

\$~32 & 33

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

% Judgment delivered on: 24.09.2015

+ **FAO (OS) 389/2015**

+ **FAO (OS) 544/2015**

BINOD KUMAR BAWRI & ORS

.... Appellants

versus

DALMIA CEMENT (BHARAT) LIMITED

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr A.S. Chandiok, Sr Advocate with Mr Shaunak Kashyap, Mr Ravjyot Singh, Mr Rahul Mukherjee and Ms Abhaya Kashyap, Advocates.

For the Respondent : Mr Akil Sibal, Mr Ankur Mahindra, Mr Pradeep Chandra, Mr Harshal Tholia and Mr S. Choudhary, Advocates.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.21121/2015 (exemption) in FAO(OS) 544/2015

Exemption is allowed subject to all just exceptions.

CM No.21117/2015 in FAO(OS) 389/2015

Although this appeal was to be taken up on 01.10.2015, on account of the fact that the learned Single Judge has passed another order on 22.09.2015

and an appeal [FAO(OS) 544/2015] has been preferred therefrom and that appeal is listed before us today, we are allowing this application and taking up the consideration of FAO(OS) 389/2015 also.

The next date fixed in the matter i.e. 01.10.2015 stands cancelled.

FAO(OS) 389/2015

FAO(OS) 544/2015 & CM No.21122/2015 (stay)

1. FAO(OS) 389/2015 has been preferred against the order dated 15.07.2015. That order was passed in OMP(I) 341/2015. The order dated 15.07.2015 reads as under:-

“CAVEAT 710/2015

1. Learned counsel for the Caveator is present and has received paper book.
2. Caveat is disposed of.

IA No.13873/2015

3. Exemption allowed subject to just all exceptions.
4. IA stands disposed of.

O.M.P.(I) 341/2015

5. Issue notice.
6. Learned counsel for the respondents/caveator accepts notice.
7. The respondents are directed to file affidavits of their assets in the Form 16A, Appendix E under Order 21 Rule 41(2) of the Code of Civil Procedure within a period of one week with advance copy to the learned counsel for the petitioner.
8. List for further hearing on 10th August, 2015.

9. Respondents shall not transfer or create any third party interest in respect of their assets till the next date of hearing.

10. Learned counsel for the respondents submits that this order would obstruct in their business activities. If any such contingency arises, the respondents are given liberty to approach this Court for appropriate orders.

11. Learned counsel for the respondents further submits that day to day operation of the bank accounts should not be stopped. It is clarified that the respondents can operate their bank accounts for day to day activities. However, the particulars of such operations be filed along with affidavit.

12. Copy of the order be given *dasti* to the learned counsel for the parties under the signatures of Court Master.”

2. On 10.08.2015, the said FAO(OS) 389/2015 came up for hearing and this Court passed the following order:-

“Renotify on 18.08.2015.

In the meanwhile, the affidavit, which has been filed by the appellant with regard to the furnishing of an appropriate security, be also placed before the learned Single Judge before whom the matter is listed today. The learned Single Judge shall examine the same and may vary the order, which is impugned herein, without being influenced by any observations made in the earlier order or any observations made by us in any of the orders passed in this appeal. A copy of the affidavit, which has been filed in this appeal, shall be placed before the learned Single Judge today itself. A copy of the reply to the affidavit may also be placed before the learned Single Judge.

Dasti under the signature of the Court Master.”

3. From the order passed on 10.08.2015, it is clear that while the appeal was kept pending before this Court, we had directed that the affidavit which was filed by the appellants with regard to the furnishing of an appropriate security be also placed before the learned Single Judge, who was required to examine the same and, upon such examination, he could vary the order which was impugned herein. In other words, he could vary the order dated 15.07.2015. But, we find from the order dated 22.09.2015, which was passed by the learned Single Judge that the said affidavit was not examined at all and instead, a direction was passed even beyond the original directions of 15.07.2015. The order dated 22.09.2015 reads as under:-

1. The respondent has placed on record the copy of affidavit dated 05th August, 2015 filed before the Division Bench in FAO (OS) No.389/2015.

