

Nazimuddin Khan Vs. Lloyd Insulation(S) India Limited

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Court : Kolkata

Decided On : Feb-23-2017

Judge : Soumen Sen

Appellant : Nazimuddin Khan

Respondent : Lloyd Insulation(S) India Limited

Judgement :

ORDER

SHEET GA No.1820 of 2014 WITH EC No.467 of 2013 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE NAZIMUDDIN KHAN VS. LLOYD INSULATION(S) INDIA LIMITED BEFORE: The Hon'ble JUSTICE SOUMEN SEN Date :

23. d February, 2017. Mr. Krishnaraj Thaker, Mr. Brajesh Jha, Md. B. Israil, Advocates for decree holder. Mr. Abhrajit Mitra, Sr. Advocate, Mr. Anirban Ray, Mr. Soumabho Ghose, Mr. Nikunj Berlia, Advocates for judgment debtor. The Court : There are two issues involved in this execution application. The first relates to an application filed by the award debtor Mr. Abhrajit Mitras client for recording satisfaction of the decree. The application is based on a post award written agreement arrived at between the parties. The petitioner is the award debtor. The award was passed on 13th May, 2013. On 3rd September, 2013 a Memorandum of Understanding was entered into between the award holder and the award

debtor by which the award debtor had agreed to pay a sum of Rs.68 lakhs to the award holder, subject to the award holder withdrawing the criminal case being C. R. No.326 of 2007 pending before the ACJM, Haldia Court in terms of the settlement. It is an admitted position that the said case is still pending. It is also an admitted position that the award debtor did not approach the Court under Order 21 Rule 2 Sub-Rule 2 of the Code of Civil Procedure within a period of 30 days as prescribed under Article 125 of the Limitation Act, 1963. Mr. Abhrajit Mitra, learned Senior Counsel made a valiant attempt to argue that the said article is not applicable in the instant case and the provision of Order 21 Rule 2 Sub-rule 2 cannot be applied in the case of an award passed under the Arbitration and Conciliation Act. Division Bench (India) Limited The learned judgment MANU/MH/1305/2011 Vs. and of the Mr. a Senior Counsel Bombay Subrata decision of has referred High Court Roy Sahara the Honble in Jet to Airways reported Supreme a at Court in Morgan Securities and Credit Pvt. Ltd. Vs. Modi Rubber Ltd. reported at (2006) 12 SCC642. Per contra Mr. Krishnaraj Thaker, learned Counsel appearing on behalf of the award holder submits that a decree becomes enforceable under Section 36 of the Code of Civil Procedure after the expiry of the statutory period and the procedure under the Code of Civil Procedure is to be followed for the purpose of executing such an award. It is submitted that the award under the new act does not require to be formally declared as a decree and in this regard Mr. Thaker has also referred to Morgan Securities and Credit Pvt. Ltd.(supra) and a single Bench decision of this Court in HDFC Bank Ltd. Vs. Sima Mondal & Anr. Reported at (2010) 1 CAL LT511HC). In view of the settled law that an award passed under the 1996 Act is a deemed decree and is enforceable immediately after the expiry of the statutory period of three months unless an application for setting aside of the decree is filed either within the said period or within the extended period of another 30 days beyond which the award debtor forfeits its right to challenge the award, the provisions of code of civil procedure would apply in an execution proceeding. On my respectful reading of Jet Airways (India) Limited (supra) and Morgan Securities and Credit Pvt. Ltd. (supra) it does not appear that the defending its provision is said judgments action. found So in far the come as to decree Limitation the aid holder Act, of is 1963 Mr. Mitra in concerned, no for making an application for certification of payment and

hence, he can apply at any time. The period of limitation for an application by the judgment debtor under sub-rule (2) of Rule 2 is 30 days and an adjustment cannot be taken note of by the executing court unless it is recorded within 30 days. It is now a settled law that Order 21 Rule 2 is a special provision and the procedure prescribed therein has been held to be mandatory and the Court cannot go into the question of discharge and satisfaction of the decree de hors Order 21 Rule 2 when a specific plea is raised that there has been an adjustment of the decree. This aspect was discussed in detail in paragraphs 17 to 21 in the case of Padma Ben Banushali & Anr. V. Yogendra Rathore & Ors. reported at AIR2006 Supreme Court 2167 which are stated hereinbelow :

17. Order XXI, circumstances. Rule 2 applies to a specific set of If any money is payable under a decree, irrespective of the nature of decree, and such money is paid out of court, the decree-holder, has to certify such payment to the court whose duty it is to execute the decree and that court has to record the same accordingly. Similarly if a decree, irrespective of its nature, adjusted in whole or in part to the satisfaction of the decreeholder, the decree-holder has to certify such adjustment to that court which has to record the adjustment accordingly. If the payment or adjustment is not reported by the decreeholder, the judgment-debtor has been given the right to inform the court of such payment or adjustment and to apply to that court for certifying that payment or adjustment after notice to the decree-holder. Then comes sub-rule (3) which provides that a payment or adjustment which has not been certified or recorded under sub-rule (1) or (2), shall not be recognised by the court executing decree.

