

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

+ **OMP No.472/2009 (U/s.9 of the Arbitration Act, 1996) & Caveat No.77/2009**

% **Date of decision:19th August, 2009**

Ajay Makhija Petitioner

Through: Mr. A.P.S. Gambhir, Advocate

Versus

M/s. Dollarmine Exports Pvt. Ltd. & Ors ..Respondents

Through: Mr. Sanjeev Puri, Sr. Advocate with Mr. Anshul Tyagi and Mr. Sonal Sinha, Advocates

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1 The counsel for the Caveator has appeared. The caveat stands discharged.

2 Interim measures are sought before the commencement of the arbitration proceedings arising out of a partnership deed dated 2nd October, 2005 between the petitioner and the respondent No.1. The petitioner has also impleaded as respondent No.2 M/s. Picadilly Properties Pvt. Ltd. which is stated to be a company controlled by the same persons who are controlling the respondent No.1 company. The reason for impleading the respondent No.2 appears to be the case of the petitioner, of the corporate veil of the respondents No.1 and 2 being liable to be pierced.

3 I have brought to the notice of the counsel for the petitioner the recent judgment of a Single Judge of this court in ***Kanta Vashist Vs. Ashwini Khurana*** MANU/DE/0380/2008 wherein it has been held that in a Section 9 petition no reliefs can be given against the companies controlled by the family members who are parties to the arbitration when which companies are not parties to the arbitration. Even though I have subsequently in Value ***Advisory Services Vs. M/s. ZTE Corporation*** MANU/DE/1032/2009 held that no hard and fast rule can be laid down as to the issuance of interim orders qua third parties and the same depends on the facts of each case but I do not find the facts of the present case to be such in which it can be said that orders under Section 9 can be passed against the respondent No.2.

4 Another reason for impleadment of respondent No.2 given in the petition is that the respondent No.2 is the owner of the property from which the business of the partnership was being carried on. The respondent No.2 has given a notice to the firm as well as to the petitioner and the respondent No.1 seeking their removal/ ejectment from the premises. However the same also does not call for any interim order against the respondent No.2 in as much as in Clause No.4 of the partnership deed it is expressly provided that the petitioner shall have no right to the said premises and on dissolution of the firm, which the petitioner admits to have happened, the authority / right of the firm to use the said premises shall come to an end. No interim relief restraining the respondent No.2 from interfering with use of its premises by the erstwhile firm's partners can thus be granted.

5 The name of the respondent No.2 is thus struck off from the array of respondents.

6 The counsel for the petitioner has contended and it is also his case in the pleadings that the petitioner was only rendering technical services in the partnership firm and the entire operations and accounts were being looked after by the respondent No.1 through its Directors. The petitioner as such states that he is not aware of the accounts of the firm since the very beginning and seeks the interim measure of directing the respondent to furnish accounts to the petitioner. It is contended that such accounts are also necessary for the petitioner to prefer its claim against the respondent in the arbitration proceedings.

7 Per contra the senior counsel for the respondent has in the court handed over the balance sheet of the partnership firm as on 31st March, 2008 and which is shown to be signed by the petitioner. He has further contended that the averments made in the petition are of a period prior thereto. It is thus argued that the case set out by the petitioner of not being aware of the accounts is falsified from the said balance sheet. The counsel for the petitioner states that the petitioner is not present in the court and he is unable to state whether the signatures as appearing on the photocopy of the balance sheet supplied to him also are of the petitioner or not.

8 Be that as it may be, prima facie the statement of the petitioner in the pleadings of being unaware of the accounts is falsified from the documents handed over in the court.

9 Even otherwise I am of the opinion that the relief as sought of

furnishing accounts cannot be granted as an interim measure under Section 9 of the Act. The liability to furnish accounts is itself a question which may require adjudication and more so when the case of the respondent is of the petitioner having himself signed the balance sheet. Thus even if the case of the petitioner remains that it is not in possession of the accounts, the relief of rendition of accounts is a substantive relief to be claimed before the arbitrator and this court cannot usurp to itself in exercise of powers U/s.9, the jurisdiction of the arbitrator and the same is also barred under Section 5 of the Act.

10 As far as the contention of the counsel for the petitioner of the accounts being required by the petitioner for the purposes of preferring claims is concerned, the same is also not a correct proposition in law. The claims for accounts is coupled with the relief for recovery of amounts found due on accounts being taken. The said matters are for adjudication in the arbitration proceedings.

11 The counsel for the petitioner has also claimed the relief of restraining the respondents from dealing with the movable and immovable assets of the partnership. Save for stating that the assets of the partnership comprise of stocks of silks imported by the firm no other assets of the firm have been pleaded. Even today on inquiry the counsel states that he is unaware of what are the other assets of the firm. Per contra the senior counsel for the respondent on instructions has made a statement in the court that there are no immovable assets of the firm and no immovable assets have been shown as property of the firm in the balance sheets of the firm also filed from time to time.

