

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

% **Date of decision: 6th July, 2018.**

+ **EX.S.A. 1/2018**

DR. S.C. JAIN

.... Appellant

Through: Mr. Amit Prabhat Deshpande and
Mr. Amit Jain, Advs.

Versus

SAHNY SECURITIES PVT. LTD.

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CMs No.26129/2018 & 26130/2018 (both for exemptions)

1. Allowed, subject to just exceptions.
2. The applications are disposed of.

EX.S.A. 1/2018 & CM No.26128/2018 (for stay)

3. This Execution Second Appeal, filed invoking Section 100 read with Section 103 read with Order XLII of the Code of Civil Procedure, 1908 (CPC), impugns the judgment/order [dated 14th May, 2018 in RCA No.233/2017 of the Court of Additional District Judge-12, Tis Hazari Courts] of dismissal of First Appeal under Order XXI Rule 58(4) of the CPC preferred by the appellant against the judgment/order [dated 4th September, 2017 in CS No.95136/2016 of the Court of Additional Senior Civil Judge (Central)] of dismissal of objections filed by the appellant to the execution sought by the respondent of arbitral award dated 4th March, 2003.

4. The counsel for the appellant has been heard and the copies of the relevant records annexed to the memorandum of this appeal perused.

5. Vide *ex-parte* arbitral award dated 4th March, 2003, the respondent was held entitled to a sum of Rs.2,24,926.59 paise together with interest @ 9% per annum from the date of filing the statement of claim i.e. 29th May, 2001, from the appellant. The challenge thereto by the appellant by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996 was dismissed as time barred on 19th September, 2012 and the appeal being FAO No.481/2012 preferred thereagainst was also dismissed on 9th July, 2014.

6. On the appellant still failing to comply with the arbitral award, the respondent filed for execution thereof as a decree of the Court.

7. The appellant filed objections in the execution, pleading (i) that the arbitral award was a nullity and non-est; (ii) that the Arbitrator lacked jurisdiction; (iii) that the appointment of the Arbitrator was not in terms of Bye-laws 270(a), (b) & (c) and 271 of the Bye-Laws of the Delhi Stock Exchange (DSE) in respect of appointment of Arbitrators; (iv) that the appellant had sent a letter dated 7th October, 2002 objecting to the appointment of the Arbitrator, as also noticed in the *ex-parte* arbitral award; (v) that the Arbitrator however still proceeded with the matter in derogation of the Bye-laws and of Section 34(2)(a)(v) read with Explanation (i) to Section 34(2) of the Arbitration Act; (vi) that in accordance with the Bye-laws, the arbitration was to be of an Arbitral Tribunal comprising three arbitrators; (vii) that the arbitral proceedings were thus not consensual; (viii) that vide Section 25(c) of the Arbitration Act, the Arbitrator is not

permitted to proceed *ex-parte* in the matter; and, (ix) that there has been a violation of the principles of natural justice; no proper notice/opportunity of the dates of hearing was served by the Arbitrator on the appellant.

8. The aforesaid objections to execution were dismissed vide order dated 4th September, 2017, finding/observing/reasoning (a) that vide order in FAO No.481/2012, execution of the arbitral award was stayed subject to the appellant/objector depositing Rs.2,25,000/- in the form of Fixed Deposit Receipt (FDR) with the Registrar General of the High Court; the High Court, while dismissing the said appeal directed that the FDR deposited with the Court be released in favour of the respondent/decree holder along with accrued interest and the respondent/decree holder withdrew the entire amount including interest, without any protest; (b) that it was the contention of the counsel for the appellant/objector that the respondent/decree holder having so received the amount, is not entitled to execute the arbitral award for balance amount due thereon; (c) that there was no merit in the said contention, as it was nowhere recorded in the orders in FAO No.481/2012 that the payment of Rs.2,25,000/- was in full and final satisfaction of the arbitral award; (d) that objections with regard to the composition of the Arbitral Tribunal or with regard to the arbitral proceedings being not in accordance with the arbitration agreement, are covered under Section 34 of the Arbitration Act; that the appellant/objector should have challenged the arbitral award on such grounds by moving an application under Section 34 of the Arbitration Act; the application under Section 34 of the Arbitration Act filed by the appellant/objector had been dismissed and FAO No.481/2012 preferred thereagainst had also been dismissed; the objections

