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Prabir Kumar Chatterjee and Ors. Vs. Ambition Realty Projects Pvt. Ltd. and Anr.

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Court : Kolkata

Decided On : Jul-17-2017

Judge : Sanjib Banerjee

Appellant : Prabir Kumar Chatterjee and Ors.

Respondent : Ambition Realty Projects Pvt. Ltd. and Anr.

Judgement :

OD-4 APO No.281 of 2017 EC No.404 of 2014 IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORIGINAL SIDE PRABIR KUMAR CHATTERJEE & ORS.Versus AMBITION REALTY PROJECTS PVT.LTD.& ANR.

BEFORE: The Hon'ble JUSTICE SANJIB BANERJEE The Hon'ble JUSTICE SIDDHARTHA CHATTOPADHYAY Date : 17th July, 2017.

Appearance: Mr.Moloy Kr.

Ghosh, Sr.Adv.Mr.Sarosij Dasgupta, Adv.Mr.Avijit Dey, Adv.for the appellants Mr.Ahin Chowdhury, Sr.Adv.Mr.Subhasis Sarkar, Adv.Mr.S.K.

Samanta, Adv.Ms.Moly Roy, Adv.Ms.Susmita Sarkar, Adv.for the respondents The Court : The appeal is of limited import as it arises out of an order of March 28, 2017 passed in couRs.of execution proceedings when it dawned the appellants,

deep into such proceedings, that the arbitral award could not have been executed in this Court.

The facts are not much in dispute.

The appellants herein have suffered an arbitral award of November 27, 2013.

It is also not in dispute that prior to the commencement of the arbitral reference, a petition under Section 9 of the Arbitration and Conciliation Act, 1996 was carried to the Alipore Court.

In view of the command in Section 42 of the said Act, all the subsequent proceedings pertaining to the same arbitration agreement had, per force, to be carried to the same forum.

Indeed, the appellants say that the appellants have applied for setting aside the award under Section 34 of the Act before the Alipore Court, though such petition may have been filed at a belated stage and, at any rate, after the execution proceedings were commenced in this Court.

The problem arises in view of the legal fiction in Section 36 of the said Act.

In terms of such provision, an arbitral award is deemed to be a decree for the purpose of its enforcement.

However, the provision does not specify which should be regarded as the Court which would be deemed to have passed the decree since the legal fiction in the provision is couched in somewhat vague words in the expression in the same manner as if it were a decree of the court. The use of the definite article before the word court is somewhat of a misnomer without the provision specifying any particular court.

Some assistance may be obtained from the definition of the expression court in Section 2(1)(e) of the Act.

In respect of an arbitration agreement where any petition under Part-I of the Act of 1996 has been carried to a particular court and entertained in such court without

there being any objection as to the authority of such court to receive the same, the relevant court can be regarded as the decree-passing court for the purpose of identifying the court in Section 36 of the Act.

The problem does not arise in decrees actually passed by a court since there is the physical existence of a particular court which passed such decree and even if execution may not be proceeded with in the decree-passing court upon the person or the properties of the judgment-debtor not being available within its jurisdiction, execution has to be levied in such court and, thereafter, the decree transmitted to one or more other courts for its appropriate execution.

In a situation covered by Section 36 of the Act of 1996 and the legal fiction contained therein, it may be possible that a reference is conducted without the assistance of the court and without any petition pertaining to the arbitration agreement being carried to any court prior to an arbitral award being rendered in respect thereof.

It is in such a situation that a serious problem will arise in discovering the appropriate court in which the execution proceedings may be levied.

On a reading of Section 36(1) of the Act with Section 2(1)(e) thereof, it may be said, even in cases where an arbitral award is rendered without any proceedings pertaining to the arbitration agreement reaching any court, that the venue of the execution proceedings may be any of the courts which would have been capable of receiving an action, if such action were to be a suit, in terms of Section 2(1)(e) of the Act.

In this case, it is much simpler.

There was a court which was approached by one of the parties in connection with the relevant arbitration agreement at a point of time prior to any award being rendered in respect of such arbitration agreement.

There does not appear to have been any objection as to the authority of the Alipore Court to receive the pre-reference petition under Section 9 of the said Act.

Execution proceedings had, therefore, only to be carried to the Alipore Court at the first instance; and, if the person or the properties of the judgment-debtor were not available within the jurisdiction of such court, a prayer for transmission made in the Alipore Court itself for the effective execution of the arbitral award, as a deemed decree, before any appropriate court.

Thus, there was justification in the appellants herein objecting on the ground of jurisdiction.

However, such an objection has to be tempered by the rule as recognised in Section 21 of the Code.

Section 21(3) of the Code precludes any objection being taken as to the competence of an executing court, with reference to the local limits of its jurisdiction or, more precisely, of any appellate Court taking cognizance of such objection unless the objection was taken in the executing court at the earliest possible opportunity and unless there is a consequent failure of justice.

As is evident from the order impugned dated March 28, 2017, the objection was taken in course of an application filed by the award-holder deep into the execution proceedings, complaining of the reports filed by a surveyor and a special officer appointed by the executing court.

The executing court appropriately observed that it was no longer permissible for the appellants herein to raise such objection, in view of the appellants having unreservedly participated in course of the execution proceedings and even having applied and obtained positive orders therein.

The view expressed in the order impugned in such regard is unexceptionable.

It must also be appreciated that an early objection as to the territorial limits of the jurisdiction of an executing court is not the only matter for consideration by the appellate Court.

The principle embodied in Section 21(3) of the Code requires such objection to be taken at the earliest stage and, in addition, for it to be demonstrated to the

appellate Court that as a result of the executing Court proceeding with the matter despite the objection, injustice has been occasioned to the award-debtor.

Even on such second limb of the rule, the appellant falls woefully short.

The arbitral award in this case has a monetary component and another part by which the award-holder is entitled to recover possession of an immovable property.

It is the admitted position that a sum of Rs.9 lakh has been realised qua the monetary component of the award in couRs.of the execution proceedings or the appeals arising therefrom.

As to such monetary part of the award, it will be open to the award-holder to make appropriate prayers which may permit the executing court to realise the money due to the award-holder under the relevant award.

If, however, any measures are necessary to be taken by the executing court beyond the limits of its territorial jurisdiction, the executing court will take appropriate steps thereupon.

As to the portion of the arbitral award that requires possession of the immovable property to be made over to the award-holder, and it being the admitted position that such land is situated beyond the ordinary original jurisdiction of this Court, the arbitral award may require transmission to the appropriate court or courts as the executing court will have to discover.

However, it will also be open to the executing court to decide whether the archaic form of transmission of the decree as still recognised by the Code need be followed or the executing court may give leave to the award-holder to execute such part of the decree before an appropriate forum; and for the award-holder to cite the order when it approaches the appropriate forum for the archaic act of transmission to be completed thereby.

Accordingly, APO No.281 of 2017 is disposed of by not interfering with the order impugned dated March 28, 2017 in so far as it rejects the objection as to the

authority of the executing court to receive the execution proceedings.

However, in so far as the entirety of the arbitral award may be incapable of being executed within the jurisdiction of the executing court, appropriate orders may be passed for giving leave to the award-holder to execute the remainder of the award before any appropriate forum.

There will be no order as to costs.

Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(SANJIB BANERJEE, J.) (SIDDHARTHA CHATTOPADHYAY, J.) kc

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