2. Learned senior counsel for the petitioner submits that the affidavit dated 05th August, 2015 is not in terms of the order dated 15th July, 2015 whereby this Court had directed the respondents to file the affidavit of their assets in Form 16A, Appendix E, under Order XXI Rule 41(2) of the Code of Civil Procedure. It is further submitted that the respondent was required to disclose the particulars of their operations in terms of para 11 of the affidavit which has not been done.

3. Learned senior counsel for the respondents submits that without prejudice to the rights and contentions, the respondents shall file a fresh affidavit in terms of the order dated 15th July, 2015.

4. The respondents are directed to file fresh affidavit of their assets in Form 16A, Appendix E, under Order XXI Rule 41(2) of the Code of Civil Procedure along with statement of all their bank accounts, balance sheets and income tax returns for the last three years within five days. The respondents shall also disclose in the affidavit the status of their assets as on 15th July, 2015 as well as on the date of filing of the affidavit.

5. List on 28th September, 2015 at the end of the Board.

6. Copy of this order be given *dasti* to counsels for the parties under signature of Court Master.”

4. We may point out that although the order dated 22.09.2015 purported to have been passed in OMP(I) 341/2015 and OMP(I) 410/2015, no notice had by then been issued by the learned Single Judge in OMP(I) 410/2015. Therefore, we take it that the order was actually passed only in respect of OMP(I) 341/2015. FAO(OS) 544/2015 has been filed in respect of the order dated 22.09.2015 arising out of OMP(I) 341/2015.

5. The order dated 15.07.2015 requires the appellants herein to file affidavits of their assets in Form 16A, Appendix E under Rule 41(2) of the

Code of Civil Procedure, 1908. It is important to note that the petition filed by the respondent herein was one under Section 9 of the Arbitration & Conciliation Act, 1996 for interim measures. It was not an application seeking execution of any decree. In fact, there is no question of there being any decree inasmuch as even the Arbitral Tribunal has not yet passed any award. Therefore, clearly, Order 21 Rule 41(2) CPC is inapplicable in this case. The heading of Rule 41 of Order 21 itself discloses that it pertains to the examination of a judgment debtor as to his property. Rule 41(2) is applicable where a decree for the payment of money has remained unsatisfied for a period of 30 days. This is not the case here. Therefore, the provisions of Order 21 Rule 41 (2) of the CPC are inapplicable and, consequently, the requirement of the appellants to furnish affidavits in Form 16 A, Appendix (C) CPC is without the authority of law.

6. Therefore, it was incumbent upon the learned Single Judge to have examined the affidavit which was filed pursuant to a direction given by this Court and to have passed appropriate orders in terms of Section 9 of the said Act which permits the Court to provide for interim measures in respect of any of the matters specified in Section 9(ii). Before such an order could be passed by way of interim measures, the Court has to be satisfied that the petitioner has made out a prima facie case and that the balance of convenience is also in favour of making any interim measures. The question of irreparable harm and

injury would also have to be considered. We find that no such conclusions have been arrived at by the learned Single Judge.

7. Consequently, the impugned orders dated 15.07.2015 and 22.09.2015 are set aside. However, we are leaving the question open to be decided by the learned Single Judge as to whether the petitioner in the said Section 9 applications has or has not made out a case for interim measures. The affidavit that has been filed before this Court and which we have directed the parties to place the same before the learned Single Judge would be examined by the learned Single Judge from the stand point of any interim measures that may be contemplated. In the meanwhile, Mr Chandhiok, the learned senior counsel appearing on behalf of the appellants states that no third party interest would be created in the assets mentioned in the affidavit. It is further directed that if any other assets which are not mentioned in the affidavit are transferred or any third party rights created therein till the matter is taken up by the learned Single Judge, full account thereof shall be placed before the learned Single Judge.

8. The appeals stand disposed of.

9. *Dasti* under the signatures of the Court Master.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

SEPTEMBER 24, 2015/st