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

+ O.M.P. 493/2010

% **Judgment dated 28.03.2012**

ANIL ARORA

..... Petitioner

Through : Mr.Rajive Sawhney, Sr. Adv. with
Mr.Vineet Jhanji, Adv.

versus

GULATI RETAIL INDIA LTD

..... Respondent

Through : Mr.Arjun Harkauli, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. This is a petition under Section 9 of Arbitration and Conciliation Act, 1996.
2. As per the petition, the petitioner is a tenant and in possession of the premises bearing no.29-B, Connaught Place, New Delhi, vide an Agreement of Tenancy dated 26.2.1973. In the month of June 2008 the respondent approached the petitioner and invited the petitioner to enter into a business arrangement to undertake the sale of apparel under the name and style of 'PENNY Lane' from the premises in question. The petitioner and respondent executed a Franchise Agreement dated 5.9.2008. The minimum guaranteed commission was fixed at Rs.1,65,60,000/-. The Agreement was initially for a period of three years and the same could be extended by mutual consent of the parties. Respondent had admittedly handed over post-dated cheques to the petitioner, copies of which have been placed on record. Initially the minimum guaranteed commission was paid for a period of one year and

thereafter since disputes and differences arose between the parties respondent stopped the payments of the cheque. Petitioner, in these circumstances, prays for following reliefs:

- A. Restrain the Respondent from continuing to use the Premises bearing No.29-B, Connaught Place, New Delhi;
 - B. Restrain the Respondent from stopping payment of the cheques handed over to the Petitioner towards payment of the guaranteed commission w.e.f. the month of Sep 2010 and to cover the overdue payment and payments upto the date on which the Respondent stops the use of the Premises;
 - C. Direct the Respondent to hand over to the Petitioner the account books and other supporting documents and records in relation to the sales affected from the Premises from the date of the Agreement dated 5th Sep 2008;
 - D. Direct the Respondents to deposit in this Hon'ble Court an amount of Rs.6,225,612/- (Rupees Sixty Two Lacs Twenty Five Thousand Six Hundred Twelve Only) along with interest @18% p.a. representing the cheques dishonoured and the amount due to the Petitioner till date in terms of the Agreement dated 5th Sep 2008.
3. During the pendency of the matter, respondent has handed over possession of the premises in question to the petitioner on 29.10.2011. As the post-dated cheques, which were handed over by the respondent to the petitioner, were dishonoured, the petitioner filed a complaint under Section 138 of Negotiable Instruments Act against the respondent. While, admittedly, prays A, B and C of the petition have become infructuous, learned senior counsel for the petitioner prays that the respondent be directed to deposit the outstanding sum of Rs.62,25,612/- together with interest @18% per annum to the petitioner.
4. After some hearing in the matter, both the parties are agreeable for Appointment of an Arbitrator. It is also prayed that a former Judge may be

appointed as an Arbitrator to adjudicate upon all disputes and differences including claims and counter claims arising between the parties.

5. Learned counsel for the respondent submits that the petitioner has failed to make out a case for grant of prayer D of the petition, which amounts to attachment before judgment as the petition is devoid of material particulars. The petitioner has failed to state that with a view to defeat the decree the petitioner is disposing off all his assets. Counsel further submits that such an order would be a very drastic order. Counsel for the respondent relies upon *Raman Tech & Process Engineering Company & Anr. v. Solanki Tradders*, reported at 2007 (13) SCALE 419, more particularly paras 5 and 6, which are reproduced below:

“5. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also

keep in view the principles relating to grant of attachment before judgment (See - Prem Raj Mundra v. Md. Maneck Gazi, AIR (1951) Cal 156, for a clear summary of the principles.)”

6. Counsel for the respondent has also relied upon *M/s Global Company v M/s National Fertilizers Limited*, reported at AIR 1998 DELHI 397, more particularly paras 6, 8 and 11, which are reproduced below:

6. Obviously, said Section is silent as to the circumstances under which a respondent can be asked to furnish security for securing the amount in dispute in the arbitration.

8. Both the aforesaid sections operate in separate spheres, section 19(1), amongst others, confers discretionary power to pass interim order directing the respondent to furnish security for the satisfaction of the decree at any time after the filing of the award in court on the fulfillment of the conditions noted in that sub-section Section 41(b) read with para 2 of the IIInd schedule empowers the court to pass order for securing the amount of difference not only when the proceedings are pending before it but also when they are pending before the arbitrator(s). The practice and procedure of the court in issuing interim injunction or attachment before judgment would be equally applicable in such cases.

