

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

% **Judgment reserved on: 30.10.2009**
Judgment delivered on: 10.11.2009

+ **C.M. No.14047/2009 in FAO(OS)No.134/2008**

S. HARINDER SINGH Appellant
Through: Mr. P.S. Patwalia, Senior Advocate
with Mr. Ashok Mahajan and Ms.
Kamlesh Mahajan, Advocates

versus

S. NIRMAL SINGH & ORS. Respondents
Through: Mr. Sandeep Sethi, Senior Advocate
and Mr. V.P. Singh, Senior Advocate
with Mr. Sunil Arora, Advocate

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

J U D G M E N T

VIPIN SANGHI, J.

1. The appellant has filed the present appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short 'The

Act') to challenge the order dated 29.02.2008 passed in OMP No.261/2003 whereby the learned Single Judge of this Court has allowed the objections under Section 34 of the Act in respect of the award made by the arbitrator Mr. Haji Ayamuddin on 04.04.2003, and consequently set aside the award made in favour of the appellant.

2. This application has been filed by respondent Nos.1 & 2 to allow the applicants/respondent Nos.1 & 2 not to deposit the amount of US\$ 300,000 or its equivalent in rupees in this Court in compliance of our order dated 12.01.2009, as corrected on 06.02.2009.

3. The appeal came up before us for hearing on 12.01.2009. We heard arguments for some length of time. One of the submissions of learned senior counsel appearing for the respondents, Mr. V.P. Singh, was that the scope of the arbitration agreement and the appeal is confined to the distribution of sale proceeds of US\$ 550,000. This submission of Mr. Singh also finds reflection in the order dated 25.05.2008 passed by the Bench then hearing the appeal. The order dated 22.05.2008, inter alia, recorded:

“Mr. V.P. Singh, Sr. Advocate, on instructions, on behalf of respondent No. 1 states that it is the respondent's contention that the subject matter of the dispute before the Arbitrators was only the dispute with regard to half a million dollars sale consideration of the house in Kabul and no more.”

4. We were shown the arbitration agreement entered into between the parties on 29.08.2009. The same, inter alia, provided:

“ By this letter, we, each one of us, Nirmal Singh, Harinder Singh, Kirat Singh all sons of Amar Singh agree in regard to the money from the sale of Wazir Akbar Khan House the value of which is five hundred fifty thousand US Dollars until the arbitration/settlement of accounts be kept in the custody of the following:

1. With Harinder Singh three hundred thousand US Dollars
2. With Kirat Singh two hundred fifty thousand US Dollars.

The expenses of sale deed based on documentary proof, be borne by Kirat Singh, with the consent of all the three parties, from the amount lying in his custody. The sale of this house is subject to the compliance/execution of the terms and conditions embodied in this document. This agreement is being signed by all the parties thereto as consent document. Haji Ayamuddin has undertaken the responsibility to arbitrate all the financial matters with the participation of S. Attar Singh which be done after the consent of Harinder Singh who is the main subject of the matters and after all settlements the money kept in the custody be handed over to the rightful parties. S. Harinder Singh and S. Kirat Singh have agreed not to use these amounts for any personal use, which be lying in their custody until next 45 days till such account matters be adjudicated upon and arbitration awarded by Haji Ayamuddin with the help of S. Attar Singh within 45 days. In case all such matters, accounts are not arbitrated within 45 days still the money would remain with them in their custody only. The time for final arbitration award would be extended by Haji Ayamuddin anu with the

cooperation/consent of S. Attar Singh. Amount of US\$ three hundred thousand be transferred in the account of S. Harinder Singh within 15 days. We all parties honestly abide ourselves by all consents. And again in the presence of two witnesses and in the court, before the judge we give our consent truthfully and honestly abide by our consents.”

5. We have taken the above extract from the translation of the said agreement filed on record. The translation has been certified by the Ministry of Justice, State Affairs, Department of the Islamic State of Afghanistan.

