

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

Date of Reserve: 6.4.2009
Date of Order: April 23, 2009

OMP No.558/2007
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23.4.2009

**National Agricultural Co-operative Marketing
Federation of India Ltd. (NAFED) ... Petitioner**

Through: Mr. A.K.Thakur, Mr. R.K.Mishra,
Mr. Rajiv Arora, Advocates

Versus

Earthtech Enterprises Ltd. & Anr. ... Respondents

Through: Mr. Parvinder Khatra, Advocate &
Mr. Pramod Kumar, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

IA No. 9245/2008

This application under Order 1 Rule 10 read with Section 151 CPC has been made by respondent no.2 stating that respondent no. 2 was not a party to the arbitration agreement and it has been unnecessarily made as a party to the application under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act'). There is no dispute to the fact that respondent no. 2 M/s Firstcorp Petrochem Ltd. was not a party to the MoU/Agreement entered into between petitioner and respondent no.1. The applicant/petitioner has made respondent no.2 as a party to the application on the ground that respondent no.2 was affiliated to respondent no.1 in the manner that

respondent no. 2 was a group company of respondent no.1 and it was through respondent no.2 that the respondent no.1 fraudulently diverted the money advanced by the petitioner in respect of the transactions. Respondent no.2 actively connived with respondent no.1 in sale of the goods and diverting the money to its own account for further purchase of other goods on High Seas.

2. It may be that a fraud has been played with the petitioner by respondent no. 1 in connivance with respondent no.2, which is the sister concern of respondent no.1 however, an application under Section 9 of **the Act** can be made only against the parties to the arbitration agreement. A petition under Section 9 cannot be entertained against third party. The petitioner would have liberty to proceed against respondent no.2 for fraud, connivance etc. either before the Criminal Court or Civil Court, but the petitioner cannot make respondent no.2 as a party to an application under Section 9, since respondent no.2 is not a party to the agreement or before the arbitrator, where arbitration proceedings are going on between petitioner and respondent no.1.

I, therefore allow this application and name of respondent no.2 is struck off from the array of parties.

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3. The petitioner has made this application under Section 9 of the Arbitration & Conciliation Act, 1996 after the prayer of the petitioner made in an application under Section 17 of **the Act** before the Arbitrator asking respondent to provide adequate security to protect the interests of claimant to the dispute in the form of bank guarantee and other property security was dismissed observing that only the High Court has wider

power to pass such an order under Section 9 of **the Act** and the power of the Arbitrator under Section 17 was limited.

4. Brief facts relevant for the purpose of deciding this application are that the petitioner filed a claim petition before the Arbitrator seeking passing of an award of Rs.304,14,69,002/- plus interest thereon. The dispute arose between the parties since a MoU was entered into between the parties on 16.10.2003 which was subsequently amended on 12.2.2004. The petitioner imported various material at the instance of the respondent the material so imported was to be sold on high sea sale basis against 100% payment i.e. the full value of the material plus other expenses viz. bank rates interest and services charges etc. All material so imported was to stand hypothecated/.pledged in favour of the petitioner till the dues were paid. Upto July, 2005 respondent lifted the material only after making payment of dues but thereafter it lifted the material and sold the same without making payment. The petitioner then sent notices and reminders to the respondent asking it to pay the due amount. In response, respondent (respondent no.1) gave 50 Post Dated Cheques (PDCs) of Rs.2 crore each on 5.9.2005 promising that it would fulfill all its commitments in terms of the agreement. On 11.1.2006 respondent promised to pay a sum of Rs. 250 crore in partial discharge of its liabilities and towards that issued 30 PDCs for Rs. 5 crore each. On 1.2.2006, respondent handed over 20 more PDCs of Rs.5 crore each. On receipt of these cheques, the claimant/petitioner returned the previously obtained 50 PDCs of Rs.2 crore each. Thus, the respondent no. 1 gave PDCs worth Rs. 250 core to the petitioner assuring the petitioner that it will discharge its liability. However, the respondent failed to discharge its liability and when some of these PDCs were presented for payment they got dis-honoured. The

respondent even did not furnish the details of the stock available with it. The petitioner then raised a dispute and the matter was referred to the Arbitrator under the orders of this Court. The petitioner had also made an application under Section 9 of **the Act** and sought an order of attachment and sale of stock, location of which petitioner learnt. This Court appointed Local Commissioner and directed sale by public auction of certain stock and directed that the amount realized be kept in an FD in a nationalized bank. The amount received from sale of the stock being a miniscule as compared to the liability, the petitioner made present application for security.

5. The learned Arbitrator while disposing of application under Section 17 of **the Act**, though declining the relief because of jurisdiction, observed that the amount realized on sale of stock fell extremely short of the claim made by the petitioner. He also observed that the respondent had issued PDCs of Rs.250 crore and some of the cheques which were presented got dishonoured. All this, tilted a balance towards the petitioner. However, the learned Arbitrator felt helpless in passing an order for providing adequate security to protect the interests of the petitioner.

6. The respondent in its reply had not denied the factual situation of issuing PDCs worth Rs.250 crores but stated that the nature of claims set up by the petitioner before the Arbitrator was hollow and flimsy. The petitioner in its earlier petition under Section 9 of **the Act** before this Court had claimed that the outstanding due and payable by the respondent was 199.19 crore inclusive of interest and service charges as per MoU. This clearly reflects that as per petition itself, the figure of Rs.250 crore was not a correct figure and the position was highly inconsistent with the position taken by the petitioner.

7. During pendency of this petition, the respondent was asked to file a list of its immovable properties and the respondent in the affidavit filed that it had no immovable property. This Court cannot enter into the merits of the matter and decide as to what amount was likely to be awarded in favour of the petitioner. Suffice it to say that there is no denial of the fact that respondent had issued PDC worth Rs.250 crore. These cheques were issued by the respondent after considering its liability towards the petitioner. Had there been no liability of the respondent towards the petitioner the respondent would not have issued these cheques. There is no denial of the fact that the petitioner had been acting as financier to the respondent and the petitioner had opened a Letter of Credit on behalf of the respondent for importing the material. This material/stock was to be sold on high seas sale basis and the money was to be transferred to the petitioner. Prima facie there is a gross breach of the contract by the respondent and the petitioner seems to have a good case before the Arbitrator.

8. Looking into the financial condition portrayed by the respondent and the fact that the petitioner has discovered that the respondent had diverted large sums of money to respondent no.2 I consider that it is necessary that respondent no. 1 should be asked to give adequate security to ensure that if an award is passed, it does not become a paper award. I, therefore direct the respondent to provide security to the tune of Rs.200 crore for the claim of petitioner either in the form of bank guarantee or property security within a period of 30 days to the satisfaction of Registrar General of this Court.

April 23, 2009
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SHIV NARAYAN DHINGRA, J.