A.F.R.

Neutral Citation No. - 2025:AHC:44024

Reserved on 7.3.2025

Delivered on 28.3.2025

Court No. - 10

Case :- MATTERS UNDER ARTICLE 227 No. - 8387 of 2024

Petitioner :- M/s LR Print Solutions

Respondent :- M/s Exflo Sanitation Pvt Ltd. and 2 others

Counsel for Petitioner :- Mr. Abhishek Kumar, Mr. Ishwar Kumar Upadhyay

Counsel for Respondent :- Mr. Ishir Sripat

HON'BLE PIYUSH AGRAWAL, J.

1. Heard Mr. Abhishek Kumar along with Mr. Ishwar Kumar Upadhyay, learned counsel for the petitioner; Mr. Rahul Sripat, learned Senior Advocate assisted by Mr. Ishir Sripat, learned counsel for the respondents.

2. The petition u/a 227 has been filed for quashing the order dated 24.6.2024 passed by the Executing Court / Commercial Court No. 2, District Gautam Buddh Nagar in Execution Case No. 108 of 2021.

3. Brief facts as stated in the writ petition are that the petitioner is tenant of the industrial plot no. C – 156, Sector 10, NOIDA (area 114 Sq. Meter) (ground floor of the building), since the date of execution of tenancy agreement dated 1.7.2008 at the rate of Rs. 8000/- per month. The agreement was unregistered for a period of 11 months for manufacturing purpose which continued even after expiry of the period. There was a

dispute between the plaintiff -petitioner and defendant respondent no. 1 with regard to the payment of rent, therefore, respondent no. 1 has filed a S.C.C. Case no. 19 of 2011 for ejection of the petitioner. In the said suit, the petitioner has filed an application for rejection of plaint under Order 7 Rule 11 CPC on the ground that since there is an arbitration clause in the rent agreement between the parties, as such, the dispute is required to be decided by the Arbitrator alone and the Court has no jurisdiction in the matter. The said application has been objected by respondent no. 1, however, the Additional Sessions Judge vide order dated 19.9.2015 has rejected the plaint of the respondent. Thereafter, respondent no. 1 has filed Arbitration petition before the sole Arbitrator for the same relief in which the petitioner has filed written statement. Thereafter, the Arbitrator has allowed the claim of the respondent no. 1 vide award dated 19.7.2017, against which the petitioner has filed an objection under Section 34 of the Arbitration and Conciliation Act, 1996 before the Commercial Court, Gautam Buddha Nagar. The said objection under Section 34 was rejected vide order dated 30.6.2022. Being aggrieved to the said order, the petitioner has filed Arbitration Appeal Defective no. 46 of 2022, under Section 37 of the Act before this Court, which was rejected vide order dated 6.12.2022. Thereafter the petitioner has approached the Apex Court in Special Leave Petition, which was also dismissed. During pendency of the objection filed by petitioner under Section 34 of the Act, respondent no. 1 has sold the property in question to respondent no. 2 vide registered sale deed dated 5.3.2021 against which Suit No. 342 of 2021 was filed by the petitioner before the Civil Judge (Sr.

Division), Gautam Buddha Nagar for cancellation of sale deed dated 5.3.2021, which was rejected vide order dated 29.5.2023. The said order has been challenged by the petitioner before this Court in First Appeal No. 1000 of 2023, which was admitted on 10.4.2024. In the Execution Case No. 108 of 2021, the decree holder moved an application on 3.4.2024, which was objected by the petitioner but the court below has allowed the application bearing paper no. 89 Ga filed by the contesting respondent by the impugned order dated 24.6.2024 and judgement debtor/ petitioner was directed to make payment of Rs. 8,58,795/-. Hence the present petition.

