

\$~3.

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

+ EFA(OS) 15/2017 and CM APPL. 16118/2017

DEVIKA BUILDERS (P) LTD Appellant
Through: Mr. Anil K. Aggarwal, Advocate

versus

NATIONAL CO-OPERATIVE CONSUMER FEDERATION OF
INDIA LTD. Respondent

Through: None

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

% **10.07.2017**

1. The appellant Devika Builders (P) LTD./Judgment Debtor(hereinafter referred to as '**Devika Builders**') is aggrieved by an order dated 21.03.2017 passed by the learned Single Judge in EX.P. 280/2015, dismissing the objections filed by it in reply to the Execution petition of the respondent National Cooperative Consumer Federation of India Ltd, the Decree Holder(hereinafter referred to as '**NCCF**') for seeking enforcement of an Arbitral Award dated 22.01.2010, allowing some claims/counter claims of Devika Builders and rejecting the rest.

2. A glance at the relevant facts of the case is considered necessary.

3. DDA had allotted Plot No.B-19, Okhla Industrial Area, Phase-I, New Delhi in favour of NCCF. NCCF and Devika Builders executed a Collaboration Agreement dated 14.10.1996 for undertaking construction on

the said plot. Under the Collaboration Agreement, the structure on the plot was to be raised by Devika Builders through its own finances and both the parties were entitled to equal share in the property.

4. Later on, certain disputes and differences had arisen. Devika Builders invoked the arbitration clause governing the parties and lodged certain claims before the Sole Arbitrator. On its part, NCCF also preferred certain counter claims against Devika Builders. One of the counter claims preferred by NCCF was for refund of a loan amount of Rs.37 lakhs advanced by it to Devika Builders for completion of the work. Under the Award published on 22.01.2010, the learned Sole Arbitrator partly allowed the counter claims preferred by the NCCF, including a claim with respect to the loan advanced by it to Devika Builders, for completion of work at the site.

5. Aggrieved by the Arbitral Award, both the parties had filed petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '**A&C Act**'). OMP 215/2010 was filed by Devika Builders and OMP 268/2010 was filed by NCCF. In its petition, Devika Builders had averred that the counter claim preferred by NCCF for refund of the loan amount of Rs.37 lakhs, was not an arbitrable dispute for the reason that the agreements in respect of the said loan were governed by Mortgage Deeds and therefore, beyond the scope of the Collaboration Agreement. It was contended on behalf of Devika Builders that the Sole Arbitrator lacked the inherent jurisdiction to make any award in respect of the aforesaid counter claim and to the said extent, the award was a nullity. To substantiate the said submission, counsel for Devika Builders had placed reliance on a judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors. reported as **AIR 2011 SC 2507**.

6. On hearing the parties, the learned Single Judge had however concurred with the conclusion arrived at by the Sole Arbitrator and held that the judgment of the Supreme Court in the captioned case had no application to the facts of the case at hand. By a detailed and exhaustive common judgment dated 08.05.2015, Devika Builder's petition was dismissed in entirety and the petition filed by NCCF was partly allowed, thereby, modifying the impugned Award.

7. Aggrieved by the aforesaid judgment, Devika Builders filed two appeals under Section 37 of the A&C Act, registered as FAO(OS) 516/2015 and 566/2015. Vide order dated 31.08.2016, both the appeals were admitted by the Division Bench. On the accompanying applications seeking stay of the common judgment dated 08.05.2015, it was directed that subject to Devika Builders depositing the decretal amount within six weeks, which could then be withdrawn by NCCF on furnishing security to the satisfaction of the Registrar, operation of the impugned award would remain stayed. It is an undisputed position that Devika Builders has not deposited the decretal amount in court so far.

8. After waiting for some time, NCCF, the Decree Holder filed an execution petition (Ex 280/2015) for seeking enforcement of the Arbitral Award wherein, Devika Builders filed its objections as the Judgment Debtor. Learned counsel for Devika Builders opposed the execution petition and contended that the Award was a nullity, a ground already taken by Devika Builders in OMP 215/2016 which did not find favour with the Single Judge. It was argued before the learned Single Judge that the issue of arbitrability of a claim can be raised at all the three stages, firstly, before the Arbitral Tribunal, secondly at the stage of the proceedings under Section 34

of the A&C Act, and thirdly at the stage of execution of the Arbitral Award and therefore, Devika Builders was entitled to take the plea of the award being a nullity in the execution proceedings all over again. The justification for taking such a plea in the execution proceedings was that an Arbitral Award in respect of disputes outside the scope of the Collaboration Agreement has to be treated as a nullity as the Sole Arbitrator lacked the inherent jurisdiction to make an award in relation thereto. To fortify the said submission, learned counsel relied on the decision of the Supreme Court in the case of Sarwan Kumar & Anr. Vs. Madan Lal Aggarwal reported as **(2003) 4 SCC 147**.