which ought to have been adjudicated in proceedings under Section 34 of the Arbitration Act could not be raised in execution of the arbitral award; (e) that even otherwise, there was no merit in the contention of the appellant/objector that the appointment of Arbitrator was not as per the provisions of Bye-laws of DSE; (f) that the appellant/objector, after sending the letter dated 7th October, 2002, did not appear before the Arbitrator; (g) that the appellant/objector was informed of the orders in the arbitral proceedings, as is evident from letter dated 21st October, 2002 of the appellant/objector but the appellant/objector, even thereafter chose not to appear before the Arbitrator; (h) that the appellant/objector had himself not complied with Bye-law 270(a) and had not appointed his Arbitrator or taken any steps in that regard; (i) that therefore it could not be said that the arbitral proceedings were not in accordance with the Bye-laws of DSE; and, (j) that in the circumstances, the President or the Executive Director or the Convener of the DSE was fully entitled to appoint the Arbitrator, as the Arbitrator who pronounced the award was appointed.

9. The First Appeal preferred by the appellant/objector against the order aforesaid of dismissal of his objections has been dismissed vide the impugned judgment/order, reasoning (i) that there was no merit in the contention of the appellant/objector that execution of an arbitral award was not maintainable before the Court of Civil Judge because the Court of Civil Judge is not a 'Court' within the meaning of Section 2(1)(e) of the Arbitration Act in the light of the dicta of this Court in ***S.K. Brothers Vs. Delhi Development Authority*** ILR (2009) I Delhi 305 and ***Daelim Industrial Co. Ltd. Vs. Numaligarh Refinery Ltd.*** (2009) 159 DLT 579

affirmed by the Supreme Court in *Sundaram Finance Limited Vs. Abdul Samad* AIR 2018 SC 965; (ii) that the other objections of the appellant/objector qua the appointment of the Arbitrator who had rendered the arbitral award under execution were also taken by the appellant/objector in his petition under Section 34 of the Arbitration Act; though the said petition under Section 34 of the Arbitration Act had been dismissed on the ground of being barred by time but the objections taken therein including of the appointment of the Arbitrator being not in accordance with the Bye-laws of DSE were also rejected on merits and which order was upheld vide the judgment dated 9th July, 2014 in FAO No.481/2012; (iii) that the appellant/objector could not thus be permitted to raise the same objection in execution; (iv) reliance by the appellant/objector on *Sadhna Gupta Vs. Shish Pal* 2016 VII AD (Delhi) 454 and *Dharma Partisthanam Vs. Madhok Construction Pvt. Ltd.* AIR 2005 SC 214 was misconceived as in the present case, the objections which were taken in execution had already been rejected in the orders on petition under Section 34 of the Arbitration Act.

10. The counsel for the appellant/objector before me, besides reiterating the contentions urged before the Executing Court and before the First Appellate Court, has also argued that the objections of the appellant/objector have nowhere been adjudicated on merits.

11. I have considered the controversy.

12. Though the First Appellate Court is correct in reasoning that the petition under Section 34 of the Arbitration Act preferred by the appellant/objector impugning the arbitral award, besides being dismissed as

barred by time was also dismissed on merits but a perusal of the petition under Section 34 of the Arbitration Act, copy whereof has been annexed to the memorandum of this appeal, shows that the petitioner therein did not take objection to the appointment of the Arbitrator and did not contend that the appointment of the Arbitrator was violative of the Bye-laws of the DSE. Thus, even from dismissal on merits of the petition under Section 34 of the Arbitration Act, it cannot be said that the said objection taken in execution was adjudicated against the appellant/objector in orders of dismissal of petition under Section 34 of the Arbitration Act.

