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

% Date of decision: 03.04.2018

+ CONT.CAS(C) 490/2017

HINDUSTAN POWER PROJECTS (P) LTD..... Petitioner

Through Ms.Maneesha Dhir, Mr.K.P.S.Kohli,
Ms.Sharmistha Ghosh and Mr.Mahipal Singh,
Advs.

versus

GAO JI FAN & ORS

..... Respondent

Through Mr.A.S.Chandhiok, Sr. Adv. and
Mr.Rakesh Khanna, Sr.Adv. with Ms.Pooja Mehra
Saigal, Mr.Sahil and Ms.Shefali Jain, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. Present Contempt Petition is filed under Article 215 of the Constitution of India read with sections 11 and 12 of the Contempt of Courts Act, 1971 for deliberate, intentional and wilful disobedience of the orders of this court dated 12.01.2015, 19.02.2016 and 29.5.2017. A winding up petition was filed by the respondent No.3 against the petitioner alleging non-payment of USD 35,740,136/- alongwith interest @ 18% p.a. The winding up petition was filed during pendency of arbitration proceedings started by respondent No.3. In the winding up petitions the parties entered into a Settlement Agreement dated 8.1.2015. The Settlement Agreement was filed before this court and the winding up petitions were disposed of on 12.1.2015.

2. The admitted position is that as per the Settlement Agreement the

petitioner had undertaken to pay a sum of 30.37 million USD in stated 12 instalments. The settlement also provided that if there is default in payment of the said instalment amounts in accordance with the payment schedule then the entire outstanding amount of USD 35,740,136/- less any amount paid under the said Agreement would become payable immediately.

3. After some default the petitioners have paid the amount in terms of the Settlement Agreement, namely, USD 30.37 million plus interest.

4. Subsequently the respondent No.3 filed an application before the Company Court seeking revival of the winding up proceedings in view of the default committed by the petitioner. Reliance was placed on the stated clause of the Settlement Agreement which provided that in case of default by the petitioner the full amount of USD 35,740,136/- was payable by the petitioner.

This Court by order dated 29.5.2017 dismissed the said application holding that as the respondent No.3 company had accepted the payment in the extended period that too with interest on the defaulted instalments, then merely because there was a default in making payments, revival of the Company Petition for winding up was not justified. The Court also noted that if a time limit is provided by the consent order the court has jurisdiction/ power to extend such time stated in the consent terms filed by the parties and the said terms would merge in the order of the Court.

5. Based on the order dated 29.05.2017, the Settlement Agreement and the order of this court dated 12.01.2015 accepting the Settlement Agreement, the petitioner has filed the present Contempt Petition. Essentially, the grievance of the petitioner is that the respondents have failed to comply with the terms of the Settlement Agreement dated 8.1.2015

despite receipt of the full amount as has been noted by this Court in the order dated 29.5.2017. The grievance of the petitioner is that under Clause 7 of the Settlement Agreement Trina Solar's receipts for each instalment duly paid were to be duly released to the petitioner. This particular document entitles the owners of the solar modules for a warranty for 25 years. It has been pleaded that though the petitioner has paid the entire dues the respondents have illegally and contrary to the terms of the Settlement and order of this court withheld the Trina Solar's Receipts which the respondent was obliged to release.

Another grievance of the petitioner is that as per Clause 6 of the said Agreement the respondents were obliged to withdraw the pending arbitral proceedings which has not been done.

6. I have heard learned counsel for the parties. Learned counsel for the petitioner has relied upon the judgments of the Supreme Court in ***Ram Narang vs. Ramesh Narang and Another, (2006) 11 SCC 114*** and ***Delhi Development Authority vs. Skipper Construction Co.(P) Ltd. and Another, (1996) 4 SCC 622*** to contend that even in the event there is no undertaking recorded by the respondents in the order of this Court dated 12.1.2015 accepting the Settlement Agreement, the present Contempt proceedings would lie against the respondents.

7. Learned senior counsel appearing for the respondents has relied upon the order of the Court dated 12.1.2015 and 29.5.2017 to contend that no undertaking was recorded by the respondents to release the Trina Solar Receipts or to withdraw the arbitration proceedings as has been claimed. It is also pointed out that even in the order dated 29.5.2017 when the application of the respondents was not accepted for revival of the winding up petition no

specific direction was passed holding that the respondents are obliged to release the Trina Solar Receipts or withdraw the arbitration proceedings. Reliance is placed on judgment of the Division Bench of the Allahabad High Court in *Arun Kumar Tiwari and Ors. vs. Rajesh Pandey and Ors., 2015(6) ADJ 338* and judgment of the Supreme Court in *Kanwar Singh Saini vs. High Court of Delhi, (2012) 4 SCC 307*.

