

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

% **Date of decision: 17th July, 2018**

+ **EX.S.A. 4/2014 & CM No.9650/2014 (for stay).**

**NORTH DELHI POWER LIMITED (NOW KNOWN AS
TATA POWER DELHI DISTRIBUTION LIMITED)..Appellant**

Through: Mr. Manish Srivastav, Mr. Ankit
Agrawal, Advs. and Mr. Adib K.
Khan, Sr. Manager, Tata Power –
DDL.

versus

MAHINDRA COLD STORAGE Respondent

Through: Mr. B.P. Agarwal, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Execution Second Appeal, under Section 100 of the Code of Civil Procedure, 1908 (CPC) read with Order XLII Rule 1 of the CPC, impugns the order [dated 22nd April, 2014 in MCA-24/12 of the Court of Additional District Judge-12 (Central), Tis Hazari Courts, Delhi] of dismissal of Execution First Appeal filed by the appellant against the order [dated 13th December, 2011 in Execution No.56/2007 of the Court of Civil Judge-01 (North), Delhi] of dismissal of objections filed by the appellant to the execution sought by the respondent of the decree dated 17th October, 2002 in Suit No.183/1999 of the Court of Civil Judge, Delhi.

2. The appeal came up before this Court first on 29th May, 2014 when notice thereof was ordered to be issued and stay granted of execution proceedings. The said interim order has continued till now. The counsel for the appellant / defendant and the counsel for the respondent / plaintiff have been heard.

3. The respondent / plaintiff instituted the suit, from execution of judgment and decree wherein this appeal arises, for declaration that the bill raised by the Delhi Vidyut Board (DVB), being the predecessor-in-interest of the appellant, for the sum of Rs.17,12,545.58p was illegal, null and void and for permanent injunction restraining the DVB from disconnecting the electric supply to the premises of the respondent / plaintiff for non-payment of the said bill.

4. The said suit was decided vide judgment dated 17th October, 2002; the bill for Rs.17,12,545.58p, raised on 4th January, 1999, for the period from September, 1990 to December, 1991, was declared as null and void and not payable by the respondent / plaintiff and the DVB was restrained by a decree of permanent injunction from disconnecting electric supply to the premises of the respondent / plaintiff for non-payment of the said bill. It was further ordered that “outstanding amount be returned or adjusted in future bills”. No appeal was preferred against the said judgment and decree which attained finality.

5. The respondent / plaintiff, in or about February, 2002, pleading that North Delhi Power Limited (NDPL) was the successor-in-interest of DVB against which the decree had been passed, applied for execution of the aforesaid judgment and decree and in column 10 of the Execution Application, as to the manner in which the Court’s assistance was required, it was pleaded “by attachment of chair of C.E.O of NDPL”. Else, nothing was pleaded in the Execution Application, as to execution of which part of the judgment and decree was being sought, whether of the decree of declaration or of the decree of permanent injunction or of the decree insofar as directing outstanding amounts to be returned or adjusted in future bills

and if so, what amount and in what manner.

6. The appellant/defendant filed objections to the Execution Application, pleading that the respondent / plaintiff had not made any payment of the bill for Rs.17,12,539.58p and thus no monies were due for refund or for adjustment.

7. The respondent / plaintiff did not file any reply. Though the counsel for the respondent/plaintiff contends that a reply was filed but neither is he possessed of any copy thereof nor does a perusal of the Execution file requisitioned in this Court shows the respondent/plaintiff to have filed any reply to the aforesaid objections.

