A NARAYAN PRASAD LOHIA

v.

NIKUNJ KUMAR LOHIA

(Civil Appeal No. 6753 of 2008)

NOVEMBER 25, 2008

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[TARUN CHATTERJEE AND AFTAB ALAM, JJ.]

Arbitration – Arbitration award – Execution of – Award in terms of family settlement – Set aside by High Court on C *objection from two of the parties to the settlement – Appeals against the same dismissed as infructuous in terms of out of court settlement between the parties – Application for execution of the award – Dismissed by High Court holding that the award was not existing – On appeal, held: On facts,* D *dismissal of appeal as infructuous, left the order of High Court setting aside the award, subsisting and undisturbed – Thus the award did not exist – Hence, the same could not have been executed.*

An arbitration award was passed confirming a family E **settlement under a Memorandum of Understanding dated June 24, 1996 between five parties (including appellant and respondent), subject to some modifications. For implementation of the award, appellant and respondent entered into a Memorandum of Understanding dated May** F **4, 1997. Despite that, the respondent and 'B' (one of the parties to the settlement dated June 24, 1996), filed separate applications objecting to the award. Single Judge of High Court allowing the objections of both, set aside the award. The appeals thereagainst preferred by** G **the appellant was dismissed by Division Bench of High Court. The appeals against the same were remitted to High Court for fresh consideration. When the matter came back to High Court, the appellant resolved the matter with the respondent. Respondent by a letter to High Court and**

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by way of an affidavit stated that he was no longer interested in contesting the proceedings. In view of the same, Division Bench of High Court disposed of the appeal so far as the respondent was concerned. High Court allowed the appeal filed by 'B'. In the meantime, respondent filed an application in the disposed of appeal praying for correction of date of Memorandum of Understanding as June, 24, 1996 instead of Memorandum of Understanding dated May 4, 1997. High Court declined to entertain the application in view of the pending appeal by 'B' before Supreme Court as the date of MOU was one of the questions involved therein. Respondent's appeal to this Court was dismissed. Appeal of 'B' to this Court was again remitted to High Court for reconsideration.

Appellant filed execution application against the respondent. Single Judge directed the parties to maintain *status quo* during the pendency of appeal of 'B' before Division Bench of High Court on remand by Supreme Court. In appeal against the same, Division Bench of High Court stayed the interim direction passed by Single Judge. In the meantime, appellant settled his dispute with 'B' outside the Court and his appeal was dismissed as infructuous by Division Bench of High Court in view of the settlement. Division Bench of High Court by its final order in appeal against the order in execution application, held that since there was no award, order of Single Judge in execution is liable to be set aside, as a non-existent award cannot be put into execution. Hence, the present appeal.

Dismissing the appeal, the Court:

HELD: In the facts and circumstances of the case, the order of the Division Bench brought under appeal is quite unexceptionable and calls for no interference. Though the appellant and 'B' were able to arrive at a settlement, the terms in which the order was passed, dismissing the

appeal as infructuous, clearly left the order of the Single Judge, upsetting the award, subsisting and undisturbed. Hence, when the respondent's appeal against the order directing to maintain status quo came up for final disposal, the Division Bench rightly held that there was no award in existence and there was no question of putting a non-existent award into execution. [Paras 18 and 19] [650-B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6753 of 2008.

From the Judgment and Order dated 14.11.2006 of the High Court of Judicature at Calcutta in G.A. No. 1761 of 2006 in A.P.O.T. No 281 of 2006 in A.P.O. No. 194 of 2006 in E.C. No. 24 of 2006.

S.K. Bagaria, Anshul Singal, Meenakshi Arora and Mohit D. Ram for the Appellant.

M.L. Verma, Ritin Rai and Shally Bhasin Maheshwari for the Respondent.

The Judgment of Court was delivered by

AFTAB ALAM, J. 1. Heard counsel for the parties.

