

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on:- 13.10.2011*
Judgment delivered on:- 19.10.2011

+ **CONT. CAS (C) No 920/2009**

M/s Terra Manufacturing and Sales

..... Petitioner
Through: Mr. Sanjiv Puri, Sr. Advocate
with Ms. Akriti Gandotra,
Advocate.

Versus

M/s Alagendiraa Apparels

.....Respondent
Through: Mr. Upamanuya Hazarika, Sr.
Advocate with Mr. E.
Mohamed Abbas, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1 (i) This contempt petition has arisen out of the directions contained in the order dated 27.01.2009. This order was passed by a Division Bench of this Court in an appeal which had been preferred by M/s Alagendiraa Apparels Pvt. Ltd.. This appeal had

impugned the order dated 28.08.2008. On 28.08.2008 in a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act'), the following interim measures were made:-

- (i) The Respondent is restrained from selling, alienating, encumbering or parting with possession of the equipment.
- (ii) The Respondent, if desires to retain the equipment, to intimate the same to Petitioner within four weeks herefrom and to then furnish security to the satisfaction of Arbitral Tribunal in the sum of Rs.3,74,87,343/- within eight weeks herefrom.
- (iii) Upon the failure of Respondent to exercise option in (ii) above, the Respondent is directed to, within 8 weeks herefrom, deliver the equipment to the Petitioner/Applicant in the presence of Mr. K. Parameshwar, Advocate (Mobile: 9818113824) who is appointed as the Local Commissioner to make an inventory of the equipment delivered.
- (iv) Upon the failure of the Respondent to so deliver the equipment, the aforesaid Local Commissioner is authorised to take delivery of the equipment from the Respondent after preparing an inventory of the same and to hand over the same to the Petitioner/Applicant. The Police Authorities of the place where the equipment is at present in custody of the Respondent are directed to render all possible help to the said Local Commissioner for delivery of the equipment.
- (v) The fee of Local Commissioner is fixed at Rs. 30,000/- besides out of pocket and travel expenses.
- (vi) The Petitioner/Applicant would be entitled to dispose of the said equipment under direction of the Arbitral Tribunal."

(ii) This order as noted supra was the subject matter of an appeal which had been disposed of on 27.01.2009. The relevant part of this order reads as follows:-

“a. Subject to the appellant furnishing security to the tune of Rs.1,51,98,833/- to the satisfaction of the Arbitrators on the first date of hearing before the Tribunal, the appellant is permitted to use the equipment/machinery in question. The Appellant shall, however, not alienate, remove or damage the same till the making of the award and shall abide by the directions that may be given by the Arbitral Tribunal in this regard.”

(iii) Security to the tune of Rs.1,51,98,833/- to the satisfaction of the Arbitrator had to be furnished.

(iv) On 06.03.2009, the learned Arbitrator had directed the respondent to furnish security in the aforementioned sum of Rs.1,51,98,833/- in the form of a bank guarantee in the name of the claimant on or before 18.03.2009.

(v) This order of 06.03.2009 was sought to be modified; application to the said effect was filed before the Arbitrator.

(vi) On 26.03.2009, the learned Arbitrator disposed of the application giving liberty to the respondent to seek directions from the High Court to the said effect.

(vii) Application i.e. CM No. 5956/2009 was filed before the High Court; the prayer made by the petitioner was to permit him to furnish security other than by way of bank guarantee i.e. by way of personal guarantee of the Managing Director.

(viii) This application was dismissed on 09.12.2009 by a Division Bench of this Court.

(ix) The SLP filed against the order dated 09.12.2009 also stood dismissed.

2 The counsel for the petitioner is aggrieved by the conduct of the respondent; his contention is that inspite of specific directions given by the Division Bench of this Court in its order dated 27.01.2009 directing the respondent to furnish a security to the tune of Rs.1,51,98,833/-, the same has not been furnished till date. Learned counsel for the petitioner has placed reliance upon a judgment of the Apex Court reported in (2007) 13 SCC 220 Maruti Udyog Limited Vs. Mahinder C. Mehta & others to support his submission that even an interlocutory order passed by the Arbitrator in a petition under Section 9 of the said Act can be the subject matter of a contempt; it is pointed out that in this case also a direction had been given to the party to furnish a security and this direction had been given in a petition under Section 9 of the said Act; non-compliance of the said direction had led the Court to hold that the said party was guilty of contempt of Court.

