

S/L. 11.
June 24, 2019.
MNS.

C. O. No. 39-41 of 2019
SRS Investments Bengal Tiger Ltd.
Vs.
Rahul Todi and others
with
C. O. No. 197 of 2019
Shrachi Realty Pvt. Ltd. and another
Vs.
SRS Investments Bengal Tiger Ltd. and others

Mr. Surjendu Das,
Mr. Sakabda Roy

... for the petitioner.

Mr. Jagannath Marotia,
Mr. Indradeep Basu

...for the opposite party nos. 1 to 6.

Re: **CAN 3830 of 2019 (correction).**

When these matters are called on, learned counsel for the opposite party nos. 1 to 6 submits that the opposite party nos. 1 to 6 have submitted affidavit-of-assets in the court below.

Learned counsel for the petitioner submits that this has no bearing on these matters and took place prior to the passing of the order.

However, at this juncture, while taking up an application for correction of the previous order, merits of these matters will not be gone into afresh.

Upon considering the submissions of both sides, CAN 3830 of 2019 is allowed, thereby directing that the order dated March 27, 2019 shall be deemed to be corrected and will now stand corrected as follows:

- “1. C.O. Nos. 39 to 41 of 2019 and C.O. No. 197 of 2019 are taken up together, having emanated from the same proceeding under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) initiated by the petitioner/award-holder for execution of an arbitral award.
2. In C.O. No. 39 of 2019, the award-holder has challenged an order by which the executing court modified an order passed by the Delhi High Court, holding that when all the properties have been seized by way of an interim order, it was not required to file any affidavit in support of the properties of the award debtors in the court below but the said affidavit of assets were to be filed before the Delhi High Court. In the impugned order, it was first observed that the affidavit of assets was not required to be filed before the executing court but that the said court had no jurisdiction to interfere with the direction of the Delhi High Court regarding submission of the affidavit of assets. In spite of so observing, the executing court held that the affidavit of assets was not required to be filed by the judgment debtor in the court below, keeping the other conditions of the Delhi High Court’s order intact. **By the same order, the executing court refused to vacate, and extended, the interim order granted by the Delhi High Court restraining the award-debtors from disposing movable and immovable properties and from operating the bank accounts of the company. The award-debtors have challenged that portion of the order dated October 6, 2018 in C.O. No. 197 of 2019.**
3. By the order impugned in C.O. No. 40 of 2019 and C.O. No. 41 of 2019, an objection taken by the award-holder/petitioner, as regards maintainability of two

applications of the award-debtors under Section 47 of the Code of Civil Procedure (hereinafter referred to as "CPC"), bearing Miscellaneous Case Nos. 13 and 14 of 2018, filed in the execution proceeding under Section 36 of the 1996 Act, was turned down, holding the said applications under Section 47, CPC to be maintainable.

4. The interim order of the Delhi High Court, referred to above, was passed in a proceeding under Section 9 of the 1996 Act preferred by the award-debtors.
5. By an order dated February 26, 2018, the respondents/award debtors/opposite parties were restrained by the Delhi High Court from transferring, selling, encumbering or in any manner alienating any of their immovable assets till the next date of hearing. The opposite parties were also directed to file an affidavit making a complete disclosure of their assets, movable and immovable, as well as encumbrances, if any.
6. By a subsequent order dated July 4, 2018, certain directions were passed by the Delhi High Court. In order to appreciate the impact of the said directions, those are set forth below:

"5. Having regard to submissions put forth by the counsel for both sides, the best course in my view would be that the captioned petition is closed with the following directions in order to avoid any further conflict between orders issued by this Court and the Alipore Court:

- (i) *The order dated 26.2.2018 passed by this Court shall continue to operate till such time the executing court i.e., the Alipore Court*

vacates or varies the directions contained in the order. Liberty in that behalf is given to the Alipore Court, albeit, after hearing the concerned parties.

