IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2304 OF 2007
IN
APPEAL NO. 376 OF 2007
IN
NOTICE OF MOTION NO. 1245 OF 2006
IN
EXECUTION APPLICATION NO. 405 OF 2006
IN
AWARD (LODGING NO.77 OF 1998)

M/s. Sylvester and Company,)
having their office at Sylvester Building,)
20, Shahid Bhagat Singh Road, Fort,)
Mumbai-400 023.).. Appellants
(Orig. Respondents)

versus

M/s. A. Infrastructure,)
having their registered office at P.O. 311025,)
Hamirgarh, Bhiwara, Rajasthan and at their)
Mumbai office at Rajan House, Appasaheb)
Marathe Marg, Prabhadevi, Mumbai-400 025)..Respondents

Mr. D.D. Madon, Senior Advocate, instructed by M/s. Thakore Jariwala & Associates, for the appellants in support.

Mr. Pir Moiuddin, instructed by M/s. Paras Kuhad & Associates, for the respondents.

CORAM: SWATANTER KUMAR, C.J. &

SMT. RANJANA DESAI, J.

Judgment reserved on : July 02, 2007
Judgment delivered on: July 19, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

A memorandum dated 14th July, 1994, was signed between the parties to the present appeal. The memorandum provided that the disputes between the parties shall be resolved by any Chamber of Commerce as named therein including Bombay Chamber of Commerce. This was so provided vide letter dated 20th October,1994 addressed to the Bombay Chamber of Commerce. The proceedings in the arbitration commenced between the parties in the year 1994 itself as one Shri R.K. Tanna was appointed as sole arbitrator and first date of arbitration hearing was fixed as 15th September,1995. During the pendency of these proceedings, the Arbitration Act, 1940 was repealed and on 27th January, 1996, the Arbitration and Conciliation Act, 1996 came into force. In terms of Section 85 of the new Act, according to the appellants, the proceedings would be deemed to have continued under the provisions of the 1940 Act. Without any right having been exercised by the parties, as it is the case of the appellants, the arbitration proceedings culminated into an Award dated 9th June, 1997. On the basis of this award, the respondents commenced execution proceedings which, according to the appellants, were illegal.

2. The claimants sought the execution of the award and as more than two years had lapsed from the date of the award, notice under Order 21 Rule 22 of the Code of Civil Procedure, 1908, was taken out. No reply affidavit was filed in that notice by the respondents but later another Notice of Motion being Notice of Motion No. 1245 of 2006 in Execution Application No. 405 of 2006 was filed by the appellants stating therein that the award would be deemed to have been passed under the provisions of the 1940 Act and without specific consent of the parties, the proceedings could not have continued or be treated in law as proceedings under the new Act. The award, therefore, was not executable as a decree in terms of the provisions of the Act of 1996. Some other objections were also taken which were rejected by the learned single Judge vide order dated 9th March, 1997 and Notice of Motion No. 1245 of 2006 taken out by the respondents was made absolute. Aggrieved from the order dated 9th March, 2007, the appellants have filed the present appeal.

3. During the pendency of this appeal, the appellants took out two notices of motion being Notice of Motion Nos. 2304 of 2007 and 2115 of 2007. The former being an application under Order 41 Rule 27 for permission to lead additional evidence and the latter praying for an

order of injunction restraining the respondents in the appeal from taking any execution proceedings in furtherance to the award dated 9th June,1997 and stay of all further proceedings in Execution Application No. 405 of 2006.

4. Arguments at some length were addressed by the learned counsel appearing for the parties in relation to the question whether the provisions of the old Act would continue to control the rights and obligations of the parties or whether such rights were governed by the provisions of the Arbitration Act, 1996.