2. Leave granted

3. This appeal is directed against the order dated November 14, 2006 by which a Division Bench of the Calcutta High Court allowed the appeal preferred by the respondent and set aside the order dated May 16, 2006 passed by a Single Judge of the High Court on an application for execution, arising from an arbitration award, directing the parties to maintain status quo. The Division Bench was apparently fully conversant with the relevant facts and hence, it allowed the appeal by a brief order without stating the basic facts of the case. It was thus left open to the appellant to take us through the facts of

the case and in turn it falls upon us to uphold the decision of the High Court by stating the relevant facts. A

4. This appeal arises from an arbitration award that was intended to settle a family dispute but which apparently failed to satisfy all the contending parties. Objections against the award were filed in the High Court and a protracted litigation commenced. In course of the long drawn proceedings, it seems the appellant tried to resolve his disputes with the two objectors not at the same time but by dealing with them separately and one by one. In that process some slips were made here and there and as a result the whole thing comes unstuck for the appellant. B C

5. The relevant facts of the case may, in brief, be stated as follows: D

6. An arbitration award dated October 6, 1996 confirmed, subject to some modifications, a family settlement under the memorandum of understanding dated June 24, 1996 between five parties. The parties to the award were (I) Bal Govind Lohia (II) Narayan Prasad Lohia (the appellant) (III) Nikunj Kumar Lohia (the respondent) (IV) Smt. G. Lath and (V) Mukund Lath. In furtherance of the award and for its implementation the appellant and the respondent entered into a memorandum of understanding dated May 4, 1997. Nevertheless, objections to the award were filed in the Calcutta High Court by the respondent Nikunj Kumar Lohia (AP No. 406/1997) and Bal Govind Lohia (AP No. 53/1998). A single judge of the High Court allowed both the objection cases and set aside the arbitrators' award. The main judgment was passed on November 17, 1998 in AP No. 53 of 1998 filed by Bal Govind Lohia. The objection filed by the respondent (AP No. 406 of 1997) too was allowed by another order passed on the same day following the judgment passed in AP No. 53 of 1998. Against the judgment and orders passed by the single judge the appellant filed two appeals before the division bench of the Court, APO No. 620 of 1999 arising out of AP No. 53 of 1998 E F G H

A (Bal Govind's objection) and APO No. 619 of 1999 arising from AP No. 406 of 1997 (the respondent's objection). Both the appeals were dismissed by the division bench. Once again the main judgment dated May 18, 2000 was passed in APO No. 620 of 1999 following which APO No. 619 of 1992 was B dismissed by a brief order dated July 14, 2000.

7. The appellant brought the matter to this Court in appeals; Civil Appeal No. 1382 of 2002 was filed against the division bench judgment and order dated May 18, 2000 in APO No. 620 of 1999 (arising from Bal Govind's objection) and Civil Appeal C No. 1384 of 2002 was filed against the order dated July 14, 2000 dismissing APO No. 619 of 1999 (relating to the respondents objection). The two appeals were heard in this Court in two stages. One of the grounds on which the single judge of the High Court had held the award as bad was that it D was made by a panel of two arbitrators. It was contended before the High Court that section 10 of the Arbitration and Conciliation Act, 1996 provides against the number of arbitrators being even. The single judge upheld this objection, amongst others, and, accordingly, set aside the award. The E division bench dismissed the appeals on this short point. Since the appeals before this Court involved the question of interpretation of section 10 of the Arbitration and Conciliation Act those were first laid before a bench of three judges. The three-Judge bench by judgment and order dated February 20, F 2002 in Civil Appeal No. 1382 of 2002, (2002) 3 SCC 572 held that section 10 undoubtedly provides that the number of arbitrators should not be even but the provision was not 'non-derogable'. The Court further observed that since Nikunj Kumar Lohia (the present respondent) and Bal Govind Lohia did not G raise any objection to the composition of the Arbitral Tribunal as provided in section 16 they must be deemed to have waived their right to object. The three -Judge bench held that the judgments of the single judge and the division bench on the question of section 10 were unsustainable and, accordingly, set H aside the judgments of the High Court on that issue. For

consideration of other aspects, the appeals were directed to be listed before a bench of two Judges. As directed, the two appeals came up before a bench of two judges and were finally disposed of by judgment and order dated January 28, 2003, (2003) 2 SCC 251. The Court noted that the judgment of the single judge of the High Court, setting aside the award, was based on as many as six findings. In appeal, however, the division bench had dealt with only two questions and, deciding them in favour of the objectors, had dismissed the appeal without going into the other questions/findings. This Court, accordingly, disposed of the two appeals with the following directions:

> "9. Accordingly, we dispose of these appeals with the direction that the matters be remitted to the High Court for the division bench to consider the other grounds on which the learned Single Judge had set aside the award by its judgment and order dated 17-11-1998, which have not been considered by the Division Bench in its judgment and order dated 18-5-2000. These appeals are disposed of accordingly. There will be no order as to costs."

