

M/s. Fab Leathers Limited and Another Vs KND Engineering Technologies Ltd.

Court: Calcutta High Court

Date of Decision: July 11, 2008

Acts Referred: Arbitration and Conciliation Act, 1996 â€” Section 34

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Jayanta Mitra, Ranjan Bachawat, Dhruva Ghosh and Ms. Usha Doshi, for the Appellant; S.B. Mookherjee, S.N. Mookherjee, Ratnanko Banerjee, Ms. Lopita Banerjee and Mr. Tarun Aich, for the Respondent

Judgement

Sanjib Banerjee, J.

The Judgment of the Court was as follows:

1. These are applications for implementation of an award. The judgment-debtor, KND Engineering Technologies Limited, claims satisfaction of the

award upon the deposit that it has made in Court. The decree-holders, Fab Leathers Limited and Chroma Business Limited, seek execution in

terms of the award. The present round of execution by the decree-holders comes upon their earlier failed attempts, including an application that

stood dismissed by an order of June 11. 2002.

2. E.C. No. 113 of 2007 is the decree-holders' present attempt at execution and E.C. No. 115 of 2007 is the judgment-debtor's rival application

for recording discharge of the decree by payment.

3. The award, in its material terms", provides for payment of a sum of Rs. 6,82,62,117/- with pendente lite and post-award interest at the simple

rate of 15 per cent per annum. The award permitted the judgment-debtor to pay off the amount within three months from the date thereof, failing

which the decree-holders were entitled to get a conveyance of premises No. 30, Shakespeare Sarani, Calcutta-700 017 executed and registered

in their favour. The concluding and operative portion of the award provides as follows:-

I, therefore, direct as follows:

(a) The respondent will pay a total sum of Rs. 6,82,62,117/- together with interest at the rate of 15% per annum simple on the principal amount of

Rs. 5,18,98,909/- from 16th April, 1999 until payment within a period of three months from the date hereof,

(b) If the respondent does not pay the aforesaid sum within the said period of three months, the claimants will be entitled to get the conveyance of

premises No. 30, Shakespeare Sarani together with the benefit of the sanctioned plan registered in their favour or any one of them or their nominee

or nominees on compliance of all legal formalities. The transaction shall be completed within a period of six months. The respondent is directed to

cause Bata India Ltd. and/or other parties necessary to execute such conveyance in favour of the claimants or any of them or their nominee or

nominees as the case may be. The value of the land has already been determined by me at RS. 12.50 crores,

(c) In the event of execution of such conveyance, if the total amount payable by the respondent to the claimant does not exceed the said sum of Rs.

12.50 crores, the claimants shall pay the balance amount simultaneously to the respondent. It is made clear that interest @ 15% per annum on the

principal amount shall accrue either until payment of the awarded amount or the date of conveyance as the case may be,

(d) The stamp and registration charges in respect of the registration will be borne by the parties as follows:

For Rs. 12.50 crores by the claimants. Balance Rs. 6.5 crores by the respondent.

(e) The respondent will bear all Municipal taxes and other outgoings in respect of the said property upto the date of conveyance and handing over

possession of the property to the claimants or any of them or the nominee or nominees as the case may be,

(f) So far as the shares in respondent are concerned since the claimants have not asked for any relief in their statement of claim, I refrain from

giving any direction,

(g) I assess the costs of arbitration at Rs. 1 lack which shall be payable by the respondent to the claimants together with the awarded amount

mentioned above.

4. The judgment-debtor challenged the award; particularly the valuation of the Shakespeare Sarani property and in proceedings u/s 34 of the

Arbitration and Conciliation Act, 1996, this Court remitted the award to the arbitrator for reconsidering the valuation. The arbitrator returned the

same valuation.

5. The judgment-debtor says that the award is a money award simpliciter and since the judgment-debtor has deposited the money under the

decree in terms of Order XXI Rule 1 of the Code of Civil Procedure, such money should be made over to the decree-holders and satisfaction of

the decree entered up. The judgment-debtor cites the decree-holders' earlier interpretation of the award and copious reference has been made in

the judgment-debtor's application to the averments in earlier execution proceedings launched by the decree-holders. The judgment-debtor seeks

to demonstrate that the stand now taken by the decree-holders is contrary to their earlier assertion that it was only money that the decree-holders

were entitled to.

