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

Decided on: 5th August, 2019

+ **CM(M) 264/2017**

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Mr.Sanjeev Sagar, Std. Counsel with
Ms.Nazia Praveen, Advocate

versus

M/S ASHOK KUMAR & CO

..... Respondent

Through: Mr.S.K.Jain, in person Proprietor of
the respondent company.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. The present petition under Article 227 of the Constitution of India is filed by the petitioner – Delhi Development Authority [hereinafter referred to as “DDA”], against the order dated 24.08.2016, passed by ASCJ-CUM-JSCC-CUMCJ (South), Saket District Courts, Delhi in M.No.02/2013 by which the petitioner’s application under Section 144 and Order XXI read with Section 151 of the Code of Civil Procedure, 1908 [“CPC”] for restitution of the amounts paid to the respondent has been dismissed.

2. The petitioner and the respondent had entered into a construction contract, which gave rise to certain disputes between them. Under an arbitration clause contained in the contract, arbitration proceedings were instituted, which culminated in an award dated 17.10.2008 by which the

respondent was held entitled to a sum of ₹3,94,814.66, inclusive of interest until the date of award and an interest of 18% per annum thereafter. The respondent sought to execute the award by filing an Execution Petition in the Court of the Senior Civil Judge, New Delhi. During the course of execution proceedings, the award amount alongwith the accrued interest amounting to ₹4,62,766/- was admittedly paid by the petitioner/DDA to the respondent on 09.04.2018.

3. The DDA, however, filed an application for setting aside of the award under Section 34 of the Arbitration & Conciliation Act, 1996 [hereinafter referred to as “the Act”]. The award was set aside by an order of the Additional District Judge-04, South District, Saket Court Complex, New Delhi, dated 08.01.2013. This order was carried in appeal before this Court in FAO No.200/2013. The appeal was disposed of on 30.01.2014, with the following order:

“After arguments, this appeal is not pressed by the appellant. I may clarify that since the Award stands set aside, if the respondent is entitled to restitution, it can initiate proceedings in accordance with law. Parties are left to bear their own costs.

Dasti to counsel for the parties.”

4. Pursuant to the liberty granted by this Court, the DDA filed an application under Section 144 and Order XXI read with Section 151 of the CPC before the Senior Civil Judge, New Delhi for restitution of the amount which had been paid to the respondent in terms of the order dated 30.11.2009, passed by the said Court. The prayer in the application was for the payment of an amount of ₹4,62,760/- alongwith interest @ 12% per annum w.e.f. 30.11.2009 till the realisation of the amount.

5. The application was opposed by the respondent on the ground that the provisions of the CPC are not applicable to proceedings under the Act and that Section 144 of the CPC is applicable only to a decree or an order and not to an arbitral award. The respondent also contended that the order passed by the Additional District Judge under Section 34 of the Act in favour of the DDA was obtained by fraud and was therefore a nullity.

6. By the impugned order dated 24.08.2016, the Executing Court has dismissed the application under consideration relying upon the judgment of the Supreme Court in *Neelathupara Kummi Seethi Koya Phangal (Dead) By LRs vs. Montharapalla Padippua Attakoya And Ors.* 1994 Supp. (3) SCC 760. The Executing Court has come to the conclusion that the Court contemplated by Section 144 of the CPC, is either the Court which passed the order or decree or the Appellate Court which reversed it. The Executing Court, in the present case, has therefore held that it lacks jurisdiction to entertain the application in question.

7. Pursuant to an order dated 12.03.2018, passed in the present proceedings, the respondent has deposited in this Court an amount of ₹4,62,760/- on 09.04.2018 [demand draft No.006905, dated 26.03.2018].

8. I have heard Mr.Sanjeev Sagar, learned Standing Counsel for the DDA and Mr.S.K.Jain, the proprietor of the respondent concern, who is also stated to be a practicing advocate.

9. The main ground upon which the petition is resisted by Mr.Jain is that the Court of the Civil Judge is not the proper Court in which the application under Section 144 and Order XXI read with Section 151 of the CPC could have been instituted by the petitioner. He has also submitted that Section 144 of the CPC applies only to suits and not to arbitral awards. However, it is not disputed that the arbitral award under which the amount

had been paid to him has been set aside in proceedings under Section 34 of the Act against which the respondent's appeal before this Court was not pressed.

10. The question therefore, is only with regard to the appropriate proceedings and the forum in which the petitioner could have claimed restitution of the amount from the respondent. It is noteworthy that the respondent does not assert any substantive claim to the amount in question, other than to challenge the validity of the order passed in the Section 34 petition.