4. Learned counsel for the petitioner submits that the award dated 19.7.2017 contemplate that if the same was not complied within 30 days then the petitioner would be liable to pay Rs. 15 thousand as mesne profits to the claimant/respondent no. 1 with compound interest @ 10 % from 20.8.2017 till handing over of the possession. He further submits that the application under Section 34 of the Arbitration Act is filed within time , the award would be deemed to be stayed and the petitioner was not obliged to comply with the direction of the award. He further submits that once the award is not operative, there is no question of mesne profits to be paid by the petitioner to respondent no. 1. He further submits that once by operation of law, the award was stayed merely on filing of the application under Section 34 of the Arbitration Act, there is no liability upon the petitioner for making payment of the amount of mesne profits. He further submits that by the impugned order, the Court has not considered the matter in a proper prospective, therefore, it is liable to be set aside. He further submits that the

court below has wrongly calculated the amount for payment for the period of December 2020 to March 2021 as the payment of said period is already made by the petitioner. He prays for allowing the present petition.

5. In support of his argument, learned counsel for the petitioner has relied upon the following judgements:-

(i) **M/s Shree Vishnu Constructions. Vs. The Engineer in Chief Military Engineering Services and others,** 2023 8 SCC 329;

(ii) **Union of India and others Vs. M/s Banwari Lal and sons (P) Ltd.** AIR 2004 Supreme Court 1983;

(iii) **Small Scale Industrial Manufactures Association (Reg.) Vs. Union of India and others,** (2021) 8 SCC 511.

6. *Per contra*, Mr. Rahul Sripat, learned Senior Counsel submits that the impugned order has been passed in accordance with law, therefore, no interference is warranted. He further submits that award dated 19.7.2017 clearly provides for payment of mesne profits and penal interest in case of non compliance. It is admitted fact that petitioner did not vacate the premises till April 2024, therefore, as per the award, the petitioner was duty bound to make payment of mesne profits along with interest. He further submits that the award dated 19.7.2017 has attained finality and at no stage, the said award was stayed by any of the competent Court and further no proceeding against the same is pending in any of the court of law.

7. He further submits that the petitioner has instituted the application under Section 34 of the Act in the year 2017 but has not brought any material on record to show that the interim order was granted in its favour, therefore, it is incorrect to say on the part of the petitioner that merely filing

of the application under Section 34 of the Act, automatic stay was deemed in favour of the petitioner.

8. In order to buttress his submission, learned Senior Counsel further submits that in the year 2015, the Arbitration Act has been amended and admittedly, the present proceedings under Section 34 was initiated by the petitioner in the year 2017, therefore, merely filing of the application under Section 34 of the Arbitration Act, no automatic stay can be deemed in favour of the petitioner.

9. In support of his submission, learned Senior Counsel for the respondent has relied upon the following judgement:-

(i) **Board of Control for Cricket in India Vs. Kochi Cricket Pvt. Ltd. and others** (2018) 6 SCC 287;

(ii) **Hindustan Construction Company Limited and others Vs. Union of India and others,** AIR 2020 SC 122;

(iii) **State of Rajasthan and others Vs. J.K. Synthetics Ltd. and others,** (2011) 2 SCC 518.

10. He further submits that in the case of **Hindustan Construction Company Limited (supra)** the Apex Court has categorically held that no automatic stay of the award would lie merely filing of an application under Section 34 of the Arbitration Act.

11. Learned Senior Counsel further submits that the executing court has rightly computed the mesne profits with interest and it is not open for the petitioner at this stage to challenge the grant of penal interest in favour of respondent vide award dated 19.7.2017 as the award has attained finality up

to the stage of Hon'ble the Supreme Court. He prays for dismissal of the present writ petition.

12. After hearing learned counsel for the parties, the Court has perused the records.

13. It is admitted between the parties that the award has been passed on 19.7.2017, in which the petitioner was directed to vacate the premises in question and hand over the peaceful possession within 30 days from the date of passing the award, failing which the respondent -claimant shall be entitled not only for the rent but also the mesne profits along with interest. It is also not in dispute that against the said award, the petitioner has filed an application under Section 34 of the Act in the year 2017. It is also not in dispute that the possession as per the direction of the award was handed over in the month of April 2024.

