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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 4th October, 2021

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EX.F.A. 14/2021 & CM APPL. 25078/2021

GATI KAUSAR INDIA LTD.

..... Appellant

Through: Mr. Vivek Gupta and Mr. Saket
Agarwal, Advocates.

versus

**B. K. STRUCTURAL CONTRACTS PRIVATE
LTD.**

..... Respondent

Through: Mr. L.B. Rai and Mr. Kartik Rai,
Advocates.

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JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through video conferencing.
2. The present execution first appeal has been filed by the Appellant challenging the impugned orders dated 4th September, 2020 and 15th January, 2021 passed by the Ld. ADJ, Patiala House Courts, New Delhi (*hereinafter "Executing Court"*). By the impugned order dated 4th September, 2020, warrants of attachment have been issued by the Executing Court against the Judgment Debtor/Appellant herein (*hereinafter "Judgment Debtor"*) in order to enforce the interim arbitral Award dated 16th November, 2019/1st February, 2020 passed by Ld. Arbitrator in favour of the Claimant/Decree Holder/Respondent herein (*hereinafter "Decree Holder"*). By the impugned order dated 15th January, 2021, the Execution application was disposed of by the Executing Court considering that the entire decretal amount had been paid by the Judgment Debtor.
3. The present case raises an important question in respect of passing of

arbitral awards, the execution thereof, as also entertaining of objections under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter “the Act”*).

4. The dispute that has arisen between the parties herein pertains to the Agreement dated 29th December, 2016, in terms of which, the Judgment Debtor had engaged the Decree Holder for civil and allied works towards construction of a warehouse/cold storage at Shamirpet, Hyderabad. The project was to be executed for a total consideration of Rs. 3,50,00,000/-.

5. The case of the Claimant before the Arbitral Tribunal was that the amounts due as per the Agreement dated 29th December, 2016 had not been paid by the Judgment Debtor. In view of the arbitration clause in the said Agreement, Shri. N.K. Goel, former Addl. District and Sessions Judge, Delhi was appointed as the Sole Arbitrator to adjudicate the disputes. In the Arbitral proceedings being **Arb. Case No. 01/2019** titled ***B.K. Structural Contracts Pvt. Ltd. v. Gati Kausar India Ltd.***, interim Award dated 16th November, 2019/1st February, 2020 came to be passed under Order XII Rule 6 CPC wherein the Decree Holder was awarded a sum of Rs. 23,63,004/-. The operative portion of the said interim Award reads as under:-

“However, if we read the e-mails dated 11.10.2017 and 12.10.2017 together, we would reach to the irresistible conclusion that the respondent has made an unequivocal, unambiguous and plain admission with regard to its liability to pay Rs. 2463629, /- with taxes (net amount Rs. 1948950/-) but finding a difference of Rs. 1,00,625/- which is accepted by the claimant company also. Thus, the admitted liability of the respondent comes to Rs. 2463629/- minus Rs. 100625/- = Rs. 2363004/-.

Therefore, it is a fit case where judgment on admission can be passed under Order 12 Rule 6 CPC. Accordingly, I hold that the claimant is entitled to an award of Rs. 2363004/- under Order 12 Rule 6 CPC. The interim award for the said amount is passed accordingly in favour of the claimant and against the respondent. The question of payment of interest and costs, if any, shall be decided at the time of final disposal of the claim petition.”

6. After the passing of the above interim Award, the parties to the dispute filed parallel proceedings. The Decree Holder filed an execution petition being **Execution Petition No. 47 of 2020** titled **M/s. B.K. Structural Contracts Pvt. Ltd. v. M/s. GATI Kausar India Ltd.** before the ld. ADJ, Patiala House Courts, New Delhi on 4th February, 2020. On the other hand, the Judgement Debtor filed an application under Section 34 of the Act in **OMP No. 09/2020** titled **M/s. Gati Kausar India Lts. V. B.K. Structural Contracts Pvt. Ltd.**, before the DJ (Commercial Courts), South, Saket Courts (hereinafter “Commercial Court”) on 10th February, 2020.