9. After carefully considering the arguments advanced by learned counsels for the parties, vide order dated 21.03.2017, the objections filed by Devika Builders were dismissed by holding that the decision of the Supreme Court in the case of Sarwan Kumar (supra) had no application to the facts of the case at hand and once an identical plea taken by Devika Builders during the course of arguments addressed on the Section 34 petition was considered and turned down vide judgment dated 08.05.2015, the same was binding on all the parties and Devika Builders could not be permitted to re-agitate the very same issue in the execution proceedings.

10. Assailing the order dated 21.03.2017, Mr. Aggarwal, learned counsel for the appellant submits that the learned Single Judge has failed to properly appreciate the decision in the case of Sarwan Kumar (supra) and omitted to consider another decision cited by him in the case of NTPC Ltd. vs. Deconar Services Pvt. Ltd. reported as **2010 (116) DRJ 648 (DB)**. Much stress has been laid on the fact that a decree passed by a court lacking jurisdiction being a nullity does not bind a party against whom the same was passed

even on being confirmed in appeal and therefore, it cannot operate as *res judicata*. On merits, he submits that the claims preferred by the respondent/NCCF relating to amounts due under the Loan Agreement are based on separate agreements, which could not be referred to arbitration under the Collaboration Agreement, as held in the decision in the case of Booz Allen (supra), which aspect has not been considered at all in the impugned order.

11. We have carefully considered the arguments advanced by learned counsel for the appellant and examined the pleas taken in the appeal and the documents placed on record.

12. Section 16(3) of the A&C Act contemplates that a plea that the Arbitral Tribunal is exceeding the scope of its authority, must be raised by a party as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitration proceedings. As per the record, admittedly, Devika Builders did not raise any objection with regard to the competence of the Arbitral Tribunal to adjudicate upon certain disputes raised by the NCCF in its counter claim, though such an option was available to it under Section 16 of the A&C Act, which unlike the provisions of the old Arbitration Act, 1940, empowers the Arbitral Tribunal to rule on its own jurisdiction, including a ruling on any objection with regard to the existence or validity of the arbitration agreement.

13. After the award was made, both the parties had applied to the High Court for setting aside the said award under Section 34 of the A&C Act. Yet again, Devika Builders did not lay a challenge to the counter claim granted in favour of NCCF by taking the plea of the Award being a nullity. This fact was duly noted by the learned Single Judge in para 22 of the common

judgment dated 08.05.2015.

14. Despite the above position, since oral arguments were addressed on behalf of Devika Builders on the above aspect, the learned Single Judge had considered the said plea that the Sole Arbitrator had gone beyond his jurisdiction in deciding the disputes, which were not a subject matter of the Collaboration Agreement and had finally it turned down. While doing so, the decision cited by counsel for Devika Builders in the case of Booz Allen (supra) was taken note of and it was observed that the said judgment did not have any application to the facts of the case, for the reason that in the cited case, the Supreme Court was concerned with an issue regarding arbitrability of certain disputes that had arisen between the parties in the context of an application filed under Section 8 of the Act.

15. The argument of the counsel for the appellant that notwithstanding the appeal filed by Devika Builders under Section 37 of the A&C Act, wherein a similar objection has been taken, the appellant is entitled to raise the same objection before the Executing Court, for which reliance has been placed on a decision of the Division Bench of this Court in the case of NTPC Ltd. (supra), is found to be devoid of merits. We are of the opinion that in the cited case, while examining as to whether the plea of the appellant therein that certain claims were not arbitrable, being excepted matters, regardless of their reference to the Arbitrator, the Division Bench had referred to certain decisions of the Supreme Court including one in the case of General Manager, Northern Railway vs. Sarvesh Chopra reported as **(2002) 4 SCC 45** and had concluded that it was the appellant therein who had referred all the claims to arbitration and therefore, it would not be permitted to subsequently raise objections with regard to the existence of an exception

clause and its arbitrability simply because the Arbitrator and the Single Judge had held against them. Just because the decision in the captioned case refers to the decision in the case of Sarvesh Chopra (supra) in the context of “excepted matters”, cannot be of any assistance to the appellant herein for the reason that the case of Sarvesh Chopra (supra) was governed by the old Arbitration Act and the discussion therein was on the scope of setting aside the award on the ground of an error apparent on its face. It was in the said background that the Supreme Court had referred to the three stages that were available for a party who files a petition under Section 20 of the Arbitration Act, 1940 to lay a challenge to the arbitration award on the ground of nullity.