18. The expression or the decree of any kind is otherwise adjusted. are of wide amplitude. It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order XXI. It may or be pointed out that an agreement, contract compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent within the will amount meaning of to an the adjustment Rule and of the the decree court, if approached, will issue the

certificate of adjustment. An uncertified payment of money or adjustment which is not recorded by the court under Order XXI, Rule 2 cannot be recognised by the executing court. In a situation like this, the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment or satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted adjustment certified wholly or by or in part satisfaction the court, the but was the not compromise recorded executing court or and/or would not recognise them and will proceed to execute the decree.

19. The problem can be looked into from another angle on the basis of the maxim *generalia specialibus non derogant*..

20. Section 47, as pointed out earlier, gives full jurisdiction and power to the executing court to decide all questions relating to execution, discharge and satisfaction of the decree. Order XXI, Rule 3, however, places a restraint on the exercise of that power by providing that the executing court shall not recognise or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment-debtor before the executing court, the latter, in view of the legislative mandate, has to ignore it if it has not been certified or recorded by the court.

21. The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order XXI, Rule 2 including sub-rule (3) containing special provisions regulating payment of money due under a decree outside the court or in any other manner adjusting the decree. The general provision under Section 47 has, therefore, to yield to that extent to the special provisions contained in Order XXI, Rule 2 which have been enacted to prevent a judgment-debtor from setting up false or cooked-up pleas so as to prolong or delay the execution proceedings.

. The award which has become a deemed decree after 13th July, 2013 was not enforced in view of the Memorandum of Understanding dated 3rd September, 2013. The application for recording satisfaction was filed on 12th June, 2014,

which is beyond the period of 30 days as prescribed under Article 125 of the Limitation Act. The Arbitration and Conciliation Act, 1996 is a complete Code but for the purpose of enforcement of the award in view of Section 36 the provisions of the Code of Civil Procedure have been made applicable. It thus follows that the award passed under the Arbitration and Conciliation Act is to be enforced in the same manner as a decree of a Civil Court and Section 47 and Order 21 of the Code of Civil Procedure would be applicable relating to the enforcement of an award which is a deemed decree. The Division Bench of our High Court in Humayun Properties Ltd. v. Ferrazzinis (Private) Ltd. reported at AIR1963 Calcutta 473 also considered similar issues in the context of the earlier Limitation Act, namely, Article 174 governing an application under Order 21 Rule 2 Sub-Rule 2 of the Code of Civil Procedure in paragraph 12 which is reproduced below :

12. The law regarding the recording and certification of payments under a decree has been the subject matter of numerous decisions. As a result of these authorities, the position has become clear. A payment of money made under a decree or an adjustment, casts a duty upon the decree holder to certify such payment or adjustment to the court, whose duty it is to execute the decree. There is no particular form for such certification, and there is no period of limitation for doing so. It has been held that the decree holder can at any time give the information to the court, and this need not be on notice to the judgment debtor and the Court automatically records the information, and this is a mere ministerial act. The information so certified and recorded is not binding upon the judgment debtor, if he has not been given prior notice of it, and he may dispute its accuracy. This has been laid down in Full Bench decision of this court - Amar Krishna v. Jagat Bandhu, AIR creditor 1931 Cal 719. not done this has Where duty, however, the the judgment judgment debtor may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree holder to show cause why such payments or adjustments should not be recorded or certified. This gives rise to a judicial proceeding. In other words, the court has then to adjudicate as to whether there has been payment or adjustment. For such an application on the part of the judgment debtor, a time limit has been prescribed. Under Art. 174 of the Limitation Act, such an application must be made within 90 days from the date of the alleged payment or adjustment. In the present payments have been either

