

(2011) 11 DEL CK 0483

In the Delhi High Court

Case No : Cont. App. (C) No. 19 of 2011

Alagendiraa Apparels Pvt Ltd and Another

APPELLANT

Vs

Terra Manufacturing and Sales

RESPONDENT

Date of Decision : 01-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 34, 9
Contempt of Courts Act, 1971 — Section 11, 12, 15

Citation : (2011) 11 DEL CK 0483

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : U. Hazarika with Mr. E. Md. Abbas, Mr. Santosh Kumar and Mr. Paul R. Paske, for the Appellant; Sanjeev Puri with Mr. Ritin Rai and Ms. Aarti Gandotra, for the Respondent

Final Decision : Disposed Off

Judgement

Sanjay Kishan Kaul, J.

Caveat No.980/2011

1. Learned counsel for the respondent has entered appearance and thus the caveat is discharged.

CM No.19915/2011 (Exemption)

2. Allowed subject to just exceptions.

CM No.19914/2011 (for permission to file appeal)

3. This application has been filed for leave to appeal by appellant No.2, who is the Managing Director of appellant No.1. It appears that appellant No.2 was by name not impleaded as a respondent though in the capacity of the Managing Director of appellant No.1, the contempt proceedings were sought to be initiated against appellant No.2.

4. We, thus, grant leave to appellant No.2 to file the appeal and the application is allowed.

Cont. App. (C) No.19/2011

5. Admit.

6. Learned counsel for the respondent accepts notice.

7. At request of learned counsels for the parties, the appeal is taken up for final disposal.

8. The origin of disputes between the parties is a leasing agreement entered into between appellant No.1 and the respondent qua the machinery. It is the case of the respondent that appellant No.1 defaulted in making payments from the very inception which resulted in proceedings being filed by the respondent - an application u/s 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") and an application u/s 9 of the Arbitration Act for necessary interim relief qua the leased machinery. These two applications were disposed of by a common order of the learned single Judge dated 28.8.2008. The disputes were referred to an arbitrator and in so far as the relief u/s 9 of the Arbitration Act is concerned, interim measures were made as per paragraph 18, which is reproduced hereinunder:

18. Accordingly, the following interim measures are 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 the 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.

9. Appellant No.1 filed an appeal aggrieved by this order, being FAO (OS) No.439/2008, which was disposed of by a Division Bench of this Court vide order dated 27.1.2009. We may note at this stage that an issue of jurisdiction had been raised before the learned single Judge by appellant No.1 which was also raised in appeal but was given up. The agreed terms of the settlement are contained in paragraphs 3 to 5, which are reproduced hereinunder:

3. After the matter was argued at some length, the parties have agreed to the following manner of disposal of this appeal:

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.

b. The respondent, after giving notice in writing to the appellant of the intention to visit and inspect the machinery and take photographs of the same shall be entitled to inspect the machinery and the appellant shall provide full cooperation therefor.

c. That the appellant will appoint their own Arbitrator not later than 3rd February, 2009 and give intimation to the Respondent.

d. That Mr. Rajesh Goel, the learned Arbitrator appointed by the Court shall be the Chairman of the Arbitral Tribunal, the third arbitrator being the one already nominated by the respondent.

e. That the arbitration proceedings shall be conducted in Delhi.

f. That the parties will file before the Arbitral Tribunal and exchange amongst themselves the statement of claims not later than 24th February, 2009 and will also file and exchange their responses to the statement of claims by 18th March, 2009. The parties shall also, within the same period file and exchange their respective documents and shall also conduct the admission/denial of documents on statements. The Tribunal shall proceed on the basis of the above pleadings and such other pleadings through necessary by the arbitral tribunal.

g. That the Parties shall appear before the Arbitral Tribunal on 26th March, 2009, on which date the parties shall produce the suggested issues.

h. That the Arbitral Tribunal shall dispose of the dispute not later than four months from the first hearing before it. The said date can be changed to suit to the convenience of the Arbitrators and the parties but, the first hearing should not be later than 15 days from the date fixed by us.

4. The learned counsel for the appellant states that in view of this settlement, the order u/s 11 would not be challenged.

5. The judgement of the learned Single Judge impugned before us stands modified in the aforesaid terms.

10. In so far as the present controversy is concerned, which arises out of interim relief granted u/s 9 of the Arbitration Act, the material difference was the reduction in the value of the security to be furnished by the appellants and paragraph 5 aforesaid made it clear that the order of the learned single Judge is modified in the terms as set out in paragraph 3 of the order dated 27.1.2009. The effect of this, in our considered view, was that the appellants were required to furnish a security of `1,51,98,833.00 instead of `3,74,87,343.00 as specified in the order of the learned single Judge in paragraph 18 (ii) and on the failure of the same, the consequences in paragraphs 18 (iii) & 18 (iv) would be triggered of.