- (ii) Accordingly, respondents will have liberty to approach the executing court for vacating or varying the order dated 28.6.2018. This, of course, would be without prejudice to the rights and contentions of the petitioner.*
- (iii) The respondents will, in the meanwhile, file an affidavit in terms of para 4 of the order dated 26.2.2018. Needful will be done within two weeks from the date of receipt of a copy of this order.*
- (iv) The aforesaid directions, however, will not come in the way of petitioner approaching executing court for obtaining relief in terms of remaining prayers adverted to in the captioned petition.”*

7. The relevant facts, in a nut-shell are that the petitioner/award holder is an offshore investment company, incorporated under the laws of Mauritius, carrying on its business from Mauritius. The petitioner is one of the shareholders in the opposite party no. 6 company, namely, Shrachi Realty Pvt. Ltd. and holds 28.76 percent of the issued and paid-up equity share capital of opposite party no. 6.
8. On the other hand, opposite party nos. 1 and 2, namely Rahul Todi and Shrawan Kumar Todi, are also shareholders in the opposite party no. 6-company and are allegedly responsible for the day-to-day management and affairs of the opposite

party no. 6, holding between themselves 7.92 percent of the issued and fully paid-up equity share capital of opposite party no. 6.

9. The opposite party nos. 3 to 5 together hold 57.36 percent of the issued and fully paid-up equity share capital of the opposite party no. 6.

10. It is worth mentioning that the opposite parties have also preferred applications under Section 34 of the 1996 Act in the High Court of Delhi against the arbitral award itself, which are still pending, although no order of stay of execution of the award has been passed till date in connection with the said matters.

11. The petitioner, being the award-holder, filed on June 2, 2018, an application under Section 36(1) of the 1996 Act, read with Order XXI Rule 11(2), of the CPC for enforcement of the arbitral award, thereby giving rise to Execution Case No. 352 of 2018.

12. In the said execution case, the opposite party nos. 1 to 6 filed Miscellaneous Case Nos. 13 and 14 of 2018, under Section 47, read with Section 151, of the CPC on July 26, 2018, praying inter alia for a declaration that the award was not enforceable.

13. In the applications under Section 47 of the CPC, it was urged that the award dated October 5, 2017 was void, null, illegal, unenforceable, inexecutable and violative of the substantive mandatory provisions of Indian law. It was alleged inter alia that the purported award did not come within the definition of a decree and could not be executed as such and that the award itself imposed a restriction on its executability by leaving issues un-adjudicated.

14. It was further alleged that the award sought to re-write the agreement between the parties, which goes to the root of the matter; although the award-holder made a claim of its entire share holding of 28.76 percent to be sold, the award directed the award-holder to sell only 25 percent, which was allegedly contrary to the agreement between the parties.
15. It was further alleged that an application under Section 33 of the 1996 Act, dated September 9, 2017 which was filed for correction of the majority award, was not considered. It was further alleged that there was no signature of one of the arbitrators on the award dated October 5, 2017 and nothing was stated therein as to why he did not sign. No dissent was also recorded in the award after the order dated October 4, 2017. The award was alleged to be *ex facie coram non-judice*.
16. It was also alleged that the award was a nullity for violation of the provisions of the Companies Act and the Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA"). Particular reliance was placed on the proviso to Section 68(1) and Section 68(2)(c) of the Companies Act, 2013 in this regard.
17. Violations of the Foreign Exchange Management (Transfer of Security by a Person Resident outside India) Regulations, 2000 were also alleged.
18. It was alleged that since the award was in the nature of a decree for specific performance, prayers in the nature of Order XXI Rule 32(5) of the CPC ought to have been made, but were not made in the execution case.
19. It was further alleged that one of the arbitrators failed to make adequate disclosures under Section 12, read with the Fifth Schedule of the 1996 Act, regarding his

subsequent appointment in another arbitral proceedings during pendency of the proceedings.

20. The award-debtor alleged that no oral hearing was conducted and that the adjudication was done by only two of the three arbitrators, although the tribunal was comprised of three. It was averred that the corrected arbitral award dated October 4, 2017 was also not signed by the third arbitrator, being the Hon'ble Justice V. N. Khare (retd.), but it was only recorded by the presiding arbitrator that he was authorized to sign the corrected award on behalf of the third arbitrator, without any such authority being part of the arbitral record, whereas the third arbitrator gave an independent dissenting award/opinion dated August 5, 2017.

