July 19, 2023
Sl. No.14 & 15
Court No.19
s.biswas

CO 2051 of 2023

M/s. J. J. Grihanirman Private Limited
vs.
Nirmal Kumar Khemka and others

WITH

CO 4546 of 2016

M/s. J. J. Grihanirman Private Limited
vs.
Parvati Devi Khemka and others

Mr. Debasish Kundu, Sr. Adv.
Mr. Abhishek Haldar
Mr. Subhankar Chakraborty
Mr. A. Kundu
Mr. Saptarshi Bhattacharjee
… for the petitioner
in both the revisional applications
Mr. V. V. V. Sastry
… for the opposite party nos.1 & 2
in CO 2051 of 2023
Mr. Arijit Bardhan
Mr. Rishabh Dutta Gupta
… for the opposite party nos.3 to 14
in CO 2051 of 2023
and opposite party nos.30 to 34
in CO 4546 of 2016
Mr. Vinay Kumar Purohit
… for the opposite party nos.4, 6 to 29
in CO 4546 of 2016

Three major parties are involved in the present dispute, namely, the petitioner, who is the developer engaged by the Khemkas, the Khemkas, who had been granted lease in respect of the property situated at premises No.23 Rustomjee Street, Kolkata 700019 by the sebaits of the property and the Modis, who were sold the property, allegedly, behind the back of the petitioner. The property is a debuttar property.

Both the revisional applications are taken up together as the issues are interrelated.

On the prayer of the petitioner, CO 4546 of 2016 has been assigned to this court upon being released by a learned Co-ordinate Bench, before whom the matter was pending.

The subject matter of challenge in this revisional application is an order dated September 5, 2016, passed in Title Suit No.44 of 2014, by the learned Civil Judge (Senior Division), Tenth Court at Alipore, South 24 Parganas.

The reliefs claimed in the civil suit, are quoted below:-

"a) Decree for declaration that the suit property described in schedule "A" is a Debutter Estate of the defendant no. 4 and it cannot be encumbered by way of sale, gift, mortgage, long-term lease or otherwise without permission from Principal Court of Civil Jurisdiction;

b) Decree for declaration that the impugned deed of indenture of conveyance dated 12th October, 2010 described in schedule "B" executed by the defendant nos. 4 to 29 in favour of the defendant nos. 30 to 34 without obtaining prior permission from Court is void ab initio, inoperative and not binding upon the plaintiff and it should be treated as cancelled and delivered up;

The Additional District Sub- Registrar South 24 Parganas at Alipore is informed by sending a copy of the judgment of this suit to note that the order of cancellation in the concerned volume.

c) Decree for declaration that the defendant nos. 5 to 29 for their personal gain collusively obtained decree on compromise from the Hon'ble High Court in F.A. No. 246 of 1972 and F.A. 204 of 1974 by practicing fraud upon the Court thereby cheated the Debutter Estate of the defendant no. 4;

d) Decree for declaration that the defendant nos. 5 to 29 have executed the impugned deed misappropriated the sale proceeds detrimental to the interest of the defendant no. 4;

e) A decree of perpetual injunction restraining the defendants as their men, servants, agents and assigns from taking any steps and/or further steps pursuant to and in terms of the impugned deed dated 12th October, 2010;

f) A decree for specific performance of contract directing the defendant nos.1 to 29 to execute deed of sub-lease in respect of the suit property described in schedule “A” in favour of the plaintiff for a period of 99 years on and from 1st May, 1965; Or alternatively, decree for mandatory injunction directing the Defendant Nos. 1 to 34 to execute and register the Sale Deed in favour of the plaintiff in respect of the suit property on obtaining permission either from the Hon'ble High Court or from the Learned District Judge, South 24 Parganas at Alipore at a price the impugned deed was executed and registered;

g) A decree for confirmation of possession of the plaintiff in respect of the suit property described in Schedule "A";

h) A decree of perpetual injunction restraining the defendants and their men, servants, agents and assigns from interfering with the plaintiff's peaceful possession and enjoyment of the suit property described in schedule “A”;

i) A decree for damages against the defendants and each of them to be paid to the plaintiff to the tune of Rs. 2,35,02,718/- (Rupees Two Crore Thirty Five Lakh Two Thousand Seven Hundred Eighteen) Only for causing extreme hardship, mental pain and agony, loss and/or damage to the avocation/business of its Directors for not executing deed of sublease for 99 years in favour of the plaintiff in respect of the suit property and for executing the impugned deed described in schedule-B without Court's permission thereby permanently creating cloud over the plaintiff's right and enjoyment in respect of the suit property;

j) Injunction;

k) Receiver;

1) Attachment;

m) Such further or other reliefs.”