16. In the case in hand, as noted above, the right to raise a plea with regard to the competence of the Arbitral Tribunal to rule on certain disputes was available to Devika Builders during the course of the arbitration proceedings itself. But the appellant failed to raise such a plea before the Arbitral Tribunal or in the petition filed under Section 34 of the A&C Act. It did so only in the course of arguments on the Section 34 petition that came to be decided against it. Yet again, the same plea has been taken by Devika Builders in the appeal filed by it under Section 37 of the A&C Act. It therefore cannot be argued by learned Counsel that the right to legal redressal has been completely obliterated in the case as the appeal under Section 37 is still pending adjudication.

17. Nor can the decision in the case of Sarvan Kumar (supra) cited by learned counsel for the appellant take the case of his client further for the reason that in the said case, the point that had come up for determination before the Supreme Court was as to whether a decree for ejectment passed

by a civil court *qua* a commercial tenancy in Delhi before the declaration of the law in the case of Gian Devi Anand vs. Jeevan Kumar and Ors. reported as (1985) 2 SCC 683, to the effect that such a tenancy is heritable, is inexecutable or can the Judgment Debtors object to execution of the said decree on the ground that the same was passed by a court lacking inherent jurisdiction and therefore, inexecutable.

18. The impugned order takes note of the decision in the case of Sarwan Kumar (supra) and the learned Single Judge has specifically observed that the same has no application to the fact position here since the question raised therein was with regard to execution of a decree that was passed by a civil court for eviction of a tenancy. Therefore, the submission being made by learned counsel for the appellant that the learned Single Judge has failed to properly appreciate the decision in the said case, is not tenable. We do not find any infirmity in the view taken in the impugned order. In the captioned case, in the context where the Delhi Rent Control Act itself stipulates that civil courts have no jurisdiction to entertain suits for eviction of tenancy from premises to which the said Act applies, the Supreme Court had declared that a decree passed by a court having no jurisdiction over the subject matter, would be a nullity and in those circumstances, the Judgment Debtor can object to execution of such a decree even at the stage of execution of the decree or in any other collateral proceedings.

19. In the present case, the Arbitration and Conciliation Act, 1996 being a special enactment which has been legislated with the specific intent of curbing procedural delays that are inherent in the adjudication of ordinary civil disputes pending in courts, a summary procedure has been prescribed so as to ensure speedy and efficient justice and to overcome the pitfalls that

were inherent in the Arbitration Act, 1940.

20. In our view, it is not permissible for the appellant to insist that irrespective of the pendency of its appeal under Section 37 of the A&C Act, wherein a challenge has been laid to the findings returned by the learned Single Judge in the common judgment dated 08.05.2015, the learned Single Judge would be bound to consider and decide the said plea all over again in the execution proceedings. We may reiterate that while admitting the appeals filed by Devika Builders under Section 37 of the A&C Act, the Division Bench had granted a stay of the impugned award on the condition that the appellant deposits the decretal amount, which it has failed to do.

21. If it was the intention of the Legislature to extend the benefit of staying the execution proceedings on the mere filing of an appeal under Section 37 of the Act, it would have been so prescribed in the Act itself, and then, a provision akin to Order XLI Rule 5 of the CPC would have been incorporated. However, no such provision has been incorporated in the new Act, for valid reasons, which is to cut short all kinds of procedural delays and ensure speedy disposal of disputes under the said special enactment.

22. The appellant cannot be permitted to take advantage of its own fault of first failing to take an objection with regard to the lack of jurisdiction of the Arbitral Tribunal during the arbitral proceedings as provided for under Section 17 of the A&C Act, then again, omitting to take such a plea in the appeal filed by it under Section 34. It is a different matter that despite the above position, the learned Single Judge had fairly considered the said plea and vide judgment dated 8.5.2015, turned it down as devoid of merits. Furthermore, in the appeal filed by Devika Builders under Section 37 of the A&C Act, the Division Bench had agreed to stay the impugned award on

the appellant depositing the decretal amount, which also it has failed to do.

23. In the above background, the insistence on the part of the learned counsel for the appellant that notwithstanding the plea taken before the Division Bench in the pending appeal under Section 37 of the Act, the Executing Court must be called upon to consider and decide its objections all over again, while enforcing the award, is fallacious. If such an argument is accepted, it would make a mockery of the summary procedure contemplated under the A&C Act.

24. In view of the above, we decline to entertain the present appeal, which is dismissed in *limine*, as being meritless.

HIMA KOHLI, J

DEEPA SHARMA, J

JULY 10, 2017

rkb/ap/sr/mk