14. The argument was raised by the counsel for the petitioner that mere filing of the application under Section 34 of the Act, the arbitral award was stayed, therefore, no default has been committed by the petitioner which entitles respondent no. 1 to claim mesne profits. But the record reveals that application under Section 34 of the Act was filed by the petitioner in the year 2017 and Section 34 of the Arbitration Act was amended with effect from 23.10.2015. Section 34 of the Act is considered to be Court proceedings and amendment made therein will apply prospectively as held by the Apex Court in the case of **Board of Control for Cricket in India (supra)** and same was further clarified in the case of **Shree Vishnu Constructions (supra).**

15. The relevant para of the judgement passed by the Apex Court in the case of **Board of Control for Cricket in India (supra)** are quoted hereunder:-

> *"25. That the expression "the arbitral proceedings" refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:*
>
> *"Conduct of Arbitral Proceedings"*
>
> *The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings "in relation to" arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words "in relation to" the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act.*
>
> *Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings – arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section*

26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

....

43. <u>The matter can also be looked at from a slightly different angle. Section 36, prior to the Amendment Act, 74 is only a clog on the right of the decree holder, who cannot execute the award in his favour, unless the conditions of this section are met. This does not mean that there is a corresponding right in the judgment debtor to stay the execution of such an award.</u> Learned counsel on behalf of the Appellants have, however, argued that a substantive change has been made in the award, which became an executable decree only after the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege in favour of the Respondents. It has been argued, relying upon a number of judgments, that since Section 36 is a part of the enforcement process of awards, there is a vested right or at least a privilege accrued in favour of the Appellants in the unamended 1996 Act applying insofar as arbitral proceedings and court proceedings in relation thereto have commenced, prior to the commencement of the Amendment Act. The very judgment strongly relied upon by senior counsel for the appellants, namely Garikapati Veeraya (supra), itself states in proposition (v) at page 515, that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides specifically or by necessary intendment and not otherwise. We have already held that Section 26 does specifically provide that the court proceedings in relation to arbitral proceedings, being independent from arbitral

proceedings, would not be viewed as a continuation of arbitral proceedings, but would be viewed separately. This being the case, it is unnecessary to refer to judgments such as Union of India v. A.L. Rallia Ram, (1964) 3 SCR 164 and NBCC Ltd. v. J.G. Engineering (P) Ltd., (2010) 2 SCC 385, which state that a Section 34 proceeding is a supervisory and not an appellate proceeding. Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corpn. Ltd., (2010) 3 SCC 34 at 47-49, which was cited for the purpose of stating that a Section 34 proceeding could be regard as an "appeal" within the meaning of Section 7 of the Interest on Delayed Payments To Small Scale and Ancillary Industrial Undertakings Act, 1993, is obviously distinguishable on the ground that it pertains to the said expression appearing in a beneficial enactment, whose object would be defeated if the word "appeal" did not include a Section 34 application. This is made clear by the aforesaid judgment itself as follows:

> *"36. On a perusal of the plethora of decisions aforementioned, we are of the view that "appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re- agitation of entire matrix of facts and law. We have already seen in Abhayankar [(1969) 2 SCC 74] that even an order passed by virtue of limited power of revision under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving such a wide meaning to the term "appeal", we are constrained to disagree with the contention of the learned counsel for the respondent Corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/decree. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council.*
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> *40. It may be noted that Section 6(1) empowers the buyer to obtain the due payment by way of any proceedings. Thus the proceedings that the buyer can resort to, no doubt, includes arbitration as well. It is pertinent to note that as opposed to Section 6(2), Section 6(1) does not state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by the Arbitration Act. Hence, the right context in which the meaning of the term "appeal" should be interpreted is the Interest Act itself. The meaning of this term under the Arbitration Act or the Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that the Arbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term "appeal" in the Interest Act, and not in the Arbitration Act."*

