

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

C.O.441 of 2023

Sri Arun Kumar Jindal & Anr.

VS.

Smt. Rajni Poddar & Ors.

For the Petitioner

:Mr. Subhasis Sarkar, Adv.
Mr. Subrata Bhattacharjee, Adv.
Mr. Bikramjit Mandal, Adv.
Mr. Sk. Mustafi Rahaman, Adv.

For the Opposite Parties

:Mr. Chayan Gupta, Adv.
Mr. Rittick Choudhury, Adv.
Mr. Shoham Sanyal, Adv.

Last Heard On

:13.01.2025

Judgement On

:29.04.2025

Bibhas Ranjan De, J. :

1. Challenge in the instant revision is the order no. 39 dated 11.01.2022 passed by Ld. Additional District Judge, 6th Court, Alipore, South 24 Parganas wherein the application filed at the

behest of the petitioner under Section 47 of the Code of the Civil Procedure (hereinafter referred to as CPC) was dismissed.

2. The fact of the case in a nutshell is to the effect that one Radha Krishan Poddar, the predecessor in-interest of the decree holder had instituted an execution proceeding which was registered as Execution Case no. 9 of 2002 in order to execute the award dated 22.12.2001 passed in the arbitral proceedings. But, on 24.08.2014 the original award holder passed away and the opposite parties herein being the legal heirs of the original award holder were substituted by the Court vide order dated 30.10.2014. But, later on in the year 2018 the opposite parties became aware of the fact that the Ld. Civil Judge has no jurisdiction and accordingly withdrew the proceeding and filed an execution proceeding afresh being arbitration execution case no. 535 of 2018 for execution of the arbitral award dated 22.12.2001 before the Ld. District Judge, Alipore who, in turn, transferred the same to the Ld. Additional District Judge, 15th Court, Alipore which was again subsequently transferred to the Ld. Additional District Judge, 6th Court, Alipore.

3. During pendency of such execution proceeding the decree holder took out an application under Order 21 Rule 37 & 38 read with

Section 151 of the CPC. Upon obtaining notice of the same the petitioners filed an application under Section 47 of the CPC, thereby questioning the execution of the said decree. But the Ld. Executing Court vide its impugned order dismissed the application preferred by the petitioners on the ground that there was no scope for the executing Court to go beyond the decree. Hence, the interference of this Court is sought for.

Argument Advanced:-

4. Mr. Subhasis Sarkar, Ld. Counsel appearing on behalf of the petitioners/award debtors assailed the order impugned in this revision application by submitting inter alia that the title execution was filed before a court having no jurisdiction. It has been further submitted that the withdrawal of an execution application without obtaining proper leave amounts to complete disposal of legal proceedings. It is further submitted that consequence of defective filing is knowledge and is of no consequence and the petitioner is not entitled to benefit of initial filing or after curing the defect.
5. In support of his contention, Mr. Sarkar relied on a cases of ***Vidya Drolia and others vs. Durga Trading Corporation (along with SLPS (C) Nos. 5605-606 of 2019 & SLP (C) No.***

111877 of 2020), (2021) 2 SCC & Delhi Development Authority vs. M/s Durga Construction Co. (unreported)

6. In stark contrast, Mr. Chayan Gupta Ld. Counsel, appearing on behalf opposite parties / award holders has submitted that the application under Section 47 of the CPC was filed challenging the appointment of arbitrator and also executability of the decree. Mr. Gupta continued his argument by submitting inter alia that appointment of arbitrator cannot be challenged at the time of execution of the award without re-coursing the steps under Section 16 of the Arbitration and conciliation Act, 1996 (for short Act of 1996). It has been further submitted that judgment debtor deliberately refrained from challenging the award under Section 34 of the Act of 1996 and therefore the arbitral award attained its finality within the meaning of Section 35 of the Act of 1996.
7. On the issue of executability of the award is concerned Mr. Gupta has vehemently contended that award debtor failed to appear in the execution proceeding and in the month of September 2018 award holders realized that Ld. Civil Judge, Senior Division, Alipore has no jurisdiction. Consequently, award holder withdrew the said proceeding with liberty to file afresh. Subsequently, arbitration execution case no. 535 of 2018 was

filed before the Court of Ld. District Judge, Alipore which was, in turn, transferred to the Court of Ld. Additional District Judge, 15th Court, Alipore and lastly to the Court of Ld. Additional District Judge, 6th Court, Alipore. In support of his contention, Mr. Gupta has referred to Section 14 of the Limitation Act and submitted that the time spent before the Ld. Court without jurisdiction shall be excluded from the period of limitation which is executable without losing its enforceability.