6. After hearing the arguments of the learned senior counsel for the parties for some time we passed our order on 12.01.2009, which was corrected on 06.02.2009 on the appellants application being C.M.No.1625/2009. We reproduce herein below our said order as corrected:

**“FAO (OS) 134/2008 & C.M.
No.10712/2008**

We are of the view that taking into account the fact that even if the stand of the respondent is accepted and the scope of the arbitration agreement, and indeed this appeal, is confined to the distribution of the sale proceeds of USD 550,000 until the arbitral settlement of accounts the said amount ought to be kept in the custody of the parties as per their agreement. The said agreement dated 29.08.2002 postulated as follows:

“By this letter, we, each one of us, Nirmal Singh, Harinder Singh, Kirat Singh all

sons of Amar Singh agree in regard to the money from the sale of Wazir Akbar Khan House the value of which is five hundred fifty thousand US Dollars until the arbitration/settlement of accounts be kept in the custody of the following:

1. With Harinder Singh three hundred thousand US Dollars
2. With Kirat Singh two hundred fifty thousand Dollars."

It is not in dispute that the sum of USD 300,000 has not been kept in the custody of the appellant Harinder Singh during the pendency of the arbitration proceedings, or thereafter. It is also not in dispute that the said amount is with the respondents. It is stated that the said amount was received late due to some intervention by the appellant Harinder Singh in the completion of the sale transaction of the property in Kabul. The respondent is directed to bring the aforesaid sum of USD 300,000 or its converted equivalent rupees and deposit the same in Court not later than eight weeks from today. The respondents shall also file an affidavit supported by documentary evidence to show as and when the said amount of USD 550,000 was received by them. The affidavit shall be filed within four weeks.

List on 27th March, 2009."

7. The above order directed the respondents to deposit the amount of US\$ 300,000 or its equivalent in Indian currency in this Court within eight weeks. It is this direction which the respondents/applicants now seek a review/recall of.

8. The respondents preferred a Special Leave Petition to impugn the corrected order dated 06.02.2009 being SLP (Civil) No.5949/2009.

It appears that an attempt towards mediation was made when the matter was pending before the Hon'ble Supreme Court, which apparently did not succeed. Then the applicants/respondents herein stated before the Supreme Court that they would approach this Court to seek appropriate remedy and sought leave to withdraw the Special Leave Petition. The same was dismissed as withdrawn by the Supreme Court on 07.09.2009. Thereafter, the applicants/respondent Nos.1 & 2 have filed this application which, in effect, seeks a review of our order dated 12.01.2009 as corrected on 06.02.2009.

9. The foundation of this application moved by respondent Nos.1 & 2 is that the amount of US\$ 550,000 was never received by respondent No.2 and that the said amount was lying with Rajinder Singh, who is an estate agent and an Afghan national. It is stated that Sh. Rajinder Singh had sold the property of Wazir Akbar Khan. The applicants also state that they have no control over the amount of US\$ 550,000 stated to be lying in Kabul, Afghanistan. They also state that it is not possible for them to repatriate the said amount to India.

10. Mr. Sandeep Sethi, learned senior counsel appearing for the applicants/respondents submits that when the order dated 12.01.2009 was passed by this Court the aforesaid position could not be informed to the Court. Mr. Sethi submits that in their objection petition filed under Section 34 of the Arbitration and Conciliation Act being OMP

No.261/2003, the respondents in paragraph 4 under the heading “Background” had, inter alia, stated:

“4. That since the Petitioners and Mr. Avtar Singh had come to India, they entered into an arrangement/agreement of sale qua the said immovable property through Mr. Rajinder Singh in favour of a Hon’ble Judge in Kabul on 15% commission. Mr. Harinder Singh Respondent No.1 came to know about the said transaction and started asserting that he also has 1/4th share in the said property. Due to this illegal assertion by Respondent no.1, Mr. Rajinder Singh did not complete the transaction and pay the balance sale consideration. The Respondent No.1 Mr. Harinder Singh also claimed that since the company namely Omega Exports Pvt. Ltd. was his company, the shares in the same were held benami by petitioner no.2 and late S. Manmeet Singh and they were merely name lenders and they should return the same to him with nil value.”

11. Mr. Sethi submits that as the said amount of US\$ 550,000 had not been received by respondent no.2, there could be no direction issued by the Court to the respondents to deposit US\$ 300,000 in this Court.

