

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

% **Date of decision: 11th July, 2018**

+ **EX.F.A. 29/2018**

SUMEET SALUJA

..... Appellant

Through: Mr. Ashish Kapur, Adv.

versus

A.K. HAB EUROPE BV & ANR

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.27010/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

EX.F.A. 29/2018 & CM No.27009/2018 (for stay)

3. This Execution First Appeal impugns the order [dated 2nd April, 2018 in Execution No.219/2017 of the Court of Additional District Judge (ADJ)-01, South East District, Saket Courts, New Delhi] of dismissal of objections filed by the appellant to the execution filed by the respondent no.1 of a money decree against the appellant and the respondent no.2 / judgment-debtor.

4. The objections filed by the appellant were two fold. Firstly, that the appellant / judgment-debtor was merely a Director of the respondent no.2 / judgment-debtor Whitefields International Pvt. Ltd. and a decree for liability of the respondent no.2 / judgment-debtor, a company within the meaning of Companies Act, 1956, could not be enforced against the appellant / judgment-debtor who is a Director of the respondent no.2 / judgment-debtor company. The second

objection was to the authority from the respondent no.1 / decree-holder of the signatory of the Execution Application.

5. Qua the first objection of the appellant, the Executing Court held that the decree, of which execution was sought, was for recovery of money jointly and severally against the respondent no.2 / judgment-debtor as well as the appellant / judgment-debtor and it was not open to the appellant as judgment-debtor in an execution to urge that no decree could have been passed against him.

6. The Executing Court, finding that the Special Power of Attorney (SPA) in favour of the signatory of the Execution Application and extract of the Resolution of the Board of Directors of the respondent no.1 / decree-holder in this regard had been placed on record, found no merit in the second objection aforesaid.

7. The counsel for the appellant / judgment-debtor, with respect to the former of the aforesaid two findings, draws attention to the order dated 23rd September, 2014 in RFA (OS) No.136/2014 preferred by the appellant / judgment-debtor against the judgment and decree of which execution was sought. The said order is as under:

“After some arguments, Mr. Ashish Kapur, the learned counsel representing the appellant seeks to withdraw the present appeal with liberty to urge the contentions raised in the present appeal at the time of filing of the execution by the decree holder.

The appeal is dismissed as withdrawn with the aforesaid liberty.”

8. The counsel for the appellant / judgment-debtor argues, that the Division Bench of this Court, vide the aforesaid order, has permitted

him to challenge objections the merits of the decree, in execution. It is also contended that in fact, the Division Bench had advised him to do so.

9. A perusal of the order aforesaid does not show the Division Bench to have given any such advice and such practice by advocates, of themselves withdrawing the petitions / appeals and thereafter putting the reason therefor on the Court, has to be deprecated.

10. A reading of the order shows that the appellant / judgment-debtor, after failing to have the notice in the appeal issued, withdrew the same with liberty to urge the contentions as raised therein, at the time of filing of the execution by the respondent no.1/deGREE holder and the Division Bench merely dismissed the appeal with liberty sought. There is no finding of the Division Bench, that a challenge which law does not permit to be made to the decree in execution, was permitted to be made in execution or any departure from the settled legal position was permitted, for it to be said that this Court would not change its order, even if erroneous. I may however mention that the Supreme Court, recently in **Canara Bank Vs. N. G. Subbaraya Setty** 2018 SCC OnLine SC 427, has held that even in the same proceeding, there is no *res judicata* qua the matter of law.

11. Otherwise, it is not in dispute that the money decree of which execution is sought, is jointly and severally against the respondent no.2 / judgment-debtor and the appellant / judgment-debtor. Once it is so, no error can be found in the reasoning in the impugned order, that the plea that the appellant as a Director is not liable for the debt of the respondent no.2 / judgment-debtor company ought to have been taken

in defence to the suit or in appeal against the decree and cannot be taken in execution of the decree. Supreme Court, in ***Brakewel Automotive Components (India) Pvt. Ltd. Vs. P.R. Selvam Alagappan*** (2017) 5 SCC 371, was concerned with an objection by a judgment-debtor, in execution of the money decree, that his wife and not him was the proprietor of the firm against which the suit had been instituted and the decree was thus not executable against him. It was held that (i) the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree only if it is found that the same is void ab initio and is a nullity, apart from on the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law making the decree inexecutable was promulgated after its passing; (ii) an executing court can neither travel behind the decree nor sit in appeal over the same or pass an order jeopardizing the rights of the parties thereunder; (iii) it is only in limited cases, where the decree is by a court lacking inherent jurisdiction or is a nullity, that the same is rendered *non est* and is thus inexecutable, that cause of action thereof can be thwarted; (iv) an erroneous decree cannot be equalled with one which is a nullity; and, (v) since the averment in the plaint in the suit in which decree was passed was that the defendant was the proprietor thereof, even if, in fact, the wife of the defendant and who was not impleaded was a proprietor of the firm, it would not render the decree void or unexecutable; such error would not infest the decree

with any jurisdictional infirmity or reduce it to nullity. The objection under Section 47 was thus held to be not maintainable.