5. One of the principal submissions on behalf of the appellants was that they should be permitted to lead additional evidence as they could not produce the documents now annexed to the application because of their non-availability and for a bona fide mistake. It is also stated that the papers were with different counsel and as a result of change of counsel, the omission occurred resulting in serious prejudice to the appellants. It is further their contention that once the documents are permitted to be taken on record and read in evidence, in that event, the judgment under appeal would have to be necessarily set aside. While opposing this motion, the respondents contended that no cause,

much less sufficient cause, has been shown for non-production of these documents which, according to the respondents, are not even admissible in evidence. It is also contended that the documents could have been produced by the appellants by exercise of due diligence. In fact, they also wanted to file counter documents to suggest that the parties had specifically agreed and participated in the arbitration proceedings without protest as they were the proceedings under the 1996 Act. The counsel for the appellants, while relying upon the judgment of the Supreme Court in the case of *Sunder Dass* vs. *Ram Parkash*, AIR 1977 SC 1201, contended that the decree itself is a nullity and as such the executing court ought to have examined the correctness of the judgment and decree and ought not to have treated the award as a decree and enforced the same as a decree under the provisions of the 1996 Act.

6. It is a settled rule of procedural law that if an applicant satisfies the basic requirements as contemplated under Order 41 Rule 27 of the C.P.C, then the Court should be inclined to admit additional evidence and particularly when such evidence has relevance and can help the Court in fully and finally determining the matter in controversy. We even could have taken the documents on record and proceeded to

decide the appeal on merits, but there is a specific objection raised on behalf of the respondents in regard to the admissibility of these documents in evidence. They have questioned the correctness of the documents itself. The documents sought to be produced with a prayer for them to be admitted in evidence relate to certain Memoranda of Understanding executed between the parties, letter from the Chamber of Commerce dated 15th September, 1995, minutes dated 20th December, 1996, written submissions filed by the parties and objections dated 21st July, 1997 in regard to additional claims. In fact, the letter dated 14th July, 1994, annexed with the list of documents filed by the appellants has also been relied upon and filed even in the reply filed by the respondents as well. Ex facie, the relevancy of these documents can hardly be questioned. These are the documents which have a bearing on the matter. No doubt, these documents were in power and possession of the appellants and by exercise of due diligence, these documents could have been produced on record, but the reason given in the application under consideration is that there was change in counsel of the appellants at the execution stage itself and, therefore, the documents could not be placed on the record of the executing Court. The new advocate was appointed after the notice issued by the Court under Order 21 Rule 22 was served upon them and this was a

bona fide error or a mistake which occurred despite exercise of due diligence by the appellants.

7. At this stage, it may be appropriate to refer to the principles governing the application under the provisions of Order 41 Rule 27. In the case of *Hukam Chand* vs. *Phool Chand and others*, 1998 (1) PLR 822, the Court discussed various judgments on the subject and held as under:

> "The applicant could not have produced these documents inspite of exercise of any amount of diligence. It is not a case where the applicant can be faulted on the ground of delay, laches or even the negligence, intentional or otherwise. The provisions of Order 41 Rule 27 of the Code primarily require that the evidence which can be permitted to be produced even at the appellate stage, upon satisfaction of the well settled conditions and contentions stipulated under the relevant provisions of the Code are satisfied, such evidence should be permitted to be adduced rather than declining such a request. The Hon'ble Supreme Court of India in a very recent case titled as *Jaipur Development Authority* vs. *Smt. Kailash Wati Devi,* JT 1997 (7) SC 643 while setting aside the judgment of the High Court in declining the additional evidence at the appellate stage in second appeal, permitted the evidence to be taken on record even during the pendency of the Special Leave Petition. The following observations of the Hon'ble Supreme Court need to be noticed here:-
>
> > "All that is required is that the conditions mentioned in the body of the sub-rule must be proved to exist. It is not permissible to restrict the sub-clause (aa) for the benefit of only those who have adduced some evidence

in the trial court.

> In the result, the Judgment of the High Court is set aside and the objection to the maintainability or the application is overruled, it will not be for the High Court to examine the application of the appellant on merits and decide the same in accordance with law. Appeal is allowed as stated above. There will be no order as to costs."

