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

% **Date of Decision: 22nd December, 2020**

\+ **EFA(OS) (COMM) 6/2020**

SKS POWER GENERATION (CHHATTISGARH) LTD
..... Appellant

Through: Mr.Mukul Gupta, Sr. Advocate with Mr. Atul Shanker Mathur, Ms. Priya Singh, Mr. Vivek Mathur and Mr. Umang Katariya, Advocates

versus

AQUATECH SYSTEMS (ASIA) LIMITED ..... Respondent

Through: Mr. Hiroo Advani with Mr. Navdeep Dahiya and Mr. Tariq Khan, Advocates

\+ **FAO (OS) (COMM) 144/2020**

SKS POWER GENERATION (CHHATTISGARH) LTD
..... Appellant

Through: Mr.Mukul Gupta, Sr. Advocate with Mr. Atul Shanker Mathur, Ms. Priya Singh, Mr. Vivek Mathur and Mr. Umang Katariya, Advocates

versus

AQUATECH SYSTEMS (ASIA) LIMITED ..... Respondent

Through: Mr. Hiroo Advani with Mr. Navdeep Dahiya and Mr. Tariq Khan, Advocates

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE RAJIV SAHAI ENDLAW

CM APPLN. No.28711/2020 (for exemption from filing certified copies of annexures, lengthy list of dates, legible copies of annexures and true copies of orders) in FAO (OS) (COMM) 144/2020

1. Allowed, subject to just exceptions and as per extant rules.
2. The application is disposed of.

EFA(OS) (COMM) 6/2020, C.M. Appln. Nos.28204/2020 (of the appellant for stay), FAO (OS) (COMM) 144/2020, CM APPL. No.28710/2020 (of the appellant for stay)

3. FAO(OS) (COMM) 144/2020 impugns the order dated 24th September, 2020, in I.A. No. 5928/2020 in O.M.P. (COMM) 122/2018 under Section 34 of the Arbitration and Conciliation Act, 1996 preferred by the appellant with respect to the Arbitral Award dated 21st November, 2017 in favour of the respondent and against the appellant, for recovery of money.

4. It appears that vide earlier orders in IA No. 3632/2018 in the O.M.P aforesaid, the execution by the respondent of the subject Arbitral Award as a decree was stayed subject to the appellant depositing Rs.11 Crores in the Registry of this Court. I.A. No. 5928/2020 aforesaid was filed by the appellant before the Commercial Division of this court pleading that, (i) the appellant had paid a sum of Rs.12,05,21,864/- to the respondent by way of advance, under the contract between the parties, and the appellant had admittedly not received any goods from the respondent; (ii) though the appellant, in the arbitration, had claimed

refund of the said amount, but the same had been denied by the Arbitral Tribunal and on which aspect inter-alia the petition under Section 34 of the Arbitration Act had been filed. The appellant thus, sought stay of execution proceedings, without the condition of deposit.

5. The said I.A. No. 5928/2020 was dismissed by the Commercial Division vide the impugned order, reasoning that the Arbitral Award rejected the counter claim of the appellant for refund of the advance amount of Rs.12,05,21,864/- and once the claim of the appellant for the said amount stood rejected by the Arbitral Tribunal, at that stage, on the basis thereof, the earlier direction for deposit of the awarded amount in the court, could not be changed. It was further reasoned that the Arbitral Tribunal had recorded that the appellant, in support of its claim for refund of Rs. 12,05,21,864/-, had not even addressed any arguments and thus the execution of the awarded amount in favour of the respondent could not be stayed on the basis of the claim of the appellant which had been rejected by the Arbitral Tribunal. Axiomatically, the order earlier granted for stay of execution proceedings was also vacated since the appellant had not deposited the amount, subject to which stay of execution was granted.