12. Earlier, in ***Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman*** (1970) 1 SCC 670, it was held that the question whether the Court of Small Causes had jurisdiction to entertain the suit depended upon the interpretation of the terms of the agreement of lease and the user to which the land was put at the date of grant of the lease; these questions cannot be permitted to be raised in an execution proceeding so as to displace the jurisdiction of the Court which passed the decree. Only if the decree on the face of the record is without jurisdiction and the question does not relate to the territorial jurisdiction or Section 11 of the Suits Valuation Act, objection to the jurisdiction of the Court to make the decree may be raised; where it is necessary to investigate facts in order to determine whether the Court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding. Mention may also be made of ***Morgan Securities & Credits Pvt. Ltd. Vs. Morepen Laboratories Ltd.*** 2006 (91) DRJ 618 (EFA(OS) No.19-21/2006 preferred whereagainst was dismissed on 14th August, 2008) holding that the illegality in the rate at which interest was awarded / decreed could not be an objection in execution of the arbitral award as a decree because the executing court cannot go behind the decree or into the merits of the decree.

13. The counsel for the appellant / judgment-debtor has, in this context, referred to ***Sarup Singh Vs. Union of India*** 2011 (11) SCC

198 holding that a decree of a Court which does not have jurisdiction is null and void.

14. Citing of the aforesaid judgment is by losing sight of what constitutes a jurisdictional error. The principle that the liability of a shareholder and Director of a company is limited and a company is a distinct legal entity from its shareholders and Directors and that the shareholders and Directors of a company are not liable for the debts of the company, is subject to the principle of piercing the corporate veil. The suit in the present case was filed by the respondent no.1 / plaintiff / decree-holder for recovery of monies jointly and severally from the respondent no.2 / defendant / judgment-debtor Whitefields International Pvt. Ltd. and the appellant / defendant / judgment-debtor as its Director and this Court definitely had jurisdiction to pass a decree in favour of the respondent no.1/plaintiff/ decree-holder and it cannot be said that this Court lacked inherent jurisdiction to pass the decree.

15. An elucidation with respect to what constitutes a jurisdictional fact can be found in *Arun Kumar Vs. Union of India* (2007) 1 SCC 732, *Ramesh Chandra Sankla Vs. Vikram Cement* (2008) 14 SCC 58 and *Carona Ltd. Vs. Parvathy Swaminathan* (2007) 8 SCC 559. It was held, that a jurisdictional fact is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter; a jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a Court, a Tribunal or an Authority. It was further held, that once the Court has jurisdiction in the matter on existence of jurisdictional fact, it could decide the fact in issue or

adjudicatory fact and a wrong decision on fact in issue or on adjudicatory fact would not make the decision of the authority without jurisdiction or vulnerable, provided the essential or fundamental fact as to existence of jurisdiction is present. It was further cautioned that a distinction exists between a jurisdictional fact and an adjudicatory fact; an adjudicatory fact is a fact in issue and can be determined by a Court on merits on the basis of evidence adduced by the parties and a decision on an adjudicatory fact, even if erroneous, would be unimpeachable unless the error of law is apparent on the face of the record of the determination. ***Eversole Vs. Smith*** 159 SW 2nd 35 holding that the question whether the petitioner was an adult in adoption proceedings was not a jurisdictional fact, was cited with approval.

16. With respect to the other contention, the counsel for the appellant / judgment-debtor has handed over a copy of the SPA filed by the respondent no.1 / decree-holder and on the basis of which it is contended that the signatory of the Execution Petition had no authority from the respondent no.1 / decree-holder. It is contended that the SPA has been executed by a Director of the respondent no.1 / decree-holder and only for the purpose of the suit and not for execution.

17. I am afraid not. The same refers to “all stages of the suit”. In ***Bansidhar Shankarlal Vs. Mohd. Ibrahim*** 1970 (3) SCC 900 it was held that when sanction under Section 179(a) of the Indian Companies Act, 1913 had been obtained for prosecution of a suit, it would be plainly unnecessary to obtain fresh sanction for institution of the execution proceedings at the instance of the successful party because

execution is only a continuation of the suit. The Division Bench of the High Court of Bombay also in *Satguru Construction Co. Pvt. Ltd. Vs. GR. Bombay Co-operative Bank Ltd.* 2007 (3) Mh.L.J. 843 held that statutory bar to a suit would also apply to an execution because execution is a continuation of the suit.

18. The aforesaid shows the appellant to be taking untenable objections just to avoid liability under the decree.

19. This Execution First Appeal, even otherwise is not maintainable. All orders made in the course of the execution or adjudicating objections under Section 47 of the CPC have not been conferred the status of a decree, for an appeal to lie thereagainst. The definition of a decree under Section 2(2) of the CPC does not include an order on objections aforesaid preferred by the appellant. Though Section 2(2) of the CPC, as it stood prior to the amendment of 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 thereunder appealable. Under Rule 46H, orders under Rules 46B, 46C or 46E i.e. against a garnishee or third persons, have been made appealable. Under Rule 58, invoking which this appeal has been preferred, adjudication of claims to, or objections to attachment of property on the ground that such property is not liable to such attachment has been conferred the same status as a decree. Under Rule 103, an adjudication under Rules 98 and 100 adjudicating possession of immovable property have been conferred the status of a

decree. The objections raised by the appellant / judgment-debtor, against dismissal of which this appeal has been preferred, do not fall in any of the said categories. A right to appeal is otherwise not a natural right and has to be specifically conferred. No right of appeal has been conferred against an order of dismissal of objections as aforesaid and invocation of the appellate remedy thereagainst thus is even otherwise misconceived.

20. Thus, this appeal is dismissed with costs of Rs.25,000/- payable to the respondent no.1 / decree-holder and to be recoverable from the appellant and the respondent no.2 Whitefields International Pvt. Ltd. as part of the decretal amount.

JULY 11, 2018
'gsr'..

RAJIV SAHAI ENDLAW, J.