> *46. In 2004, this Court's Judgment in National Aluminium Company (supra) had recommended that Section 36 be substituted, as it defeats the very objective of the alternative dispute resolution system, and that the Section should be amended at the earliest to bring about the required change in law. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case,* ***it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons."***

16. The relevant para of the judgement passed by the Hob'ble the Apex Court in the case of **Shree Vishnu Constructions (*supra*)** is quoted hereunder:-

> *9.1 The submission on behalf of the appellant, as above, cannot be accepted for the simple reason* ***that this Court in the case of BCCI (supra) was considering the court proceedings under sections 34 and 36. To that, this Court interpreted section 26 in paragraphs 37 to 39, reproduced hereinabove, and held that the Amendment Act is prospective in nature,*** *and will apply to those arbitral proceedings*

that are commenced as understood by section 21 of the principal Act, on or after the Amendment Act, 2015 and to court proceedings which have commenced on or after the Amendment Act, 2015 came into force. ***Therefore, any observations made by this Court in paragraphs 37 to 39 in the case of BCCI (supra) shall be understood and construed with respect to court proceedings which have commenced on or after the Amendment Act coming into force, namely, the proceedings under sections 34 & 36.*** *Therefore, the decisions of this Court in the cases of Parmar Constructions Company (supra) and Pardeep Vinod Construction Company (supra) cannot be said to be per incuriam and/or in conflict with the decision of this Court in the case of BCCI (supra). As observed hereinabove, in the case of Parmar Constructions Company (supra) which is directly on the point, it is Civil Appeal No. 3461 of 2023 Page 40 of 42 specifically observed and held that the 2015 Amendment Act, which came into force w.e.f. 23.10.2015 shall not apply to the arbitral proceedings which are commenced in accordance with the provisions of section 21 of the principal Act, 1996 before the coming into force the 2015 Amendment Act, unless parties otherwise agree (para 27). Similar view has been expressed in the case of S.P. Singla Constructions Private Limited (supra).*

(Emphasis supplied by this Court)

17. In the aforesaid judgement, Hon'ble the Supreme Court has categorically held that the proceedings under Section 34 and 36 of the Arbitration Act are Court proceedings and any proceeding commenced after the amendment came into force, will be prospective in nature.

18. In the present case, the application under Section 34 of the Arbitration Act was filed by the petitioner in the year 2017, which is much after the enforcement of the amended Act in the year 2015, therefore, the argument of the counsel for the petitioner that merely on filing of the application under Section 34 of the Arbitration Act, against the award in question was automatically stayed, is misplaced and cannot be accepted.

19. Further, Hon'ble the Apex Court in the case of **Hindustan Construction Company Limited (*supra*)** after has taken note of its earlier

judgement passed in the case of **Board of Control for Cricket in India (*supra*)** has categorically held that no automatic stay of the award would lie just because of filing an appeal under Section 34 of the Arbitration Act.

20. The other argument raised by the counsel for the petitioner after relying upon the judgement of the Apex Court in the case of **Small Scale Industrial Manufactures Association (*supra*)** that since there was no default on the part of the petitioner, the mesne profits ought not to have been granted.

21. On perusal of the aforesaid judgement, it appears that the said judgement was entirely based upon the facts of that case as the same was related to the economic policies framed by the Union Government, but the facts of the case in hand are entirely different. The petitioner has not hand over the possession within 30 days as per the award dated 19.7.2017, or award was stayed or set aside by the competent Court, therefore, the benefit of the said judgement cannot be accorded in favour of the petitioner.

22. Admittedly, the petitioner has not vacated the premises in question within 30 days from the date of passing the award and further the petitioner has not brought any material on record to show that the award was stayed by any of the competent Court, therefore, the contesting respondent no. 1 is entitled for mesne profits.