7. Both the Execution Petition as also the application under Section 34 of the Act were heard on different dates, and the chronology is captured in the table below:-

Execution Petition No. 47 of 2020	OMP No. 09/2020 u/s.34 of the Act
05.02.2020 - Fresh execution was received, checked and registered by the Executing Court.	11.02.2020 - Fresh case was received, checked and registered by the Commercial Court.
13.03.2020 - Executing Court perused the Civil Nazir’s report and observed that the 90 days’ period for filing appeal had not expired.	07.03.2020 - Summons were issued to the Decree Holder.

28.07.2020 - Decree Holder's application seeking injunction was dismissed as withdrawn by the Executing Court .	27.06.2020 - Fresh summons were issued to the Decree Holder.
03.09.2020 - The matter was adjourned to 04.09.2020.	14.08.2020 - Fresh summons were issued to the Decree Holder.
04.09.2020 - Considering Civil Nazir's report, warrants of attachment were issued against the Judgment Debtor.	06.10.2020 - Fresh notice issued to the Decree Holder and summons were issued dasti for service upon Decree Holder.
15.01.2021 - The Executing Court was informed that the Judgment Debtor had paid the entire decretal amount in pursuance of the warrants of attachment. However, Judgment Debtor submitted that the Award was under challenge in an application under Section 34 of the Act and thus, payment had been made under protest, subject to the outcome of the said application. Accordingly, execution petition was disposed of.	21.11.2020 - Matter was adjourned on account of the Covid-19 pandemic.
	19.01.2021 - Fresh notice was issued upon the Decree Holder.
	23.07.2021 - Decree Holder entered appearance for the first time. Id. Counsel for Decree Holder submitted that the interim Award had stood satisfied. On the other hand, Id. Counsel for Judgment Debtor submitted that the payment was made under protest and thus, the Decree Holder cannot force the Judgment Debtor to withdraw his application for setting aside the Award. The Decree Holder's application for disposing of the Judgment Debtor's application under Section 34 was rejected as being devoid of merits.

8. A perusal of the above chronology of events as they transpired in both the proceedings shows that the Executing Court was unaware and not

informed of the proceedings before the Commercial Court, and vice versa. The Judgement Debtor delayed serving the Decree Holder with the application under Section 34 of the Act. The Executing Court was proceeding *ex-parte* on the ground that the interim Award was not challenged.

9. The first issue raised by Mr. Gupta, Id. Counsel for the Judgment Debtor, is that the authenticated copy of the Award was only issued on 1st February, 2020. Thus, the date of the interim Award should be deemed to be 1st February, 2020 for the purpose of filing an application for setting aside the Award under Section 34 of the Act. He relies upon the judgment of the Supreme Court in ***Dakshin Haryana Bijli Vitran Nigam Ltd. V. M/s Navigant Technologies Pvt. Ltd. [Civil Appeal No. 791 of 2021 decided on March 2, 2021]*** to contend that the limitation period for filing an application under Section 34 of the Act begins from the date of receipt of the signed copy of the arbitral Award. Id. Counsel urges that the execution petition itself could not have been filed earlier and hence the orders passed therein deserve to be set aside. On the basis of an improperly filed execution petition, the amounts have been recovered by the decree holder, in a manner contrary to law.

10. On the other hand, Mr. Rai, Id. Counsel for the Decree Holder, submits that the interim Award was handed over to both the parties on the same date when it was passed i.e., on 16th November, 2019. He has shown to the Court an acknowledgment where the Id. Counsels have signed and received the interim Award, from the Id. Arbitrator on 16th November, 2019. Thus, the limitation commenced from the said date. He then submits that the execution petition, though filed early, by the time the warrants of attachment

were issued, it was long past the limitation period for filing of a challenge under Section 34 of the Act. Moreover, the Judgment debtor chose not to serve the said petition for a long time and thus the decree holder had no knowledge of the filing of the challenge to the interim Award.