12. Mr. V.P. Singh, learned senior counsel also appearing for the respondents, has now sought to urge that the order dated 12.01.2009 as corrected on 06.02.2009 is *per incuriam*, inasmuch as, it has been passed in ignorance of Section 4 of the Act. He submits that the appellant was aware of the fact that the amount of US\$ 550,000 had to be kept in custody of the parties in terms of the arbitration agreement

above extracted. He was also aware that the amount had not been so kept. He still continued to participate in the arbitration proceedings without any objection and, therefore, he had waived his right to require the respondents to deposit the said amount, or any part thereof, either in this Court or with the appellant. In support of this submission, he relies on **Bharat Sanchar Nigam Limited & Anr. v. Motorola India Private Limited** (2009) 2 SCC 337. He submits that if an order passed by the Court is *per incuriam*, the Court can and ought to review the same. For this proposition, he relies on **A.R. Antulay v. R.S. Nayak & Anr.** AIR 1988 SC 1531.

13. Mr. Patwalia, learned senior counsel for the appellant, has vehemently opposed the application. He submits that the order dated 12.01.2009 was passed in the presence of the parties. No such stand was taken by the respondents at that stage. On the contrary, the respondents had stated that the amount had been received, though belatedly. He further submits that the respondents were also required by the Court to state on affidavit as to when the amount of US\$ 550,000 had been received by them. This part of the order was passed, since the appellant was also insisting on the deposit of interest accrued on the amount of US\$ 300,000 from the date of receipt of the amount, till deposit. As it was contended by the respondents that the amount had been received by them belatedly, the Court had required

them to file an affidavit within four weeks to disclose as to when the said amount of US\$ 550,000 was received by them. He submits that at no point of time any issue was raised by the respondents with regard to the factum of their being in custody of US\$550,000. He submits that the respondents are now taking a summersault and this plea of the respondents is dishonest.

14. He further submits that though the respondents were required to file their affidavits within four weeks, the same was not filed by them till as late as 25.03.2009. Had there been any truth in the stand taken by the respondents, they would have immediately approached this Court to seek correction of the so called mistake as soon as the order dated 12.01.2009 was passed. He further submits that even when the application being C.M. No.1625/2009 was moved by the appellant to seek correction of the order, the respondents did not choose to contest the same or inform the Court about the so called mistake in the recording of the order dated 12.01.2009, in so far as it proceeded on the basis that the amount of US\$ 550,000 had been received by the respondents and that the said amount was in the custody of the respondents.

15. Mr. Patwalia further submits that in response to the aforesaid averment made by the respondents in their objection petition, the appellant had, inter alia, stated "*It is wholly incorrect to state that S.*

Avtar Singh entered into an agreement with the Petitioners. It is also false that S. Rajinder Singh sold the property to an Hon'ble Judge in Kabul on 15% commission. The said property in fact has been sold by S. Rajinder Singh to one Ahmed Zia who is at present Afghan Ambassador to Russia. The Respondent has been able to obtained certificate from the office of the Municipal Corporation of Kabul, certifying that the said property was transferred one year back in the name of Ahmed Zia, under two sale deeds and currently the property is in the occupancy of South Korean Embassy. A true copy of the certificate along with photograph of the property is annexed hereto as Annexure – R/3 (Colly)". In their rejoinder to the said averment of the appellant, the respondents conceded that they had made false averments, inter alia, in paragraph 4 of the objection petition. The respondents had, inter alia, stated *"It is submitted that due to political turmoil in Afghanistan, the Petitioners were unable to know the exact occupant/buyer of the said property and the statement was made on the information received from Kabul."* Mr. Patwalia, therefore, submits that the averment of the appellant that the amount of US\$ 550,000 had been received and pocketed by the respondents had not been ever disputed by the respondents.

16. He submits that even in the impugned award, the factum of the respondents having received and pocketed the entire amount of

US\$ 550,000 stands recorded. The award, inter alia, records a finding to the effect:

“But still S. Kirat Singh, unethically and illegally with the connivance of his brother in law, sold this property in much less price than its regular fair market price. According to the proof submitted by S. Harinder Singh, the average fair market price of this property at the time of its illegal sale was US\$ 7.5 lac (US Dollars Seven lac fifty thousand only) and as on date its price is US\$ 8.5 lacs (US Dollars Eight lac fifty thousand only).