8. I may first see the order of this court dated 12.1.2015. The order reads as follows:-

“CO.PET. 584/2014
CO.PET. 585/2014

Both these matters are stated to have been settled in terms of the compromise arrived at between the parties on 8th January, 2015. A copy of the settlement agreement entered into between the parties has also been filed before the Court along with affidavits of Principal Officers of both the parties. The same is taken on record. Both the parties affirm the settlement arrived at between them. Counsel for respondent-company undertakes to this Court to pay the instalments in terms of the schedule mentioned in para 1 of the aforesaid settlement dated 8th January, 2015. The undertaking given by the respondent is accepted by this Court and the respondent is directed to remain bound by the same.

Counsel for the petitioner states that in view of the aforesaid settlement, and also in view of the undertaking given by the respondent to this Court, petitioner does not seek to press the present petitions, with liberty to take such appropriate steps including revival of these petitions and initiation of contempt proceedings, if advised, in case of violation of undertaking given to this Court. He is permitted to do so.

The petitions stand disposed off in terms of the aforesaid.”

9. It is clear from the above order that parties affirmed the Settlement Agreement. The petitioner undertook to pay the instalments in terms of the schedule mentioned in the Settlement Agreement dated 8.1.2015. The undertaking given by the petitioner was accepted by the Court. There is no undertaking given by the respondent. Thereafter the admitted fact is that the petitioner has made payment in terms of the Settlement Agreement dated 8.1.2015 but with delay. Paragraph 4 of the said Settlement Agreement reads as follows:-

“4. That the Guarantor agrees and undertakes that if it defaults/deviates in any payment of the said settlement amount of US\$ Thirty Million Three Hundred Seventy Nine Thousand One Hundred Fifteen and cents Sixty in accordance with the aforesaid Payment Schedule, then the entire •outstanding amount of US\$ 35,740,136 (which includes liquidated damages of US\$ 1,701,911) less any amount paid by the Guarantor obligors under this Agreement along with interest @ 12% per annum on the balance amount, starting from the date of such default till the date; of payment, shall immediately become due and payable, by the Guarantor to Trina Solar.”

10. Hence, in terms of the Settlement Agreement the petitioner had undertaken to make the payment of the settlement amount of USD 30.379 million in terms of the payment schedule. In the eventuality of default, the entire outstanding amount of USD 35,740,136/- less any amount paid alongwith interest @12% per annum was payable from the date of default till the date of payment.

11. The next relevant order applicable is the order of this court dated 29.5.2017. This court noted as follows:-

“10. Thus where the petitioner company had received an huge sum of USD 31 million approx. under the settlement agreement would it then be entitled to seek revival of the liquidation proceedings, seeking resort to Clause 4 (supra). The answers would be "No".

11. It is the settled law that if the Time limit is provided by a consent order, the Court has the jurisdiction power to extend such time on the basis that when such-consent terms are filed by the parties and accepted by the Court, such terms merge in the order of the Court and; then the Court is well within its power to extend the time for making payments of the instalments. Rule 9 of the Company (Court) Rules confers inherent powers upon this Court to pass any order in the interest of justice and hence it has-the discretion to grant extension of time.

.....

13. Thus, per law, discussed above since the petitioner company has accepted the payments in the extended period and that too with interest on the default instalment, then simply because there was delay in making the payments under the settlement agreement, it would not be justifiable to take recourse to clause 4 of the Settlement Agreement and thus vitiating the efforts made by the Court to conclude the settlement. After receiving huge payments with interest and yet again making the respondent suffer liquidation proceedings would be asking too much. The conditional offer made by the learned counsel for the petitioner to deposit the amount so received only once a liquidator is appointed is not acceptable and such a plea cannot be allowed.”

12. Hence, this court took the view that if time limit is provided in a consent order the court has the jurisdiction/power to extend such time when such consent terms which are filed by the parties are accepted by the court inasmuch as consent term merge in the order of the court. In view of this

finding and the fact that the petitioner had made payment of the agreed amount in terms of the Settlement Agreement with interest for the delayed payment the court took the view that the petitioner cannot now be made to suffer liquidation proceedings.

