

Reserved On: 23.05.2022
Delivered On:27.05.2022

Court No. - 1

Case :- CIVIL REVISION No. - 53 of 2022

Revisionist :- M/S Bharat Pumps And Compressors Ltd.

Opposite Party :- M/S. Chopra Fabricators And Manufacturers Pvt. Ltd.

Counsel for Revisionist :- Abhinav Gaur, Sr. Advocate, Vibhu Rai

Counsel for Opposite Party :- Rahul Mishra

Hon'ble Piyush Agrawal, J.

1. Heard Shri Anoop Trivedi, learned Senior Counsel, assisted by Shri Shri Suraj Kumar Tripathi and Shri Abhinav Gaur, learned counsels for the revisionist and Shri Rahul Mishra, learned counsel for opposite party.
2. Revision has been filed for setting aside the judgement & order dated 27.04.2022 passed by the Civil Judge (Senior Division), Allahabad in Misc. Case No. 3 of 2004 rejecting the application/objection (paper no. 4-C) filed by the revisionist under section 47 of CPC as not maintainable.
3. Learned Senior Counsel submits that on 05.07.1983, an agreement was entered in between the revisionist and opposite party as its ancillary unit for manufacturing of fabricated items and accessories, etc. for a period of seven years with an arbitration clause that single Arbitrator to be nominated by the Chief Executive Officer of the revisionist – Company, whose award will be final and binding between the parties. He further urged that condition of supply of contract as mentioned in the impugned order is not correct, as such, it does not exist. The opposite party, vide letter dated 05.05.1991, raised a dispute with the revisionist expressing its desire for invocation of arbitral proceedings. Opposite party appointed one Shri Kashi Nath Tripathi as Arbitrator on its behalf and requested the revisionist to

appoint its Arbitrator within 30 days. He further urged that vide letter dated 18.11.1991, the revisionist intimated the opposite party that as per clause IX(a) of the agreement, Arbitrator is to be appointed by the Chief Executive of the revisionist – Company and accordingly, Shri C.V. Subba Rao, General Manager of the revisionist – Company was appointed as an Arbitrator. It was further urged that the arbitration clause provides only appointment of sole Arbitrator and as such, the proposal to appoint Shri Kashi Nath Tripathi as Arbitrator was illegal and against the arbitration clause. Vide letter dated 28.11.1991, the revisionist again raised objection with regard to appointment of Shri Kashi Nath Tripathi as Arbitrator. On 01.11.1991, the opposite party filed its claim before its own Arbitrator, Shri Kashi Nath Tripathi.

4. He further urged that vide award dated 01.01.1992, the entire claim of the opposite party was allowed without any service of notice or opportunity of hearing to the revisionist. Pursuant thereto, on 04.02.1992, the opposite party made a reference before the Civil Judge (Senior Division), Allahabad for making the arbitral award dated 01.01.1992 as a rule of the Court, which was registered as Suit No. 57 of 1992. He further submits that on 28.04.2003, without any notice to the revisionist, the award was made rule of the Court. When the revisionist came to know about the filing of Execution Case No. 6 of 2003 by the opposite party, the revisionist filed objection dated 24.04.2004 under section 47 of the CPC, same was registered as Misc. Case No. 3 of 2004, which has been rejected vide impugned order dated 27.04.2022. He urged that the revision may be allowed.
5. In support of his submissions, learned Senior Counsel has relied upon the following judgements:-

i) **Dharma Prathishthanam Vs. Madhok Construction Private Limited** [AIR 5005 SC 214] (Hon'ble Supreme

Court);

ii) **Sitaram Reddy Vs. Chinna Ram Reddy & others** [AIR 1959 AP 159] (Andhra Pradesh High Court);

iii) **Union of India Vs. Jagat Ram Trehan & Others** [1996 RRR 551] (High Court of Delhi); and

vi) **M.P. Housing Board & others Vs. Sohanlal Chourasia & others** [ILR (2008) MP 48] (Madhya Pradesh High Court);

v) **Jaichandlal Ashok Kumar & Company Pvt. Ltd. Vs. Yossuf & Others** [AIR 2018 Cal 117]