On an application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) filed by the Khemkas, the suit was dismissed as barred under the provision of the said Act.

This civil revisional application has been pending since long and the issues raised by the petitioner have not been decided.

Mr. Kundu submits that Title Suit No.4546 of 2016 was a composite suit. Other reliefs were claimed against the sebaits, who sold the property to Mr. Bardhan's clients i.e. the Modis (the opposite party nos.3 to 14 in CO 2051 of 2023). As such, under the settled principles of law, the suit could not have been dismissed. The suit should have been heard as a whole. Moreover, the court did not have the jurisdiction to dismiss the suit on an application under Section8 of the said Act.

Further contention of Mr. Kundu is that the challenge to the deed of conveyance executed by the sebaits, behind the back of the petitioner herein (the developers), was not a part of the arbitration agreement. The rights of the petitioners in the suit for declaration and permanent injunction and the challenge to the deed of sale executed between the sebaits and Modis, had gone unadjudicated. Declarations that the Khemkas were to execute a deed of sub-lease as per the decision of the Hon'ble High Court, in an earlier suit, had also gone unadjudicated. The arbitration clause was between the Khemkas and the petitioner with regard to the development agreement, in respect of the premises.

The arbitration clause was incorporated in a contract which was insufficiently stamped. Thus, according to Mr. Kundu, the revisional application should be allowed and the order dated September 5, 2016 passed in Title Suit No.44 of 2014, should be set aside.

The submissions of Mr. Kundu have been rebutted by the learned advocates for Khemkas and the Modis on the ground that when the suit was dismissed as being barred under the provisions of Arbitration Act, the same would amount to a deemed decree. The proper remedy of the petitioner would be in an appeal.

The issue to be decided by this court, in this revisional application is whether the order impugned would be amenable to the jurisdiction of this court under Article 227 of the Constitution of India and if such question is answered in the positive, whether the learned court below erred in dismissing the entire suit, in which reliefs had been claimed against other persons who were not parties to the arbitration agreement, entered into between the Khemkas and the petitioner.

CO 2051 of 2023 is an application challenging the order dated June 17, 2023 by which the learned Additional District Judge, 15th Court, Alipore, South 24 Parganas, allowed the misc. arbitration execution case no. 58 of 2020, thereby rejecting an application filed by the petitioner under Section 151 of the Code of Civil Procedure.

By the said application, the petitioner prayed for dismissal of the execution case on the ground that the arbitration award was a nullity. The contract which incorporated the arbitration agreement was void, as it was not sufficiently stamped.

Mr. Kundu submits that the learned court failed to take into consideration the following:

a) As per the ratio in Hon'ble Apex Court in **N. N. Global Mercantile Private Limited vs. Indo Unique Flame Limited & Ors.** reported in **(2023) SCC OnLine SC 495**, the award was a nullity. The Hon'ble Apex Court in paragraph 119 had held that if the arbitration clause was incorporated in a contract which was insufficiently stamped, the same would be a void contract and the courts could not look into the same.

b) Four Hon'ble Judges Bench of the Hon'ble Apex Court in the matter of **Kiran Singh and others vs. Chaman Paswan and others** reported in **AIR 1954 SC 340**, held that the question with regard to nullity of a decree, could be raised at any time, even at the stage of execution or in collateral proceedings.

c) The application under Section 151 of the Code of Civil Procedure, was rightly filed before the learned Executing Court challenging the executability of the decree, after the law was declared in **N.N Global** (supra)

d) The ratio of the said judgment would have a retrospective effect.

e) Without adjudication of the validity of the order by which the Title Suit No.44 of 2014 had been dismissed, the arbitration between the Khemkas and the petitioner could not be reached to its logical conclusion.

Mr. Kundu, further submits that this court must interfere with the order passed in the execution proceeding on the ground that the learned executing court misconstrued the provisions of Section 36 of the Indian Stamp Act. The learned executing court erroneously held that once the contract had been accepted in evidence and marked as an Exhibit, the admissibility of the same could not be questioned. The decision in **N. N. Global** (supra), could not be looked into for the reason that the executing court could not go behind the award.

Mr. Sastry, learned advocate for the Khemkas (the opposite party nos.1 and 2 in CO 2051 of 2023), submits that the validity of the contract on account of the same being insufficiently stamped, had been raised in an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the learned Arbitrator and the said application was dismissed.