13. The contention of the respondents is that they have no objection to abide by the terms and conditions of the Settlement Agreement. However, in terms of Clause 4 of the Settlement Agreement, the petitioner remains in default in making payments of the balance dues of the respondent. The respondent also state that they have no objection in handing over the Trina Solar Receipts provided the petitioner abides by clause 4 of the Settlement Agreement. It has been pointed out that Trina Solar Receipts for the value of payments made by the respondent of USD 31 million already stand released to the petitioner. What has been withheld by respondent No.3 is only the balance receipts on account of non-payment of the balance amount under clause 4 of the Settlement Agreement which are valued approximately USD 5 million. The case of the petitioner however is that in view of the order of this court dated 25.05.2017 refusing to revive the winding up petition, the entire dues of the respondent stand duly paid in terms of the Settlement Agreement and nothing further survives to be paid.

14. I may look at the legal position regarding initiation of contempt proceedings where a Settlement Agreement has been taken on record by the Court. It is quite clear from a reading of the aforesaid two orders that no undertaking has been recorded on behalf of the respondents to comply with the orders of this Court. The respondents continues to maintain that the petitioner has failed to abide by the terms and conditions of the Settlement Agreement dated 8.1.2015 and hence the respondents are justified in

withholding necessary certificates and continuing with the arbitration proceedings.

15. The Supreme Court in *Ram Narang vs. Ramesh Narang and Another (supra)* was dealing with a case where the petitioner and the respondent represented two groups of members of one family. More than eight cases were sought to be disposed of by settlement of the disputes. The parties filed the Minutes of consent order before the court. An undertaking was also recorded by the parties that they will implement the terms of the Minutes of Consent. It was in those facts and circumstances that the court held as follows:-

22. The Court then considered various consent orders which could not base proceedings for contempt if the consent orders were violated. Thus for example, a decree for payment of money if not complied with could not found an action for contempt. Similarly, the allocation of certain property to a party by consent would not give rise to proceedings of contempt if possession of property was not given to that party. The Court was of the view that: (SCC p. 53, para 10)

“In the absence of any express undertaking given by the appellant or any undertaking incorporated in the order impugned, it will be difficult to hold that the appellant wilfully disobeyed or committed breach of such an undertaking. ... if we were to hold that non-compliance of a compromise decree or consent order amounts to contempt of court, the provisions of the Code of Civil Procedure relating to execution of decrees may not be resorted to at all. In fact, the reason why a breach of clear undertaking given to the court amounts to contempt of court is that the contemner by making a false representation to the court obtains a benefit for himself and if he fails to honour the undertaking, he plays a serious fraud on the court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution. The same cannot, however, be said of a consent order or a compromise decree where the fraud, if any,

is practised by the person concerned not on the court but on one of the parties. Thus, the offence committed by the person concerned is qua the party not qua the court, and, therefore, the very foundation for proceeding for contempt of court is completely absent in such cases.”

(emphasis in original)

The appeal was accordingly allowed and the order passed under Section 2(b) of the Act was set aside.

.....

24. All decrees and orders are executable under the Code of Civil Procedure. Consent decrees or orders are of course also executable. But merely because an order or decree is executable, would not take away the court's jurisdiction to deal with a matter under the Act provided the court is satisfied that the violation of the order or decree is such, that if proved, it would warrant punishment under Section 13 of the Act on the ground that the contempt substantially interferes or tends substantially to interfere with the due course of justice. The decisions relied upon by the respondents themselves hold so as we shall subsequently see.

25. In such circumstances it would neither be in consonance with the statute, judicial authority, principle or logic to draw any distinction between the wilful violation of the terms of a consent decree and wilful violation of a decree which is passed on adjudication. The decision in *Babu Ram Gupta case* [(1980) 3 SCC 47 : 1980 SCC (Cri) 527] must, therefore, be limited to its own peculiar facts.”

16. Similarly, the Supreme Court in *Kanwar Singh Saini vs. High Court of Delhi (supra)* held as follows:-

“16. Be that as it may, the so-called statement/undertaking given by the appellant/defendant culminated into the decree of the civil court dated 12-5-2003. Thus, the question does arise as to whether the application under Order 39 Rule 2-A CPC or under the 1971 Act could be entertained by the civil court and whether the matter could be referred to the High Court at all.

.....