11. The Arbitral Tribunal which came to be constituted as per the directions of the Division Bench passed an order on 6.3.2009 requiring appellant No.1 to furnish security in the form of a bank guarantee in the name of the respondent on or before 18.3.2009 on which date none appeared for the appellant. The reason for absence was given as the date being noted as 26.3.2009. The appellant, was, however unable to obtain a bank guarantee and moved an application for modification of the order dated 6.3.2009. Appellant No.1 sought to furnish the personal guarantee of the Managing Director, i.e., appellant No.2, by way of security or in the alternative prayed that appellant No.1 may be permitted to move the Hon''ble High Court for return of the machinery. In effect the appellants threw up their hands and expressed their inability to furnish a bank guarantee.

12. The Arbitral Tribunal in the proceedings held on 26.3.2009 refused to accept the personal guarantee of appellant No.2 as security but granted liberty to appellant No.1 to seek appropriate direction from the High Court for return of machinery, if appellant No.1 was not in a position to furnish a bank guarantee.

13. Appellant No.1 thereafter moved CM No.5956/2009 in FAO (OS) No.439/2008 but prayed for the said appellant to furnish a security other than the bank guarantee by way of personal guarantee of the Managing Director. This application was examined on 28.5.2009 when appellant No.1 was directed to obtain directions whether instead of a personal guarantee/security, a security in the nature of immovable property could be submitted. The appellants sought to offer an immovable property as security on 9.7.2009. The Division Bench noted this fact as also there being dispute about valuation. A valuation report was, thus, called for from appellant No.1. The issue of valuation of property located at Village Velampalayam, Coimbatore SRO Zone, Revenue District Coimbatore, Taluk Trippur, Chennai was thereafter further explored and the Division Bench directed that the appropriate method would be to request the Registrar, Madras High Court to appoint a Government approved valuer. In terms of the order dated 4.8.2009, the Registrar, Madras High Court was requested to appoint an official valuer of its choice to carry out the necessary exercise. This resulted in a valuer being appointed and a valuation report coming on record in terms whereof

the property was valued at ` 1,36,02,869.00.

14. The application, however, came to be listed before a different Division Bench on 9.12.2009 which took a view that the order of the Arbitral Tribunal for furnishing of security in the form of a bank guarantee which was sought to be altered by the application was not appealable and that the security amount had been reduced by the consent of the parties and the security had to be furnished to the satisfaction of the Tribunal. The application was accordingly dismissed and the endeavour of appellant No.1 to further challenge the same in Special Leave to Appeal (Civil) No.5146/2010 also met the same fate though with the direction to withdraw the petition with liberty to move the High Court. We are informed that there were no further proceedings in the High Court.

15. The respondent sought to file a Civil Contempt Petition under Sections 11 & 12 of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Contempt Act") against appellant No.1 and for punishment of the officers in charge of and in control of appellant No.1 including appellant No.2 in view of the aforesaid facts. We are informed that the machinery in question was handed over to the respondent in collateral proceedings about more than six (6) months back but that the same has not been sold by the respondent.

16. The present appeal arises from the impugned order dated 19.10.2011 passed by the learned single Judge in Cont. Cas. (C) No.920/2009. In this contempt case on 15.1.2010 it was observed by the learned single Judge that the respondent was at liberty to inspect the machinery and to seize the same so that appellant No.1 could not use the same. The learned single Judge observed that "it is doubtful that non furnishing of security would amount to contempt". However, the counsel for the respondent stated that he would like to make further submissions to address arguments on the issue of contempt. The endeavour of the respondent to seek a review of this order for deletion of this sentence was not successful. This contempt petition has ultimately come to be decided by another learned single Judge vide order dated 19.10.2011, whereby appellant No.1 has been held guilty of contempt as represented by appellant No.2 as its Managing Director, who has been convicted under Sections 12 & 15 of the Contempt Act and the matter is adjourned to 3.11.2011 for sentence.

17. Learned senior counsel for the appellant has pointed out to us, and rightly so, that there is an obvious mistake in the operative portion of this order, at least, to the extent that it seeks to invoke Section 15 of the Contempt Act in as much as the jurisdiction to hear a criminal contempt petition is of the Division Bench and not of the Single Bench. The invocation by the respondent was also under Sections 11 & 12 of the Contempt Act.