It is further contended by Mr. Sastry that an award had been passed directing that 50% of the constructed area should be handed over to the Khemkas and the 50% of the same would remain with the petitioner. Further, cost of Rs.32 lakhs along with interest at the rate of 6% per annum, was also imposed upon the petitioner/award debtor. An application under Section 34 of the said Act was filed by the petitioner, for setting aside the award. The said application was dismissed. Against the order of dismissal, an appeal was filed under Section 37 of the Act, which is pending hearing.

Mr. Bardhan, learned advocate appears on behalf of the Modis. The Modis were added in the execution proceedings. The Modis came in to the picture when the sebaits of the said debuttar property, which had been leased to the Khemkas had sold the property to them. Mr. Bardhan submits that right title and interest in respect of the entire property, including the structure raised by the petitioners, had passed on to the Modis. Mr. Bardhan submits that the ratio of **N. N. Global** (supra) would be applicable in this case. The award was a nullity. Hence, the execution case should be dismissed.

Mr. Sastry opposes the submissions of Mr. Bardhan.

Mr. Kundu , learned Advocate for the petitioner submits that the contentions of Mr. Sastry were based on facts, but the legal implication of the ratio of **N. N. Global** (supra) was yet to be decided. Also, the challenge to the initial order of dismissal of the suit which was a composite suit against the vendors and Mr. Bardhan's clients had remained undecided. Neither the sebaits nor Mr. Bardhan's clients were parties to the arbitration. The arbitration proceeding was not with regard to such issues.

Heard the parties.

Mr. Sastry hands over an order passed by another Judge of this court, dated July 13, 2015 in which, the existence of the arbitration agreement was noted and the parties were referred to the arbitration. The petitioner was a party to the said proceeding.

It also appears that the points raised in CO 4546 of 2016 were raised in an application under

Section 47 of the Code of Civil Procedure filed by the petitioner, in this execution proceeding. It was contended that the award was not executable in view of the fact that the order of dismissal of the suit was under challenge before the High Court. The validity of the order of dismissal and the irregularities in the same, were pleaded in the objection with regard to the executability of the award.

The application under Section 47 of the Code of Civil Procedure was withdrawn by the petitioner, without seeking any liberty to file afresh.

Once again, the petitioner filed an application under Section 151 of the Code of Civil Procedure alleging the award to be a nullity, by relying upon the decision in **N. N. Global** (supra).

Thus, the objection with regard to executability of the award, on the ground of pendency of CO 4546 of 2016 was not proceeded with. Such challenge was abandoned, with the withdrawal of the application filed under Section 47 of the Code of Civil Procedure.

The application under Section 34 of the said Act, filed by the petitioner was also rejected on the ground that award had provided for both the Khemkas and the petitioner. 50% of the constructed area was to be retained by the petitioner. No illegality was found in the award. An appeal therefrom is pending.

This court is of the view that the orders passed in different stages of the arbitration and the challenges to the arbitration proceedings as also the award, have all gone against the petitioner.

CO 4546 of 2016 was not persuaded with diligence. The revisional application had been pending since 2016 and had been listed before different courts. It had also been dismissed for default and thereafter restored. Even if, the submissions of Mr. Kundu that the learned civil court did not have jurisdiction to dismiss the suit while deciding an application under Section 8 of the Arbitration and Conciliation Act and the suit should have been heard as a composite court by the learned civil court in view of the decision in ***Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & anr.,*** reported in ***(2003) 5 SCC 531,*** merit consideration, this court is of the view that the ultimate decision of the learned civil court was dismissal of the suit and such order is an appealable order. Moreover, the cause of action against the khemkas do not survive after completion of the arbitration proceedings.

The learned civil court passed the following order:-

T.S 44/2014

05.09.2016

Both parties are present. Today is fixed for hearing of the petition filed u/s 8 of Arbitration Act filed by defendant no. 1 to 3.

> Defendant no. 1 to 3 has filed an adjournment petition which is considered and rejected and the petition filed u/S 8 of Arbitration Act is taken up for hearing. However before Ld. Advocate appearing for defendant no. 1 to 3 begins his submission, Ld. Advocate representing defendant no. 4 to 29 submits that he concedes with the contention of the instant petition filed by defendant no. 1 to 3 and though he has not filed any petition in that regard, the oral submission may be considered by the Court in this regard and both the Ld. Advocates representing defendants submits that the plaintiff is also taking part in the arbitration proceedings and Ld. Advocate appearing for the plaintiff also admits in the open Court in presence of Ld. Advocate representing the defendants that the plaintiff is taking part in the Arbitration proceedings and considering the submission and admission of Ld. Advocates appearing for the plaintiff and defendants, <u>it appears to the Court that the proceedings u/S 8 of Arbitration Act is going on and as such this Court cannot proceed in the instant suit when there is an arbitration clause between the parties and arbitration proceedings is going on according to the said clause and accordingly the suit is dismissed the jurisdiction being barred under Arbitration Act.</u>

It is clear from the above order, that the learned court upon hearing the parties, came to the finding that as the arbitration proceedings were continuing and the plaintiff/petitioner was participating in the said proceeding, the suit should be dismissed being barred by the provisions of the Arbitration Act. It was found to be barred by law.