3 Arguments have been rebutted. It is submitted that there has been no willful disobedience of the order of this Court; contention being that all along efforts were being made to arrange for a bank guarantee but this was beyond the financial control of the respondent. Attention has been drawn to the order dated

28.05.2009 passed by a Division Bench of this Court on the application being CM No. 5956/2009 filed by the respondent/Alagendiraa Apparels Pvt. Ltd.; contention being that since the respondent could not arrange for a bank guarantee, he had sought to furnish security in the nature of an immoveable property and this contention has been noted in this order dated 28.05.2009. Attention has also been drawn to the subsequent orders passed on 09.07.2009 and 04.08.2009 where again the submission of the respondent that he was willing to furnish security by way of immoveable property had been noted and in fact the Madras High Court had been requested to appoint a Government approved valuer to evaluate the immoveable property of the respondent which was situated in Coimbatore, Chennai; the valuer had been directed to give his report within four weeks. On 09.12.2009, the said application i.e. CM No. 5956/2009 was dismissed; the SLP filed against the order dated 09.12.2009 (as noted supra) has also been dismissed. Counsel for the respondent contends that in these circumstances it is clear that there has been no willful disobedience of the orders passed by the Court. The second contention is that the petitioner is aggrieved by the fact that the directions contained in the order dated 27.01.2009 have not been complied with; attention has been drawn to the said

order. It is submitted that on 27.01.2009, the Division Bench of this Court had directed the appellant to furnish a security in the sum of Rs.1,51,98,833/- which was to the satisfaction of the Arbitrator; on 06.03.2009, the Arbitrator had directed that the security should be furnished in the nature of a bank guarantee; contention being that it is the order of the Arbitral Tribunal dated 06.03.2009 which is the subject matter of the contempt and as such this contempt petition is not maintainable; procedure contained in Section 27 (5) of the said Act could not be by-passed. The third objection of the learned counsel for the respondent is that the order dated 27.01.2009 was passed as an interim measure in a petition under Section 9 of the said Act; it is submitted that the Arbitral Award has since been passed on 21.12.2009; the order of 27.01.2009 which was only by way of an interim measure has merged with the final Award; it cannot therefore be the subject matter of contempt. Learned counsel for the respondent has placed reliance upon a judgment passed in OMP No.597/2008 Sri Krishan Vs. Anand dated 18.08.2009 wherein the Court had noted that where a party has elected to apply for a relief under Section 17 of the said Act, he is not entitled to seek the same relief under Section 9 of the said Act; contention being that once a remedy of obtaining an interim

CONT. CAS (C) No.920/2009 Page 6 of 14

measure is available to a party before the Arbitrator under Section 17 of the said Act, he cannot take simultaneous benefit of provisions of Section 9 of the said Act.

4 Record has been perused.

5 On 27.01.2009, the parties had agreed that the appellant/respondent will furnish a security to the tune of ₹1,51,98,833/-. The direction to furnish the security in the aforementioned sum was accordingly passed by the Division Bench; the Court had also recorded that in view of this settlement, the appellant would not challenge the order under Section 11 of the said Act passed by the Single Judge. The order of the Single Judge had in fact directed the appellant to furnish a security in the sum of ₹3,74,87,343/-. The Division Bench had reduced this amount by half. Submission of learned counsel for the petitioner is that a definite benefit had accrued to the respondent by the order of the Division Bench dated 27.01.2009 and he had been directed to furnish a security only for half of the original amount. This factual position is not in dispute. The argument of learned counsel for the petitioner is well founded that a brazen contempt has been committed by the respondent and he has willfully disobeyed this direction given by the Division Bench on 27.01.2009. The

submission of the respondent that the petitioner is actually seeking a contempt of the order dated 06.03.2009 (which is an order passed by the learned Arbitral Tribunal) as it was the Tribunal which had described the security in the form of a bank guarantee is an argument without merit. The direction of 27.01.2009 had to be honoured which was to furnish a security of the aforementioned amount; the Tribunal on 06.03.2009 had only satisfied itself that the security should be in the nature of a bank guarantee. To buy time, the respondent thereafter filed an appeal against the order dated 06.03.2009; he sought a modification of the said order as is evident from the prayer made in his application before the Division Bench. The Division Bench on 09.12.2009 had dismissed his application holding that it was only with the consent of the parties that a direction had been given to the respondent for furnishing a security to the tune of ₹1,51,98,833/-. The SLP filed against this order of the Division Bench dated 09.12.2009 has also been dismissed.

6 The judgment of the *Maruti Udyog* (Supra) squarely applies to the facts of the instant case. In the said case also, in a petition under Section 9 of the Arbitration and Conciliation Act, the parties had arrived at a settlement and in terms of the aforestated

settlement, it had been agreed that the parties will give an undertaking to furnish security before the Arbitrator. The sole Arbitrator thereafter directed the parties to furnish the security in the form of a bank guarantee; this was not complied with; security sought to be furnished by way of a property which an already encumbered property had been justified; the Court had found favour with the argument of the petitioner and held the respondent guilty of contempt of Court. The Apex Court had rejected the submission of the respondent that an interlocutory order passed by the Arbitrator under Section 9 of the said Act had merged with the final Award and as such it could not be the subject matter of contempt. In the instant case as well, the argument of learned counsel for the respondent that the order passed by the Single Judge on a pending petition under Section 9 of the Arbitration and Conciliation Act has since merged with the Final Award and cannot be the subject matter of contempt is an argument without any merit. The order of the Single Judge dated 28.08.2008 passed in a petition under Section 9 of the Arbitration and Conciliation Act was to furnish a security of ₹3,74,87,343/-; it was modified by the Division Bench on 27.01.2009 pursuant to which direction had been given to the respondent to furnish a

security of half the amount i.e. to the tune of ₹1,51,98,833/-. Thus the order passed in a petition under Section 9 of the said Act having been willfully violated, the petitioner is liable for contempt.