11. The first question that would arise is whether the date of the interim Award should be deemed to be 16th November, 2019 or 1st February, 2020. On the basis of the acknowledgment which has been shared with the Court, by Mr. Rai, this Court is of the opinion that the copy of the interim Award having been served upon the Id. Counsels for both the parties on 16th November, 2019, the date of the interim Award would be reckoned as 16th November, 2019.

12. However, the dispute would not end here. On 10th February, 2020, the Judgment Debtor filed an application challenging the interim Award dated 16th November, 2019 under Section 34 of the Act, and the same was first listed before the Court on 11th February, 2020, i.e., within a period of 90 days after the passing of the Award on 16th November, 2019. Thus, the said application was filed within the period of limitation. In the said application under Section 34 of the Act, summons were repeatedly issued to the Decree Holder, as reflected in the Table set out hereinabove, on 11th February, 2020, 7th March, 2020, 27th June, 2020, 14th August, 2020, 6th October, 2020, 19th January, 2021 and 23rd January, 2021. However, the Decree Holder finally entered appearance before the Commercial Court only on 23rd July, 2021.

13. The issue that has arisen in this appeal is, however, not in respect of the Judgment Debtor's application under Section 34. Instead, the grievance of the Judgment Debtor is that the execution petition came to be filed within the period of 90 days from the date of the interim Award. The period of 90

days, for challenging the award, even if reckoned from 15th November, 2019 would have ended only on 15th February, 2020. According to Mr. Gupta, the execution petition could not have been entertained prior to the expiry of the period of 90 days from the date of the interim Award, in terms of the limitation for filing an appeal as stipulated by Section 34(3) of the Act. Thus, the fundamental grievance of the Judgment Debtor is that the execution having been filed prior to the 90 days' period the filing of the execution petition itself was contrary to law and hence the warrants of attachment are void and liable to be set aside.

14. On the other hand, Mr. Rai, Id. Counsel for the Decree Holder, submits that even though the execution petition was filed prior to expiry of the period of 90 days from the date of the interim Award, the same was not entertained by the Executing Court within the 90 days' period, and it was for the first time in September 2020 that the warrant of attachment were issued against the Judgment Debtor. He further submits that the Decree Holder was not served with the application under Section 34 of the Act, and so he had no knowledge of the challenge made to the interim Award by the Judgment Debtor herein.

15. Undoubtedly, the execution petition was filed within a period of 90 days from the date of passing of the interim Award dated 16th November, 2019 i.e., before the period of limitation for filing an appeal against the Award as stipulated by Section 34(3) of the Act, had come to an end. Both parties have not placed any order of the Id. Arbitrator on record or any acknowledgement on behalf of the Counsel for the Decree Holder or the Decree Holder himself, which can attribute knowledge to the Decree Holder of the filing of the application under Section 34 of the Act.

16. Mr. Gupta, Id. Counsel for the Judgment Debtor, submits that the Executing Court had not issued notice in the execution petition. Mr Rai submits that under Order XXI of CPC, if the execution is filed within two years, no notice is required to be issued and warrants of attachment can be ordered directly.

17. It is quite incongruous that the execution petition came to be filed prior to the expiry of the period of 90 days from the date of the interim Award. Under Section 34 of the Arbitration and Conciliation Act, 1996, the time limit for filing an application for setting aside the Award is three months. Thus, an execution petition ought to be filed only after a period of three months have elapsed from the date of the Award, unless there is some grave exigency. Further, Section 36 of the Act provides for the enforcement of the arbitral award. Section 34 (3) and Section 36(1) of the Act read as under:

“Section 34...

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

“36. Enforcement.—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the

provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).]