21. The award-holder raised the question of maintainability of Miscellaneous Case Nos. 13 and 14 of 2018 and filed a brief "written synopsis" recording its objections as to maintainability of the said applications under Section 47, CPC.

22. Vide Order dated 47 dated November 28, 2018 passed in Miscellaneous Case Nos. 13 and 14 of 2018, the executing court held that the said cases were maintainable.

23. On the other hand, vide Order No. 40 dated October 6, 2018, the executing court refused **the award-debtors' prayer to vacate the interim order restraining them from disposing all the movable and immovable properties and from operating the bank accounts** as passed by that court as well as the Delhi High Court and extended the interim order till the next date. While doing so, the executing court observed inter alia that the order of the Delhi High Court was required to be modified to a limited extent and that when all the properties had been seized by

way of interim order, it was not required to file any affidavit in support of the award-debtor's properties to the executing court but it was the direction of the Delhi High Court to file the said affidavit of assets before that court. On such premise, the executing court found that affidavit of assets was not required to be filed before the said court but that it had "no jurisdiction to interfere the direction of the Hon'ble High Court of Delhi regarding the submission of the affidavit of assets". However, in the same breath the executing court held that affidavit of assets was not required to be filed by the award-debtor to the said court and the other conditions remained intact.

24. At the outset, the award-debtors/opposite parties, represented by different sets of counsel, raise a preliminary objection as to whether the present applications under Article 227 of the Constitution of India are maintainable in their present form, since the affidavits in support of such applications were not executed in accordance with Indian law.

25. Placing reliance on Order XXIX Rule 1 of the Code of Civil Procedure, learned counsel for the opposite parties argue that any pleading by a corporation (here, the petitioner-company) may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. In the present applications, however, the person affirming the supporting affidavits is described merely as an "authorized representative" of the petitioner-company. Even the documents subsequently produced show that, at best, the said person was authorized by the company to represent it, without any formal board resolution being produced or it being established that the deponent is a secretary, director or other principal officer of the

company. Since the applications are affirmed and being moved in an Indian court, the same will be governed by Indian law and as such the affidavits accompanying the applications are unlawful, rendering the applications themselves bad in law.

26. Learned senior counsel for the petitioner argues that the petitioner-company was incorporated in, and as per the laws of, Mauritius. Mauritian laws permit the filing of applications on behalf of companies by authorized signatories. Since in the present case the directors of the company took a resolution, a copy of which has been produced, authorizing the deponent(s) to file the applications, the hyper-technical objection taken by the opposite parties ought to be brushed aside.

27. Learned senior counsel for the award-holder/petitioner, then arguing on the merits, submits that the applications under Section 47, CPC were not maintainable since the points raised therein amounted to going behind the award, which is prohibited in law. The only recourse open to the award-debtors to substantially challenge the award was limited to Section 34 of the 1996 Act. Since the award-debtors had already filed a challenge against the award under Section 34, which was *sub judice* in the Delhi High Court and no stay order had been passed therein, it was beyond the jurisdiction of the court hearing an application under Section 36 of the 1996 Act to exercise jurisdiction under Section 34 of the 1996 Act, usurping the domain of the Delhi High Court, where the said challenge is pending. The grounds taken in the applications under Section 47, CPC, it is argued, are within the domain of Section 34 of the 1996 Act and are similar to the grounds taken in the already-pending challenge before the Delhi High Court under the said provision.