11. The provisions of Section 144 of the CPC are as follows:

“144. Application for restitution.—(1) Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order].

Explanation.—For the purposes of sub-section (1), the expression — “Court which passed the decree or order” shall be deemed to include,—

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

12. In a case of a regular decree in a suit, the provision of Section 144 of the CPC contemplates the filing of an application in the Court "which passed the decree or order". The explanation to the sub-section elaborates the meaning of the said phrase. In a case where the Court which passed the decree has ceased to exist or ceased to have jurisdiction to execute it, Explanation (c) to Section 144(1) of the CPC contemplates an application for restitution in the Court, which would have jurisdiction to try the suit at the time of making the application.

13. However, the jurisdiction to order restitution is not strictly confined within the parameters of Section 144 of the CPC; it is also a facet of the inherent power of a Court. The inherent power of the Court is to reconstitute the parties to the position in which they would have found themselves, absent an order of the Court. This has been emphasised, in the context of Section 144 of the CPC, by the Supreme Court in *Mrs. Kavita Trehan and Anr. vs. Balsara Hygiene Products Ltd.* (1994) 5 SCC 380. The observations of the Court in paragraphs 21 and 22, of the said judgment are of some relevance:

“21. Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive.

22. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words. “Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose,...” The instant case may not strictly fall within the terms of Section 144 but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.”

14. This judgment of the Supreme Court has been followed by this Court *inter alia* in *M/s Rajora Builder vs. Delhi Jal Board* [Execution Petition No.246/2007, decided on 13.01.2016]. In that case, this Court, in execution proceedings, directed restitution of an excess amount that had been paid to the decree holder.

15. In such a situation, the petitioner-DDA had little option other than approaching the Court pursuant to whose orders it had made the payment to the respondent. In the case of a civil suit, the respondent is right in suggesting that the applicant would have been required to approach the Court which had passed the decree, which may have subsequently been reversed. However, such an option does not arise in the case of an arbitral award.

16. In the case of an arbitral award which has been executed by a Civil Court and has subsequently been set aside under Section 34 of the Act, an additional factor to be considered is Section 36 of the Act, which provides as follows:-

“36. Enforcement.—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”

17. The provisions of Section 36(1) make it clear that an arbitral award is liable to be executed as if it were a decree of the Court. The respondent has cited the judgment of the Supreme Court in *Paramjeet Singh Patheja vs. ICDS Ltd.* (2006) 13 SCC 322 in support of the contention that Section 36 of the Act does not render the award to be a decree of the Court itself. While that position is accepted, the import of Section 36 of the Act is that the Executing Court treats the award as if it were a decree of the Court itself. It is under that power that the respondent sought execution of the award, which was granted by the Executing Court. Having invoked the power of the Executing Court to treat the award as its own decree, the respondent cannot now argue that the same Court should not so treat the award for the purposes of restitution.

18. The judgment of the Supreme Court in *Neelathupara Kummi Seethi Koya Phangal* (supra) cited by the Trial Court, was in the context of a regular suit in a civil court. In such a context, the provisions of Section 144(1) unambiguously provide for the forum in which restitution proceedings must be instituted. The said judgment does not diminish the inherent jurisdiction of the Court as laid down in *Kavita Trehan* (supra).

19. The observations of the Supreme Court in *Kavita Trehan* (supra) clearly lay down that an application for restitution is not required strictly to fall within the terms of Section 144 of the CPC, but the jurisdiction to order restitution inheres in the Court. The said view having been applied by this

Court in *Rajora Builder* (supra) to execution proceedings also, the impugned order of the Trial Court is not sustainable in law. Consequently, the impugned order of the Trial Court is set aside and the application filed by the petitioner under Section 144 and Order XXI read with Section 151 of the CPC is remanded to the learned Civil Judge for a decision on its merits.

20. As stated hereinabove, the amount of ₹4,62,760/- has been deposited by the respondent on 09.04.2018 in this Court. The said amount, alongwith the accrued interest, may be released to the petitioner, subject to the result of the application under Section 144 and Order XXI read with Section 151 of the CPC. Mr.Sagar undertakes that in the event the petitioner is unsuccessful in its application, the amount released to it pursuant to this order, will be refunded to the respondent forthwith.

21. The petition is allowed in the aforesaid terms. The respondent will pay costs assessed at ₹10,000/-, to the petitioner.

AUGUST 05, 2019

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PRATEEK JALAN, J

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