8. To bolster his contentious proposition, Mr. Gupta has leaned heavily upon the following judgements:-

- ***Hindustan Zinc vs. National Research Development Corporation, 2023 SCC OnLine Del 330***
- ***Krishna Kumar Mundhra vs. Narendra Kumar Anchalia, (2004) 2 Arb LR 469***
- ***M/s. Sri Swaminathan Construction vs. Sri. Thirunavukkarasu Dhanalakshmi, 2008-4-L.W. 956***
- ***Birat Chandra Dagara vs. Orissa Manganese & Minerals Ltd., 2020 SCC OnLine Ori 5***
- ***Fuerst Day Lawson Limited vs. Jindal Exports Limited, (2011) 8 Supreme Court Cases 333.***

- ***Pasl Wind Solutions Private Limited vs. Ge Power Conversion India Private Limited, (2021) 7 SCC***

9. The cases relied on behalf of the opposite parties handed down the ratio that the arbitration and conciliation act is a complete code and provision of Section 47 of CPC has no application in an execution proceeding under the Act of 1996.

Analysis:-

- 10.** As an initial measure, it is judicious to commence by reproducing the esteemed contentions put forth in the petition, as enshrined under Section 47 of the CPC, are delineated hereinafter for due consideration:-
- a. The execution of arbitral award dated 22.12.2001 was initiated in the year 2018 thereby losing its enforceability and becoming unexecutable.
 - b. Appointment of arbitrator was not proper.
 - c. There was no arbitration agreement by and between the parties.
- 11.** Mr. Sarkar has endeavoured to enlighten to this court regarding limitation for execution of the arbitral award by referring to the date of arbitral award (22.12.2001) and filing of the title execution case no. 09 of 2002 that too before the Ld.

Civil Judge, Senior Division, 4th Court at Alipore. It is further countered that in the year 2018 the award holder realized that Civil Judge, Senior Division, Alipore had no jurisdiction over the matter and consequently withdrew the proceeding and file fresh execution case being no. 535 of 2018 before the Ld. District Judge, Alipore, who in turn, transferred the same to the Court of Additional District Judge, 15th Court and subsequently to the Court of Additional District Judge, 6th Court.

12. Mr. Sarkar has submitted that at the time of withdrawal Ld. Civil Judge, Senior Division, Alipore directed for filing the **same execution application** before the appropriate forum.

13. Mr. Sarkar has tried to make this Court understand that award holder filed one fresh arbitration execution case no. 535 of 2018 in violation of liberty given by the Civil Judge, Senior Division, Alipore. Mr. Sarkar has referred to **Delhi Development Authority** (supra) wherein it was observed as follows:-

“17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly

inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered nonest and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing...”

14. In **Delhi Development Authority** (supra) the Hon’ble Division Bench dealt with an defects application under Section 34 of the Act of 1996 and there was dispute of delay in refilling the objection under Section 34 of the Act of 1996. Therefore, the dispute dealt with in **Delhi Development Authority** (supra) is not at all identical with the facts of our case.
15. In the case at hand, initially title execution case no. 09 of 2002 was filed admittedly before a wrong forum. Subsequently, arbitration execution no. 535 of 2018 was filed. Title execution petition cannot be dealt with by a Court in an execution of arbitral award under the provision of the Act of 1996.
16. In the case in hand the petition for withdrawal dated 07.09.2018 clearly spells out prayer for withdrawal on the ground of defect of jurisdiction and particularly in paragraph 15 of the application opposite party/ decree holder made a prayer for withdrawal **for filing the same before appropriate**

forum. Therefore, absence of express liberty in the order cannot, in my opinion, affect the period of limitation while opposite party/ decree holder specifically made a prayer for withdrawal of the execution case for filing before the appropriate forum, for want of jurisdiction. Moreso, prayer for filing the execution case before the appropriate forum was not refused by the Learned Judge in the order dated 29.09.2018 in connection with Title Execution No. 09 of 2002.