28. It is argued by the petitioner that the objection taken in the applications under Section 47 of the CPC, regarding FEMA guidelines being a bar to execution, cannot hold water, since the question was decided finally in the arbitral award itself. Placing reliance in particular on Clauses 480 to 483 of the award, it is submitted that the arbitral tribunal held that objections related to FEMA were premature at that stage and would only come into operation once the foreign shareholder, i.e. the claimant, is required to repatriate the funds abroad; therefore, FEMA guidelines had no impact on either the arbitral award or the powers of the arbitrator to grant the reliefs as prayed for in the facts and circumstances of the present case. It was categorically held by the tribunal that the obligation of the parties was purely contractual in nature and as such regulatory legislations such as the FEMA and Notifications issued thereunder had no application in a bilateral dispute between the claimant and respondents. In any event, it was held, FEMA permitted the enforcement of the operating clauses. In fact, what was *inter alia* not permitted under the FEMA was guaranteeing the foreign investors a fixed rate of return. It was nobody's case that the claimant was in the instant case guaranteed a fixed rate of return in terms of the SHA. The fact that the IPO was not arranged only meant that there could not have been any guaranteed rate of return on the claimant's investment. Therefore, it was held, even if the FEMA Regulations were to apply, it could not be said that the claimant's rights were against the FEMA Regulations. In fact, the only restriction upon the claimant was in terms of Section 3 of the FEMA in so far as it was applicable to the claimant.

29. It is submitted that since there is no question of dealing in any foreign exchange for execution of the award, such execution cannot be said to be barred by FEMA. No occasion of foreign repatriation arises at the present stage and hence the objection in that regard is premature.
30. Referring to clauses 169 to 177 of the arbitral award, as well as the ordering portion of the award at clause 487 thereof, learned senior counsel for the petitioner argues that the tribunal considered at length and on merits the objection as to compliance of Section 68 of the Companies Act, 2013 and passed the award accordingly. Hence such a challenge could not be taken under Section 47 of the CPC at the stage of execution under Section 36 of the 1996 Act. The scope of such objection would touch the merits of the award and could at best be raised under Section 34 of the 1996 Act, if at all.
31. As such, the petitioner argues that the objections taken by the opposite parties in the garb of Section 47 of the CPC pertained to the merits of the award. Even if there were allegations of the award being illegal, those would at best give rise to questions of law and fact but would not render the award a nullity, making it amenable to a challenge under Section 47, CPC.
32. In this context, learned senior counsel cites a judgment reported at *AIR 1969 SC 823 (Official Trustee, West Bengal & Ors. v. Sachindra Nath Chatterjee & Anr.)*. The concept of “jurisdiction” was explored therein and held inter alia to be the authority to hear and decide a legal controversy. The authority to decide a cause at all, and not the decision rendered therein, was held to make up jurisdiction. If the

court had the power and authority to decide a question and pass the necessary orders, the validity of the order could not be challenged on the ground of jurisdiction. It would at best be a wrong order or an illegal order, but not an order it did not have the competence to make.

33. Learned senior counsel for the petitioner next cites a judgment reported at (2018) 11 SCC 113 (*Harpal Singh v. Ashok Kumar & Anr.*). It was laid down therein that the validity of a decree can be challenged before the executing court under Section 47, CPC only on ground of inherent lack of jurisdiction which renders the decree a nullity.

34. The judgment next cited is reported at (2004) 1 SCC 287 (*Rafique Bibi (Dead) by LRs v. Sayed Waliuddin (Dead) by LRs. & Ors.*). It was held therein that if nullity of a decree for want of jurisdiction is patent on the face of the decree, the executing court may take cognizance of the same; else the normal rule that the executing court cannot go behind the decree prevails. Remedy in case of illegality is to have it set aside in a duly constituted legal proceeding or by a superior court, failing which the command of the decree must be obeyed. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.

35. By placing reliance on Sections 33 to 36 of the 1996 Act, it is submitted by the petitioner that the scheme of the 1996 Act is to cut short lengthy procedure in an arbitral proceeding and the scope of challenge to an arbitral award. The award-debtors cannot, in the garb of a challenge under Section 47 of the CPC, enlarge the

scope of an execution proceeding under Section 36 of the 1996 Act even beyond the scope of interference by a superior forum. Hence the present applications under Section 47 of the CPC were not maintainable at all.