1 [Provided further that where the Court is satisfied that a *Prima facie* case is made out that,— (a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the

*Arbitration and Conciliation (Amendment) Act,
2015 (3 of 2016).]*”

18. The clear stipulation under Section 36 is that filing of an execution petition prior to the expiry of a period of three months, for enforcement of an award, would not be permissible. The execution of the arbitral Award can be sought only past the expiry of three months, that too with a specific averment being made in the execution petition to the effect that there is no application for setting aside the Award under Section 34 of the Act, which has been filed by the Judgment Debtor wherein notice has been served upon the Decree Holder.

19. This principle of law was also upheld by the Ld. Single Judge of this Court in ***Vindhya Telelinks Limited v. Bharat Sachar Nigam Limited & Ors. [103 (2003) DLT 82]***, wherein the execution petition was dismissed as being premature on the ground that the application for execution could not have been filed until three months for filing an application under Section 34 have expired. The relevant observations read:

“3. Under the Arbitration Act, 1996 it is provided in Section 36, that an Award may be enforced as a decree only in either of the two eventualities referred to below:-

(a) When time for making an application to set aside the arbitral award under Section 34 has expired, or

(b) When such application having been made, same has been refused.”

20. In ***D. M. Jawahar Merican v. Engineer India Ltd. [AIR 2009 Delhi 41]***, the Ld. Single Judge of this Court drew a distinction between the enforceability and executability of an arbitral award, in terms of Section 34(3) and Section 36 of the Act. The Court has also reiterated that the

executability of the Award is postponed in cases where the validity of the Award has been questioned in proceedings under Section 34(3) of the Act.

The relevant observations read as under:

“13. The above decision is a clear pointer to distinguish between enforceability and executibility of an award. Its enforceability i.e. the legal validity or correctness has to be decided in the Court of law in accordance with the procedure prescribed. In the case of a decree, the validity is challenged by way of an appeal. The decision in Dr.Chiranjilal case (supra) was concerned with that question. Analogically in the case of an arbitral award the validity can be questioned in proceedings under Section 34(3) of the Act. The award's executibility, is postponed in such cases as is evident on reading of Section 36 of the Act. However, in both instances (i.e. award and decree) and since the effect of an award is that it amounts to a decree under the New Act - is the same. Therefore, this Court is un-persuaded by the arguments on behalf of the petitioner that the correct date for considering it receiving the award (under Section 31 of the Act, to enable it to file the petition under Section 34 of the Act) was 13.04.2005. It was in fact 18.01.2005.”

21. In the present case, the execution petition was clearly filed prior to the expiry of the period of 90 days as stipulated under Section 34(3) of the Act. The Executing Court was, however, conscious of this fact and the Executing Court repeatedly adjourned the matter from 5th February, 2020 to 13th March, 2020, 28th July, 2020 and 3rd September, 2020. It was only on 4th September, 2020, after recording that there was no stay or appeal filed against the Award, that the warrants of attachment have been issued against the Judgment Debtor. Thus, though the execution petition was filed within

the period of 90 days and entertained by the Executing Court on 5th February, 2021, no default can be found with the Executing Court, which waited till September, 2020 to issue the warrants of attachment. By this time, the application under Section 34 of the Act was also filed by the Judgment Debtor. However, unfortunately the Judgment Debtor herein did not take proper steps to serve the Decree Holder in time. Further, the orders passed by the Commercial Court while entertaining the application under Section 34 of the Act repeatedly show that the Decree Holder was not being served, and the steps were not being taken by the Judgment Debtor to serve the Decree Holder. Thus, it is clear that there has been some callousness which has been exhibited by the Judgment Debtor as well, which has led to a situation wherein warrants of attachments were issued by the Executing Court in the Decree Holder's execution petition, and the Decree Holder was not served in the Judgment Debtor's application under Section 34 of the Act.

22. Thus, in view of the warrants of attachments issued by the Executing Court, the Judgment Debtor paid the decretal amount as per the interim Award dated 16th November, 2019. Finally, vide order dated 15th January, 2021 in **Ex. 47 of 2020**, the Executing Court disposed of the execution petition in the following terms:

"It is submitted by counsel for parties that W/As have been executed and it informed by counsel for DH that in execution of W/As issued by this court JD has already made payment of entire decretal amount, vide cheque and same has already been encashed.

