

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 26th September, 2018.

+ EX.F.A. 23/2018

MASTER ABHISHEK MEHRA & ORS Appellants

Through: Mr. Aman Bhalla, Ms. Aastha
Dhawan and Mr. Ali R. Osmani,
Advs.

versus

JLG RETAILS LTD & ORS Respondents

Through: Mr. Naveen Sharma, Mr. S.K.
Sharma and Mr. Sachin, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Execution First Appeal under Order XXI Rule 103 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 27th April, 2014 in Execution No.69/2017 of the Court of the Additional District Judge-05, New Delhi] of dismissal of the application filed by the appellants for execution of an Arbitral Award as a decree, accepting the objections filed by the respondents/judgment debtors.

2. This appeal came up first before this Court on 31st May, 2018, when upon the counsel for the appellant referring to *Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors* AIR 2004 SC 1330, notice of the appeal was ordered to be issued. All the four respondents stand served and Mr. Naveen Sharma, Advocate appears on their behalf. The counsels have been heard and the copies of the record annexed to the memorandum of appeal perused.

3. The appellants/decreed holders filed the application for execution of Arbitral Award dated 11th November, 2011 corrected on 16th November,

2011, and application under Section 34 of the Arbitration and Conciliation Act, 1996 preferred with respect where to was dismissed vide judgment dated 20th April, 2012 in OMP No.366/2012 of this Court and appeal under Section 37 preferred where against being FAO No.532/2012 was dismissed on 7th November, 2012 by the Division Bench of this Court and Special Leave Petition (C) No.10108/2013 preferred where against was dismissed on 18th March, 2013.

4. The appellants/decreed holders, against the column “whether any payment has been received towards satisfaction of decree/order”, of the prescribed application form for seeking extension, stated “a payment of Rs.7,23,390/- was made by the judgment debtors which was accepted by the decree holders without prejudice to all their rights and contentions. Hence the present execution petition”. Similarly, against the column “amount of suit along with interest as per decree or any other relief granted by the decree” stated (i) that the Arbitral Award was for a sum of Rs.25,25,977.28p along with interest at @ Rs.15% *pendente lite* and future interest till the date of payment; (ii) that after adjusting the monies received by the appellant, the amount to be paid under the Arbitral Award inclusive of proportionate costs awarded and interest, was Rs.40,08,769.60p; and, (iii) that the respondents, under the Arbitral Award were entitled to adjust the security deposit amount of Rs.16,46,000/-.

5. The respondents/judgment debtors filed objections to the aforesaid application for execution *inter alia* pleading as under:-

“After passing of the Award, the Decree Holder on 19.01.2012 voluntarily, without any pressure, coercion or undue influence, after due deliberations with the

*Judgment Debtor agreed to accept a sum of Rs.7,23,391/- in full and final settlement of all his claims against the Judgment Debtor in respect of the Award dated 16.11.2011 passed by the Ld. Arbitrator. The Decree Holder in pursuance of the said settlement executed a Receipt-cum-Undertaking dated 19.01.2012 and accepted the afore-said amount of Rs.7,23,391/- by way of three Demand Drafts. Copy of the Receipt-cum-Undertaking dated 19.01.2012 is annexed as **Annexure A-1**.*

That the Decree Holder in the above-said Receipt-cum-Undertaking also undertook not to challenge the Award dated 16.11.2011 passed by the Ld. Arbitrator in any manner whatsoever. But the Decree Holder after receiving the said amount became greedy and with dishonest intentions to extract more money from the Judgment Debtor challenged the Award by filing an Appeal before this Hon'ble Court in April 2012. The said Appeal was dismissed by this Hon'ble Court without even notice to the Judgment Debtor. Not satisfied with the same, the Decree Holder preferred Appeal before the Division Bench of this Hon'ble Court which was also dismissed in limine and subsequently his SLP was also dismissed".

6. The appellants/decreed holders, in reply to the aforesaid objection *inter alia* pleaded as under:-

"It is denied that after the passing of the Award the Decree Holders on 19.01.2012 voluntarily, without any pressure, coercion or undue influence and after due deliberations with the Judgment Debtors agreed to accept a sum of Rs.7,23,391/- in full and final settlement of the claims of the Decree Holders against the Judgment Debtors. It is submitted that the Judgment Debtors paid the above mentioned sum by way of three Demand Drafts for a sum of Rs.2,41,130/- each. That the Decree Holders rejected the request of the Judgment Debtors that the three Pay

Orders be accepted as full and final settlement, and categorically informed the Judgment Debtor that they would receive the said three Pay Orders without prejudice to their rights and contentions, and the Judgment Debtors handed over the three Pay Orders knowing that the Decree Holders were accepting the same without prejudice to their rights and contentions and not in full settlement of the amounts owed to them. That the Judgment Debtors at the time requested the Decree Holders to accept the Pay Orders towards the award and that they would make good the balance. That it was in these circumstances that the Decree Holders accepted the sum without prejudice to their rights and contentions which was informed to the Judgment Debtors and also mentioned on the alleged Receipt-cum-Undertaking dated 19.01.2012. Therefore, it is submitted that it was understood by the parties that the amount of Rs.7,23,391/- was not in full and final settlement and the Judgment Debtors still owed the Decree Holders with respect to the Arbitral Award.”

