National Fertilizers Ltd vs Tuncay Alankus & Anr on 2 April, 2013

Equivalent citations: AIR 2013 SUPREME COURT 1299, 2013 (9) SCC 600, 2013 AIR SCW 2016, 2014 (1) SCC (CRI) 172, (2013) 2 CHANDCRIC 93, 2013 (5) SCALE 255, (2013) 3 RECCRIR 168, (2013) 2 WLC(SC)CVL 77, (2013) 2 ALLCRILR 753, (2013) 4 MAD LJ 453, (2013) 2 CURCRIR 156, (2013) 5 SCALE 255, (2013) 3 ALLCRIR 2490

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Bench: Ranjana Prakash Desai, Aftab Alam

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

CONTEMPT PETITION (CIVIL) NO.320 OF 2009
IN
CRIMINAL APPEAL NO.926 OF 2006

NATIONAL FERTILIZERS LTD. …PETITIONER/

APPELLANT

VERSUS

TUNCAY ALANKUS & ANR. …RESPONDENTS

J U D G M E N T

Aftab Alam, J.

1. This petition is filed under Article 129 of the Constitution of India read with Order XLVII of the Supreme Court Rules, 1966 and rule 3(C) of the Rules to regulate proceedings for Contempt of the Supreme Court, 1975 making the prayer to punish respondent No.1 for withdrawing a very large sum of money from his bank account in a Swiss bank in violation of this Court's orders dated September 4, 2006 and December 14, 2006. As a matter of fact, by an earlier order passed by the Court on April 1, 2010, in course of the proceedings of the case, respondent No.1 has actually been held guilty of contempt of court; it is a brief order, wherein Paragraphs 6 & 7, the Court observed and held as follows:

> "6. For the allegations made in the contempt petition, a notice had been issued to the contemnor. In the notices it was specifically mentioned that the charge against him is that he has violated the order of this Court dated 4.9.2006. In fact, the respondent No.1-contemnor has filed his reply thereto. However, from a perusal of the reply filed by the contemnor it is clear that he has not denied the allegation of the petitioner that he has withdrawn money by flouting the order of this Court dated 4.9.2006.
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> 7. From the above discussion, we are satisfied that there is sufficient material on the record to suggest that contemnor-

respondent No. 1 has committed contempt of Court. Therefore, we hold the contemnor guilty of Contempt of Court."

2. On that date, however, the Court did not give any punishment to the respondent but directed the case to be listed on April 12, 2010 for passing the sentence on the contempt, observing further that, in the meanwhile, if the contemnor deposited the amount withdrawn from the bank, the Court might consider recalling the order passed on that date.

3. The respondent did not deposit the amount allegedly withdrawn by him from the bank account but on April 6, 2010 filed a petition for recall of the order holding him guilty of contempt of court. He took the plea that the order dated April 1, 2010 was based on the incorrect premise that in the reply to the contempt petition filed by him, he did not deny the allegation that he had made withdrawals from his bank account by flouting the Court's order dated September 4, 2006. He pointed out that in the reply petition, he had clearly and repeatedly said that he had not withdrawn any money from his bank account after the orders of this Court, dated September 4, 2006 and December 14, 2006 and he reiterated that statement in the petition for recall of the order.

4. After that, the case was heard on a number of dates and was finally taken up on July 17, 2012 when the matter was practically heard all over again also on the question whether or not the respondent had committed contempt of court by withdrawing money from his bank account in the Swiss bank in violation of the Court's orders dated September 4, 2006 and December 14, 2006.

5. The relevant facts necessary to appreciate the respective contentions made on behalf of the parties may be stated thus. The petitioner, National Fertilizers Ltd., is a company registered under the provisions of the Companies Act owned and controlled by the GOI.

6. Karsan Danismanlik Turizm Sanayi Ve Ticaret Limited STI (hereinafter: Karsan) is a Turkish company. The respondent, Tuncay Alankus was the manager of Karsan with individual signature and one Cihan Karanci (not a party to this proceeding) was his deputy manager and counselor. Both Alankus and Karanci were the beneficiaries of Karsan.

7. The petitioner company entered into an agreement, dated November 9, 1995 with Karsan, which presented itself as a producer of urea. The contract was for supply of two lakh metric tons of urea, 46 N fertilizer at a price of US$ 190 per metric ton. The total value of the contract was US$

38,000,000. In terms of the contract, the petitioner company was to pay to Karsan the full contract value in advance by way of two remittances i.e., (1) US$ 380,000 towards insurance premium before entering into the contract and (2) US$ 37,620,000 towards cost of urea after entering into the contract.