12 The senior counsel for the respondent admits that the stocks of imported silk exists in the firm and the same as per the business of the firm were being sold and the sale proceeds thereof are being remitted in the bank account of the firm which is lying frozen at the instance of the petitioner. He states that no stocks have been sold after the notice of dissolution and at the moment the stocks of value of Rs.8 lacs only are existing in the firm.

13 It has been put to the counsel for the petitioner that either the respondent can be permitted to sell the said stocks or the said stock can be handed over to the petitioner subject to the petitioner remitting Rs.8 lacs in the account of the firm. The counsel has opted for the respondent to sell the said stocks subject to the remittance of Rs.8 lacs in the account of the firm. Accordingly, the respondent is permitted to sell the said stocks subject to the deposit of the sale proceeds in the account of the firm.

14 It may however be recorded that the counsel for the petitioner states that the stocks worth more than Rs.8 lacs are in existence. However in the absence of any particular no vague interim orders incapable of enforcement can be made and it will be open to the petitioner to plead/prone during the arbitration proceedings that the stocks were more and to claim accounts with respect thereto.

15 The counsel for the petitioner has contended that the petitioner should also be permitted to be involved at the time of sale of the aforesaid stocks by the respondent. However the same is not found practical especially when the petitioner is not willing to take the responsibility of sale itself even though it is the argument that the goods are marked and there can be no dispute as to their identity

and also that the goods are of perishable nature and the value thereof is bound to depreciate with the passage of time. If the parties are ordered to jointly sell the stocks, the sale is likely to be delayed and would result in depreciation in the value and the said sum of Rs.8 lacs also is unlikely come in the hands of the firm.

16 The petitioner has also sought the interim measures of restraining the respondent, its Directors, Agents, nominees, employees from trading in the stocks held by them or from utilizing the monies which according to the petitioner have been siphoned off by the respondent out of the firm's account in its own accounts. The petitioner in fact wants a restraining order against the respondent from carrying on any business whatsoever.

17 Such order cannot be granted especially when there is no material for the corporate veil to be lifted at this interim stage. All that can be said at this stage is that the ingredients which the Supreme Court in ***Singer India Ltd. Vs. Chander Mohan Chadha*** (2004) 7 SCC 1 has laid down for lifting the corporate veil have not been pleaded. This is more so in the light of the senior counsel for the respondent having handed over in the court the photocopy of the balance sheet at 31st March, 2008 signed by the petitioner. Even otherwise such an order would be in the nature of a final order and not an interim order.

18 The counsel for the petitioner has also sought the interim measure of directing the respondent to deposit the bank slips and cheque books of the account of the partnership firm in this court. It is admitted by both the counsels that the firm had only one bank account which is frozen at the instance of the petitioner. In the

circumstances no case is made out for this interim relief also as the same is subject matter of accounts to be gone into before the arbitrator. The senior counsel for the respondent also points out that presently there is a negative balance of approximately Rs.1.2 Crores in the said account.

19 The last interim measure claimed is of restraining Union Bank of India with which the firm had a bank account from releasing the securities of the respondent and on the strength whereof advances had been made by the said bank to the firm. Union Bank of India is not party to the arbitration agreement or to these proceedings. However in my view, irrespective of the same, the petitioner is not entitled to such interim relief. The counsel for the petitioner admits that the petitioner is also liable for his share of the loans advanced by the said bank. The petitioner has not furnished any securities for the same, which have been furnished by the respondent only. The counsel for the petitioner states that if the respondent withdraws the said securities, the bank would take steps for recovery of the amounts due from the petitioner also. Though the petitioner admits liability for the same but contends that since the petitioner has claims against the respondent, the bank ought not to realise the dues from the petitioner and should realise the dues from the securities furnished by the respondent only.

20 It is pointed out by the respondent that capital of the petitioner in the firm is approximately 1/10th of the capital contributed by the respondent. Firstly it is unlikely that the bank would release the securities without settlement of its dues and even otherwise in these proceedings this court ought not to interfere with the transaction of the bank and the order if any made in this court is capable of being

misused against the bank.

21 The petitioner is thus not found entitled to the said interim measures also.

22 The petition is accordingly disposed of. However in the circumstances, parties are left to bear their own costs.

23 It is needless to state that nothing contained herein shall be deemed to be an expression of opinion on the rights and contentions of the parties or on the merits to be adjudicated by the arbitrator.

**RAJIV SAHAI ENDLAW
(JUDGE)**

August 19, 2009
J