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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 24.09.2019
Pronounced on: 21st.01.2020

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+ O.M.P. (CONT.) 1/2017

KAMAL KUMAR

..... Decree Holder

Through: Mr. Anirudh Bakhru & Mr. Ayush Puri,
Advocates

versus

MILAN SAINI

..... Judgement Debtor

Through: Mr. Ambar Qamaruddin & Mr. Varun
Nischal, Advocates.
Mr. Neeraj Yadav, Advocate for Yes
Bank Ltd.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present contempt petition has been filed by the petitioner alleging non-compliance of the order dated 16.01.2014 passed by this Court and the order passed by the Arbitral Tribunal on 27.10.2014 modifying the order of this Court.

2. It is the case of the petitioner that pursuant to the disputes having arisen between the parties a Sole Arbitrator was appointed. The petitioner filed its claims. In an application under Section 17 of the Act, the Arbitrator passed an interim order dated 26.12.2013 restraining the respondent herein and one Sh. Deepak Marda from receiving an amount of Rs.11.5 Crores from escrow agent, Hon'ble Mr. Justice S.S. Chadha (Retd.) and /or from

M/s Cinepolis India Pvt. Ltd. The escrow agent was directed not to release the demand draft to the respondents of an amount equivalent to Rs.11.5 Crores.

3. The said interim order under Section 17 of the Act was challenged by the respondent and Deepak Marda in this Court in an appeal being no. Arb. A. No. 3/2014. Vide order dated 16.01.2014, this Court recorded the consent of the parties, without prejudice to their rights and contentions that the amount lying with the escrow agent in the form of demand drafts would be released to the appellant by the escrow agent and encashed by them. The same was to be deposited by the appellants in account nos. 000293300000032 and 000293300000020 maintained with Yes Bank, Fortune Global Arcade, M.G. Road, Gurgaon. It was agreed between the parties that from the amount so realised, the appellants therein shall not withdraw or deal with in any manner an amount of Rs. 9.50 crores. The said amount was agreed to be placed in a fixed deposit jointly in the names of the appellants with a lien marked thereon. The deposit was to be created initially for a period of three months and renewed automatically till further orders of the Tribunal. Copy of the fixed deposit was to be placed before the Arbitrator as also to be provided to the petitioner herein without delay.

4. Recording the agreement between the parties, the appeal was disposed of continuing the arrangement agreed upon till disposal of applications under Section 16 & 17 of the Act by the Arbitrator. The Court had also directed a copy of the order to be communicated to Yes Bank as well as to the learned escrow agent.

5. The application under Section 17 of the Act was finally decided by the Arbitral Tribunal vide order dated 27.10.2014. During the hearing, the counsel for the respondent herein and Deepak Marda contended that the amounts lying in the Yes Bank were urgently required by them to defray their tax liabilities and other expenses. The Arbitral Tribunal observed that the respondents had not placed any documentary evidence to reiterate the same as also that both the respondents were non-resident Indians and had not produced any evidence about their financial status with regard to property or other assets in India. However, the Tribunal on the ground that the proceedings had not reached the stage of evidence and there was a dispute between the parties regarding the existence of the agreement dated 16.08.2013, permitted the respondent to withdraw the said amount lying in the fixed deposits in Yes Bank. The order of this Court dated 16.01.2014 was modified to this extent. However, while permitting the withdrawal of the amount the Tribunal directed the respondents to furnish bank guarantees in the amount of Rs. 4.50 Crores each respectively. Relevant part of the order is extracted hereinbelow:

“Taking an overall view of the facts and circumstances of the case, it will be in the interest of justice to modify the Order of the learned Single Judge dated 16.01.2014 to the effect that the respondent No. 1 and respondent No.2 shall be at liberty to withdraw the amounts lying in the fixed deposits in ‘Yes Bank’ Fortune Global Arcade, Sikanderpur, Mehrauli Gurgaon Road, Gurgaon- 122002 and instead furnish Bank Guarantees (“BG”) in the amount of Rs. 4.50 crores each respectively.”