6. The decree-holders had insisted earlier that the decree could only be satisfied upon the immovable property being sold and the sale proceeds

being made over to them in protanto satisfaction of the amount covered by the decree. The decree-holders had sought a sale of the Shakespeare

Sarani property through a receiver. Such failed attempt culminated in the order dated June 11, 2002 where the opening line records that the

application in question was one for execution of a money award.

7. The judgment-debtor says that since this Court had already recognised the award that is the subject-matter of either application at present, to be

one for payment of money, the decree-holders cannot be heard to assert to the contrary. Such order has not been carried in appeal and, according

to the judgment-debtor, it has attained finality and the principles of res judicata or constructive res judicata would apply.

8. The judgment-debtor refers to a decision reported at 11 IA 37 (Ram Kirpal Shukul v. Mussumat Rup Kuari and Another) at 11 IA 181 (Bani

Ram & Anr. v. Nanhu Mal) to submit that not only does the principle of res judicata apply in execution, as to whether a judgment operates as a

bar to the matters covered thereby being reopened does not depend on the correctness of the judgment but on the finality thereof. The following

passages from the two judgments have been placed:-

It is unnecessary for their Lordships to express any opinion as to the answer of the High Court to the question propounded by the Division Bench,

though they must not be understood as concurring in it. The question, if the term "res judicata" was intended, as it doubtless was, and was

understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to

the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders

reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an

interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in

carrying the judgment into execution. The binding force of such a judgment depends not upon Section 13, Act X of 1877, but upon general

principles of law. If it were not binding there would be no end to litigation....." (11 IA 37)

..... The question now for their Lordships" decision is, whether the order of the 25th of January, 1879 was not conclusive between these parties?

It was an order made in the execution proceedings in this very suit; and the decision of this Board in *Ram Kirpal Shukul v. Mussumat Rup Kuari*

(11 IA 37) is exactly in point. The only question that could be raised, and was raised by the learned Counsel for the respondent, was that there

might be some difficulty as to the construction to be put upon the words of the order of the 25th of January, 1879. But looking at the terms of that

order, although it may not be so clearly expressed as it might have been, there appears to be no doubt that what was decided on that occasion was

the same right to recover the interest, after the expiration of the two years which was fixed by the decree for payment, as is now put in question in

the present execution proceedings." (11 IA 181)

9. For the same principle the judgment-debtor cites 48 IA 187 (*Hook v. Administrator-General of Bengal & Ors.*) and *Mohanlal Goenka Vs.*

Benoy Krishna Mukherjee and Others, .

10. The decree-holders claim that they cannot be the losers on opposite sides of the same issue. They say that if the first sentence of the order of

June 11, 2002 operates as *res judicata*, the second paragraph of such order would operate in equal force against the present contention of the

judgment-debtor. It was held in the second paragraph that the award provided a particular mode of satisfaction and such mode had to be

exhausted first. The decree-holders say that notwithstanding their attempt to achieve in further execution what they had failed to obtain in the

proceedings concluded by the order dated June 11, 2002, a party"s conduct would scarcely affect the nature or quality of the decree or award

sought to be implemented.

11. The second paragraph of the order dated June 11, 2002 needs to be noticed in its entirety:-

Therefore, I am of the view that since the award provides for a particular mode of satisfaction and the mode of execution has to be exhausted first.

The petitioner has to take the award as a whole. It cannot be bifurcated in order to suit his case. Mr. Sen submits that since there is no dispute as

regarding money award therefore this award can be executed in any other mode and particularly the mode by which the assistance of this Court is

sought for by this application. I am unable to accept his contention for the reasons stated above. Therefore, the mode which has been prayed

herein cannot be granted until and unless the mode as prayed for... in the award itself is exhausted.

12. The judgment-debtor falls back on its second line of defence to suggest that since the award provided for reciprocal obligations and it is

apparent that the decree-holders have failed to act in accordance with the terms thereof, either the judgment-debtor's offer for payment has to be

accepted or the decree-holders left altogether high and dry for not having discharged their obligations under the award.

