

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

Date of Reserve: 15th February, 2010
Date of Order: 22nd February, 2010

CONT. CAS. (C) No. 341/2005

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22.2.2010

BIOCON LIMITED

... Petitioner

Through: Mr. Jenis Francis &
Mr. Gaurav Beri, Advocates

Versus

M/S MOREPEN LABORATORIES LTD. & ORS.

... Respondents

Through: Mr. Amit Sibal & Ms. Divya Jain, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

By this petition petitioner has invoked the contempt jurisdiction of this Court on the ground that the respondents (hereinafter referred to as respondent) despite entering into an agreement with the petitioner and filing an affidavit in the Court that it shall abide by the agreement did not make the payment in terms of the agreement and hence committed breach of the undertaking given to the Court and committed contempt of Court.

2. Brief facts relevant for the purpose of deciding this petition are that the respondent issued three cheques dated 31st July 2003, 31st August, 2003 and 30th September 2003 to the petitioner in discharge of its liability against purchase of material. These cheques got bounced and cases under Section 138 of Negotiable Instruments Act were filed against the respondent. During pendency of one of the complaints under Section 138, respondent entered into a settlement/agreement dated 27.4.2004 for payments of dues. In the statement, it was agreed that the respondent owed a sum of Rs.82, 30,751/- towards the petitioner company. This amount was agreed to be paid in installments and first installment was to be paid on

5.5.2004. An undertaking of Chairman/Managing Director was to be filed to comply with the agreement. The schedule of installments was given in the agreement itself starting from 5.5.2004 to 5.7.2005. After entering into this agreement respondent moved a petition under Section 391(1) of the Companies Act, 1956 before High Court at Shimla expressing its inability to pay its debt and wanted the High Court to issue notice to all creditors so that a scheme could be prepared. The Shimla High Court vide order dated 28.6.2004 entertained the petition and passed interim directions and also issued an injunction order that till the reply was filed and respondent was heard further proceedings in all cases, a list of which was attached with the petition as annexure 1A, 2A, 3A, 4A and 5A, will remain stayed.

3. The facts reveal that the respondent did not follow the schedule of payment as agreed in the agreement dated 27.4.2004 although some amount was paid in accordance with the agreement. The contention of petitioner is that the respondent on the one hand made statement before Court at Delhi and on the other hand moved a petition before Shimla High Court and obtained an injunction against all the proceedings. It is also submitted that the stay would not be operative as far as giving of undertaking by respondent before the Court at Delhi was concerned and defiance of undertaking was deliberate. On the other hand, it is submitted by the Counsel for the respondent that no case for contempt was made out. The respondent even at the time of entering into settlement with the petitioner had made it clear that the respondent was under financial difficulty. The respondent invited attention of the Court to Article 2.1 of the agreement which reads as under:

2.1 Morepen has represented to the Company that Morepen intends to repay the entire Admitted Debt but owing to certain financial difficulties would like to repay the Admitted Debt in installments as per the schedule ("Payment Schedule") attached hereto as Schedule-1.

4. The respondent further stated that the agreement itself provided that in case of non compliance of the agreement the respondent would indemnify the petitioner against any or all expenses or costs which petitioner may have incurred in enforcing the terms of agreement or recovery of admitted dues. It is stated that at the time of agreement itself it was envisaged that if the financial difficulties of the respondent became insurmountable and the respondent was not in a position to pay the agreement could be enforced and the additional expenses incurred by the petitioner would become liability of the respondent. It is submitted that due to these

financial difficulties the respondent had to approach Shimla High Court which was the High Court for the respondent and notice was issued to all creditors and the persons who had to receive money from the respondent. The High Court at Shimla dwelled upon the financial status of the respondent at length and ultimately a scheme of arrangement was approved by the High Court at Shimla on 8.9.2009 in respect of Fixed Deposit holders, a copy of the scheme of arrangement has been placed on record. In the scheme approved by the High Court para C reads as under:

C. Current Viability Status of the company and Need For Restructuring

The Company has been facing challenges in servicing its debts for quite some times past. However, the Banks/Financial Institutions after considering the potential of the Company's state of the art and USFDA approved plants for manufacture and its supply of complex molecules to advanced countries took up the case of restructuring it's the debts and consequently a restructuring scheme was sanctioned by CDR Cell.

In accordance with the sanctioned CDR Scheme 23 banks have been settled under OTS option and 6 Banks have opted for restructuring who are to be paid over a period of 10 years. Non CDR member banks have been/are being settled through mutual negotiations. The settlement with the secured lenders being banks/Financial Institutions has paved the way for restructuring and settlement of others i.e. Fixed Deposit holders etc. Given the limitations of future cash flows as approved by the CDR Cell, it is imperative and in the best interest of the Company, Fixed Depositors i.e. unsecured creditors and its shareholders that the proposed scheme of restructuring of the debts of Fixed Depositors of the Company should be favorable considered and approved to enable the Company to service these restructured debts and Fixed Deposit holders on becoming shareholders may participate in the growth of the company.

5. It was submitted that it was not a case where petitioner could have invoked contempt proceedings. There was no deliberate non compliance of the undertaking given to the Court and the respondent was financially handicapped of compliance of the order despite that the respondent had even during pendency of the proceedings before Shimla High Court discharged the principal liability of the petitioner and only interest part remained unpaid.

6. The factual situation is not disputed by the petitioner. It is not disputed that respondent had run into rough financial weather and most of the creditors of the respondent had to forego large amounts. The scheme itself shows that the secured

creditors had to waive off 55%, unsecured creditors had to waive off 70% of their amount under the scheme. Looking at this situation, I consider that it is not a case of willful defiance or willful non compliance of the undertaking given to the Court. This Court in National Agriculture Corp. Marketing v. Reliance Polycrrete Ltd. 163 (2009) DLT 441 had observed as under:

“4. I consider that in this case the contention of the respondent/contemnor has to be believed on the face of it since the petitioner has not brought to the notice of this Court any fact contrary to the contention of the contemnor showing that the contemnor was having sufficient liquidity to furnish to the bank or had property/security with 25% amount which he could have furnished to the bank. It does not seem to be a case of the deliberate defiance of the order of the Court. The Contempt Petition is hereby dismissed.”

7. In Alora Trading Co. Ltd. v. Sanjay Ghai 98(2002) DLT 139 this Court had considered liability to face contempt under similar circumstances and observed as under:

“10..... Only willful disobedience of the order or breach of any undertaking will be liable to be punished as a civil contempt. The term “willful disobedience” in Section 2(b) of the Contempt of Courts Act has to be proved. There is a possibility that the breach of undertaking of Court’s order may not be willful and intentional. In the instant case, at best the undertaking is to pay the decretal amount within a time frame. The breach of such an undertaking can amount to contempt only if there is proof that the contemnor had the means at the specified time to pay the amount, but has willfully refused to make the payment. In order to prove whether the default is willful, an inquiry is required to be held. In this case, facts ex-facie do not show that the default on the part of the defendant is willful. It is difficult to find out without holding an enquiry, as to whether the defendant had the means to make payment when he gave the undertaking or whether he is unable to comply with the undertaking on account of want of means at his end.”

8. In view of the facts and circumstances brought to the notice of this Court, I consider that it is not a case where there was willful breach of the undertaking given by the respondent to the Court. I find that no case for initiating contempt was made out against the respondent. The petition is hereby dismissed.

February 22, 2010
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SHIV NARAYAN DHINGRA, J.