23. Hon'ble the Apex Court in the case of **State of Rajasthan Vs. J.K. Synthetics Ltd. (*supra*)** has held as under :

> *14. The contesting respondents filed the second round of writ petitions before the High Court challenging the demand for interest*

and the validity of Rule 64A, on two grounds : that Rule 64-A was invalid; that the rate of interest was excessive. The learned Single Judge negatived the first contention in view of the decision of this South Eastern Coalfields. He however accepted the second contention and restricted the rate of interest to 12% per annum. The contesting respondents have not challenged the order of the High Court holding that they are liable to pay interest at 12% per annum. They have in fact paid the interest at such rate. Before us, one of the contentions urged to resist the claim of the State for increase in the rate of interest, is with reference to the fundamental question about the liability itself. It was submitted that they were not liable to pay interest on the increase in royalty amount, in view of their challenge to the increase and order of interim stay of the High Court. It was submitted by the contesting respondents, that even if the writ petitions challenging the notification dated 17.2.1992 revising the royalty rate were ultimately dismissed, in the absence of any specific direction by the High Court to pay interest on the difference in royalty amount, they were not liable to pay any interest during the period of operation of stay. This question is no longer res integra. We may refer to 11 the decisions of this Court that have categorically laid down about the liability to pay interest for the period of stay when the stay is ultimately vacated.

15. In Kanoria Chemicals and Industries Ltd. vs. UP State Electricity Board - 1997 (5) SCC 772, this Court held that grant of stay of a notification revising the electricity charges does not have the effect of relieving the consumer of its obligation to pay interest (or late payment surcharge) on the amount withheld by them by reason of the interim stay, if and when the writ petitions are dismissed ultimately. The said principle was based on the following reasoning :

> *"Holding otherwise would mean that even though the Electricity Board, which was the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules/regulations. It would be a case where the Board suffers prejudice on account of the orders of the court and for no fault of its. It succeeds in the writ petition and yet loses. The consumer files the writ petition, obtains stay of operation of the Notification revising the rates and fails in his attack upon the validity of the Notification and yet he is relieved of the obligation to pay the late payment surcharge for the period of stay, which he is liable to pay according to the statutory terms and conditions of supply - which terms and conditions indeed form part of the contract of supply entered into by him with the Board. We do not*

> *think that any such unfair and inequitable proposition can be sustained in law..... It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court. Any other view would result in the act or order of the court prejudicing a party (Board in this case) for no fault of its and would also mean rewarding a writ petitioner in spite of his failure. We do not think that any such unjust consequence can be countenanced by the courts. As a matter of fact, the contention of the consumers herein, extended logically should mean that even the enhanced rates are also not payable for the period covered by the order of stay because the operation of the very notification revising/enhancing the tariff rates was stayed. Mercifully, no such argument was urged by the appellants. It is ununderstandable how the enhanced rates can be said to be payable but not the late payment surcharge thereon, when both the enhancement and the late payment surcharge are provided by the same Notification - the operation of which was stayed."*

24. The Apex Court in the aforesaid judgement has categorically held that after dismissal of the writ petition, the consumer is liable to pay interest even during period of interim order which entitle the consumer to withhold the amount.

25. The case in hand, the arbitral award dated 19.7.2017 was not stayed or any material was brought on record otherwise and ultimately the award dated 19.7.2017 has been affirmed by the Apex Court and no proceedings are pending thereafter. Thus, in view of the aforesaid facts, the contesting respondent no. 1 is entitled for mesne profits as the award dated 19.7.2017 was not complied with in its letter and spirit.

26. In view of the aforesaid discussions as well as law laid down by the

Apex Court as referred herein above, no interference is called for by this Court in the impugned order.

27. The petition lacks merit and same is **dismissed** accordingly.

Order Date :- 28.3.2025
Rahul Dwivedi/-