13. I have for detailed reasons given, in ***Khanna Traders Vs. Scholar Publishing House P. Ltd.*** (2017) 241 DLT 145 reiterated in ***National Projects Construction Corporation Vs. Royal Construction Co. Pvt. Ltd.*** 2017 SCC OnLine 10944, held that objections, if fall within the confines of Section 47 of the CPC, are entitled to be considered in execution of an arbitral award as a decree of the Court. It was further observed, relying on the dicta of the Division Bench of this Court in ***Union of India vs. Jagat Ram Trehan*** AIR 1996 Del 191, that a plea of lack of jurisdiction of the Arbitral Tribunal can be taken under Section 47 of the CPC in proceedings for execution of the award.

14. It has been held in ***Rafique Bibi Vs. Sayed Waliuddin*** (2004) 1 SCC 287, ***Balvant N. Viswamitra Vs. Yadav Sadashiv Mule*** (2004) 8 SCC 706 and ***Vijay Patel Vs. Jugal Kishore*** 2018 SCC OnLine Del 10279 that an objection, that the decree is a nullity, can be taken in execution only if there was inherent lack of jurisdiction in the Court which passed the decree. What thus falls for consideration is, whether the plea of the

appellant/objector is, of the Arbitrator who pronounced the award, inherently lacking jurisdiction to arbitrate.

15. Bye-law 270 of the Bye-laws of the DSE, on which the counsel for the appellant/objector relies, provides (i) that disputes are required to be referred to arbitration, either of a single Arbitrator or in default of sole arbitration, an arbitration tribunal comprising of three Arbitrators appointed from among the arbitration panel in the manner provided therein; (ii) that upon receipt of the reference to arbitration, the Exchange Arbitration Committee shall appoint a single Arbitrator from among the arbitration panel; (iii) that if either or both the parties, within seven days of appointment of single Arbitrator, object to single Arbitrator, then the claimant party and the respondent party shall each appoint an Arbitrator and the two Arbitrators so appointed by them shall appoint a third Arbitrator who shall act as the presiding Arbitrator; (iv) that in the event only one of the parties objects to a single Arbitrator, such party shall bear the cost of Arbitrator appointed by it as well as the cost of the third Arbitrator so appointed.

16. The arbitral award in the present case records, and it is not in dispute, (a) that the respondent/decreed holder, on 29th May, 2001 invoked arbitration in terms of the Rules, Bye-laws and Regulations of DSE Association Limited and on 19th June, 2001 filed a statement of claim; (b) the said statement of claim was sent to the appellant/objector on 22nd June, 2001; (c) that the appellant/objector, vide his letter dated 28th June, 2001 sought some documents; (d) that on 30th June, 2001, the Arbitration Committee of DSE appointed Dr. S.P. Narang as the Arbitrator; (e) however the said Dr. S.P.

Narang expressed inability; (f) that the Arbitration Committee of the DSE thereafter, on 16th July, 2001 appointed Prakash Aggarwal as the Arbitrator and whose appointment was intimated to appellant/objector as well as the respondent/decreed holder on 23rd July, 2001 and Prakash Aggarwal commenced arbitration proceedings and gave notice thereof; (g) that the appellant/objector, inspite of notice, did not appear; (h) that the appellant/objector sent a letter dated 7th September, 2001 to Securities and Exchange Board of India (SEBI) challenging the appointment of the Arbitrator and thereafter also failed to appear before Prakash Aggarwal inspite of notice; (i) that the Arbitrator Prakash Aggarwal resigned on 28th November, 2001; (j) that the Arbitration Committee of DSE, on 12th December, 2001 appointed Justice M.K. Chawla (Retd.) as the sole Arbitrator and intimation thereof was given to the parties; (k) that the appellant/objector vide his letter dated 24th December, 2001 challenged the appointment of Justice M.K. Chawla also; Justice M.K. Chawla expired on 14th March, 2002; (l) that the Arbitration Committee, on 19th July, 2002 appointed M.R. Sikka as the sole Arbitrator and again sent intimation to both the parties; (m) that M.K. Sikka also expressed inability; (n) that the Arbitration Committee of DSE, on 6th September, 2002 appointed Justice J.D. Jain (Retd.) as the sole Arbitrator and again sent intimation; (o) that the appellant/objector, vide his letter dated 17th September, 2002 objected to the appointment of Justice J.D. Jain as well; (p) that Justice J.D. Jain (Retd.) withdrew on 21st September, 2002; (q) that finally, the Arbitration Committee of DSE on 28th September, 2002 appointed the Arbitrator who rendered the award and intimation of which appointment was again sent to both the parties vide letter dated 1st October, 2002 and which was duly