17. At this stage, it would be convenient to reproduce the Section 14 of the Limitation Act 1963 which runs as follows:-

“14. Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1)In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2)In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of

jurisdiction or other cause of a like nature, is unable to entertain it.

(3)Notwithstanding anything contained in rule 2 of Order XXXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation.—For the purposes of this section,—

(a)in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b)a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c)misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

18. Like a protective shield guarding the right, in my humble opinion, Section 14 of the Limitation Act stands as a sentinel, carefully preserving the precious period of limitation within its legislative embrace.

19. Challenging the appointment of an arbitrator for the first time during execution proceedings is generally not permissible. The Act of 1996, provides specific timelines and procedures for challenging an arbitrator's appointment. The

time to challenge an arbitrator is usually during the arbitration proceedings themselves under the provision of Section 12 to 16, or at the latest, when challenging the award itself under Section 34 of the Act of 1996.

20. In ***Vidya Drolia*** (supra) Hon'ble Apex Court made an observation qua the stage of objection regarding non-arbitrability in paragraph 82 & 83:-

“ 82. Issue of non-arbitrability can be raised at three stages. First, before the court on an application for reference under Section 11 or for stay of pending judicial proceedings and reference under Section 8 of the Arbitration Act; secondly, before the Arbitral Tribunal during the course of the arbitration proceedings; or thirdly, before the court at the stage of the challenge to the award or its enforcement. Therefore, the question — “Who decides non-arbitrability?” and, in particular, the jurisdiction of the court at the first look stage, that is, the referral stage.

83. Who decides the question of non-arbitrability? — a jurisdictional question is a technical legal issue, and requires clarity when applied to facts to avoid bootstrapping and confusion. The doubt as to who has the jurisdiction to decide could hinder, stray, and delay a many arbitration proceedings. Unfortunately, who decides non-arbitrability remains a vexed question that does not have a straightforward universal answer as would be apparent from opinions in the at-variance Indian case laws on this subject. To some extent, the answer depends on how much jurisdiction the enactment gives to the arbitrator to decide their own jurisdiction as well as the court's jurisdiction at the reference stage and in the post-award proceedings. It also depends upon the jurisdiction bestowed by the enactment viz. the facet of non-arbitrability in question, the scope of the arbitration agreement and authority conferred on the arbitrator.”

21. In ***Vidya Drolia*** (supra) Hon'ble Apex Court suggested the stages when the question of non-arbitrability can be raised. But, the grounds for non-executability of the award, taken in the case at hand have not been dealt with. Admittedly, one application under Section 47 was filed in the arbitration execution and that was disposed of by the Executing Court by assigning reasons. Thereby, judgment debtor/ petitioner cannot take assistance of the principles enunciated in ***Vidya Drolia*** (supra).

22. Under the Arbitration and Conciliation Act, 1996, the issue of an arbitration agreement can be raised at various stages. A party can challenge the existence or validity of the agreement before the arbitral tribunal (Section 16) or in court proceedings (Section 8).

23. According to provision of Section 8 of the Act of 1996 the party raising the question of arbitration agreement can apply before the appropriate forum at the time of submitting his first statement on the substance of the dispute. Section 16 (1) (b) clearly spells out that the said question regarding existence of arbitration agreement can be raised before the arbitral tribunal at the stage not later than the submission of the

statement of defence. Therefore, significant provision of Section 8 & Section 16 of the Act of 1996 bestowed upon parties the valuable prerogative to challenge and contest the validity, scope & enforceability of an arbitration agreement, thereby establishing a crucial safeguard in arbitral process.

- 24.** In the aforesaid conspectus, I am unable to interfere with the order impugned invoking Article 227 of the Constitution of India.
- 25.** Accordingly, the revision application being no. CO 441 of 2023 stands dismissed.
- 26.** Interim Order, if there be any, stands vacated.
- 27.** Connected applications, if there be, also stand disposed of accordingly.
- 28.** Parties to act on the server copy of this order duly downloaded from the official website of this Court.
- 29.** Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]