36. Learned counsel for both sets of opposite parties, on the other hand, argued that the scope of C.O. No. 40 of 2019 and C.O. No. 41 of 2019 is limited to the applicability of Section 47 of the CPC in a proceeding under Section 36 of the 1996 Act. The only question urged by the award-holder petition in the executing court was that since there is a specific provision of Section 34 of the 1996 Act for raising objection against an award, which had already been resorted to by the award-debtors by filing such a proceeding in the Delhi High Court, the award-debtors could not have raised the same questions under Section 47, CPC before the court taking up the application for enforcement of the award under Section 36 of the 1996 Act. As such, it is argued, the petitioner is exceeding the scope of the said revisions by raking up all points taken in the application under Section 47, CPC on merits instead of confining his arguments to the maintainability point. The executing court has, by the impugned order, already kept all questions urged in the Section 47, CPC applications open for being tried at the final hearing of the said applications and as such the petitioner could not be aggrieved on such score.

37. It is argued that on merits, the award-debtors have a good case even under Section 47 of the CPC, apart from and independent of the merits of the challenge under Section 34 of the 1996 Act. The question of the bar under FEMA, it is argued, can be taken at the execution stage, when the award is sought to be implemented by the award-holder. Such was the contemplation even of the award itself, which

decided the question at that stage, but not adjudicating as to whether the implementation of the award would be unfettered by such bar.

38. Even the compliance of Section 68 of the Companies Act, 2013 is a question which can be taken at the execution stage, once the stage of buy-back of shares by the award-debtor comes.

39. It is further submitted that all objections, as held by the executing court, to the enforcement of the arbitral award, can be taken only in the proceeding for enforcement under Section 36 of the 1996 Act and such objections come within the purview of Section 47 of the CPC. Even if the applications under Section 47 of the CPC do not elaborate all points of objection, such objections can very well be taken at any stage of the proceeding for enforcement under Section 36 of the 1996 Act, more so since proof and arguments need not be pleaded.

40. For example, learned counsel for the opposite parties argue that the award was not signed by the third arbitrator and the date and place of the award were not mentioned in the award, as contemplated in sub-sections (2) and (4) of Section 31 of the 1996 Act respectively. In the corrected award also, the third arbitrator did not sign but the presiding arbitrator signed with a note that he was authorized to sign on behalf of the absentee arbitrator, without recording any reason for such absence. Such points, even if not specifically mentioned in the applications under Section 47, CPC stare at the face from the records and are legal questions which can be argued at subsequent stages.

41. Moreover, it is argued, a dissenting award by the third arbitrator nullifies the contention that he consented to the presiding arbitrator signing on his behalf in the majority award.
42. Next placing reliance on Section 33 of the 1996 Act, in particular sub-sections (4) to (7) thereof, the opposite parties argue that the additional award passed by the tribunal was not sufficiently stamped.
43. The opposite parties rely in support of this proposition on a judgment reported at (2003) 8 SCC 565 (*M. Anasuya Devi & Anr. v. M. Manik Reddy & Ors.*) wherein it was held inter alia that the scope of Section 34 of the 1996 Act is restricted to the grounds specified therein. Any deficiency in stamping or registration is not within the purview of Section 34, but such question falls within the ambit of Section 47, CPC and can be agitated only at the stage of enforcement of the award under Section 36 of the 1996 Act.
44. It is argued that requisite stamp duty was not paid as per the law in Delhi, where the award and additional award were passed. Hence the said awards are not enforceable, which objection can be raised at the time of enforcement under Section 36 of the 1996 Act and not beforehand.
45. In reply, the petitioner reiterates its original arguments and submits that the prima facie merits of the objections taken in the applications under Section 47 CPC were required to be argued to show that those fell within the purview of Section 34 of the 1996 Act.

46. This apart, it is argued that the arbitral awards produced before the executing court in the proceeding under Section 36 of the 1996 Act were duly stamped, which is within the knowledge of the opposite parties. Although the photocopies thereof, annexed to the revisions, do not reflect the stamp duty, but the original award filed in the executing court bear the requisite stamp duty. As far as the “additional” award is concerned, it is submitted that the same is a mere “corrected” award and not an “additional” award on a missed-out issue or the like. Hence no further stamp duty was payable thereon.