6. Despite the order of the Arbitral Tribunal to withdraw the amount subject to furnishing a bank guarantee, Deepak Marda withdrew the amount

on 06.11.2013 without furnishing any bank guarantee. Subsequent thereto, the respondent herein also withdrew the amount but without a bank guarantee. The petitioner then filed an application before the Tribunal for initiation of contempt proceedings against the respondent.

7. The Tribunal issued notice to the bank and on appearance before the Tribunal on 06.05.2015, a statement was made by the bank that the respondent had withdrawn the amount in the month of November, 2014 without any bank guarantee. No reply was filed by the respondent. After hearing the parties on 15.09.2015, the Tribunal returned a categorical finding that the respondent was in default and wilful contempt of the order passed by the Tribunal and made representation to this Court for appropriate orders. The Tribunal further recorded that insofar as the matter between the petitioner herein and Deepak Marda was concerned, the same was settled between the parties and hence, no reference was required.

8. The petitioner, thereafter, filed contempt case being Cont. Cas(C) No.982/2015 in this Court in 2015. On 15.12.2015, a notice was issued to the respondent, who, however, failed to appear despite having been served. On 12.05.2016 bailable warrants were issued by the Court in the sum of Rs.10,000/-. The same could not be executed and fresh warrants were issued on 19.07.2016.

9. On 09.03.2017, the petitioner withdrew the petition in view of the judgment of this Court in ***Vivekananda College through it's Principal vs. Sanjay Kumar Chandok***, being CONT.CAS(C)1321/2016 decided on 08.12.2016, with liberty to file a fresh petition under Section 27(5) of the Act read with Order XXXIX Rule 2A CPC.

10. On 26.05.2017, notice was issued to the respondent through e-mail as well as to his counsel in the arbitration proceedings. Despite several fresh notices, the respondent could not be served. The counsel representing him informed, vide letter dated 13.09.2018, that the proceedings stood concluded and thus, he would not be appearing for the respondent.

11. The petitioner filed an application being IA no. 9263/2019 with the following prayer:---

“(a). Direct the DCP, EOW, Mandir Marg, New Delhi to open a lookout circular to detain and produce the Respondent before this Hon’ble Court so as to face the criminal contempt pending before this Hon’ble Court;”

12. The said application was listed before the Court on 12.7.2019. The Court found that the repeated attempts to serve the respondent had failed and the Court was of the view that the respondent was avoiding service of the notice. The Court also recorded its prima facie satisfaction that the respondent had committed a breach of the order passed by the Arbitrator and action could be taken against him under Section 27(5) of the Act in view of the judgment in the case of *Vivekananda College through it’s Principal (supra)*. The application was allowed wherein a prayer had been made to direct the DCP, EOW to open a Look Out Circular (LOC) to detain and produce the respondent before this Court so as to face criminal contempt pending in the Court.

13. On 13.09.2019, an Advocate entered appearance on behalf of the respondent and sought time to file vakalatnama as well as to seek instructions from the respondent as to the amount which he would be willing

to deposit in this Court to show his bona fide before he could be heard in the contempt petition.

14. On 18.09.2019 the following order was passed by this Court:-

“Learned counsel for the respondent is directed to take instructions from the respondent on the following aspects:

(a) The time frame within which the respondent will deposit the entire amount of Rs. 4.50 Crores and;

(b) The earliest date on which the respondent would appear in this Court within the next three weeks.

List on 23rd September, 2019 for further consideration.

Dasti.”

15. On 23.09.2019, learned counsel for the respondent submitted that he had taken instructions from the respondent and the respondent had declined to appear in this Court as he had an apprehension of his security and safety in the country. It was further submitted that the respondent was only willing to deposit a sum of Rs. 33 lakhs as against the liability of Rs.4.5 crores. Time was sought to argue the matter on the next day on which date arguments were heard and judgment was reserved with liberty to the parties to file their synopsis.