The petitioner is at liberty to take appropriate steps against the said order, in accordance with law, by approaching the appropriate forum.

The issue which this court is required to decide in CO 2051 of 2023, is whether the execution of the award should be permitted, as directed by the learned executing court, in view of the decision in **N.N. Global** (supra).

Challenging the delay in the execution proceedings, a special leave petition was filed by the khemkas and a counter affidavit to the special leave petition was filed by the petitioner. Upon hearing the parties, the Hon'ble Apex Court passed the following order on March 24, 2023:-

> ORDER
>
> IA No. 56131/2023
>
> Application seeking permission to file additional documents/facts/annexures is allowed.
>
> As per the additional documents at Annexure P-14 at page 10 an order of the Executing Court has been brought to our notice dated 28.2.2023 adjourning the proceeding to 31.3.2023 on account of the matter pending before this Court.
>
> It is quite obvious to us that the Court has not even understood the purport of the order dated 03.2.2023 after noticing the same. In terms of that order we had asked the execution proceedings to go on day to day. Instead of taking it day to day, an excuse has been set out that the present matter is pending before the Supreme Court of India!
>
> We would only like to say that the concerned Judge must be more cautious in ensuring that the orders of this Court are complied with after understanding the same. The matter has been kept before this Court to monitor and ensure that the execution proceedings come to an end and not that the

> concerned Judge should be adjourning matters to avoid the matter.
>
> The Court below to forthwith proceed on day to day basis and submit a report to this Court and conclude the proceedings by the next date and place the orders before this Court.
>
> List in the first miscellaneous week in July, 2023.

Thereafter, the execution proceeded and the execution case was allowed by the learned executing court by passing an elaborate order.

This revisional application has been filed challenging such order. This court admitted the revisional application, but refused to pass any stay order, in view of the order passed by the Hon'ble Apex Court dated March 24, 2023. By the said order, the learned executing court had already been directed to proceed with the execution case, on a day to day basis and file to a report before the Hon'ble Apex Court.

Thereafter, the matter appeared before the Hon'ble Apex Court on July 4, 2023 and the Hon'ble Apex Court did not make any observations with regard to the pending revisional application. The petitioner was represented by learned counsel before the Hon'ble Apex Court. The Hon'ble Apex Court directed the learned executing court to complete the execution and held thus:-

> "Learned counsel for the petitioner(s) also points out that the execution petition has more than one part in execution of the

> decree. The first being issue of possession, the second is money decree passed. He further submits that in view of the continuing occupation of the petitioner(s), interim order should be passed for deposit of the appropriate damages for use and occupation by the respondent(s).
> Insofar as the money decree is concerned, we direct the respondent(s) to deposit a decretal amount in the trial Court within a period of four weeks from today. The Trial Court will also pass an order determining the interim amount for use and occupation of the premises by the respondent(s) till the disposal of the execution proceedings.
> The report received from the concerned Court suggests that the execution is being taken up on day to day basis and we expect the execution to be over by the next date."

In view of the aforementioned order passed by the Hon'ble Apex Court, the execution case has reached finality. An order has been passed for completion of the entire execution, in discharge of the award. Thus, the order impugned dated November 12, 2018 passed in Execution Case 598/2018, cannot be scrutinized further by this court. The execution case was allowed. The observations of the Hon'ble Apex Court clearly indicate that the execution proceeding arising out of the award must be over by the next date and the award must be satisfied.

Any attempt of this court to adjudicate the revisional application, would be only an academic exercise. This court cannot reopen the issue. The execution proceeding has attained finality and the same is being monitored by the Hon'ble Apex Court.

The challenge to the correctness of the award, is still pending decision in an appeal under Section 37 of the Act and the issues which have been raised in CO 4546 of 2016 and in CO 2051 of 2023 are available in the appeal.

Both the revisional applications are dismissed.

There shall be no order as to costs.

Parties to act on the sever copy of this order.

(Shampa Sarkar, J.)