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

\+ C.R.P. 172/2016

RAJESH LUTHRA ..... Petitioner

Through: Mr. Samar Singh Kachwaha, Advocate.

versus

PHAFAG AG & ANR ..... Respondents

Through: None.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

O R D E R

% 05.03.2018

1. The respondents are companies incorporated in foreign jurisdiction. It appears the services of the petitioner had been availed by them, *inter alia*, to prosecute their interest *vis-a-vis* an Indian Company (Morepen Laboratories Ltd.). The proceedings taken out in that context resulted in a foreign award being granted in arbitral proceedings, the award eventually becoming subject matter of execution proceedings taken out in this Court (Execution Petition no. 332/2012).

2. In the course of the afore-said proceedings, the judgment debtor (Morepen Laboratories Ltd.) under the award made certain deposits, remittance whereof was eventually permitted subject to procedural regulatory compliance being made by the decree holder. The question arose as to who was to remit the money to the account of the foreign entities and this became subject matter of appeal – EFA (OS) no. 35/2016 – which was decided by a division bench of this Court on 19.01.2017. In terms of the

directions in appeal, wherein the said judgment debtor was held to be the person by whom necessary compliances were to be made, it having been directed that upon procedural formalities being completed, the amount of tax payable would be deposited by the registry from out of the amount deposited by the said judgment debtor and the balance would be remitted to the decree holder, i.e. the first respondent.

3. While such proceedings were pending between the respondents on one hand and the said Indian company on the other, the petitioner claims to have entered upon a memorandum of understanding (MOU) dated 30.11.2004 with the respondents. In terms of the stipulations in the said MOU, the petitioner was to render certain services and, in turn, was to receive certain amount from the respondent. Pleading cause of action on account of non-payment of amount due to him by the first respondent, in terms of the said MOU, he filed civil suit (Suit No. 58429/2016) for recovery of Rs.48,48,132/- with interest and costs, impleading the respondents as party defendants, the second defendant having been described as *proforma* party.

4. In the course of the proceedings arising out of the above-said suit, he moved an application under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (CPC) praying for attachment of the amount which had been deposited by the afore-said judgment debtor (Morepen Laboratories Ltd.) in favour of the first respondent in execution petition No.332/12. The said request was, however, declined by the additional district judge by order dated 28.09.2016 with the observations that it would not be appropriate for the said Court to pass any such order qua the amount deposited in the

execution proceedings because this Court had already directed remittance of the amount in question in favour of the first respondent.

5. It may be mentioned here that the respondents statedly have been suffering the proceedings in the civil suit *ex parte*, though, it was submitted at the hearing an application has subsequently been moved by the first respondent seeking setting aside of the *ex parte* proceedings which is still pending consideration.

6. Against the above backdrop, the order dated 28.09.2016 of the additional district judge, as aforesaid, having been challenged, a learned single judge of this Court recorded the following order on 18.10.2016:

> *"<u>EA (OS) No.674/2016</u>*
>
> *1. The decree holder has filed the present application, inter alia, praying as under:-*
>
> > *(a) direct the Judgment Debtor to take all steps necessary including but not limited to filling Form 15CA and to deposit the tax of Rs.23,11,320 with the Tax Authorities in India;*
> >
> > *(b) direct the Registry of this Hon'ble Court to remit a sum of Rs.1,96,88,680 along with accrued interest to the Applicant/Decree Holder No.1's account through wire transfer;*
> >
> > *(c) direct the Registry of this Hon'ble Court to remit the Applicant/Decree Holder No. 1's share of the excess court fees of Rs. 2,00,000 as per its order dated 15 January 2016;*
> >
> > *(d) pass any such orders/directions in favour of the Applicant/Decree Holder No.1 as this Hon'ble Court may deem fit and proper in the facts and circumstances of the instant case and in the interest of justice."*

2. The judgment debtor had deposited the entire decretal amount with the Registry of this Court and by an order dated 17.08.2016 it was clarified that decree holder is at liberty to appoint any attorney / agent to receive the funds from the Registry of this Court, subject to the regulatory compliances.
3. Mr Mehta, learned counsel appearing on behalf of the decree holder submits that the decree holder would appoint an agent, but in terms of the provisions of Order XXI Rule 1 of the CPC, the remitter of the funds would be the judgment debtor and thus, the following details are required :-

> *"a) Login ID and password for Income Tax filing of the judgment debtor;*
> *b) Digital Signature Certificate of authorised agent;*
> *c) TDS payment proof;*
> *d) PAN of the judgment debtor; and*
> *e) Bank details of the judgment debtor (remitter)."*

4. It is clarified that as the judgment debtor has deposited the funds in this Court, the judgment debtor would no longer be remitter of the said funds. Any agent so appointed by the decree holder would be at liberty to receive the funds from the Registry, subject to regulatory compliances.

5. As far as prayer relating to the excess Court Fees is concerned, the learned counsel appearing on behalf of the decree holder No.2 submits that the entire amount towards the Court Fee was paid by the decree holder No.2. Therefore, in terms of the order dated 15.01.2016, the Court Fees amount has to be refunded to the decree holder No.2 only. It is so directed.

6. The application is dismissed with the aforesaid clarifications."

7. The respondent has been duly served and had even appeared through counsel on 13.01.2017. Neither any reply has been filed nor written synopsis submitted in context of the petition at hand on their behalf. At the hearing, there is no appearance on behalf of the respondent against whom the order of attachment of the amount deposited in the execution case before the judgment in the civil suit is sought.

8. In the given facts and circumstances, this Court is of the opinion that a case for protection of the interests of the petitioner has been *prima facie* made out. The fact that in the execution proceedings, an order of remittance of money has already been passed by this Court – acting as the executing court – could and should not have come in the way of the additional district judge in either entertaining the application of the attachment before judgment or passing any effective order. The first respondent is a foreign entity and the amount lying in deposit in the execution case seemingly is the only asset which can be reached by the petitioner as the plaintiff of the civil suit which is pending seeking recovery of the amount of money claimed as due from the first respondent. But then, it has to be borne in mind that before an order of attachment before judgment in terms of Order XXXVIII Rule 5 CPC can be passed, an opportunity has to be given to the first respondent (defendant) to appear and either furnish security or to show cause why he should not be ordered to furnish security or as to why his asset to the above extent be not attached.

9. Thus, the order dated 28.09.2016 is set aside. The directions in the order dated 18.10.2016, as quoted above, restraining the first respondent from withdrawing the amount to the extent of Rs.50 lakhs from the amount

lying deposited in execution petition no. 332/12 is made absolute till an appropriate decision in accordance with law is taken by the trial court on the application under Order XXXVIII Rule 5 CPC.

10. The trial judge will issue a fresh notice to the first respondent giving opportunity to it to show cause in terms of Order XXXVIII Rule 5(1) CPC and, in case of default, direct an attachment of the amount as aforesaid pending decision on the civil suit.

11. Since the compliance with the procedural requirement will take some time, it would be appropriate that the money to the extent of Rs.50 lakhs does not lie dormant. It is, therefore, directed that the registry shall deposit the amount of Rs. 50 lakhs from out of the amount lying in deposit in the execution petition no.332/12 in an interest bearing fixed deposit receipt in a nationalised bank initially for a period of six months with provision of auto renewal.

12. The trial judge hopefully will pass a fresh detailed order in accordance with the law on the application under Order XXXVIII Rule 5 CPC, the proceedings arising wherefrom stand revived.

13. The petition stands disposed of in above terms.

R.K.GAUBA, J.

MARCH 05, 2018
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