16. Learned counsel for the petitioner contended that the respondent has wilfully and deliberately evaded service of summons till a LOC was issued and the lawyer appeared on his behalf. Despite, having violated the orders, respondent continued to be evasive and he even refused to appear in the Court on a frivolous ground that he was not safe in this Country. He contended that nothing could be far from truth since the respondent has recently filed a petition under Section 34 of the Act in this Court. The petition has been filed by a special power of attorney and the respondent had

signed on the power of attorney on 09.07.2019 in India which is a date after service of the application for opening of a look out circular and three days before this Court directed issuance of LOC vide order dated 12.07.2019.

17. Learned counsel next contends that there is clear and wilful non-compliance of the order passed by the Tribunal wherein the permission to withdraw Rs.4.5 Crores from the Yes Bank was clearly subject to deposit of a bank guarantee. The respondent has admitted that the money has been withdrawn but no bank guarantee has been furnished. Respondent has fled away with Rs.4.5 Crores which is also a fraud on the bank as well as a contempt of the order of the Tribunal.

18. Learned counsel contends that this is a fit case for this Court to exercise its inherent plenary powers under Article 215 of the Constitution of India. Reliance is placed on the judgment by a Full Bench of Punjab and Haryana High Court in the case of ***Court on its own Motion vs. BIS Chahal (2010) 157 PLR 80***. The relevant para of which reads as under:-

“Every High Court, being a Superior Court of record, is embodied with inherent and plenary powers under Article 215 of the Constitution to punish for its contempt summarily. These powers cannot be tinkered with by legislation like the Contempt of Courts Act, 1971. While exercising its jurisdiction under Article 215 of the Constitution, the High Court may follow a procedure which is fair enough to afford a reasonable opportunity to the contemnor to defend himself. Suffice it to say that the powers under the Act are in addition and not in derogation of the High Court’s extra-ordinary jurisdiction under Article 215 of the Constitution. As held by the Hon’ble Supreme Court in Pritam Pal V/s High Court of Madhya Pradesh, 1993 Supp (1) SCC 529, “the jurisdiction vested is a special one not derived from any other statute” but derived

only from Article 215 and that “the constitutionally vested right cannot be either abridged, abrogated or cut down, by any legislation including the contempt of Courts Act”. In Vinay Chandra Mishra, (1995) 2 SCC 584, it was reiterated that the constitutional power to punish for the contempt of itself or of the subordinate courts is independent of a statutory power and the Court shall be well within its offender if the contempt is in the nature of in facie curiae.”

19. Reliance is also placed on the judgment in the case of ***MM Thomas vs. State of Kerala (2000) 1 SCC 666*** and ***Oak Park National Bank vs. Peoples Gas Light & Coke Co. 46 Ill. App. 2d 385.***

20. Learned counsel next argues that this Court should pass and order directing the CBI to issue open ended non-bailable warrants and red corner notice against the contemnor as well as direct the Ministry of External Affairs to examine the possibility of impounding/revoking the passport of the contemnor in terms of the judgment of this Court in ***Kiran Lohia v/s State & Ors.*** being W.P. (CrI.) 2375/2019.

21. Reliance is placed on ***Clough Engineering Ltd., Australia vs. ONGC, Mumbai (2009) 3 MHLJ 553***, a judgment of the Bombay High Court in this regard.

22. Learned counsel submits that to the best of the knowledge of the petitioner, the respondent is a US Citizen and does not hold an Indian passport. He is a PIO Card holder which ought to be impounded or revoked.

23. *Per contra*, learned counsel for the respondent has taken a preliminary objection that the present proceedings are barred under Section 20 of the Contempt of Courts Act as the violation is of an order dated 27.10.2014. No

application for condonation is even permitted in view of the bar under Section 29(2) of the Limitation Act. Under the said Section, where a special or local law provides for any suit, appeal or application, a period different from the one prescribed by the Schedule, the provision specified therein will apply insofar as and to the extent to which they are not expressly excluded by such special or local law. Contempt of Court Act is a self-contained code and the petition being beyond the period of one year from the date of the order of which contempt is alleged is not maintainable. It is further argued that the petition was filed on 15.12.2016 and no condonation was sought and neither is a condonation sought when the present petition was filed on 26.05.2017.