8. On November 22, 1995, three bank accounts in the names of Karsan, Alankus and Karanci were opened with Pictet and Cie Bank (hereinafter:

> Pictet) in Geneva. The form for opening the account of Karsan indicated that Alankus and Karanci as the beneficial owners.

9. The three freshly opened accounts were numbered as (i) Account No. 91923, (ii) Account No. 91924 and (iii) Account No. 91925. In this case, we are concerned with the operations in Alankus's account number 91925 with Pictet.

10. On November 23, 1995, Karsan asked the petitioner company to wire the sale price of urea on its account, opened with Pictet. On November 29, 1995, the amount US$37,620,000 was paid by the petitioner company on that account.

11. On November 30, 1995, the account of Karsan was debited and the sum of US$ 28,100,000 was transferred to the account of Alankus (Account No. 91925) with Pictet; from that amount, the sum of US$12,500,000 was split between November 30, 1995 and May 20, 1996, on the accounts of Alankus, his daughter and Cihan Karanci in banks in Ankara, Almaty and Geneva.

12. Despite making full payment of the contract money, the petitioner did not receive a single grain of urea and it later came to light that the insurance cover taken out in connection with the contract did not provide any protection against the loss suffered by the petitioner. Enquiries were made in India and on May 28, 1996, the CBI lodged a first information report under section 120B read with sections 409/420 of the Penal Code and section 13(2) read with section 7/11/13(1)(c) and (d) of the Prevention of Corruption Act, 1988 against a number of accused, including Cihan Karanci and Tuncay Alankus respondent No.1 (as accused No. 11).

13. In connection with the criminal case, Alankus and Karanci were arrested in Geneva on September 16, 1996 and were extradited to India on October 3, 1997. On being brought to India, both the accused were remanded to judicial custody and after several years of custody Alankus was released on bail subject to the condition that he would not leave Delhi.

14. In the trial of the case, after the prosecution had led its evidence and Alankus was also examined under section 313 of the Code of Criminal Procedure, a petition was submitted on his behalf for examining 63 persons, living in 10 different countries, through video-conferencing, as defence witnesses. The trial court by order, dated October 11, 2004 gave permission for examination of only 6 out of the 63 witnesses. Against the order of the trial court, Alankus filed criminal revision No.126 of 2005 before the Delhi High Court on which the High Court by order dated July 14, 2005 allowed him to examine, in addition to the 6 witnesses allowed by the trial court, 21 more witnesses, of

whom a list was placed on record before the High Court, at the expense of the State.

15. Against the order of the Delhi High Court, two special leave petitions came to this Court. One, being SLP (Criminal) No.6291 of 2005 was filed by the CBI and the other, SLP (Criminal) No.13 of 2006, was filed by the present petitioner. The petitioner in its SLP also moved an application making the prayer for a direction to respondent No.1 (Tuncay Alankus) "to furnish an undertaking to the effect that he will not withdraw any portion of the defrauded amount identified and lying in foreign jurisdiction in general and Geneva and Monaco in particular.

16. Both the aforesaid special leave petitions were tagged together and on August 21, 2006 during the hearing of the SLPs, the Court enquired from the counsel appearing for respondent No.1 whether he was willing to give an undertaking that he would not withdraw the money from his Swiss bank account. The counsel appearing for the respondent asked for a short adjournment to take instructions regarding the undertaking asked for by the Court and the SLPs were, therefore, directed to be listed on September 4, 2006.

17. On September 3, 2006, the respondent communicated to his lawyer Miss Seema Juneja in writing, stating that he had been in jail for about 7.5 years and after release on bail, under one of the conditions of the bail, he was not permitted to leave Delhi. His request for permission to travel abroad and meet his advocates for consultation had been declined. Therefore, he could not get any information. He further stated in the communication to his lawyer that he had asked Pictet bank for information by fax but he had not received any response. Referring further to the various kinds of proceedings going before the Swiss courts, he requested his lawyer to inform the Supreme Court that he was in India for 10 years and he had no access to his accounts in Switzerland and to submit before the Court that the matter had already been decided after lapse of 10 years (sic). He had not received any reply and he was waiting for further instructions.