served; (r) that the appellant/objector objected to the appointment of the said Arbitrator also vide letter dated 7th October, 2002; (s) that the appellant/objector inspite of notices did not appear before the Arbitrator; and, (t) that the Arbitrator therefore proceeded with the arbitration and in accordance with pleading and evidence of the respondent/decreed holder, made the arbitral award as aforesaid.

17. I am unable to see as to how the present is a case of inherent lack of jurisdiction in the Arbitral Tribunal. The appellant/objector admits arbitration agreement and admits to having agreed to arbitration of the DSE in accordance with the Bye-laws thereof. DSE, in accordance with its Bye-laws, appointed the Arbitrator who has made the award under execution. Though the appellant/objector, under the Bye-laws of DSE was entitled to seek arbitration, instead of the sole Arbitrator as appointed, of a panel of three Arbitrators, but did not take steps in that regard. The only inference is that the appellant/objector acquiesced and consented to arbitration of the sole Arbitrator. Therefore, in view of Section 4 of the Arbitration Act, the appellant/objector is now estopped from contending an inherent lack of jurisdiction of the Arbitrator. Reference can be made to ***Bharti Cellular Limited Vs. Department of Telecommunications*** (2012) 192 DLT 729.

18. I may in this regard notice that Section 13, titled “Challenge Procedure”, of the Arbitration Act, provides that even where a challenge is made to the Arbitrator and the said challenge fails, the Arbitrator is entitled to continue the arbitral proceedings and the only remedy of the challenging party is to make an application for setting aside of such arbitral award under Section 34 of the Arbitration Act. A perusal of Section 34 of the

Arbitration Act shows that the Court thereunder is entitled to set aside an arbitral award only if, *inter alia*, the composition of the Arbitral Tribunal was not in accordance with the agreement between the parties. It is not in dispute that the arbitration agreement between the parties was of arbitration in accordance with the Bye-laws of DSE and in accordance with which Bye-laws, the Arbitrator who has made the arbitral award was appointed by the DSE. No case of inherent lack of jurisdiction is thus made out.

19. It has been held in ***Hiralal Patni Vs. Kali Nath*** AIR 1962 SC 199, ***Sushil Kumar Mehta Vs. Gobind Ram Bohra*** (1990) 1 SCC 193, ***Urban Improvement Trust, Jodhpur Vs. Gokul Narain*** (1996) 4 SCC 178 and ***Addisons Paints and Chemicals Vs. M/s Sant Ram Parma Nand*** AIR 1976 Del 137 that for a decree to be set aside as a nullity in execution, the lack of jurisdiction in the Court should go to the root of the decree.

20. No merit is thus found in the appeal.

21. Before parting with the matter, I may however state that this Execution Second Appeal even otherwise is not maintainable.

22. 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.

23. The First Appellate Court unfortunately did not consider the said aspect and proceeded to decide the Execution First Appeal, which did not lie, on merits.

24. The appeal is accordingly dismissed.

RAJIV SAHAI ENDLAW, J.

JULY 06, 2018

'bs'

(corrected & released on 8th November, 2018)