8. Thus the matter came back to the High Court. At this stage, it appears that the appellant was able to resolve some of his disputes with the respondent who addressed to him a letter dated August 9, 2003 stating that though he had earlier filed an appeal (sic objection) he was no longer interested in contesting the proceedings. The respondent addressed another letter dated August 23, 2003 to the Registrar, Original Side, Calcutta High Court. In this letter he reiterated that he was no longer interested in contesting the two appeals (APO Nos.619 and 620 of 1999) preferred by Naryan Prasad Lohia against him and others. He further stated that his objection (AP No. 406 of 1997) against the arbitrators' award may also be treated as dismissed as withdrawn 'inasmuch as the award already passed was agreed between the parties by the joint Arbitrators, were duly given effect to, implemented, as also by

A consent of the parties'. He further stated that he had no concern with the other objection against the award filed by Bal Govind Lohia (AP No. 53 of 1998). He requested the Registrar to put up the letter before the division bench before whom the appeal was pending for hearing. On August 25, 2003 the respondent B also filed an affidavit to the same effect as stated in the letters to the appellant and the Registrar of the High Court. In view of the development the division bench of the High Court before which the two appeals were pending on remand by this Court passed an order on August 27, 2003 the relevant extract from C which is as follows:

> "In the said letter, as also in the affidavit affirmed by Nikunj Kumar Lohia, it has been stated by him that he was no longer interested in contesting the matter and that he did not wish to press the application for setting aside the D award, being AP No. 406 of 1997 and that the same be treated as dismissed as withdrawn.
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> "In view of the said communication from Sri Nikunj Kumar Lohia and the affidavit affirmed by him, we record E in both the appeals that Nikunj Kumar Lohia is no longer interested in contesting the appeals. Let the affidavit on behalf of the appellant (sic respondent) and filed in Court today be kept with the record.
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> "Let these appeals stand over till 1st September, F 2003 at 2:00 P.M. for further hearing."

9. Finally, while disposing of the two appeals by judgment and order dated February 28, 2005 the division bench noted as follows:

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> "At the very outset we were informed that as far as A.P.O. No. 619 was concerned, the respondent No. 1, Sri Nikunj Kumar Lohia, who had filed the application for setting aside the Award, had in a letter dated 23rd August, 2003, to the Registrar, Original Side expressed his intention not

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to contest the appeal. Accordingly, only A.P.O. NO. 620 of 1999, which arose out of an application filed by Sri. Bal Govind Lohia, was taken up for consideration though the case made out in respect of both the matters were identical." A

10. APO No. 620 that arose out of the objection filed by Bal Govind Lohia was allowed and the judgment of the single judge dated November 17, 1998 upsetting the award was set aside. B

11. Against the decision of the division bench Bal Govind Lohia once again came to this Court in SLP (Civil) No. 8954 of 2005 giving rise to Civil Appeal No. 2477 of 2006. C

12. While SLP No. 8954 of 2005 was pending before this Court some further development took place in the High Court between the respondent and the appellant. The respondent filed an application before the High Court in the disposed of appeals stating that the arbitrators award was based on and it confirmed, subject to some modifications, the memorandum of understanding between the parties dated June 24, 1996 but in the operative portion of the division bench decision, upholding the award, the date of the memorandum of understanding was stated as May 4, 1997. The respondent made the prayer before the High Court to correct the date of the memorandum of understanding as June 24, 1996. D E F

13. The High Court observed that the appeals were disposed of and against its decision one of the parties, (Bal Govind Lohia) had filed an SLP before the Supreme Court in which one of the grounds taken was that the arbitration award was referable to the memorandum of understanding dated June 24, 2006 and not May 4, 1997. The matter being pending before this Court the High Court declined to entertain the application filed by the respondent and disposed it of by order dated June 27, 2005. Against that order the respondent came to this Court in *Nikunj Kumar Lohia vs. Bal Govind Lohia &* G H