47. As regards the third arbitrator’s signature, the dissenting award passed by him was also produced in the executing court and as such there was no substantive violation of the statute. The presiding officer signed on behalf of the third arbitrator as well, which was substantial compliance of the provisions of law.

48. On C.O. No. 39 of 2019, learned senior counsel for the petitioner argues that the executing court acted *de hors* its jurisdiction in modifying the order of a superior forum, being the Delhi High Court, in releasing the award-debtors from the liability of filing an affidavit of assets. Such an affidavit is a *sine qua non* for enforcement of an award and is necessary for effective execution of an arbitral award.

49. The Delhi High Court never intended a modification of the said portion of the order but only adverted to the executing court being at liberty to modify or vary the restraint order.

50. On the other hand, the award-debtors argue that the executing court was justified in dispensing with the requirement to file affidavit of assets, since the maintainability

of the execution case itself was in question in the applications under Section 47 of the CPC. The award-debtors cannot be compelled to disclose their assets unnecessarily to their potential business rival, being the award-holder, without being certain that the proceeding for enforcement under Section 36 of the 1996 Act was maintainable at all.

51. Taking up first the preliminary objection as to insufficiency of adequate authorization to the deponent swearing the affidavits in support of the applications under Article 227 of the Constitution of India, it is evident that Order XXIX Rule 1, CPC applies only to suits. Although the Appellate Side Rules of this court provide that the rules as to suits apply to writ petitions *mutatis mutandis*, it has been the well-established custom of this court, unlike many other High Courts, to classify applications under Article 227 of the Constitution under the “civil revisional jurisdiction” and to allot C.O. (Civil Order) numbers to such applications, as opposed to applications under Article 226 of the Constitution, which are classified under the “writ jurisdiction” and allotted W.P. (Writ Petition) numbers. As such, the procedure of suits do not apply to civil revisional applications, including applications under Article 227 of the Constitution of India.

52. Moreover, rules pertaining to suits only apply *mutatis mutandis*, or as far as applicable, even to writ petitions, which somewhat alleviates the rigours of Order XXIX Rule 1 CPC and factors in the concept of equity. The powers of judicial review flow from the Constitution itself, which is the *grundnorm* of Indian law, and is thus unfettered by any statute, including the CPC, which derives its sanction from the Constitution itself.

53. Particularly in case of Article 227 of the Constitution, which confers on High Courts the power of superintendence over subordinate courts and tribunals, the application itself is only a formality to bring to the notice of the High Courts the alleged illegality or jurisdictional error or other abuse of process of court committed by such subordinate court, tribunal or the like.

54. Seen in such light, the affidavits accompanying the four applications under Article 227 of the Constitution must be seen leniently, with a view to promote justice, instead of strangulating justice in the quagmire of procedural wrangles. Since the petitioner-company was incorporated and runs its business from Mauritius and the authority to the deponent was given in Mauritius, being signed by the directors of the petitioner-company, it would be unfair and hyper-technical to shut out the petitioner from pointing out jurisdictional errors or irregularities, if any, at the outset only on the ground of such alleged technical flaw in the affidavits; all the more since there was substantial compliance of the relevant law.

55. Hence, it is held that the four applications under Article 227 of the Constitution of India are maintainable in law and in their present form.

56. While deciding C.O. No. 40 of 2019 and C.O. No. 41 of 2019 on merits, what draws immediate attention is the recording in the impugned order that the award-holder raised objection regarding the maintainability of the cases under Section 47, CPC only on the ground that according to the provision of the 1996 Act there is a specific provision of Section 34 read with Section 36 of the Act for raising objection regarding the arbitral award and since the award-debtors had already filed a

proceeding under Section 34 of the 1996 Act before the appropriate civil court challenging the award and the case was still pending without the award-debtors having filed any stay petition, the award-debtors were debarred from filing the applications under Section 47, CPC on self-same grounds.