This house is said to be sold at US\$ 5.50 lacs (US Dollars five lacs fifty thousand only) by S. Kirat Singh with connivance of his brother-in-law and S. Kirat Singh pocketed the whole amount.”

17. Mr. Patwalia further submits that even a perusal of the arbitration agreement dated 29.08.2002 shows that it proceeded on the foundation that the amount of US\$ 550,000 had been received by the respondents, inasmuch as, it records: (i) that the sale prices of Wazir Akbar Khan’s house is US\$ 550,000; (ii) that the same be kept in custody of S. Harinder Singh to the extent of US\$ 300,000 and with S. Kirat Singh to the extent of US\$ 250,000; (iii) that S. Kirat Singh should bear the expenses of sale deed *“from the amount lying in his custody”*; (iv) S. Harinder Singh and S. Kirat Singh agreed not to use the amounts for their personal use *“which be”* (*sic* would be) lying in their custody until next 45 days till such account matters be adjudicated upon and

arbitration award by Haji Ayamuddin with the help of S. Atar Singh within 45 days; (v) that in case the arbitration is not concluded in 45 days *"still the same would remain with them in their custody only"*; and (vi) amount of US\$ 300,000 be transferred in the account of S. Harinder Singh within 15 days.

18. Mr. Patwalia submits that all the aforesaid obligations had been undertaken only in view of the fact that the amount of US\$ 550,000 had already been received by the respondents.

19. Having heard learned counsel for the parties, we are of the view that there is absolutely no merit in this application. Firstly, we may note that when the order dated 12.01.2009 was passed, though the presence of the parties was not recorded in the order sheet, as a matter of fact the parties were present in Court. Since Mr. V.P. Singh, learned senior counsel appearing for the respondents had also appeared on the said date as the respondents' counsel, we apprised him of the aforesaid position. He has not denied the fact that his clients were indeed present in the Court when the order dated 12.01.2009 was passed by us. This is also evident from our order dated 12.01.2009. The submission that the amount had been received late was made by the respondents during the course of hearing on 12.01.2009 on the instructions of the respondents who were present. Else the counsel for the respondent's could not have made the said

statement on his own as this issue was not directly arising out of the appeal.

20. If there had been any truth in the respondents' submission that there was a failure or omission on their part to bring to the notice of the Court that the amount of US\$ 550,000 had not been received by them, it is not explained and we are unable to understand as to why the said stand was not taken when the order dated 12.01.2009 was passed by us in the open Court in the presence of the parties and their respective counsels. Pertinently, even after the passing of the order dated 12.01.2009 which, inter alia, required the respondents to file an affidavit to disclose the date when the amount of US\$ 550,000 was received by them along with documentary evidence, no steps were taken by the respondents within the time granted by the Court to assert that the Court had wrongly recorded the fact that the respondents do not dispute having received the said amount. Had there been any truth in the stand now taken by the respondents, the respondents would have immediately moved an application to seek correction/review of the order as has been done now, at this belated stage. Pertinently, even when the appellant moved the application being C.M. No.1625/2009 to seek correction of the order dated 12.01.2009, the respondents did not come forward to say that they

have not received the amount of US\$ 550,000 and that it had wrongly been recorded by the Court that the said amount was lying with them.

21. We are also not impressed by the argument of Mr. Sethi that the stand of the respondents even before the learned Single Judge was that the said amount of US\$ 550,000 had not been received by them. Firstly, a perusal of the averment made by the respondents in paragraph 4, as above extracted, shows that the same pertained to “balance sale consideration” and not the entire sale consideration. Even the said averment shows that the respondents, admittedly, had received a portion of the sale consideration and that only the “balance” had not been received. Secondly, as pointed out by Mr. Patwalia, in his reply to the O.M.P., the appellant had demolished the stand of the respondent with regard to the sale of the property. The respondents in their rejoinder had backtracked from their stand taken in the objection petition.

22. A perusal of the arbitration agreement itself shows that the same had been arrived at keeping in view of the fact that the amount of US\$ 550,000 had been received by the respondent S. Kirat Singh. Else there was no question of the parties agreeing to the keeping of the amount of US\$ 300,000 in the custody of the appellant, which had to be transferred by S. Kirat Singh in favour of the appellant within a short period of 15 days. The agreement did not recite that the same

was subject to the respondents receiving the amount of US\$ 550,000 or that the same had not been received by the respondent S. Kirat Singh till the time of signing of the agreement.