6. Per contra, learned counsel for the opposite party vehemently opposed the submissions made on behalf of the revisionist. Learned counsel for the opposite party urged that the supply contract dated 10.04.1986 (copy of which has been filed as paper no. 36/A-1 before the court below) has not been filed intentionally by the revisionist. The said supply contract contains an arbitration clause, which provides for appointment of Arbitrator. The Arbitrator was appointed as per the clause stipulated in the said supply contract. Learned counsel for the opposite party further urged that the revisionist has failed to appoint Arbitrator on its part within a period of 30 days invoking the provisions of section 9(b) of the Arbitration Act, 1940. The opposite party filed its claim petition before the Arbitrator on 19.11.1991. He further urged that the revisionist was put to notice from the very beginning, but it chose not to participate in the arbitration proceedings.
7. Learned counsel for the opposite party further urged that it is wrong to state that the Arbitrator so appointed by the opposite party has no jurisdiction. The Arbitrator, vide its order dated 15.12.1991, has rightly rejected the claim of the revisionist relying on the supply contract dated 10.04.1986 recording the satisfaction that despite notice, the revision chose not to appear. He further urged that in spite of various notices having been

served upon the revisionist for fixing the dates, for reasons best known, the revisionist had not participated in the proceedings. Therefore, it cannot be said that the order was passed without any opportunity of hearing to the revisionist.

8. Learned counsel for the opposite party further urged that the impugned order records a finding that there were documentary evidence of notice being issued and the same has been received by the revisionist – Company, which was neither challenged nor a word has been whispered about the same and only bald allegations have been made for non-service of notice. Learned counsel for the opposite party further submits that the court below has rightly rejected the application of the revisionist filed under section 47 of CPC as not maintainable. Learned counsel for the opposite party further urged that the Arbitration Act, 1940 is a complete Code in itself and the award passed by the Arbitrator has been made a rule of the Court on 28.04.2003. Thereafter, execution case was rightly filed, which is pending for more than 19 years. He further submits that Apex Court in Special Leave to Appeal No. 4654 of 2022, vide order dated 01.04.2005, had directed the court below to decide the pending execution case within the time framed. The learned counsel for the opposite party has relied upon the following judgements:-

i) **Paramjeet Singh Patheja Vs. ICDS Limited** [2007 AIR (SC) 168] (Hon'ble Supreme Court); and

ii) **Larsen & Toubro Limited Vs. Maharaji Educational Trust** [2011 (2) AWC 1682] (Allahabad High Court).

9. After hearing the learned counsel for the parties, the Court has perused the records.
10. The application under section 47 of CPC has been filed raising objection with regard to appointment of the Arbitrator by the opposite party. The consequential proceedings was also objected on the ground that the Arbitrator so appointed by the opposite

party neither had any jurisdiction, nor any notice nor opportunity was provided to the revisionist before passing an award/order. The record shows that while passing the award, a clear-cut finding was recorded that the notices were served upon the revisionist, but the revisionist chose not to appear on various dates fixed. The said findings are quoted below:-

“AND WHEREAS, on receipt of the claim, notice was issued to the opposite party fixing 15.12.1991 for hearing of the matter but the opposite party did not appear before me on the date fixed. Rather a letter was received from the opposite party challenging my jurisdiction which point was decided by me on 15.12.1991 and the order was communicated to the opposite party fixing 25.12.1991 for ex parte evidence;

AND WHEREAS, the opposite party did not appear before me on 25.12.1991 also inspite of due service of notice;

AND WHEREAS on that date the claimant filed the affidavit of Sri Harindra Singh Chopra in evidence and it was ordered that a copy of the affidavit along with a copy of the order-sheet be served on the opposite party fixing 29.12.1991 for arguments;

AND WHEREAS, on 29.12.1991 also, the opposite party did not appear before me inspite of due service of notice, arguments of claimant's counsel were heard and 1.1.1992 was fixed for AWARD and notice of this date was also served on the opposite party;

AND WHEREAS, full opportunity was afforded to the opposite party to represent its case but the opposite party failed to appear before me till today;”

11. Further, before making the award a rule of the Court, notices were

again issued to the revisionist, but in spite of service neither any objection was filed, nor anybody appeared on behalf of the revisionist to make its say. The relevant part of the decree is extracted below:-