24. It is further contended that the orders dated 16.01.2014 and 27.10.2014 have merged with the final order of the Tribunal dated 14.5.2019 which is being challenged by the respondent under Section 34 of the Act and hence, the interim orders cannot be enforced. Reliance is placed on the judgment of the Supreme Court in *Prem Chand Aggarwal vs. U.P. Financial Corporation & Anr. (2009) 11 SCC 479* and of this Court in *Rhiti Sports Management Pvt. Ltd. vs. Power Play Sports and Events Ltd. 2018 SCC Online Del 8678*.

25. Learned counsel further sought to justify the act of the respondent on the ground that the respondent is a graduate from Stanford University and has been a US citizen for more than 20 years. He has been a victim of deep-rooted conspiracy by the petitioner. The petitioner had committed to fund the litigation in respect to an agreement dated 06.10.2007 executed between the respondent, Deepak Marda and Cinepolis. It is argued that the

respondent was forced to withdraw the money due to circumstances and to protect him against the deep-rooted conspiracy under which joint liabilities were being bifurcated. The action of the respondent is neither contumacious nor amounts to wilful disobedience of any order of the Court or the Tribunal.

26. Learned counsel for the petitioner in the rejoinder submits that there is no delay in filing the petition and the same is not barred by limitation. He submits that the Tribunal had passed an order referring the matter to this Court for contempt of its order on 15.09.2015. It is only thereafter that the petitioner could have approached this Court seeking appropriate orders to punish the respondent for wilful disobedience of order dated 27.10.2014. The petitioner filed the earlier contempt case on 15.12.2015. The same was within three months from the date of the order of the Tribunal referring the matter to this Court. The said petition was therefore not barred by limitation since in this case the petitioner had as per procedure first approached the Arbitral Tribunal and only once the order was passed on 15.09.2019 the present petition was filed. Learned counsel further submits that vide order dated 09.03.2017, this Court had permitted the petitioner to withdraw the petition in view of the judgment of this Court in *Vivekananda College through it's Principal (supra)* and liberty was granted to file the petition under section 27(5) of the Act. This petition was thereafter duly filed on 26.5.2017 i.e. within two months of the said order and is therefore not barred by limitation.

27. In response to the argument of the respondent that the interim orders have merged with the final award and thus, no contempt can be filed for their violation, the counsel for the petitioner submits that such an interpretation

would render Section 27(5) nugatory and would give a free hand to the parties to flout the orders of the Tribunal. The judgment in ***Rhiti Sports Management Pvt. Ltd. (supra)*** is inapplicable as there the order under contempt related to rejection of an application to file additional documents which is procedural in nature and does not decide any substantial issue between the parties. The petitioner thus prays that the petition be allowed and respondent be directed to deposit Rs. 4.5 Crores with interest in this Court and strict action be taken for wilful disobedience of the order of the Tribunal as well as for refusing to appear before this Court.

28. I have heard the learned counsels for the parties and examined their contentions.

29. Since the respondent has raised a preliminary objection on the ground of limitation, the same requires to be decided as a preliminary issue. The question whether under Section 27(5) of the Act, the Tribunal has the power to make representation to the Court for contempt of its orders came up for consideration before the Bombay High Court in the case of ***Alka Chanderwar v/s Shamshul Ishrar Khan 2016 (1) MhLJ52***. The Bombay High Court answered the question as under:-

“In view of the above discussion, Section 27(5) of the Arbitration and Conciliation Act, 1996 does not empower the Tribunal to make representation to the Court for contempt if the orders including the interim orders passed by the Arbitrator except in respect of taking evidence are violated by the party. The Contempt Petition being the representation made by the Tribunal is beyond the period of limitation and is not maintainable in law. Moreover, the final award of Rs. 8 Crores is granted in favour of the Petitioner by the Arbitrator.”