57. Hence, the opposite parties are justified in arguing that the award-holder petitioner cannot now argue on the merits of the Section 47, CPC applications otherwise than on such limited question of applicability of the said provision, in the garb of challenging maintainability of such applications.

58. Section 36 (1) of the 1996 Act stipulates categorically that an arbitral award shall be enforced in accordance with the provisions of the CPC in the same manner as if it were a decree of the court. Thus, the provisions applicable to the execution of a decree under the CPC, including Section 47 of the Code, are squarely applicable to a proceeding for enforcement of an arbitral award under Section 36 of the 1996 Act.

59. Moreover, the scope of a challenge under Section 47 of the CPC, being confined to the executibility of the award, is entirely different than a challenge to the merits of the arbitral award itself, which would be on the specific grounds provided for in Section 34 of the 1996 Act. Therefore the executing court was justified in holding that the applications under Section 47 of the CPC were maintainable despite the pendency of a proceeding under Section 34 of the 1996 Act against the arbitral award.

60. Since the executing court, in any event, left all other points raised by the award-debtors in the proceedings under Section 47, CPC to be considered at the time of hearing of the said proceedings, there could not be any grievance of either party on that score.
61. As regards the questions of applicability of FEMA and Section 68 of the Companies Act, 2013, the award-debtors have raised arguable points in their applications under Section 47, CPC, to be decided in the enforcement proceeding. Although the award dealt with such questions, a sufficient *prima facie* case was made out as to whether such issues could be conclusively decided prior to the award being put into execution. The issues might be argued to be inchoate till the award is sought to be enforced by the award-holder by exercising the buy-back option.
62. Another arguable question raised as to validity of the award is the absence of signature of the third arbitrator in the principal award and in the corrected award, in the latter case with an observation that the presiding arbitrator was given the authority to sign on behalf of the third arbitrator, but without recording any reason for the absence of the third arbitrator. Moreover, the dissenting award of the third arbitrator also creates a *prima facie* doubt as to such authority being validly conferred on the presiding arbitrator, subject to being dispelled by the award-holder.
63. As far as the commonality of grounds in the proceedings under Section 47, CPC and Section 34 of the 1996 Act are concerned, the same *ipso facto* does not render the former non-maintainable. There can very well be grounds as contemplated in

Section 34 of the 1996 Act which also afford grounds to render the award a nullity, bring those within the domain of Section 47 of the CPC as well.

64. Hence the court taking up the application under Section 36 of the 1996 Act was justified in leaving all questions open for argument at the hearing of the applications under Section 47 of the CPC, but holding that the said applications were maintainable in law, instead of shutting out the award-debtors at the inception from raising their objections to the application under Section 36 on merits.

65. Shifting now to the other set of revisions, C.O. No. 39 of 2019 poses a question as to whether the executing court was justified in dispensing with the filing of an affidavit of assets of the award-debtors at this stage.

66. There was an *ex facie* discrepancy in the impugned order, inasmuch as the executing court held first that when all the properties have been seized by way of interim order, it was not required to file any affidavit in support of the award-debtors' properties to the said court, but then observed, "... but it is the direction of the Hon'ble High Court, Delhi to file the said affidavit of assets before the Hon'ble High Court." However, the executing court then again goes on to say that it found that affidavit of assets was not required to be filed before it, followed by, "... but this Court has no jurisdiction to interfere the direction of the Hon'ble High Court of Delhi regarding the submission of the affidavit of assets."

67. Yet, even after making such contradictory observations, the executing court lastly found that the affidavit of assets was not required to be filed by the award-debtors to that court, but the other conditions remained intact.

68. Thus in four successive observations the executing court contradicted itself, once saying that it did not have jurisdiction to modify the Delhi High Court order but then again expressing the opinion that the filing of affidavit of assets was not necessary, thereby so modifying.

69. The said portion of the impugned order could easily be set aside on the ground of such contradiction alone, even apart from the fact that ultimately the executing court did not proper reasons for holding that the affidavit of assets was not required to be filed.