23. Even according to the respondents, the only dispute in arbitration was with regard to the distribution of US\$550,000. This question had not arisen in a vacuum or merely on a hypothetical basis that the said amount would be received in future.

24. We may also note that though the award does return a factual finding that the respondent S. Kirat Singh had received and pocketed the amount of US\$ 550,000, no specific objection in respect of the said finding was taken by the respondents in their objection under Section 34 of the Act.

25. In view of the aforesaid, we reject the contention of the applicants/respondents that the respondents had failed to inform the Court on 12.01.2009 that the amount of US\$ 550,000 has not been received by them. That has never been the stand of the respondents.

26. Turning now to the arguments of Mr. V.P. Singh, Senior Advocate, we find that there is no merit in the same. All that Section 4 of the Arbitration and Conciliation Act, inter alia, provides is that where a party knows that *“any requirement under the arbitration agreement, has not complied with and yet proceeds with the arbitration without*

stating his objection to such non-compliance without undue delay,..... (he) shall be deemed to have waived his right to so object". Pertinently, it is not that the appellant has sought to raise an objection to the arbitration proceedings or the award on account of the failure of S. Kirat Singh to deposit the amount of US\$ 300,000 with him. This being the position, Section 4 of the Act, in our view, has no application in the facts of this case.

27. There is no question of the order dated 12.01.2009 as corrected on 06.02.2009, being *per incuriam*. The said order was passed after hearing the submissions of the learned senior counsel appearing for the parties, and in view of the then admitted position that the respondents were possessed of the entire amount of US\$ 550,000. The Court was also conscious of the terms of the Arbitration Agreement. The Court also took into account the fact that even if the present appeal is dismissed, as per the Arbitration Agreement the amount had to be kept in the custody of the parties as per the terms of the said agreement. Merely because the appellant may not have objected to the arbitration proceedings being undertaken as the amount of US\$ 300,000 had not been placed in his custody, it does not mean that he had waived his right to get custody of the said amount till the dispute is resolved. The only waiver, if at all, was in respect of the right to object to the arbitration proceedings. In any

event, we had not directed that the amount of US\$ 300,000 be made over to the appellant.

28. We may note that repeated attempts to persuade the parties to settle their disputes amicably have failed. One of the primary reasons for the deadlock appears to be the unfair advantage being enjoyed by the respondents, who continue to hold the entire amount of US\$ 550,000, even though, as per the agreement dated 29.08.2002 the amount of US\$ 300,000 had to be transferred to the appellant and was to remain his custody till the resolution of the disputes. Where is the incentive for the respondents to settle their disputes with the appellant? The fact that the respondents are enjoying the custody, and possibly the gainful use and exploitation of the entire amount of US\$ 500,000, in our view is a stumbling block to a fair and equitable resolution of the disputes between the parties who are brothers.

29. Section 9 of the Act (which could be invoked on 12.01.2009 as the appeal was even then pending) not only entitles a party to apply to the Court *“for an interim measure of protection in respect of.....preservation, interim custody.....of....the subject matter of the arbitration agreement”* and to secure *“the amount in dispute in arbitration”*, but also goes on to say *“and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”* The power of the Court to suo

moto pass orders in terms of Section 9 of the Act is therefore, preserved. Section 94 read with Section 151 C.P.C also invests the Court with inherent power to pass interlocutory orders as may appear to the Court to be just and convenient to prevent the ends of justice from being defeated. (See **Vareed Jacob V. Sosamma Geevarghese & Others**), AIR 2004 SC 3992.) In the interest of justice, and to bring the parties to an even keel, as we were seized of the appeal. We had the jurisdiction to pass the order dated 12.01.2009 as jurisdiction to pass the order dated 12.01.2009 as corrected on 6.2.2009. We, therefore, reject this submission as well.

30. For the aforesaid reasons, we dismiss this application with costs quantified at Rs.50,000/- to be paid by the respondents/applicants to the appellant within two weeks.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

NOVEMBER 10, 2009
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