30. The said judgment was taken up in appeal before the Supreme Court and the appeal was allowed setting aside the judgment of the Bombay High Court in Civil Appeal No. 8720/2017, decided on 06.07.2017. The Supreme Court analysed the provisions of Section 27(5) and observed that the Section had to be interpreted in consonance with the modern rule of interpretation of Statutes, the object of providing that the party may approach the Tribunal instead of the Court would be stultified if interim orders passed by the Tribunal are toothless. It is to give teeth to such order that an express provision is made in Section 27(5) of the Act. The Supreme Court in fact took note of judgment of this Court reported as **2009 (112) DRJ 657** observing that in the said case this Court had correctly construed Section 27(5). The Apex Court also relied upon **M/s. Ambalal Sarabhai Enterprises vs. M/s. Amrit Lal & Co. & Anr. (2001) 8 SCC 397**, wherein it was held that parties to arbitration proceedings are put to election as to whether to apply for interim relief before the Tribunal under Section 17 of the Act or to the Court under Section 9 of the Act. Such election would be meaningless if interim orders of the Tribunal were to be written in water and Section 17 would be a dead letter. Relevant paras read as under:-

“6. If Section 27(5) is read literally, there is no difficulty in accepting the plea of the learned Senior Advocate for the appellant, because persons failing to attend in accordance with the court process fall under a separate category from “any other default”. Further, the section is not confined to a person being guilty of contempt only when failing to attend in accordance with such process. The section specifically states that persons guilty of any contempt to the Arbitral Tribunal during the conduct of the arbitral proceedings is within its ken. The aforesaid language is, in fact, in consonance with the chapter heading of Chapter V, “Conduct of arbitral

proceedings". Further, it is well settled that a marginal note can be used as an internal aid to interpretation of statutes only in order to show what is the general drift of the section. It may also be resorted to when the plain meaning of the section is not clear. In the present case we must go by the plain meaning of sub-section (5). This being the case, we find it difficult to appreciate the reasoning of the High Court. Also, in consonance with the modern rule of interpretation of statutes, the entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such Tribunal are toothless. It is to give teeth to such orders that an express provision is made in Section 27(5) of the Act.

7. In fact, the Delhi High Court by the judgment dated 18-8-2009, reported in Sri Krishan v. Anand [Sri Krishan v. Anand, 2009 SCC OnLine Del 2472 : (2009) 112 DRJ 657 : (2009) 3 Arb LR 447] , has correctly construed Section 27(5) of the Act. Further, it must be remembered that this Court in Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co. [Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co., (2001) 8 SCC 397] has held that parties to arbitration proceedings are put to an election as to whether to apply for interim relief before the Tribunal under Section 17 or before the Court under Section 9. Such election would be meaningless if interim orders passed by the Arbitral Tribunal were to be written in water, as all parties would then go only to the Court, which would render Section 17 a dead letter."

31. Having analysed the law as laid down by the Supreme Court and this Court, I am of the opinion that the petitioner had correctly resorted to remedy of filing an application before the Tribunal for making a representation to this Court for the alleged violation and non-compliance of order dated 27.10.2014. Learned counsel for the petitioner is right in his contention that as soon as the order was passed by the Tribunal on 15.09.2015 he has approached this Court on 15.12.2015. The petition was

pending in this Court till 09.03.2017, when the petition was withdrawn but with liberty to file the petition under Section 27(5) of the Act in terms of the judgment of this Court in *Vivekananda College through it's Principal (supra)*. The present petition has been filed on 26.5.2017 and, in my view, is not barred by limitation.

32. As regards the contention of the respondent that since a final award has been passed, the interim orders have merged in the same and therefore no contempt lies, the same only deserves to be rejected. If this interpretation is given, then the learned counsel for the petitioner is right that it would render Section 27(5) of the Act redundant. Besides, it would actually give a free hand to the contemnor to flout the orders of the Court till such time his objections to the award are not decided and the challenge does not attain finality. A party who wilfully disobeys the orders of the Court has to be strictly dealt with.

