

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

+ **Ex.F.A. No.12/2017**

% **15th May, 2017**

BENCHMARK INTERNATIONAL Appellant

Through: Mr. Vivek Luthra, Advocate.

versus

SKY BARGE FREIGHT PVT. LTD. Respondent

**CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.18283/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

Ex.F.A. No.12/2017 and C.M. No.18282/2017 (stay)

2. This Execution First Appeal is filed by the appellant/defendant/judgment debtor challenging the impugned order dated 28.2.2017 whereby the objections filed by the appellant/judgment debtor have been dismissed.

3. The facts of the case are that against the appellant/judgment debtor a suit under Order XXXVII of the Code of

Civil Procedure, 1908 (CPC) was filed and which suit was decreed in terms of the order dated 20.12.2007 as nobody on behalf of the appellant/judgment debtor pursued the leave to defend application filed. This order dated 20.12.2007 resulting in the decree against the appellant/judgment debtor reads as under:-

“Suit No.193/06
20.12.07

Present: Counsel for the plaintiff.
None for the defendant.

There is a suit under order 37 CPC. After service of summons of judgment on the defendant it filed leave to defend application on 14.2.07. Alongwith the application defendant has also filed counter claim and set of under Order 8 rule 6 and 6A of CPC on the same day. Court fee had not been affixed on the counter claim. This counter claim was inadvertently taken up and the same is not maintainable at this stage and the same could have been filed alongwith written statement only. Counter claim be returned to the defendant. Today case is fixed for arguments on leave to defend application. However defendant has not appeared since morning despite calls. It is 2.30 pm. Leave to defend application is dismissed in default. Consequently suit of the plaintiff is decreed in the sum of Rs.5,98,291.45 ps together with pendentelite and future interest @ 9% per annum. Cost of the suit is also awarded. Decree sheet be drawn and file be consigned to record room.

(A.K. Pathak)
ADJ/Delhi
20/12/07”

4. When the money decree was sought to be executed, the appellant/judgment debtor contended that the execution was not maintainable because the suit under Order XXXVII CPC filed itself was not maintainable as it was based on statement of accounts. It was also pleaded and argued by the appellant/judgment debtor that the amounts with respect to two cheques in question have been already paid to the respondent/deGREE holder, and therefore, there were no

amounts due to the respondent/decreed holder. It was therefore argued that a fraud has been perpetrated on the appellant/judgment debtor and hence the decree should be held to be inexecutable.

5. The court below has dismissed the objections filed by the appellant/judgment debtor, and in the opinion of this Court rightly, inasmuch as, merits of the matter cannot be looked into in the execution proceedings. An executing court cannot go behind a decree i.e. executing court cannot go on the aspects of merits which had to be decided in the suit i.e. the leave to defend application of the appellant/judgment debtor filed in the suit under Order XXXVII CPC. Admittedly the judgment and decree dated 20.12.2007 has become final as there was no challenge to the same, and therefore, the issues argued and which are only the merits of the matter and are thus such that they do not fall in the alleged category of judgment being obtained by fraud. Matters argued are with respect to merits and therefore it cannot be alleged to be fraud for the sake of convenience for holding that the execution cannot lie.

6. The objections were thus rightly dismissed by the Court below. Dismissed.

MAY 15, 2017
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VALMIKI J. MEHTA, J