Counsel for JD, however, submits that the Award of which present execution has been filed is under challenge in a petition under Section 34 of Arbitration and Conciliation Act and JD had made

payment under protest subject to outcome of said petition.

Considering the fact that the payment of decretal amount has already been received by the DH, nothing survives in the present execution petition, same stands disposed off as satisfied. File be consigned to record room.”

23. Thus, in effect, the payment of the decretal amount has been made by the Judgement Debtor under protest and subject to the outcome of the application under Section 34 before the Commercial Court.

24. At this stage, the Court is also informed that the final Award in this matter has also been passed by the Id. Arbitrator on 29th September, 2021, by which further amounts have been awarded in favour of the Decree Holder. Thus, if any adjustment of payments is to be given, the same shall be considered by the Court dealing with the application under Section 34 of the Act i.e., the Commercial Court.

25. On merits, the present petition is, disposed of, in terms of the impugned order dated 15th January, 2021 passed by the Executing Court. It is made clear that any payment made by the Judgment Debtor shall be subject to the outcome of the Judgment Debtor’s application under Section 34 of the Act, in **OMP No. 09/2020**. Accordingly, an undertaking is recorded on behalf of the Decree Holder that they would abide by the decision in **OMP No. 09/2020**, subject to any challenge thereto. The said decision would finally bind the parties in respect of the payment which has been made to the Decree Holder by the Judgment Debtor. Under the facts and circumstances of this case, this Court holds that no further interference is warranted.

Further directions:

26. The filing of the execution petition prior to the expiry of period of 90 days from the date of the Award, as in the present case, is however, a matter of concern. This Court is of the opinion that it is necessary to sensitize all the judicial officers, including the Executing Courts, that an application seeking execution of the arbitral Award ought not to be entertained prior to the expiry of the period of 90 days as stipulated by Section 34(3) of the Act. If there is some grave exigency and some interim orders are to be sought, a petition under Section 9 can be filed by the decree holder.

27. Further, as noticed in the present case, the application under Section 34 of the Act has been filed before the Commercial Court in Saket, Delhi, but the execution petition has been filed before the Executing Court located at the Patiala House Courts, Delhi. This has also led to a situation where the Executing Court does not have knowledge of the filing and pendency of application under Section 34 of the Act by the Judgment Debtor. Usually, parties or their Counsels inform the Executing Court of the filing of the application under Section 34 of the Act. However, in the present case, the Decree Holder having not been served in the application under Section 34 of the Act, the Decree Holder could not inform the Executing Court of the filing of the Section 34 application.

28. Considering the overall fact situation and the circumstances which have arisen in this case, the present case be placed before the worthy Registrar General for placing the same before the concerned Rules committee of the Delhi High Court to consider whether any practice directions need to be issued in respect of the entertaining of execution petitions against arbitral Awards, and applications under Section 34 of the

Arbitration and Conciliation Act, 1996.

29. Further, since arbitral awards may be executable in courts across the country, the matter requires examination as to whether there ought to be any mechanism for information relating to arbitral awards to be uploaded on an online platform such as National Judicial Data Grid, so that courts can obtain information relating to challenges to arbitral awards, execution sought if any and other relevant information. For this purpose, let the present order be communicated to *Shri Atul Kurhekar, Member (Process), e-Committee, Supreme Court of India* through the email address amkurhekar@aij.gov.in.

30. The present petition, along with all pending applications, is disposed of in these terms.

31. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as the certified copy of the order for the purpose of ensuring compliance. No physical copy of orders shall be insisted by any authority/entity or litigant.

PRATHIBA M. SINGH
JUDGE

OCTOBER 4, 2021
MR//dk/AD

(corrected & released on 21st October, 2021)