7 The second submission of the respondent that the procedure under Section 27 (5) of the Arbitration and Conciliation Act has been by-passed is an argument only to be noted and rejected. The petitioner is not aggrieved by the non-compliance of the direction of the Arbitrator; he is aggrieved by the non-compliance of the directions of this Court which are dated 27.01.2009 whereby the petitioner had been directed to furnish a security in the aforementioned sum which has not been furnished. Section 27 (5) would come into play only if there is a contempt of the order passed by the Tribunal which is not so in the present case.

8 Learned counsel for the respondent further submits that there is no willful disobedience of the Court. This argument also carries little weight. Learned counsel for the respondent (as noted supra) had drawn attention of this Court to the alleged efforts made by him to comply with the directions of this Court dated 27.01.2009; his contention being that the Arbitrator had directed him to furnish security by way of a bank guarantee for which he had sought a modification as he was not in a financial position to

furnish the bank guarantee; there was an immoveable property which was located at Madras and in fact the Registrar, Madras High Court had been directed to verify the value of the said land; in these circumstances, it cannot be said that there is not a willful disobedience of the order of this Court. This position is disputed by learned counsel for the petitioner who states that by way or other, the respondent was buying time not to abide by the directions of this Court.

9 Record shows that on 27.01.2009, the respondent had agreed to furnish the security in the reduced amount of ₹1,51,98,833/-; this amount had been reduced on the specific agreement of the respondent and the original amount of ₹3,74,87,343/- was accordingly reduced to ₹1,51,98,833/-. A substantial benefit had ensued in favour of the respondent in terms of this direction. The respondent had clearly and unequivocally accepted his liability to the extent of ₹1,51,98,833/- and had agreed to furnish a security for the said amount. On 06.03.2009, the Arbitrator had directed the respondent to furnish this security by way of a bank guarantee. This order was not complied with. The matter went in appeal and by way of one application or another, the respondent continued to prolong this

litigation; the whole purpose being to buy time not comply with the directions which he had obtained specifically at his own asking. If the respondent was not in a position to furnish a security, he should not have taken an unequivocal stand before this Court on 27.01.2009. It was not a small amount; the directions for furnishing this security have clearly flouted. In no manner could it be said that there was not a willful disobedience. The petitioner is guilty of contempt of Court.

10 Relevant would it be to extract the definition of 'civil contempt' as contained in Section 2(b) of the Contempt of Courts Act, 1971:-

2. Definitions.- In this Act, unless the context otherwise requires,-
- (a) XXXXXXXXX
 - (b) "Civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a court;

11 Two categories of cases are contained therein; a willful disobedience of the order or other process of a Court or a willful breach of an undertaking given to a court. Both are two separate categories and two separate classes of contumacious behavior. The Apex Court in (2006) 11 SCC 114 Ram Narang Vs. Ramesh Narang & Another has noted the distinction between these two categories and held that the scope of willful disobedience to any

process of the Court falls in the first category of cases and a willful disobedience of a consent decree also make a person liable for contempt; further merely because a consent decree is executable under the Code of Civil Procedure, it would not take away the court's contempt jurisdiction in case of a willful disobedience or non compliance of the same.

12 In the instant case, a specific direction had been given to the contemnor to furnish a security. This order was passed at his behest and at his asking; this was on 27.01.2009; thereafter all efforts were made by him to delay the process; matter was assailed before the Division Bench and right up to the Apex Court; the respondent had sought a modification of the order asking him to furnish the security in the form of a bank guarantee; he could not get relief from any Court; even today before this Court on repeated queries, learned counsel for the respondent states that he is not ready to furnish any security as it is the petitioner in fact who is liable to pay him certain amounts and the Award which has been obtained by him has been obtained under fraud; his further contention is that he has in fact filed a counter claim against the petitioner which is also pending adjudication. Arguments of the respondent are without any merit. The respondent is guilty of contempt. He is represented by Mr.N.Ganeshan, Managing
CONT. CAS (C) No.920/2009 Page 13 of 14

Director; he is convicted under Sections 12 & 15 of the Contempt of Court Act, 1971.

For sentence.....

INDERMEET KAUR, J

OCTOBER 19, 2011

a