18. In case there is a grievance of non-compliance with the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order 21 Rule 32 CPC which provides for elaborate proceedings in which the parties can adduce their evidence and can examine and cross-examine the witnesses as opposed to the proceedings in contempt which are summary in nature. Application under Order 39 Rule 2-A CPC is not maintainable once the suit stood decreed. Law does not permit to skip the remedies available under Order 21 Rule 32 CPC and resort to the contempt proceedings for the reason that the court has to exercise its discretion under the 1971 Act when an effective and alternative remedy is not available to the person concerned. Thus, when the matter relates to the infringement of a decree or decretal order embodies rights, as between the parties, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode of executing the decree or merely because other remedies may take time or are more circumlocutory in character. Thus, the violation of permanent injunction can be set right in executing the proceedings and not the contempt proceedings. There is a complete fallacy in the argument that the provisions of Order 39 Rule 2-A CPC would also include the case of violation or breach of permanent injunction granted at the time of passing of the decree.”

17. I may also look at the judgment of the Division Bench of the Allahabad High Court in ***Arun Kumar Tiwari and Ors. vs. Rajesh Pandey and Ors.(supra)***. The said judgment pertains to a consent order passed in a company court. The Court held as follows

“8. On merits, the issue which falls for consideration before the Court is whether a contempt petition of this nature, complaining of a breach of a settlement agreement which was entered into between the parties before the Mediation and Conciliation Centre of this Court and in

terms whereof the company appeal was disposed of, was maintainable.

....

10. The agreement which was arrived at in the course of mediation was a settlement by which the dispute was compromised. When the Division Bench disposed of the appeal in terms of the compromise, the mediated settlement received the imprimatur of the Court. Section 634 of the Companies Act provides that any order made by a Court under the Act may be enforced in the same manner as a decree made by the Court in a suit pending therein....

11. A mediated settlement, upon the passing of a judicial order in terms of the settlement, has the effect of a decree of the Court. As a decree, the terms of the settlement are enforceable and executable in accordance with the process known to law. A decree for the payment of money is capable of being executed in the manner indicated by the provisions contained in Order XXI of CPC. Rules 1 and 2 of Order XXI provide for the mode of paying money under a decree and for the payment out of Court to a decree holder. Consequently, where a settlement agreement which has been arrived at between the parties is embodied in a final order or decree of the Court, the remedy of a party which is aggrieved by the non-payment of sums due and payable under it is to enforce and execute the decree in accordance with law.

....

14.....Once a settlement is arrived at in the course of a mediation proceeding, the enforcement of the terms of settlement as a decree of the Court, upon a final order of the Court passed in terms of the settlement, must take place in a manner provided for the enforcement of decrees and orders. Recourse to the contempt jurisdiction would not be warranted. The issue in regard to the maintainability of a contempt petition cannot, with

respect, be resolved on the basis of the importance of the mediation and conciliation centre as a Court annexed institution. The essence of the matter is that the terms of the settlement agreement which was arrived at in the course of mediation proceedings would have to be enforced as a decree of the Court once a final order was passed by the Division Bench in its terms on 4 January 2013.”

18. The legal position that follows from the above judgments is that all decrees and orders are executable under the Code of Civil Procedure. Consent decree and orders are also executable as noted by the Allahabad High Court in case an order has been passed in favour of the petitioner in a company petition in view of section 634 of the Companies Act, 1956. But because the order or decree is executable that would not take away the court’s jurisdiction to deal with the matter under the contempt of Courts Act provided the court is satisfied that the violation of the order is such which substantially interfered with the due course of justice.

19. Essentially the case of the petitioner is that despite order dated 29.5.2017 passed by this court, the respondent has not abided by the settlement agreement and handed over the Trina Receipts. There is no dispute that clause 4 of the settlement agreement states that in case the petitioner is unable to make the payment within the stipulated schedule the entire outstanding of USD 35,740,136/- would become payable with interest. This court however in its order dated 29.5.2017 noted clause 4 of the settlement agreement but concluded that on account of the delay in making payment by the petitioner it would not be justifiable to vitiate the efforts made by the court to conclude the settlement as the amount had been

received by the respondent. The court further concluded that the respondent cannot be made to suffer liquidation proceedings. Hence, essentially on facts this court came to a conclusion that there was no justification to revive the winding up petition.

20. In my opinion, there is nothing in the two orders of this court, namely, order dated 12.01.2015 and 29.05.2017 on account of which I can conclude that the respondent has substantially interfered in the course of justice. In my opinion, the facts do not warrant coming to a conclusion that the respondent is guilty of wilful disobedience of the order of this court or of contempt of court.

21. However, any observations made herein would not in any manner prejudice the parties in any proceedings that they may chose to initiate including any execution that the petitioner may chose to file against the respondents in accordance with law. The petition is accordingly dismissed.

JAYANT NATH, J

APRIL 03, 2018/n

Corrected and released on 24.04.2018