13. In support of the argument as to how a decree involving reciprocal obligations may be executed, the judgment-debtor relies on a judgment

reported at *Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others*, -

18. Much of the argument about this revolved round the question whether the equitable rules that obtain before decree in a suit for specific

performance continue at the stage of execution. It is not necessary for us to go into that here because the position in the present case is much

simpler. When a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the

other execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the

executing Court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree: a thing that an

executing Court cannot do. There may of course be decrees where the obligations imposed on each side are distinct and severable and in such a

case each party might well be left to its own execution. But when the obligations are reciprocal and are interlinked so that they cannot be

separated, any attempt to enforce performance unilaterally would be to defeat the directions in the decree and to go behind them which, of course,

an executing Court cannot do. The only question therefore is whether the decree in the present case is of this nature. We are clear that it is.

19. The relevant part of the decree has already been quoted. It directs that

against payment or tender by the plaintiffs..... the said defendants..... do execute in favour of the plaintiffs proper deed or deeds of transfer of.....

five annas share in the Marwari Brothers....

This is not a case of two independent and severable directions in the same decree but of one set of reciprocal conditions indissolubly linked

together so that they cannot exist without each other. The fact that it is a decree for specific performance where the decree itself cannot be given

unless the side seeking performance is ready and willing to perform his side of the bargain and is in a position to do so, only strengthens the

conclusion that was the meaning and intendment of the language used. But the principle on which we are founding is not confined to cases of

specific performance. It will apply whenever a decree is so conditioned that the right of one party to seek performance from the other is conditional

on his readiness and ability to perform his own obligations. The reason is, as we have explained, that to hold otherwise would be to permit an

executing Court to go behind the decree and vary its terms by splitting up what was fashioned as an indivisible whole into distinct and divisible

parts having separate and severable existence without any interrelation between them just as if they had been separate decrees in separate and

distinct suits.

14. Another judgment reported at Chen Shen Ling Vs. Nand Kishore Jhajharia, has been pressed into service for the same purpose where the

earlier Judgment of Kedar Nath Khetan was relied upon and quoted in course of the discussion on the subject.

15. The judgment-debtor insists that even if clause (b) of the operative part of the award comes into play, the judgment-debtor has a right to offer

the decretal amount and seek discharge by payment. The judgment-debtor says that the Shakespeare Sarani property was mentioned in the award

only by way of security and such reference could not have converted what was essentially a money award into an award of a different nature.

16. The decree-holders assert that upon the period of three months in terms of Clause (a) expiring, the decree-holders become entitled to get the

conveyance of the premises together with the benefit of the sanctioned plan registered in their favour or in favour of any nominee. The decree-

holders refer to the arbitrator having reiterated the valuation following the award being remitted and of the judgment-debtor withdrawing its

challenge to the further award. The decree-holders say that an executing Court can neither go behind the decree, nor modify it in its misplaced

endeavor to balance equities between the parties. Just as a decree that provides for no interest would not permit the executing Court from adding

the interest component, however harsh the effect of such decree on the decree-holder for interest having been excluded, the Court here cannot

alter the decree on the emotional plea of the decree-holder that the valuation of the immovable property made in the year 2000 is meaningless in

the present context. The decree-holders caution that neither can the executing Court take notice of any alleged increase in property prices, nor is a

case of hardship on account of property prices having allegedly gone up made out in the judgment-debtor's application.

17. As to the bounds of the executing Court's authority, the decree-holders rely on a judgment reported at V. Ramaswami Ayyangar and Others

Vs. T.N.V. Kailasa Thevar, and place the following passages from the report:-

7. It seems to us that the High Court's approach to the case has not been a proper one and the conclusion it has reached cannot be supported in

law.

8. The learned Judges appear to have overlooked the fact that they were sitting only as an executing Court and their duty was to give effect to the

terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree, but under the

guise of interpretation they could not make a new decree for the parties.

18. The decree-holders bring an attractive logic to the discussion. If the award has only to be seen as a money award in view of the order dated

June 11, 2002, it has only to be executed in the manner provided therein. Whether or not the view taken in the second paragraph of the order

dated June 11, 2002 is a proper construction of the award and its import, it binds the parties. The principle of res judicata, or principles analogous

thereto, are rules of public policy to bring about a finality in litigation. An erroneous order, if it has attained finality, would operate as a bar

irrespective of it appearing to be erroneous. That is not to suggest, that either limb of the order dated June 11, 2002 that the rival parties rely on, is

erroneous. With respect, that is the most likely of views that may be taken on the matter and would probably have been the view taken here.