18. However, the more material aspect which we seek to examine in the present appeal is whether even a case of civil contempt is made out in the present case. On hearing learned counsels for the parties the answer to this question would be in the negative.

19. In our view the order of the learned single Judge dated 28.8.2008 gave options. The first option was for appellant No.1 to furnish security to the satisfaction of the Arbitral Tribunal in the sum of ` 3,74,87,343.00. Paragraph 18 (iii) of the order dated 28.8.2008 of the learned single Judge provided the consequences of failure to furnish such a security, i.e., to deliver the equipment to the respondent in the presence of the Local Commissioner, who is named in the order. The further consequence is contained in paragraph 18 (iv) of that order, i.e., on the failure of appellant No.1 to deliver the equipment, the Local Commissioner was authorized to take delivery of the equipment from appellant No.1 and was even entitled to seek assistance of police authorities, if so required. The Division Bench in terms of order dated 27.1.2009 in so far as interim measures of protection are concerned only watered down the amount for furnishing security to ` 1,51,98,833.00 as per paragraph 3 (a) of that order but made it clear in paragraph 5 that the order of the learned single Judge was only modified in the terms as set out in the order of the Division Bench. The net effect was that all the consequences as discussed above would follow on non-furnishing of the security to the tune of ` 1,51,98,833.00.

20. Appellant No.1 at the threshold of the arbitral proceedings itself has thrown up its hands in so far as requirement of furnishing a bank guarantee as security was concerned and had even expressed its desire to surrender the machinery if the personal guarantee of the Managing Director was not acceptable. In this behalf, leave was taken from the Arbitral Tribunal to move the Division Bench and the appellants did move the Division Bench in this behalf. However, it is in the course of the proceedings that the Division Bench explored possibility of appellant No.1 being required to furnish an alternative security of immovable property. The matter proceeded further and even the valuation report was obtained through independent sources, i.e., by appointment of a valuer by the Registrar, Madras High Court. However, the subsequent Division Bench proceeded in a different direction and chose to dismiss the application, which order was sustained by the Supreme Court.

21. In our considered view, thus, at least, till that stage it could not be said that there was any willful contemptuous conduct of the appellants. After the withdrawal of the SLP on 26.2.2010 the respondent was well within its right to have invoked the consequences arising from the order of the learned single Judge dated 28.8.2008 as upon the failure of the appellants to deliver possession of the machinery, assistance should have been obtained of the Local Commissioner to take possession thereof and in case of resistance, assistance of police authorities could have been obtained. Learned senior counsel for the appellants has pointed out to us that the appellant, in fact, had volunteered to surrender the machinery vide letter dated 17.3.2010 but the respondent chose not to take the machinery. The response of the respondent vide letter dated 26.7.2010 shows that the respondent wanted to proceed really in the direction of contempt proceedings rather than take possession of the machinery. We, thus, find that at no stage there had been willful disobedience of the orders of the

Court by the appellants though admittedly the appellants were not able to satisfy the monetary claims of the respondent.

22. We may note that the arbitral proceedings have given rise to an award dated 21.12.2010 against the appellants, the objections of the appellants u/s 34 of the Arbitration Act were dismissed on 29.4.2011 and we dismissed the appeal on 20.9.2011.

23. Learned senior counsel for the respondent endeavoured to persuade us that the present case is covered under the parameters of the law laid down in Maruti Udyog Limited Vs. Mahinder C. Mehta and Others, . It is the submission of the learned counsel that once the appellants exercised the option to retain the machinery and furnish security, the other alternatives would not come into play.

24. We are unable to accept the plea for the reason that the alternatives have been clearly set out in the order of the learned single Judge dated 28.8.2008 which was modified by the Division Bench vide order dated 27.1.2009 only to the extent of the value of the security. We further find that the facts of Maruti Udyog Limited case (supra) are quite different in as much as there was never any question of any option being available but of an undertaking being furnished to a Court which had been violated.

25. We are, thus, of the considered view that the impugned order of the learned single Judge dated 19.10.2011 cannot be sustained and is accordingly set aside. As a sequitur the contempt notice issued against the appellants stands discharged and the order of conviction is set aside. Consequently, the date fixed before the learned single Judge of 3.11.2011 shall stand cancelled.

26. Needless to say that the respondent is within its right to proceed for the execution of the award in accordance with law.

27. The appeal is accordingly allowed in the aforesaid terms leaving the parties to bear their own costs.

CM No.19913/2011 (Stay)

28. In view of the disposal of the appeal, no directions are called for on this application and the same stands disposed of.