The provisions of Order 41 Rule 27 of the Code must be read in conjunction with provisions of the Order 18 Rule 17-A and order 18 Rule 2 of the Code. The object of such provisions is to permit the parties to adduce complete evidence in support of their case and to record such evidence so as to completely adjudicate the dispute between the parties and specially where such evidence is necessary for giving an effective and complete relief to the parties. No provisions of the Code can be read in isolation. All provisions must be harmoniously construed so as to achieve the basic object of this procedural law i.e. To give expeditious, effective and complete justice to the parties to a suit. In this regard, reference can be made to the case of *Hazara Singh and another* vs. *Bachan Singh and others,* Civil Revision No. 3723 of 1996 decided on 21.1.1998 decided by this Court wherein relying upon various judgments of this Court, it was held as under:-

" The consistent view of this Court in the above judgments is that the additional evidence of the document(s) the genuinity of which is not in doubt, additional evidence of such documents specially where it will help the Court in effectively adjudicating the matter, should not be denied."

At this stage it may also be appropriate to refer to the decision of this Court in the case of *Banwari vs. Nagina* Civil Revision No. 4287 of 1997, decided on 6.2.1998.

The learned counsel for the petitioner has relied upon the judgments in the cases of *Weston Electronics Limited* vs.

> *M/s. Chand Radio and others,* (1998-1) P.L.R. 691; *Ved Parkash Saini* versus *Mohinder Lal,* (1993-3) P.L.R. 395 and *Arjan Singh* versus *Jagdish Kaur and another* (1990-2) P.L.R 319 to further argue that the provisions relating to production of additional evidence should be construed liberally so as to met the ends of justice. There is no doubt about these judgments. The various Benches of this Court had allowed production of additional evidence, though certainly some negligence was attributable to the parties. These judgments are certainly of some help to the applicant and the other passed by the learned First Appellate Court appears to be in consonance with these settled principles."
>
> "In the present case the learned First Appellate Court has rightly commented upon the relevancy of the documents in question and the application cannot be said to be lacking in bona fides. The pleadings of the same parties in relation to the subject matter of the present suit are certainly documents which would ultimately have a bearing on the matters in issue in the present case. The genuinity of these documents can hardly be doubted because they form part of judicial record in Suit No. 670 of 1991. If the reference is being made to the pleadings of the non-applicant, it is beyond understanding as to what prejudice would be caused to the non-applicant, because it is his own documents admittedly relating to the same property. No matter from which point of view this case is examined, the impugned order cannot be said to be an order which can be permitted as an order passed in excess of jurisdiction vested in the Court. The order does not suffer from any jurisdictional or other error apparent on the face of the record which would justify interference by this Court in its revisional jurisdiction"

8. We have already noticed that the purpose of the procedural law is not to frustrate the rights of the parties but the law is primarily intended to achieve the ends of justice and fully and finally decide the

controversy between the parties. In the present case, the documents were with the Counsel and there was change of counsel and whereafter because of a bona fide error the same could not be filed in the executing Court. Thus, the case of the appellants does not fall within the scope of the expression “exercise of due diligence” and the mistake is not attributable to the appellants. In fact, the earlier counsel did not even file reply to the Notice issued by the Court under Order 21 Rule 22. In these circumstances, we are of the considered view that it would neither be just nor fair that the appellants should be denied the opportunity of placing these documents and have adjudication of their rights in accordance with law. The documents thus can be permitted to be taken on record and leave can be granted to the appellants to lead additional evidence, of course, subject to determination of the objections raised by the respondents in accordance with law. There has been some delay on the part of the appellants in making the submission before the Court in relation to prayer for leading additional evidence for which the other party can always be compensated by awarding costs. We are also of the considered view that no prejudice or irreparable loss is being caused to the respondents herein. In fact, as already noticed, they are also relying partially on the documents sought to be placed by the appellants

on record.

9. For the reasons aforesaid, the Notice of Motion is made absolute in terms of prayer clause (a).

10. The inevitable consequence of the above discussion is that Notice of Motion No. 2115 of 2007 has been rendered infructuous and is dismissed as such. The judgment under appeal is consequently set aside and the matter is remitted to the executing Court for being proceeded further in accordance with law, subject to payment of Rs. 5,000/- as costs. Costs being conditional to the leading of the additional evidence, in the event the documents are not placed on record and costs are not paid within four weeks from today, the benefit accruing to the appellants under this order shall be deemed to have been withdrawn and the present appeal would stand dismissed. The parties are directed to appear before the executing court on 21st August, 2007, where the executing Court may proceed with the matter in accordance with law.

CHIEF JUSTICE

SMT. RANJANA DESAI, J.