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

+ **FAO(OS) (COMM) 82/2021**

OK PLAY INDIA LIMITED

..... Appellant

Through: Mr. Anirudh Wadhwa, Advocate.

versus

BIBBY FINANCIAL SERVICES INDIA PRIVATE LIMITED

..... Respondent

Through: Ms. Anjali Sharma and Mr. Deepak
Bashta, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE AMIT BANSAL

ORDER

% **01.06.2021**

[VIA VIDEO CONFERENCING]

C.Ms. No. 17876/2021, 17877/2021 & 17878/2021(all for exemption)

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

FAO(OS) (COMM) 82/2021 and C.M. No. 17879/2021(for placing on record additional documents)

3. This appeal, under Section 13(1A) of the Commercial Courts Act, 2015 read with Section 37(1)(b) of the Arbitration and Conciliation Act, 1996, impugns the order dated 18th May, 2021 of the Commercial Division in O.M.P. (Comm) No.140/2021 preferred by the respondent under Section 34 of the Act with respect to the Arbitral Award dated 14th July, 2017 and

Additional Award dated 28th September, 2017, of issuing notice of I.A. No. 6459/2021 filed by the appellant (the respondent before the Commercial Division) for directions, for 4th August, 2021.

4. The counsel for the respondent (the applicant before the Commercial Division) appears on advance notice.

5. The position which emerges is, (a) that on Section 34 application being filed by the respondent with respect to the Arbitral Award, whereunder according to the appellant a sum of over Rs. 1.61 crores is due to the appellant from the respondent as of today, the Commercial Court before which the said application was filed, vide order dated 26th March, 2018 granted stay of execution subject to deposit by the respondent in the Commercial Court, of 50% of the entire awarded amount as of then, in the form of FDR or bank guarantee; (b) the respondent, in compliance of the aforesaid order is stated to have deposited a sum of Rs.44 lacs odd in the Commercial Court; (c) the appellant took objection before the Commercial Court, to the jurisdiction of the Commercial Court to entertain the Section 34 application; (d) the Commercial Court held that it was within its jurisdiction to entertain the Section 34 application; (e) aggrieved therefrom, the appellant preferred a revision petition before this Court; (f) though the order in the said revision petition has not been filed along with this appeal but the counsels state that during the hearing of the revision petition, a consensus was arrived at, that the Section 34 application filed by the respondent be transferred from the Commercial Court to the Commercial Division of this Court and pursuant to which, the Section 34 application was so transferred to this Court and came to be registered as O.M.P. (Comm.) No.140/2021; (g) the appellant filed I.A. No.6459/2021 in O.M.P. (Comm.)

No.140/2021 before the Commercial Division of this Court, for directions to the respondent to deposit the balance Award amount in this Court after deducting the sum of Rs.44 lacs odd deposited before the Commercial Court and, (h) the Commercial Division, vide the impugned order, issued notice of the said application for 4th August, 2021.

6. The grievance of the appellant is, that the Commercial Division of this Court, instead of immediately directing the respondent on the same day on which I.A. No.6459/2021 had come up before the Commercial Division for consideration, to deposit the balance Award amount, issued notice of the application for 4th August, 2021.

7. We have considered this appeal, without going into the question of maintainability thereof.

8. Having not found on the record anything to show that the Commercial Division of this Court had stayed the execution of the Award, we have enquired so from the counsel for the appellant.

9. The counsel for the appellant contends that though the Commercial Division has not granted any stay of execution of the Arbitral Award but the Commercial Court before which the Section 34 application was earlier pending, had granted stay of execution subject to deposit of Rs.44 lacs odd.

10. From the aforesaid narrative it appears that the Commercial Court which granted the order of stay of execution of the Award subject to deposit of Rs.44 lacs odd, has ultimately been held to have had no jurisdiction to entertain the same, and an order of the Court which is ultimately found to have had no jurisdiction is of no avail, we have enquired from the counsel for the appellant, whether according to the appellant, there is a stay of execution of the Award or not.

11. The counsel for the appellant, without wanting to answer the said question for obvious reasons, contends that he was seeking a direction from the Commercial Division, by filing a Section 9 application in the Section 34 proceeding.

12. Section 9 of the Act cannot be a substitute for execution of the Arbitral Award. If there is no stay of execution of the Arbitral Award, the remedy of the appellant was to seek release of the amount deposited in the Commercial Court and to execute the Arbitral Award as a decree. On the contrary, if there is a stay of execution, then we do not find any error in the impugned order of issuing notice of the application aforesaid, inasmuch as the application was in effect for modification of an earlier order and such modification, under the principles of law which would be applicable to arbitration, also ordinarily cannot be done without hearing the opposite party. It cannot also be lost sight of that according to the appellant itself, the Section 34 application is pending since 16th October, 2017. Once interim order of stay of execution subject to the condition of deposit of Rs. 44 lacs odd had existed for nearly 3½ years, there was no such urgency for which the Commercial Division ought to have dealt with the application of the appellant on the same day, without even giving an opportunity to the respondent to file a reply.

13. We are also surprised that the appellant, by taking such technical pleas, has itself caused the 34 application to remain pending for such a long period of time. We may also state that we are unable to understand as to how the jurisdiction in the Commercial Division of this Court, to entertain a Section 34 application could be created by consent, as the counsels have represented before us. In law, there can be no creation of jurisdiction in a

Court which did not have such jurisdiction.

14. For all the aforesaid reasons, no ground to entertain the appeal or to interfere with the impugned order is made out.

Dismissed.

RAJIV SAHAI ENDLAW, J

AMIT BANSAL, J

JUNE 1, 2021

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