanji Vs. Govindgouda Narayangouda Aparanji*** AIR 1941 Bom 77 held that the expression “obtained by fraud” under Section 44 refers to the fraud practised against the Court by one party or it may also imply a fraud against any party to the proceeding; however a party cannot be permitted to take advantage of his own baseness or permitted to defeat a judgment by showing that in obtaining it he had himself practised a imposition on the Court.

20. A Division Bench of this Court in ***T.R. Verma Vs. Union of India*** (1969) ILR Delhi 587 held that fraud contemplated by Section 44 of the Evidence Act is an extrinsic act unconnected with matters adjudicated upon, such as fraud in preventing a litigant from appearing and presenting his case before the Court. Constructive fraud was held to be not enough. It was held that fraud must be actual, positive fraud, a meditate and intentional contrivance to keep the parties and/or Courts in ignorance of facts relevant to enquiry and judgment should have been obtained by such contrivance. It was yet further held that suppression of a fact which was known to the plaintiff is not a fraud within Section 44.

21. Supreme Court, in ***S.P. Chengalvaraya Naidu Vs. Jagannath*** AIR 1994 SC 853 held that the principle of “finality of litigation” cannot be pressed to the extent of such absurdity that it becomes an engine of fraud in the hands of dishonest litigants; such a judgment / decree, by the first Court or the highest Court has to be treated as a nullity by every Court, whether superior or inferior; it can be challenged in any Court, even in collateral proceedings. It was on facts held, that obtaining a preliminary decree of partition of property

without mentioning at trial, of having executed a release deed, before filing the suit, regarding the property in favour of another, to be a decree vitiated by fraud.

22. Again, in *Hamza Haji Vs. State Of Kerala* (2006) 7 SCC 416, while reiterating that Section 44 of the Evidence Act gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud, it was held on the facts of that case that where a party founded his case before Forest Tribunal on a false plea or on a claim which he knew to be false, and suppressed documents which had relevance to deciding the claim, the same would amount to fraud. It was held to be not a case of the party merely putting forward a false claim or obtaining a judgment based on perjured evidence; it was found to be suppression of most vital fact and founding of a claim on a non-existent fact, knowingly and deliberately, with the intention to deceive. It was further found to be a case where on a fundamental fact of entitlement to relief, the party had misled the Court by suppressing vital information – a case of procuring the order from Forest Tribunal by playing a fraud. It was owing thereto, that the fact that on an earlier occasion interference had

been declined on the ground of delay, was held to be not a deterrent to the Court declaring the order of Forest Tribunal as vitiated by fraud.

23. I am afraid, the present suit has been filed without the aforesaid clarity and only on general notions of fraud. The plea of fraud, even if any to be found in the plaint, is of fraud practised by the ex-officials of the plaintiff in collusion with Mr. M.C. Jain, Managing Director of the defendant in waiving off hire charges for additional dumper trucks of the plaintiff used by the defendant. The said fraud was antecedent to the arbitral proceedings culminating in the arbitral award having force of the decree and the plea with respect thereto ought to have been taken in the arbitral proceedings and / or in the petition under Section 34 of the Arbitration Act preferred with respect to the arbitral award. Even if the said plea was not taken in the said proceedings, the said plea does not amount to fraud in obtaining the arbitral award.

24. Not only are there no averments of the officials of the plaintiff conducting the arbitration proceedings and the proceedings under Section 34 of the Arbitration Act and the defendant or its Managing Director having acted collusively or fraudulently, but the senior counsel for the plaintiff, in response to the specific query (contained in

para 5 aforesaid of the order dated 24th March, 2017), on 17th May, 2017 (and as recorded in the order of that date reproduced above) categorically stated that the arbitration proceedings were not entrusted to the same officials of the plaintiff who had colluded with Mr. M.C. Jain, Managing Director of the defendant in waiver of the hire charges and which officials have been convicted.

25. Applying the aforesaid law, I fail to see any attempt even by the plaintiff to plead the case of the arbitral award having force of the decree having been obtained by the defendant by practicing fraud.

26. It has thus but to be held that no plea of fraud and /or of the arbitral award having the force of the decree having been obtained by practicing fraud, having been made, no case for setting aside of the arbitral award having force of a decree on the ground of fraud is made out.

27. There is another aspect of the matter. Section 47 of the CPC requires all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to execution, discharge or satisfaction of the decree, to be determined by

the Court executing the decree and not by a separate suit. Thus, if the plea, of the arbitral award having force of the decree being a nullity on the ground of fraud is a question relating to execution, discharge or satisfaction of the said arbitral award having force of the decree, it has to be raised before the executing Court and a separate suit therefor, as this suit is, would not lie.

28. However I find this Court to have in ***Addisons Paints & Chemicals Ltd. Vs. Santram Parma Nand*** AIR 1976 Del 137 held that an executing Court cannot go behind the decree and must take the decree as it is and must proceed to execute it – it must take the decree as per its tenor and cannot entertain any objection that the decree is incorrect in law or in facts; there is however a well established exception that if there was lack of inherent jurisdiction in the Court which passed the decree, then the decree is a nullity and the executing Court has to refuse to execute it; the question whether the decree was obtained by fraud or misrepresentation is not one which relates to inherent jurisdiction of Court; the executing Court has no jurisdiction to go into this question; a decree obtained by fraud is not a nullity but might at best be invalid; the questions relating to misrepresentation

and fraud do not relate to execution of a decree but relate to impeaching the decree itself and cannot be raised under Section 47 of CPC. No contrary view has been found by me. It thus has to be held that Section 47 of the CPC is not a bar to the suit.

29. Though I have held as aforesaid, but even if it were to be held that judgments of civil law would not apply to a proceeding under the special law as the Arbitration Act and the challenge to the arbitral award has to be only in accordance with Section 34 thereof, the suit would still be not maintainable.

30. I thus answer the questions raised in the orders reproduced above as to the maintainability and admissibility of the suit as under:

- (i) The suit for setting aside of an arbitral award having force of a decree on the ground of the arbitral award having been obtained by fraud and the proceedings pursuant thereto being tainted by fraud is maintainable.
- (ii) However the pleas in the plaint as elucidated in the replies of the senior counsel for the plaintiff to the queries in the nature of Order X Rule 2 of the CPC and as reproduced above do not disclose a case of the arbitral

award having force of a decree and the proceedings pursuant thereto being vitiated by fraud.

31. The plaint thus does not disclose a cause of action for the relief claimed.

32. Resultantly, the plaint is rejected.

No costs.

OCTOBER 10th, 2017
'gsr'

RAJIV SAHAI ENDLAW, J.