33. From the totality of facts which emerge in this case, it is clear that initially the Tribunal has restrained the respondent herein from receiving the amount deposited with the escrow agent. The said order was challenged by the respondent along with Deepak Marda in this Court. An agreement was entered between the parties that the amount lying with the escrow agent would be released to the respondent and Deepak Marda which would be deposited by them with the Yes Bank and kept in a fixed deposit with lien marked thereon. From the amount so realised, the respondent herein was directed to place Rs.9.5 Crores in a fixed deposit with a lien marked on it. The FDR was to be renewed till further orders of the Tribunal. The Tribunal thereafter, modified the earlier orders and permitted the respondent along

with Deepak Marda to withdraw the sum of Rs.9.5 Crores subject to furnishing a bank guarantee of 4.5 Crores each. This was on the ground that the respondent wanted to clear his statutory liabilities. The respondent has admittedly withdrawn the amount without furnishing a bank guarantee.

34. In my view, there is a clear and wilful disobedience of the order passed by the Tribunal on 27.10.2014. The record of this Court shows that several notices including bailable warrants were issued for production of the respondent but he had evaded service. In one of the orders, this Court *prima facie* had noticed the wilful evasion of the service by the respondent and on an application filed by the petitioner, direction was issued to the EOW Cell to open a look out circular. It was only after the LOC was issued that an advocate appeared on behalf of the respondent.

35. After the respondent was represented, opportunity was given by this Court to appear in this Court or at least to deposit some amount to show his bona fide. Despite this, the respondent remained defiant and a categorical statement was made on his behalf that he is refusing to appear in the Court. The ground set up for non-appearance was that he feared for his safety and security. This ground, in my opinion, also has no legs to stand. The petitioner has rightly pointed out that the respondent had visited India in July, 2019 to sign Special Power of Attorney on the basis of which he had filed objections in this Court under Section 34 of the Act. This was very close to the application being filed for opening of a look out circular. Given the gamut of these facts, the non-appearance of the respondent is not justified and neither is his apprehension that he is not safe in this country. The Court had even given an alternative to the counsel for the respondent to deposit

some amount. But even that was not accepted and the offer made was only to deposit Rs.33 lakhs out of a liability of Rs. 4.5 crores with interest thereon.

36. The Supreme Court in the case of ***Rama Narang vs. Ramesh Narang (2006) 11 SCC 114*** has held that in order to maintain sanctity of the orders of the Court, it has become imperative that those who are guilty of deliberately disregarding the orders of the Court in a clandestine manner should be appropriately punished. It was further held that the Majesty of the Court and the Rule of Law can never be maintained unless this Court ensures meticulous compliance of the orders. A Division Bench of this Court in ***Mohan Nair vs. Rajiv Gupta (2015) DLT 332***, held that to say that the orders of the Court are not implementable or unenforceable will make the law and the Court a laughing stock and therefore, it is the duty of every Court to prevent its machinery from being made a sham, thereby running down the Rule of Law and rendering itself an object of ridicule. The Supreme Court in ***Sukhdev Singh vs. Hon'ble C.J.S. Teja Singh & Ors. AIR (1954) SCR 454*** while recognising that the power of the High Court to institute proceedings for contempt and punish the contemnor when found necessary is a special jurisdiction which is inherent in all Courts of Record.

37. The respondent has clearly violated order dated 27.10.2014 passed by the Arbitral Tribunal. Respondent is held guilty of contempt of the order of the Tribunal.

38. To come up on 14.05.2020 for order on sentence.

39. Respondent is a US Citizen and resides in United States of America. Let a copy of this order be sent to the Ministry of External Affairs to take necessary steps to ensure the presence of the respondent on the date mentioned above for passing the sentence.

JYOTI SINGH, J

JANUARY 21st, 2020
srb/