“ न्यायालय द्वारा वाद से सम्बन्धित नोटिस प्रतिवादी संख्या एक को भेजी गयी जो कि उसे प्राप्त हुई व प्रतिवादी संख्या एक पंच द्वारा पंच निर्णय से सम्बन्धित पूर्णकारगुजारी न्यायालय में प्रस्तुत की गयी। प्रतिवादी संख्या दो को पंच निर्णय से सम्बन्धित नोटिस दिनांक 26.2.2003 को निर्गत की गयी जो कि प्रतिवादी संख्या दो पर पंजीकृत डाक द्वारा तथा व्यक्तिगत रूप में प्राप्त हुई परन्तु नोटिस प्राप्त करने के पश्चात भी प्रतिवादी संख्या दो ने कोई आपत्ति प्रस्तुत नहीं की। न्यायालय द्वारा तत्पश्चात दिनांक 17.4.2003, 19.4.2003 व दिनांक 21.4.2003 को पुनः आपत्ति हेतु निर्धारित की गयी परन्तु प्रतिवादी संख्या दो द्वारा कोई आपत्ति प्रस्तुत नहीं की गयी और न ही प्रतिवादी की तरफ से न्यायालय में कोई उपस्थित हुआ। अतएव वादी को सुनकर नियमानुसार आदेश पारित किया गया। ”

12. Further, the impugned order also records the service of notice upon the revisionist, which has not specifically been denied in the revision. The observation of the court below is quoted below:-

“विपक्षी द्वारा द्वितीय तर्क यह प्रस्तुत किया गया है कि आर्बिट्रेटर नियुक्त किये जाने तथा उसकी कार्यवाही किये जाने की कोई सूचना उसे नहीं दी गयी थी। मूल पत्रावली के अवलोकन से यह विदित होता है कि पत्रावली पर नोटिस/समन प्रपत्र संख्या-44 ग/01 के रूप में संलग्न है, जिसे उक्त कम्पनी के डाक विभाग को प्राप्त करायी गयी है। पत्रावली पर रजिस्ट्री रसीद की प्रति प्रपत्र संख्या-47 घ उपलब्ध है। उक्त रजिस्ट्री रसीद के अवलोकन से यह स्पष्ट है कि निर्णीत ऋणी कम्पनी को पंजीकृत डाक से भी समन/नोटिस प्रेषित किया गया था। स्पष्ट है कि प्रार्थी को मामले की पूर्ण

जानकारी थी। अतएव, न्यायालय के मत में प्रार्थी के उक्त तर्क में भी बल नहीं है।”

13. During the course of arguments, learned Senior Counsel for the revisionist urged that after filing of the execution case, the opposite party had tried it best to delay the proceedings. He further urged that huge pre-payments of amount of various Banks were outstanding against the opposite party. The Banks filed various cases for recovery of its dues from the opposite party. In the event the decree got executed on time, the opposite party could not get any money as awarded by the Arbitrator. On this count, the opposite party thought it best and very cleverly succeeded to delay the execution proceedings.
14. Confronted with the said submission, learned counsel for the opposite party submitted that this argument is off the record. Learned counsel further urged that the action of the revisionist is not fair as in spite of service of notice, at every stage, the revisionist neither appeared before the Arbitrator, nor in the proceedings for making the award a rule of the Court. The revisionist succeeded in delaying the proceedings and to further delay the proceedings, filed objection in the execution proceedings under section 47 of CPC.
15. The record further shows that the execution proceedings are pending for the last 19 years.
16. Recently, the Apex Court in *M/s Chopra Fabridcators & Manufactures Pvt. Limited Vs. Bharat Pumps & Compressors Limited & Another* (SLP (C) No. 4654 of 2022), vide order dated 01.04.2022, has held as under:

“This is a very sorry state of affairs that even the execution proceedings to execute the Award passed under the Arbitration Act are pending for more than 20 years. If the

Award, under the Arbitration Act, is not executed at the earliest, it will frustrate Commercial Courts Act.