6. EFA (OS) (COMM) 6/2020 has been filed, impugning the order dated 24th September, 2020 of the Commercial Division, of dismissal of objections in the form of E.A. No. 748/2020, filed by the appellant to the execution of the Arbitral Award preferred by the respondent by filing O.M.P. (ENF.) (COMM) 56/2019. The appellant, in E.A. No. 748/2020 aforesaid raised objections to the execution on the same grounds on which modification of the earlier order granting stay of execution subject

to deposit was sought and which order is subject matter of FAO (OS) (COMM) 144/2020. The Commercial Division has again held that the monetary claim of the appellant against the respondent which had not been allowed by the Arbitral Tribunal, could not be a basis of objections to execution.

7. We have heard the senior counsel for the appellant in both appeals.

8. No error can be found in the reasoning of the Commercial Division in either of the orders. Under the new arbitration regime brought into force by the 1996 Act, amended from time to time, the Arbitral Award is executable as a decree, immediately and if a petition under Section 34 of the Act is pending with respect to the Award, the same is not an automatic bar to execution, as was the position prior to the amendment of the 1996 Act with effect from the year 2016. It was for this reason only, that the need for the appellant to approach the Commercial Division for stay of execution of the Arbitral Award during the pendency of Section 34 petition, arose and which stay was granted, as in the case of appeals against money decree, subject to deposit. The appellant however did not deposit the amount in the court, taking the plea that if its Section 34 petition was allowed, it would be entitled to Rs. 12,05,21,864/- from the respondent and which was rightly declined.

9. The senior counsel for the appellant has argued that if the appellant is made to deposit the amount or the awarded amount is recovered from the appellant, the petition under Section 34 of the Act filed by the appellant will become infructuous. It is further argued that the appellant is being made to pay/deposit the amount for which its claim against the respondent is still alive in the petition under Section 34 of the Act.

10. It is for this reason only that the Commercial Division earlier had granted stay of execution subject to deposit by the appellant in the court. Had the appellant made such deposit, further orders would have been passed with respect to disbursement, even if allowed to the respondent and on terms imposed on the respondent. However the appellant chose not to comply with the order of deposit, leaving the Commercial Division with no choice but to vacate the conditional stay of execution earlier granted and in pursuance to which the Arbitral Award having force of decree is being enforced.

11. As far as the reasons, on which unconditional stay during the pendency of the Section 34 petition has been declined and objections to the execution have been dismissed by the Commercial Division, it is a well settled principle of law that a claim which has been dismissed by the first court/forum, cannot be the basis for deferring the claim of the opposite party. We may refer to plethora of judgments in the context of suits, wherein it has been held that if the plaintiff is entitled to a decree on admissions, merely because the defendant has preferred a counter claim, is no reason to defer the passing of the decree on admissions in favour of the plaintiff. Illustratively, reference in this regard may be made to ***Kalyan Mills Ltd. Vs. Union of India*** (1987) 1 SCC 27, ***Numero Uno International Ltd. Vs. Prasar Bharti*** (2008) 150 DLT 688 (DB), ***Rane Prakash Vs. N.R. Buildcon Private Ltd.*** 2008 SCC OnLine Del 84, ***Gajender Kumar Loond Vs. Samant Barara*** (2012) 187 DLT 403, ***Veena Tuli Vs. Krishan Kumar Tuli*** 2015 SCC OnLine Del 11961, ***Nimbus Communications Ltd. Vs. Prasar Bharti*** 2015 SCC OnLine Del 858 and ***Rameshwar Dayal Gupta Vs Mange Ram Gupta***

MANU/DE/2111/2019. Till the claim of the appellant for recovery of Rs. 12,05,21,864/- crystallizes and attains finality, the same cannot be a basis for denying monies already found due from the appellant to the respondent.

12. We may clarify that in view of the limited question involved and the legal question being unambiguous, we have not deemed it appropriate to go into the question of maintainability of the appeals and thus this order may not be treated as a precedent on appeals against such orders being maintainable.

13. There is no merit in either of the appeals.

14. Dismissed.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

DECEMBER 22, 2020
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