7. The Executing Court, vide the impugned order, dismissed the execution application reasoning (i) that the appellants/decreed holders had not denied the Receipt-cum-Undertaking vide which Rs.7,23,391/- was accepted by the appellants/decreed holders on 19th January, 2012; (ii) a perusal of memorandum of FAO (OS) No.532/2012 showed that the appellants/decreed holders, in the said FAO had not alleged that the said amount of Rs.7,23,391/- was received ‘without prejudice’; (iii) if the amount had been received ‘without prejudice’, the appellants/decreed holders would have certainly raised an objection in the FAO; and, (iv) on the basis of the document dated 19th January, 2012, the claim of the appellants/decreed holders stood finally settled.

8. I may state that the FAO No.532/2012 dated 24th May, 2010 was preferred by the appellants/decreed holders against the order dated 20th April, 2012 of the Single Bench of this Court in OMP No.366/2012 preferred by the appellants/decreed holders under Section 34 of the Arbitration Act.

9. At this stage, it is deemed appropriate to set out hereinbelow in entirety the Receipt-cum-Undertaking dated 19th January, 2012, on the basis whereof the Executing Court has dismissed the execution application. The same is as under:-

“Receipt-cum-Undertaking

We, Master Abhishek Mehra s/o Mr. Chand Mehra, Master Armaan Mehra s/o Mr. Vinay Mehra, Master Vinayak Mehra s/o Mr. Pawan Mehra all r/o S-555, Greater Kailash, Part II, New Delhi have received a sum of Rs.7,23,391/- (vide demand draft no.052021 for Rs.2,41,130, in favour of Abhishek Mehra, dd no.052020 for Rs.2,41,130, in favour of Armaan Mehra and dd no.052019 for Rs.2,41,130/- in favour of Vinayak Mehra all dated 19/01/2012 in full and final settlement of all our claims against M/s JLG Retail Ltd arising out of Lease Deed dt.02/11/2007 and supplementary agreement dt.01/02/2009. On receipt of the above amount, all our claims arising out of award dated 16/11/2011 passed by Sh. Dinesh Dayal, Sole arbitrator and the three cheques bearing no.527415 dated 17/11/2009 for Rs.72790, No.527416 dt. 09/11/2009 for Rs.72790 and 527417 dated 24/11/2009 for Rs.72790, all drawn on HDFC Bank Limited, Gurudwara Road, Karol Bagh Branch, would stand settled.

We undertake not to proceed with the cases filed by us u/s 138 NIA Complaint case no.94/2010 against JLG Retail Ltd. & Others regarding the aforementioned

cheques and undertake to withdraw the same unconditionally. We also undertake not to challenge the award dt.16/11/2011 passed by arbitrator in any manner whatsoever.

*Received without prejudice
3 pay cheques of Rs.2,41,130/- each”*

10. Being *prima facie* of the opinion (i) that the Receipt-cum-Undertaking aforesaid, not in handwriting but in computerised font, was prepared obviously at the instance of the respondents/judgment debtors; (ii) that the signatures of the appellants/decreed holders thereon are of receipt of cheques “without prejudice” and would not amount to discharge of the Arbitral Award having force of a decree under Section 36 of the Arbitration Act, I have called upon the counsel for the respondents/judgment debtors to address first. However, the counsel for the respondents/judgment debtors, without citing any law, merely reiterates what is recorded in the Receipt-cum-Undertaking aforesaid and what has been accepted by the Executing Court i.e. that the acceptance by the appellants/decreed holders of the amount of Rs.2,41,130/-, when admittedly much larger amount was due under the Arbitral Award having force of a decree, discharges the liability of the respondents/judgment debtors under the Arbitral Award. Upon attention of the counsel for the respondents/judgment debtors being invited to Order XXI Rule (1) of the CPC, he draws attention to clause (b) of sub Rule (1) thereof, ignoring sub Rule (3) thereof and also ignoring Rule (2) of Order XXI. There is no averment that the respondents/judgment debtors complied with sub Rule (2) of Rule (2). Similarly, the argument of the counsel for the respondents/judgment debtors ignores the endorsement of

‘without prejudice’, subject to which the money was accepted by the appellant/decreed holder.

11. Supreme Court, in **Reshmi Constructions, Builders and Contractors** supra, dealt with the meaning to be assigned to ‘without prejudice’ and held:-

33. What would be the effect of without prejudice offer has been considered in **Cutts v. Head and Anr.** (1984) 2 WLR 349 wherein Oliver L.J. speaking for the Court of Appeals held:

"In the end, I think that the question of what meaning is given to the words "without prejudice" is a matter of interpretation which is capable of variation according to usage in the profession. It seems to be that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after, bearing in mind that the precise question with which we are concerned in this case did not arise in Walker v. Wilsher, 23 Q.B.D. 335, and the court did not deal with it. I think that the wide body of practice which undoubtedly exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs."