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Insofar as the present case is concerned, considering the fact that the Award which is sought to be executed is of the year 1992 and the execution proceedings are pending since 2003, we direct the executing court to finally decide and dispose of the execution petition within a period of four weeks from the date of receipt of the present order. ”

17. It has been informed at Bar that now, the Apex Court is monitoring all pending arbitration matters/execution proceedings, not only the State of Uttar Pradesh, but all over the country.
18. An argument was advance on behalf of the revisionist that objection can be raised under section 47 of CPC at any stage in the execution proceedings and therefore, the application under section 47 of CPC has wrongly been rejected.
19. Learned Senior Counsel has relied upon the judgement in **Dharma Prathishthanam** (supra). The said judgement was rednered in the background that a belated objection was filed with regard to the appointment of the Arbitrator, which was not considered. On this background, the Apex Court held that the award passed by the Arbitrator as in nullity. But in the case in hand, the revisionist was put to notice, but failed to appoint its Arbitrator within a period of 30 days. Thereafter, in spite of various dates having been fixed and service of notice upon it, the revisionist chose not to appear. It is not the case that the objection raised by the revisionist was not considered or decided. The action of the revisionist clearly reflects delaying tactics. Therefore, the judgement in **Dharma Prathishthanam** (supra) is of no help to the revisionist.

20. The learned Senior Counsel has relied upon various judgements rendered by the Apex Court, Andhra Pradesh High Court, Delhi High Court, Madhya Pradesh High Court and Calcutta High Court with a view to persuade the Court that the application under section 47 of CPC is maintainable. On the other hand, the jurisdiction of the High Court, i.e., this Court, in **Larsen & Tourbro Limited** (supra), relied upon the judgement in **Pramjeet Singh Patheja** (supra), held that application under section 47 of CPC is not maintainable, which squarely covers the issue in hand.
21. Following the judgement in **Pramjeet Singh Patheja** (supra), this Court in **Larsen & Tourbro Limited** (supra) has observed as under:-

16. The matter can be viewed from another angle. Section 47 CPC provides for questions to be determined by the Court executing the decree. The said section reads as under:

"47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2)Omitted by the Code of Civil Procedure (Amendment Act, 1976, S. 20 (w.e.f. 1.2.1977)

(3)Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I.- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.- (a) for the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution,

discharge or satisfaction of the decree within the meaning of this section."

It is, thus, clear that in order to invoke section 47 CPC, there must be a decree. Section 2 (2) CPC defines the decree. For a decision or determination to be a decree, it must necessarily fall within the fore-corners of the language used in the definition. Section 2 (2) CPC defines decree to mean "formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include - (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default."

Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

17. The use of words 'adjudication' and 'suit' used by Legislature clearly goes to show that it is only a court which can pass a decree in a suit commenced by plaint adjudicating the dispute between the parties by means of a judgment pronounced by the Court. The Hon'ble Apex Court in the case of *Paramjeet Singh Patheja Vs. ICDS Ltd.*, AIR 2007 SC - 168 after considering the definition of decree as contained in CPC in paragraph 29 has held that "it is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree". Again in paragraph 31, it has been held that words 'decision', and 'Civil Court' unambiguously rule out an award by arbitrators to be a decree. In the said case, the Hon'ble Apex Court while considering the question as to whether an insolvency notice under Section 9 of the Presidency Town Insolvency Act, 1909 can be issued on the basis of an arbitration award, held that such notice cannot be issued for the

reason the arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2) of the Insolvency Act and it is not rendered in a suit. Thus, the award not being covered under the definition of a decree, objection with respect to its validity can only be raised as provided under Section 34 of the Act and not by taking resort to section 47 C. P. C.

22. The Arbitration Act, 1940 is self-contained, complete code and section 17 thereof is in *pari-materia* with section 36 of the Arbitration & Conciliation Act, 1996. Section 20 thereof, provides for challenging the appointment of an Arbitrator. The revisionist never challenged appointment of the Arbitrator under section 20 thereof. Sections 30/33 and 37 of the Arbitration Act, 1940, read with Article 119 of the Limitation Act, give provision for an application to be filed within 30 days of notice of award; however, no such application within the said period was filed by the revisionist.
23. The arbitration award by way of friction is executed as decree, but it is not a decree as defined under section 2(2) of CPC and therefore, the objection under section 47 of CPC, which was filed only in execution of decree (as defined under section 2(2) CPC), is not maintainable in the proceedings seeking execution of award.
24. Upon evaluation of the submissions urged by the learned counsel for the parties, the material on record as well as the law laid down by various Courts, this Court does not find any good ground to interfere with the impugned order.
25. The revision fails and it is, accordingly, dismissed.

Order Date :-27/05/2022

Amit Mishra