70. However, such a course of action would entail a remand, which would unnecessarily delay the matter.

71. The Delhi High Court's order dated July 4, 2018, which has been quoted above, in the same breath granted liberty to the Alipore court to vacate or vary the directions contained in the order dated February 26, 2018, which included the direction to file affidavit of assets, on the one hand, and on the other, directed the award-debtors to file an affidavit in terms of para 4 of the order dated February 26, 2018 (which contained the direction to file affidavit of assets) "in the meanwhile".

72. As such, the order dated July 4, 2018, read in its totality, makes it mandatory for the award-debtors to file their affidavit of assets "in the meanwhile", that is, before they approach the Alipore court to vacate or vary the directions mentioned above. Thus, construed in proper perspective, the Delhi High Court order dated July 4, 2018 made it incumbent on the award-debtors to file such affidavit before the executing court could vacate or vary the "directions" given on February 26, 2018,

which, by necessary implication, excludes the direction to file such affidavit of assets from the ambit of vacating/variation by the executing court, because it has to be complied with prior to such vacating/variation.

73. Since, in any event, the award-debtors had to file their affidavit of assets by virtue of the orders of the Delhi High Court, be it in the said court or the Alipore court, the argument of the award-debtors, that they need not disclose their assets to business competitors prior to decision on the maintainability of the proceeding under Section 36 of the 1996 Act, does not hold water.

74. Moreover, it is an essential and integral ritual of an enforcement proceeding that the award-debtors file their affidavit of assets, disclosing the properties which could be subjected to enforcement/execution of the award. In the event the applications under Section 47 of the CPC fail, the enforcement/execution case will not be delayed unnecessarily thereafter for non-filing of such affidavit till then. On the other hand, since the award-debtors have to file such affidavit in any event as per the Delhi High Court's order, it would not affect them in any manner if the same is also filed in the executing court, irrespective of the success of their challenges under Section 47, CPC.

75. That apart, the executing court did not assign any proper reason, apart from recording certain incoherent and contradictory observations, for varying the specific direction of the Delhi High Court as to filing of affidavit of assets in the executing court, or for deviating from the usual procedure of filing such affidavit in a proceeding under Section 36 of the 1996 Act.

76. The ratio, that since an interim order was subsisting restraining the assets of the award-debtors from being transferred, no affidavit of assets was required, was neither here nor there. Such an interim order, by itself, did not give details of the assets and could not be an excuse for the award-debtors not to file an affidavit disclosing the details of their properties and assets.

77. Hence the portion of the order dated October 6, 2018, whereby the executing court dispensed with the filing of affidavit of assets by the award-debtors, was passed without jurisdiction and ought to be set aside. **However, the award-debtors having not made out any case for vacating the interim restraint order incorporated in the order dated October 6, 2018 itself, nor established any change of circumstance or new development justifying the prayer to vacate such restraint order, the executing court acted within its jurisdiction to refuse such prayer to vacate and extend the interim order. Hence, C.O. No. 197 of 2019 is dismissed.**

78. C.O. No. 40 of 2019 and C.O. No. 41 of 2019 are also dismissed, thereby affirming the orders dated November 28, 2018 passed in Miscellaneous Case Nos. 13 and 14 of 2018, and holding the said miscellaneous cases under Section 47, CPC to be maintainable. However, it is made clear that the merits of the said cases have not been gone into and the executing court will be free to decide the same in accordance with law at the final hearing of the said cases.

79. C.O. No. 39 of 2019, on the other hand, is allowed, thereby setting aside the portion of the order dated October 6, 2018 passed in Arbitration Execution Case No. 352 of 2018, whereby it was observed that the award-debtors were not required to file any affidavit in support of the properties of

the award debtors in the court below. The award-debtors are directed to file their affidavit of assets in the executing court within a fortnight from date.

80. CAN No. 1326 of 2019 is accordingly disposed of.

81. There will be no order as to costs.

82. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.”

Let this order be deemed to be a part of the order dated March 27, 2019.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)