8. The Executing Court however, dismissed the objections and directed the appellant/defendant to refund or adjust the impugned amount, reasoning (i) that it was the contention of the counsel for the respondent/plaintiff/decree holder that an amount of Rs.13,61,478/- was to be adjusted or refunded by the appellant/defendant/judgment debtor; (ii) that the counsel for the appellant/defendant/judgment debtor had argued that the amount of Rs.13,61,478.92p against other bills had been adjusted; (iii) that the appellant/defendant/judgment debtor/its predecessor, in the written statement filed in the suit, had never taken such a plea; and, (iv) that since the bill raised by the appellant/defendant/judgment debtor itself showed a credit of Rs.13,61,478/- to have been given, it implied that the said amount had been paid by the respondent / plaintiff / decree holder to the appellant / defendant / judgment debtor in excess.

9. Upon Execution First Appeal having been preferred by the appellant / defendant / judgment debtor, the First Appellate Court has agreed with the reasoning given by the Executing Court and dismissed the appeal.

10. Finding no basis in the Execution Application and no plea of the respondent / plaintiff / decree holder that any payment was made by the respondent / plaintiff / decree holder of the bill which was impugned in the suit, I have enquired from the counsel for the respondent / plaintiff / decree holder.

11. The counsel for the respondent / plaintiff / decree holder, on specific query, states that during the pendency of the suit, of decree wherein execution was sought, there was stay against recovery of the impugned bill and the bill or any part thereof was not paid by the respondent/plaintiff/decreed holder.

12. The counsel for the respondent / plaintiff / decree holder however has drawn attention to the photocopy of a bill, which was impugned in the suit, filed along with the affidavit dated 30th September, 2015 filed in this Court and has drawn attention to the credit given therein of an amount of Rs.13,61,478.92p, while demanding the amount of Rs.17,12,545.58p and has contended that since in the impugned bill the predecessor of the appellant / defendant / judgment debtor had given credit of the said amount of Rs.13,61,478.92p, and since the demand against which the said credit was adjusted has been quashed, the respondent/plaintiff/decreed holder has become entitled to recover from the appellant/defendant/judgment debtor the amount of which credit was given.

13. The counsel for the appellant / defendant / judgment debtor, in contending so however forgets that the impugned bill has been quashed and no longer exists and along there with the credit given also disappears.

14. A reading of the judgment in the suit shows the claim of the respondent/plaintiff/decreed holder to have been, that (a) the DVB, from

1986 to 1996 billed the respondent/plaintiff/deGREE holder on Large Industrial Power (LIP) basis instead of Small Industrial Power (SIP) basis; (b) the respondent/plaintiff/deGREE holder filed a suit in this regard; (c) during the pendency of said suit, DVB agreed to withdraw LIP basis; accordingly the suit was disposed of directing DVB to issue revised bill; (d) instead of giving refund to respondent/plaintiff/deGREE holder of the excess amount of Rs.13,61,478.92p collected on LIP basis, the impugned bill for Rs.17,12,545.58p was raised and the said amount of Rs.13,61,478.92p was adjusted therein; and, (e) the demand for Rs.17,12,545.58p was forged and fabricated and created only to avoid refund of Rs.13,61,478.92p.

15. A perusal of the judgment, from execution of decree wherein this appeal arises, further shows that what was for adjudication therein and what was adjudicated therein was only the validity of the demand of Rs.17,12,545.58p. The judgment was not concerned with and did not return any finding on entitlement, if any, of respondent / plaintiff / decree holder to refund of Rs.13,61,478.92p from DVB.

16. Moreover, if the respondent / plaintiff / decree holder was entitled to recover the said sum of Rs.13,61,478.92p paid in excess or recovered in excess, the respondent / plaintiff / decree holder was required to sue therefor by paying court fee thereon. No such relief was claimed. Declaration only qua demand for Rs.17,12,545.58p was claimed. No declaration even qua entitlement of respondent/plaintiff/deGREE holder to receive the amount of Rs.13,61,478.92p from the DVB was sought.

17. The respondent/plaintiff/deGREE holder, in execution of decree quashing demand of Rs.17,12,545.58p, cannot make recovery of amounts

which were adjusted thereagainst.