A *Ors.* (SLP No. (Civil) 8176 of 2006). The SLP was dismissed with certain observations by order dated April 21, 2006 which is as follows:

> "The only grievance made by the learned senior counsel appearing for the petitioner is that the date of the Memorandum of Understanding annexed to the Award has been erroneously shown as "4th May, 1997" in place of "24th June, 1996". The learned counsel states that the petitioner has no grievance whatsoever against the Award other than this grievance and that he had moved an application under Section 152 Civil Procedure Code for correction of the date of the Memorandum of Understanding annexed to the Award, but his application was dismissed on the ground of pendency of Special Leave Petition (C) No. 8954/2005.
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> "If this is the only grievance, we see no reason to interfere in the present petition. The Special Leave Petition is dismissed with liberty to the petitioner to move the High Court after Special Leave Petition (C) NO. 8954/2005 is disposed of."

14. Finally, the appeal filed by Bal Govind Lohia was allowed by this Court by judgment and order dated May 5, 2006. The Court noted that the earlier order of remand by this Court had expressly asked the division bench of the High Court to consider the several grounds on which the single judge had allowed the objection and upset the award but instead of considering the grounds relied upon by the single judge the division bench allowed the appeal on some other aspect of the matter. This Court, therefore, once again remanded the matter to the High Court with the following directions:

> "The impugned Judgment of the Division Bench is set aside and A.P.O No. 620 of 1999 is remitted to the High Court. The Division bench shall now hear A.P.O. No. 620 of 1999 in the light of the observations made in Civil

Appeal No. 1382 of 2002 by the order dated 28th January, 2003 and dispose it of in accordance with law. A

"It shall be open to all the parties, who are entitled to be heard, to raise all contentions which are open to them in law. The appeal is accordingly, allowed. There will be no order as to costs." B

15. It doesn't need to be stated that as a consequence of the setting aside of the order of the division bench, the order of the single judge, upsetting the award, got revived.

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16. The matter rested at this stage when the appellant filed an execution application only against the present respondent. On this application the single judge of the High Court passed the order dated May 16, 2006 directing the parties to maintain status quo during the pendency of the appeal before the division bench on remand by the Supreme Court. Against this order the respondent filed an appeal before the division bench which by order dated June 26, 2006 stayed the interim direction given by the single judge. D

17. At about the same time the appellant was able to settle his dispute, outside the court, with Bal Govind Lohia. The division bench of the High Court was informed about the settlement on which Bal Govind Lohia's appeal pending on remand by this Court was finally disposed of by passing the following order: E F

"Both the Learned Advocates appearing for the respective parties, namely, the appellant and Respondent No. 1 submit that out of the Court the parties have already settled the matter and accordingly this Appeal at the present moment has become infructuous. G

"Having regard to such state of affairs, the appeal stands dismissed as it has become infrutuous.

"All parties concerned are to act on a signed copy of the H

A minutes of this order on the usual undertaking."

(emphasis added)

18. It is thus to be seen that though the appellant and Bal Govind Lohia were able to arrive at a settlement, the terms in B which the order was passed, dismissing the appeal as infructuous, clearly left the order of the single judge, upsetting the award, subsisting and undisturbed. Hence, when the respondent's appeal against the order directing to maintain status quo came up for final disposal the division bench rightly C held that their was no award in existence and their was no question of putting a non-existent award into execution. The division bench further observed that since there was no award, the order passed by the single judge in execution had to be set aside; it did so and allowed the appeal.

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19. In the facts and circumstances of the case as narrated above the order of the division bench brought under appeal is quite unexceptionable and calls for no interference. The filing of the appeal against this order before this Court is wholly misconceived. The proper course for the appellant was perhaps E to file a review petition for modification of the order dated June 28, 2006 by which APO No. 620 of 1999 was *dismissed* by the division bench of the High Court as *infructuous.*

20. On hearing counsel for the parties and on a careful F consideration of the materials on record we find no substance or merit in this appeal. It is, accordingly, dismissed but with no order as to costs.

K.K.T. Appeal dismissed.