11. It is true that the said Arbitration Act, 1940 stands repealed by the Act of 1996 and the provisions contained in the Code of Civil Procedure are not applicable to the proceedings under the Act, still, in my opinion, in the absence of guidelines how the power for grant of relief under Section 9(ii)(b) is to be exercised by the court, the principles underlying the aforesaid sections are to be applied. It is only on adequate material being supplied by the petitioner that the court can form opinion that unless the jurisdiction is exercised under the said Section 9(ii) there is real danger of the respondent defeating, delaying or obstructing the execution of the award made against it. On the basis of the only ground of protection of financial interest of the petitioner taken in para No.6 of the petition, the respondent, a Govt. of India Undertaking cannot be legally directed to furnish security for the amount of US\$ 88,250 together with interest @9 p.a. Petition thus deserves to be dismissed.

7. I have heard learned counsel for the parties and also considered their rival contentions. I have also perused the petition, reply, documents filed along with the plaint and the orders passed by this Court including the order dated 25.5.2011, which reads as under:

**“O R D E R
25.05.2011**

IA No.1529/2011 (u/o 1 R 10 CPC)

Issue notice. Counsel for the plaintiff accepts notice. Reply be filed within two weeks. Rejoinder, if any, be filed within two weeks. List on 21.07.2011.

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After some arguments made by the parties, learned counsel for the respondent on instructions from authorized representatives of the respondent states that without prejudice to its rights and contentions the respondent is agreeable to furnish the bank guarantee for the part payment of rent due within the period of four weeks. As agreed, it is directed that the respondent shall furnish the bank guarantee for a sum of Rs.50 lac for the time being with the Registrar General of this court to his satisfaction. List on 21.07.2011.

8. Subsequent to the passing of the order dated 25.11.2011, the respondent moved an application, being I.A.11311/2011, for recall of the order dated 25.05.2011, primarily on the ground that the person, Sh.Sanjeev Sudan, who had appeared in Court on 25.5.2011, was merely an employee of the respondent and he was not the authorized representative of the respondent, nor he was instructed to give any undertaking to bind the respondent company.
9. Learned senior counsel for the petitioner submits that I.A.11311/2011 was merely an afterthought of the respondent as Sh.Sanjeev Sudan had proper instructions in the matter so did the counsel who had appeared on behalf

of the respondent and the respondent has changed the counsel with a view to overreach the undertaking given to Court. Counsel further submits that the averments made in I.A.11311/2011 would show that respondent has admitted in para 5 that it did not have the financial capacity to furnish the bank guarantee. Para 5 of the application reads as under:

“5. That the Respondent company/outlet does not have the financial capacity to furnish a Bank Guarantee for Rs.50 Lacs since the business has run into losses, as the shop is situated in the Connaught Place, where for last two years renovation work is going on, and huge excavations have been carried out just in front of the said shop. The Respondent is also not permitted by the Bank of Maharashtra to put hoardings/banners in front of the said shop on account of the aforesaid circumstances, the footfall at the Shop has been negligible.”

10. Learned senior counsel for the plaintiff further submits that once the undertaking is given the same cannot be withdrawn nor it can be flouted and in fact the same would amount to contempt of Court.
11. During the pendency of this matter respondent was directed to furnish an affidavit dated 19.9.2011 giving its list of assets, which has been placed on record, as per which, all the immovable properties already stand mortgaged with ICICI Bank.
12. While there is no quarrel with the submissions made by learned counsel for the respondent that the petitioner must establish a strong prima facie case and also must place on record some evidence to show that the respondent is attempting to leave the jurisdiction of this Court or is attempting to sell the immovable assets with a view to defeat the decree which may be passed in the matter, there is no denial to the fact that the parties had entered into a Franchise Agreement and the respondent enjoyed the possession of the suit premises till October, 2011, when possession was handed over to the petitioner during the pendency of this

matter.

13. The respondent could not have continued to remain in possession without payment of the minimum commission agreed to be paid to the petitioner. It is the stand of the respondent that the respondent does not have the means to furnish a bank guarantee and the affidavit filed by respondent shows that all the immovable properties stand mortgaged with ICICI Bank. I am also not satisfied with the explanation rendered by the respondent that Sh.Sanjeev Sudan was not authorized to make a statement in Court.
14. In my view the petitioner has been able to establish a strong *prima facie* case. While the prayer made for direction to deposit the outstanding amount is declined at this stage, to balance the equities and in the interest of justice, it is directed that respondent will not sell, alienate, transfer or part with possession of the immovable properties, as detailed in the affidavit dated 19.9.2011. This order shall remain in force till the disposal of the Arbitration proceedings, however, subject to modification at the request of either of the parties before the Arbitrator.
15. To adjudicate upon all disputes and differences, claims and counter claims, Justice S.K.Agarwal, a former Judge of this Court, (Cell No.9818000270), is appointed as Sole Arbitrator. As suggested the Arbitrator may fix his own fee in consultation with parties, which will be shared equally between the parties.
16. Petition stands disposed of.
17. Let a copy of this order be sent directly to learned Arbitrator.

G.S.SISTANI, J

MARCH 28, 2012

msr