19. But it is one thing to suggest that the second paragraph of such order has attained finality and cannot be reopened, and quite another to assess

the mode of execution that the award provides. There is nothing in the order to suggest that any pronouncement has been made as to what is the

exact mode of execution that the award recognises.

20. It is trite that the executing Court would not tinker with the decree, but even the case that the decree-holders have brought leave it open to the

executing Court to interpret the decree. Such interpretation cannot be influenced by any extraneous considerations, like taking into account the

rising or falling property price as in this case.

21. To start with, the two factors on which the interpretation made here rest may first be spelt out. They are the use of the word "entitled" and the

sentence, "The transaction shall be completed within a period of six months." Both are found in the apparently problematic Clause (b) of the

operative part of the award.

22. It is the decree-holders' case that upon the period of three months permitted under Clause (a) having run out, it became the decree-holders'

chance to obtain the property upon giving credit for a sum of Rs. 12.5 crore to the judgment-debtor there for and remaining entitled to receive the

balance decretal debt. The decree-holders state that whether it was a day after the expiry of the three-month period under Clause (a) or ten years

later, they would be entitled to the property and all else specified in Clause (b) and the further amount, if any.

23. Interest, in terms of the award, runs at 15 per cent per annum on the principal sum adjudged to be due. There is no indication that if the

transaction was not completed within the period of six months, whether upon the decree-holders' laggardly conduct or the judgment-debtor

deliberately dragging its feet, interest would not continue to run. The basic mode of execution, the quantum of the sum awarded and the rate of

interest and period there for are not variables, in a sense, or open to any interpretation.

24. But the valuation may be open to interpretation. The executing Court cannot attempt to read the arbitrator's mind but if valuation is found to be

not crucial to the mode of execution, it may be susceptible to an interpretation other than what the decree-holders suggest. A money award is

made; time is given to the judgment-debtor to pay up; a default clause is provided that calls for a property to be handed over in lieu of the money;

and interest continues to run all the while till the decretal debt is discharged. If such is the fundamental structure of the award and an in-built mode

of execution is provided, the valuation is a minor detail that is open to interpretation.

25. That Clause (b) says that the decree-holders would be "entitled" to get the property has clearly been seen as an integral part of the mode of

execution in the second paragraph of the order dated June 11, 2002. It was open to argument that if a party to the award was entitled to do a thing

it may not have necessarily been obliged to do it. But these are futile thoughts upon it being accepted that both the opening sentence and the

second paragraph of the order of June 11, 2002 operate as res judicata and preclude the parties from pondering as to what could have been.

26. The decree-holders still remain entitled to get conveyance of the property and the attendant rights in terms of Clause (b) but the bundle of

rights to which the decree-holders are entitled under Clause (b) would have to be valued and a contemporaneous assessment obtained. And, if the

present evaluation of the property throws up a larger or lesser figure, it is for such amount that the judgment-debtor should be given credit or found

to be indebted against the decretal debt, inclusive of interest and costs, being ascertained as at the date of transfer of the Shakespeare Sarani

property.

27. The effect of the order dated June 11, 2002 and the dismissal of the decree-holders' application is that even the judgment-debtor can no

longer urge that the property be sold and the sale proceeds be made over in protanto satisfaction of the decretal debt. But nothing in the order of

June 11, 2002 throws any light either on what is precisely the mode of execution that the award contemplates or that the valuation as at 2000 has

to be taken as sacrosanct.

28. The interpretation of a decree or an award will ordinarily have little to do with the conduct of the parties, particularly the conduct subsequent to

the decree or the award made. Circumstances leading up to the making of the decree as may be evident from the body of the judgment preceding

the decree may be relied upon to synchronise the judgment with the decree or to gauge the true purport thereof. A particular reading of the decree

or award by a party thereto would only indicate that such is a possible interpretation. But if such assessment of the decree or award by a party

thereto appears to be fallacious, that such party read the decree or award in such way will neither bind it nor have any bearing on the interpretation

of the decree.

29. The interpretation given here to the award is not dependent on any consideration as to whether the price of the property has gone up, which

would be to the judgment-debtor's chagrin, or has gone down which would be to the decree-holders' prejudice. It is also a construction of the

award keeping in mind that it has been held to be a money award and has also been recognised to have an in-built mode of execution.