18. The judgment and decree, in so far as ordering return/adjustment in future bills of outstanding amount, only referred to return/adjustment of any part of Rs.17,12,545.58p paid by the respondent / plaintiff / decree holder and does not entitle recovery by respondent / plaintiff / decree holder of the amount of which credit was given in the bill and entitlement of respondent / plaintiff / decree holder to which credit was not subject matter of suit. There is absolutely no finding in the judgment, of the entitlement of respondent / plaintiff / decree holder to recover Rs.13,61,478.92p from DVB.

19. The question, of entitlement if any of respondent / plaintiff / decree holder to Rs.13,61,478.92p, which is disputed by the appellant/defendant/judgment debtor, is thus not relating to execution discharge or satisfaction of the decree, within the meaning of Section 47 of the CPC to be adjudicated by the Executing Court. In ***Mana Devi Vs. Malki Ram*** AIR 1961 All 84, the claim, by holder of a decree for eviction, for compensation for structure of property removed by the judgment debtor, was held to be not relating to execution of decree for eviction, to be adjudged under Section 47. Else, the endeavor of the respondent/plaintiff/decreed holder to, in execution of the decree aforesaid, recover Rs.13,61,478.92p from the appellant/defendant/judgment debtor is clearly beyond the decree.

20. The impugned orders, permitting respondent / plaintiff / decree holder to, in execution of aforesaid judgment, recover Rs.13,61,478.92p from appellant/judgment/judgment debtor are thus beyond the judgment and decree of which execution was sought. The Executing Court is found to

have exceeded its jurisdiction in doing so.

21. The impugned orders of the Executing Court and the First Appellate Court thus cannot be sustained and are set aside.

22. Need to formulate substantial question of law, essential for interfering in exercise of power of Second Appeal, is not felt for the reason of the appeal itself, in my opinion, being not maintainable. Rather it is felt that even the First Appeal was not maintainable and was erroneously entertained.

23. Section 100 and Order XLII Rule 1 of the CPC, invoking which this Second Appeal has been preferred, provide for a Second Appeal against a decree in First Appeal against a decree in suit. All the orders made in the course of execution or even if adjudicating objections under Section 47 of the CPC have not been conferred the status of a decree. The definition of a decree in Section 2(2) of the CPC does not include such an order. Though Section 2(2) of the CPC, as it stood prior to the amendment of the CPC of the year 1976, included in the definition of decree the determination of any question within Section 47 of the CPC but vide amendment of the CPC of the year 1976, determination of any question within Section 47 is no longer a decree. Else, Order XXI only in Rules 46H, 58 and 103 makes the orders specified therein appealable. The order of the Executing Court of dismissal of objections preferred by the appellant/defendant/judgment debtor to the execution sought by the respondent/plaintiff/decreed holder does not fall in that category and was not appealable.

24. However, the fact remains that First Appeal was preferred and was decided without any objection by the respondent/plaintiff/decreed holder and without the First Appellate Court going into the aspect of maintainability

thereof and thereafter this appeal was preferred and has been pending for the last over four years. The counsel for the respondent/plaintiff/deGREE holder, before me also, has not objected to the maintainability of this Second Appeal and the arguments have been heard. In this view of the matter, it is now not deemed appropriate to dismiss this appeal on this ground itself especially when it has been found that the orders of the Courts below are contrary to law and beyond the powers vested in the Executing Court. The Executing Court is found to be aiding the respondent / plaintiff / decree-holder in recovering monies, for recovery of which there is no decree. It is thus deemed appropriate to do justice, by invoking jurisdiction of this Court under Article 227 of the Constitution of India.

25. The appeal is allowed and it is held that the respondent / plaintiff / decree holder, in execution of the judgment and decree aforesaid, is not entitled to recovery or adjustment of any amount whatsoever. The Execution Petition from which this appeal arises is dismissed.

26. The parties to bear their own costs.

RAJIV SAHAI ENDLAW, J.

JULY 17, 2018

‘pp’..