34. Yet again in **Rush & Tompkins Ltd. v. Greater London Council and Anr.** (1988) 1 All ER 549:

"The rule which gives the protection of privilege to 'without prejudice' correspondence 'depends partly on public policy, namely the need to facilitate compromise, and partly on 'implied agreement' as Parker LJ stated in South Shropshire DC v. Amos [1987] 1 All ER 340 [1986] 1 WLR 1271. The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase 'without prejudice'. The classic definition of the phrase is contained in the judgment of Lindley LJ in Walker v. Wilsher (1889) 23 QBD 335:

'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.'

Although this definition was not necessary for the facts of that particular case and was therefore strictly obiter, it was expressly approved by this court in Tomlin v. Standard Telephone and Cables Ltd. [1969] 3 All ER 201 [1969] 1 WLR 1378 per Danckwerts LJ and Ormrod J. (Although he dissented in the result, on this point Ormrod J agreed with the majority.) The definition was further cited with approval by both Oliver and Fox LJ in this court in Cutts v. Head [1984] 1 All ER 597 [1984] Ch. 290. In our judgment, it may be taken as an accurate statement of the meaning of 'without prejudice', if that phrase be used without more. It is open to the parties to the correspondence to give the phrase a somewhat different meaning, e.g. where they reserve the right to bring an offer made 'without prejudice' to the attention of the court on the question of costs if the offer be not accepted (See Cutts v. Head) but subject to any such modification as may be agreed between the parties, that is the meaning of the phrase. In particulars, subject to any such modification, the parties must be taken to have intended and agreed that the privilege will cease if and when the negotiations 'without prejudice' come to fruition in a concluded agreement."

*35. Meaning the words "without prejudice" come up for consideration before this Court in **Superintendent (Tech. I) Central Excise, I.D.D. Jabalpur and Ors. v. Pratap Rai** MANU/SC/0400/1978 : 1978CriLJ1266 wherein it has been held:*

"The Appellate Collector has clearly used the words "without

prejudice" which also indicate that the order of the Collector was not final and irrevocable. The term "without prejudice" has been defined in Black's Law Dictionary as follows:

Where an offer or admission is made 'without prejudice', or a motion is defined or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See, also Dismissal Without Prejudice.

Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows:

The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.

The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties - not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs..... The word is also frequently used without the foregoing implications in statutes and inter parties to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or 'excepting'.

In short, therefore, the implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred."

36. The appellant has in its letter dated 20th December, 1990 has used the term 'without prejudice'. It has explained the situation under which the amount under the 'No Demand Certificate' had to be signed. The question may have to be considered from that angle. Furthermore, the question as to whether the respondent has waived its contractual right to receive the amount or is otherwise estopped from pleading

otherwise will itself be a fact which has to be determined by the arbitral tribunal.”

12. *De hors* the aforesaid judgment also, Supreme Court in a detailed enunciation in ***National Insurance Co. Ltd. Vs. Boghara Polyfab (P) Ltd.*** (2009) 1 SCC 267, in the context of claims for arbitration by contractors of Governmental Authorities, made after taking the amount offered in full and final settlement, has held (i) that a person who is entitled to money cannot be expected to refuse the lesser monies if offered by the person from whom monies are due, even if under compulsion of endorsing the receipt to be in full and final settlement; (ii) it cannot be lost sight of that proceedings for recovery of money take long and a person to whom money is due is ultimately interested in the money and it would be unfair to expect him to, under fear of giving up a claim of the entire amount due, refuse even what is being offered; (iii) thus even if soon after executing a receipt in full and final settlement, an intimation is sent to the Governmental Authority that the receipt was executed under compulsion and was without prejudice to claim the entire amount, the person to whom the monies are due would still be entitled to claim the same and his claim cannot be denied on the ground of having received part monies against receipt of full and final settlement, executed in circumstances in which the choice was either to take what was offered or litigate for the entire amount; the accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion; the coercion is subtle but very much real.

13. The position of the appellant/decreed holder in the present case was not different. The disputes between the parties are informed to have been accrued as far back as in the year 2010.

14. The Executing Court is thus clearly in error of law in, without appreciating the law, dismissing the application for execution.

15. The appeal thus succeeds. The impugned order is set aside. Resultantly the objections of the respondents/judgment debtors are dismissed and the execution application is restored to its original position.

16. The parties to appear before the Executing Court on 30th October, 2018 and on which date the Executing Court to proceed with the execution of the decree. A copy of the impugned order along with copy of this judgment be forwarded to the Committee of Inspecting Judges of the Executing Court.

17. The counsel for the respondents/judgment debtors at this stage states that it be clarified that the amount received by the appellant/decreed holder under the Receipt-cum-Undertaking aforesaid shall be adjusted out of the decretal amount.

18. Though I have not observed anything to the contrary and it is quite obvious and follows in law but for the sake of assuaging the counsel for the respondents/judgments debtors, is clarified so.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 26, 2018

‘pp’..

(corrected and released on 26th October, 2018).