30. The sentence in Clause (b) to the effect that the transaction was to be completed within six months cannot be altogether disregarded as a

meaningless line hanging in the middle of a contentious clause. Canons of interpretation would not permit such sentence to be construed as fixing an

outer time limit for the transaction to be completed or, in default, for the award to remain a dead letter upon such period running out. Such

sentence, however, can be profitably taken along if it is recognised that the time period would have a bearing on the validity of the valuation.

31. Ephemeral as a valuation is, it is rooted to a time and, may be, context. If, say, the award required only a building (and not the land) to be

transferred after permitting the decree-holder an initial period to pay off the money found due, and if the building was either razed or compulsorily

acquired, it would not imply that upon the period for payment elapsing, the award would become meaningless and incapable of execution.

32. The award is not in the nature of barter. It is possible for a decree or award to provide for a property to be made over in lieu of the money

claim. The terms of a decree or award in the nature of barter would be quite different from the terms of the present award. In the case of a decree

or award in the nature of barter, the property to be transferred by the judgment-debtor would have been found to be of value equivalent to the

money claim and the decree-holder would only be entitled to execute the decree by seeking transfer of the property and not seek payment.

33. Clause (b) in the present case, however, appears to be a default clause. Upon such default clause coming into effect following the judgment-

debtor's failure to avail of the time given by the award to pay off the money, the decree-holders are, no doubt, entitled to the property and all else

that is due to pass to them or either of them or their nominee or nominees, in terms of Clause (b). But the valuation of the Shakespeare Sarani

property is not an indispensable part of Clause (b) or the implementation thereof in the sense that if the valuation is divorced from the clause, it can

no longer be implemented.

34. The judgment-debtor has attempted to show that upon an order made by the Bombay High Court in favour of its debenture-holder IDBI, the

Shakespeare Sarani property remains under the receiver appointed by such Court. It does not appear clear from the order that the judgment-

debtor cites that such is the state of the property. In any event, the decree-holders are left free to get the property in the manner specified in the

award and remove any impediment, if there is one, and obtain conveyance of the property and get all else as is specified in Clause (b). It would

ensure to the benefit of the judgment-debtor to remove any hurdle that may remain in the decree-holders way, as interest continues to mount

against the judgment-debtor.

35. The judgment-debtor will be at liberty to obtain refund of the deposit that it has made in Court pursuant to an order of September 13, 2007.

The Registrar will refund the money, along with all accretion thereto, less the Register's commission, if any. The judgment-debtor will convey the

Shakespeare Sarani property in favour of the decree-holders, or their nominee or nominees, together with the benefit of the sanctioned plan and

upon compliance with all legal formalities within a period of six weeks from date. Mrs. Talbot & Company is appointed to value the asset or assets

that the decree-holders are entitled to obtain under Clause (b) of the award. Such valuation should be concluded within a period of four weeks

from date and steps preparatory to the registration of the conveyance should be proceeded with for the duration that the valuation is under

progress. The decretal debt will be reckoned till the date of the actual registration of the conveyance and if money is to be paid by either side to the

other upon the calculations being made, the same should be completed within a fortnight from the date of registration of the conveyance.

36. Upon the completion of the above formalities, the parties will enter up satisfaction of the award. Or else, either side will be entitled to launch

fresh execution.

37. It will, however, be open to the decree-holders to agree to accept the money that has been offered by the judgment-debtor, complete with

interest till the date that the title deeds of the property, which appear to be either with the decree-holders or the receiver, are returned to the

judgment-debtor. If the judgment-debtor does not convey the property, upon there being no impediment thereto by virtue of any other order,

within the time permitted the receiver will execute the conveyance on the judgment-debtor's behalf and the decree-holders or either of them or

their nominee or nominees will get as good a title to the property upon such conveyance as they could have obtained from the judgment-debtor.

38. The fees of Talbot & Company should be met by the judgment-debtor, or else, if the decree-holders pay the fees they shall be entitled to

receive the money from the judgment-debtor and launch fresh execution in this Court for such purpose. The receiver will be paid a remuneration of

2000 GMs and will stand discharged upon all steps in terms of this order being completed.

39. E.C. No. 113 of 2007 and E.C. No. 115 of 2007 are disposed of accordingly. The parties will bear their own costs.

40. Urgent certified photostat copies of this judgment, if applied for, be issued to the parties upon compliance with all requisite formalities.

41. Later : The judgment-debtor prays for a stay of operation of the order which is declined.