recorded or admitted that, even if judgment debtor, application, then for the the relevant case, certified. made payments, the no It is such an bar of limitation applies. The judgment debtor has tried to get out of this difficulty by citing certain authorities which have held that the information to judgment the creditor court of a can at payment any and time there give is no particular form in which such information could be given and no time limit. The learned Judge below has held that in the affidavit in opposition filed on behalf of the judgment debtor, the factum of payment has been alleged, and since in the affidavit in reply there was no denial, it must be held that information was given to the court by the judgment creditor in terms of clause (i) of Order 21 Rule 2. With respect, I am unable to endorse this view. In my opinion, this is not in accordance with the scheme of Order 21 Rule 2 of the C.P.C. It may not be strictly in accordance with principles of equity that a decree holder who has received payment or has entered into an adjustment of a decree should ever be permitted to enjoy a position as if it was never paid or adjusted. But this is what the law allows under certain circumstances and there is no scope for imparting equitable principles to defeat it. Even assuming that there has been a payment or an adjustment, if the decree holder fails to do his duty, a right is given to the judgment-debtor to take action under clause (ii) of Order 21 Rule 2. In such a case, however, a time limit has been imposed and where the time expires the court is powerless to take cognisance of any uncertified payment or adjustment, at the instance of the judgment debtor. In certain cases, the judgment debtor may sue the judgment creditor for damages. That, however, is a matter which need not be considered here. The only point that has to be decided is as to whether, by using an affidavit in reply, in the form set out above, it can be said that the judgment creditor has certified payments in terms of clause (i) of Order 21 Rule 2. Although no particular form is required for such certification by the judgment creditor, it is obvious that the facts must be capable of giving rise to the conclusion that it is the decree holder who has given such information. If a statement in the affidavit in adjustment reply, alleged not by denying judgment an alleged debtor be payment a or sufficient compliance with clause (ii) of Order 21 Rule 2, then in every case, where there has been such a payment or adjustment and an application by the judgment debtor for certification is barred by limitation, all he has to do is to allege payment or adjustment. Then the decree holder would

be in this invidious position that if he denied the payment or adjustment in his reply he would be guilty of perjury and if he did not deny it, it will be said that he has admitted it. In my view that is not what is contemplated under Order 21 Rule 2. A number of authorities were cited before us showing under what circumstances it was deemed that information had been given to the court under clause (i) of Order 21 R.

2. The head-notes of some of these cases are misleading. But when we started reading the cases, it invariably appeared that it was the judgment creditor who had given the information. The first case cited before us is a Madras decision - C. M. Royal v. Raja S. C. Royal, AIR1929 Mad 783 (1). In that case, the decree holder, in his execution application, gave information of the payments but the dispute was as to the period for which these payments had been made. It was held that the court was not precluded from making an enquiry, and that the provisions of Order 21 Rule 2 was satisfied. It will be noted therefore, that the information was given by the decree holder himself to the court. In another decision of the Madras High Court - Cinnaswamy v. Periathanlai, AIR1929 Mad 811. The information was given by the decree holder in an affidavit, averring that the money had been received from the judgment debtor towards the decretal amount. It is not quite clear however whether this was done by way of reply to any allegation made by the judgment debtor. The application which the court was considering was a petition to set aside an order directing a sale in execution. If in such an application, the judgment creditor volunteers information of payment, then it might amount to a certification under clause (i) of Order 21 R.

2. The next case cited was a Bench decision of the Madras High Court Lodd Govindadoss v. Raja of Karvetnagar, (1915) 29 Mad LJ219 (AIR1916 Mad 795 (2)). In that case, the decree holder made information an to application the court of for sale certain and himself payments. The gave only question that was considered was as to whether if the decreeholder informed the court of certain payments or adjustments the court could enquire into the arithmetic of the payment or it was never paid or adjusted. But this what the lawyer informed the court of the factum of payment, the court was not precluded from entering into the arithmetic of it. The leaned Judge said as follows : The cardinal principle no doubt

is to see that neither party over-reaches the other. But where no intimation is conveyed by the decree holder it is doubtful whether the court can start an enquiry on the ground that the decree holder should have certified payment or adjustment. The better view seems to be that in all cases where the Court is seized of the question either from intimation conveyed by the decree holder at any time before orders are passed or from the judgement debtor within the prescribed period, the Court will be bound to enquire into the truth or correctness of the statements made in the present case the decree holder did say in the petition for execution that moneys have been received, but he coupled it with an assertion that it has been appropriated towards the expenses of the management. The truth of this assertion is a legitimate subject for enquiry.

. The application for recording satisfaction is clearly barred by limitation. Under such circumstances, G. A. 1820 of 2014 stands dismissed. There shall be no order as to costs. (SOUMEN SEN, J.) pa

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