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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: August 10, 2009

Date of Order: September 02, 2009

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02.09.2009

VISHAL GUPTA

..... Petitioner

Through: Mr. Kapil Kher, Adv.

versus

UDAI K. LAURIA

..... Respondent

Through: Mr. Arun Francis, Adv.

JUSTICE SHIV NARAYAN DHINGRA

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

ORDER

1. The petitioner in this case contended that he entered into an agreement with the respondent on 9th October, 2007 and in consideration of his dissociating with the business, he agreed to pay to the respondent a compensation of Rs.60 lakhs in the manner provided in the agreement. He paid a sum of Rs. 25 lakhs (out of Rs.60 lakhs) at the time of signing the agreement and issued a post dated cheque of Rs.35 lakhs. The respondent however did not fulfill his part of the obligation and breached the terms of the memorandum and therefore the petitioner was no longer liable to pay a sum of Rs. 35 lakhs for which post dated cheque was issued. He therefore made a prayer that the respondent be restrained from presenting the cheque of Rs.35 lakhs to his banker till the time

dispute between the parties was not settled and the respondent be restrained from carrying out any business similar to that of the business carried out by the petitioner or engaging or employing or otherwise associating with the present or future employees/customers/consultants of the petitioner.

2. Section 9 of the Arbitration and Conciliation Act reads as under :-

“9. Interim measures, etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same powers for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

3. It is apparent that the purpose of Section 9 is to preserve the subject matter of dispute and the purpose of Section 9 is not to preserve the interest of one of the parties at the cost of the other party. Neither it is to re-write a contract between the parties. The petitioner had given a post dated cheque to the respondent on the basis of an agreement. The petitioner after securing the agreement from the respondent in respect of the business cannot come to the Court to get a restrain order against the respondent from presenting the cheque thereby making the Court a tool to curtail the right of the respondent of presenting the cheque to the banker, initiating proceedings against the petitioner in case of dishonour of cheque under Section 138 of the Negotiable Instruments Act and taking action for recovery of the amount. The purpose of Section 9 is not to jeopardize the interest of one of the parties by issuing an injunction in the nature of frustrating the contract itself. But the purpose of Section 9 is to preserve the subject matter of the dispute so that the opposite party may not frustrate the subject matter itself. Where the subject matter of the dispute is recovery, the prayer at the most can be in the nature of Order 38 Rule 5 CPC for providing security and if the Court is satisfied that it was a fit case for pre decretal attachment, the Court

can issue an order in the nature of Order 38 Rule 5 CPC, but the Court cannot restrain a party from presenting the cheque. Cheque is a negotiable instrument on the basis of which an independent action can be taken by a party and by restraining a party from presenting the cheque, the Court is, in fact, restraining a person from exercising his legal rights.

4. A Division Bench of this Court in ***Ratna Commercial Enterprise Ltd. vs. Vasutech*** AIR 2008 Delhi 99 (DB) observed as under:

“29. The other issue concerns the maintainability of the suit itself in terms of the Section 41 (d) of the Specific Relief Act, 1963(‘SRA’) which reads as under:

“41 An injunction cannot be granted

(d) to restrain any person from instituting or prosecuting any proceedings in a criminal matter.”

The law concerning the interpretation of Section 41(d) of the SRA is fairly well settled. It has been held in *Re N.P.Essappa Chettiar*. AIR 1942 Mad 756 and in *Gauri Shanker v. District Board*, AIR 1947 All 81 that a suit to restrain criminal proceedings being initiated is not maintainable. In *Aristo Printers Pvt. Ltd. vs. Purbanchal Trade Centre*, AIR 1992 Gau 81 a Division Bench of the Gauhati High Court was dealing with a case where cheques issued by the plaintiff to the defendant had been dishonoured and notice had been issued to the defendant under Section 138 NI Act. The plaintiff then filed a suit to restrain the defendant from instituting proceedings under the NI Act. The Court referred to a judgment of the Hon’ble Supreme Court in *State of Orissa v. Madan Gopal Rungta*, AIR 1952 SC 12 and *Cotton Corporation of India Ltd. v. United Industrial Bank Ltd.*, AIR 1983 SC

1272 and held that “an order of injunction of the nature issued in this case cannot be granted and the hands of the criminal Court cannot be fettered by the Civil Court.”

30. The decision of this Court in Atul Kumar Singh v. Jalveen Rosha, AIR 2000 Del 38 was in a case where the plaintiff had issued four cheques issued in favour of the defendant for a value of Rs.7 lakhs. The cheques when presented were dishonoured. After service of notice under Section 138 NI Act, the plaintiff filed a suit for a declaration that “the defendant is not entitled to any benefit on account of holding the cheques” and to injunct the defendant “from using or claiming any benefit by virtue of possessing the instruments.” This Court, while allowing the defendant’s application for rejecting the plaint held that (AIR, p.40):

“The reliefs claimed in this suit are in substance for an injunction restraining the defendant from prosecuting the criminal case instituted against the plaintiff. Section 41(b) of the SRA denies to the Court the jurisdiction to grant an injunction restraining any person from prosecuting any proceedings in a Court. Consequently, the injunction sought by the plaintiff cannot be granted since it would have the effect of preventing the defendant from prosecuting the criminal case against the plaintiff.”

Turning to the present case, the plaintiff does not deny that the cheques issued by it to the defendant no. 1 if presented are likely to be dishonoured. In effect the prayer in the suit is to forestall the defendants executing proceedings against the plaintiff under the NI Act. The suit would therefore be prima facie barred in terms of Section 41(d) NI Act. Where the maintainability of the main suit is itself in doubt, the Court cannot grant a temporary injunction of the same nature. This is one more reason why the ad interim injunction should be vacated.”

5. I therefore consider that the prayer made by the petitioner cannot be granted and the respondent cannot be restrained from presenting the cheque. This Court vide order dated 7th November, 2008 had granted an interim injunction against presenting cheque by the respondent. The petitioner on 20th January, 2009 made a statement that the cheque will be revalidated. In case the petitioner fails to revalidate the cheque, this shall be considered as contempt of the order dated 20th January, 2009.

6. The other relief prayed by the petitioner is to ask the respondent to comply with the terms of the agreement. It is settled law that under Section 9 of the Arbitration and Conciliation Act, Court cannot direct specific performance of the contract.

7. The application is hereby dismissed.

September 02, 2009
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SHIV NARAYAN DHINGRA J.