18. On September 4, 2006 this Court was informed about the response of the respondent in regard to the undertaking sought for from him and on that date this Court passed the following order:-

> "Instead of giving an undertaking, learned counsel has produced before us a letter dated 3rd September, 2006, said to have been written by the respondent to his advocate, Ms. Seema Juneja, trying, inter alia, to say that he is in India for ten years and has no access to his accounts in Switzerland. It is stated that, in view of what is stated in this letter, the respondent is not in a position to give an undertaking, as noticed in the order dated 21st August, 2006. Be that as it may, we grant leave and expedite the hearing of the appeals which shall be listed for hearing within a period of three months. All the parties agree that the appeal be heard on the existing record. Additional documents, if any, may be filed within two weeks.
>
> Pending disposal of the appeals, the order of stay granted by this Court on 2nd January, 2006, will continue to operate. However, the trial can go on and the respondent, if so advised, can produce such witnesses which have been allowed by the order of this Special Judge. We restrain the respondent from withdrawing the

> amounts from the accounts in Swiss Bank till the decision of these appeals." (emphasis added)

19. The special leave petitions were finally allowed by order, dated December 14, 2006 by which this Court set aside the order of the High Court and remanded the matter for a fresh consideration by the High Court. While concluding the judgment, this Court made the following direction:

> "The interim order dated 4.9.2006 is made absolute to the effect that the respondent is restrained from withdrawing the amount from the accounts in Swiss Bank till the decision of the matter. The appeals are allowed accordingly." (emphasis added)

20. This contempt petition is filed alleging violation of the afore- mentioned two orders, dated September 4, 2006 and December 14, 2006.

21. Let us now take a look at some of the connected proceedings in Switzerland. On June 19, 1996, the petitioner was able to obtain a criminal attachment order against the three accounts in Pictet, including account No.91925 in the name of Tuncay Alankus. However, the criminal attachment order was defreezed on April 1, 2003 as the trial was not concluded within one year and Alankus was not freed on bail during that period as per the terms stipulated by the Swiss authorities.

22. Besides the criminal attachment, dated June 19, 1996, the petitioner was also able to obtain the civil attachment of the three bank accounts in question on October 3, 2000 from the Court of First Instance, Geneva.

23. On September 30, 2002, Pictet and Cie Bank, Geneva, informed the Federal Department of Justice and Police, Geneva, as follows:-

> "Please share below the total balance of the sued accounts.
>
> Their credits (value on 30.09.2002) are as follows:-
>
> Account No.91923 owner Karsan Ltd. – US$ 232,253/- Account No.91924 owner Mr. Cihan Karanci – US$ 394,757/-
>
> Account No.91925 owner Mr. Tuncay Alankus – US$10,763,412."

> 24. The civil attachment order dated October 3, 2000 became inoperative on June 1, 2006 when the petitioner lost its appeal in Swiss Supreme Court.

And it was presumably for that reason that the stay petition was filed by the petitioner in SLP(criminal) No.13 of 2006 which was apparently on an altogether different issue. Nonetheless, this Court deemed fit to pass the order dated September 4, 2006 prohibiting respondent No.1 from withdrawing any money from the accounts in Swiss bank.

25. On September 9, 2006, the advocate of the petitioner sent a copy of the order dated September 4, 2006 passed by this Court to Pictet which was received by Pictet on September 21, 2006.

26. On December 12, 2006, the petitioner's Swiss lawyer applied for attachment in respect of the amounts lying in Pictet including the amount lying in the accounts of respondent No.1.

27. On December 15, 2006, the Court of the First Instance at Geneva granted attachment in favour of the petitioner against respondent No.1 and others in respect of the amount lying in Pictet. Pictet acknowledged the Sequestration order sent by the petitioner's Swiss attorneys vide its communication dated, December 20, 2006 which is as under:

> Concerns: sequestration no. 06 070 321 Z-C/30199/06 Dear Sir, We acknowledge receipt of your mail dated 15 December 2006 and have taken good note of its contents.
>
> Remaining at your disposal and with regards.
>
> For PICTET & CIE Signature"

28. Apparently this attachment too lapsed and finally on March 4, 2009, the petitioner's Swiss lawyer obtained a fresh attachment order from the Court of First Instance, Geneva, but on March 9, 2009 Pictet informed the Debts Collection Office at Geneva that they do not hold any assets, inter alia, on behalf of respondent No.1.

29. On April 23, 2009, the Debts Collection Office at Geneva forwarded the letter dated March 9, 2009 of Pictet to the Swiss Attorneys of the petitioner and, completely surprised by the bank's response. the petitioner filed this contempt petition on August 26, 2009.

30. Mr. Gourab Banerjee, learned Additional Solicitor General appearing for the petitioner strongly argued that respondent No.1 had withdrawn a huge sum of money amounting to US$10,763,412 from his account No.91925 with Pictet in brazen violation of this Court's prohibitory orders, dated September 4, 2006 and December 12, 2006 and he is, therefore, liable to be given the most stringent punishment.

31. At first sight the conduct of the respondent may indeed appear contumacious but, a careful scrutiny of the material facts makes it clear that respondent No.1 cannot really be held guilty of contempt.

32. It may be recalled here that on November 21, 2011 on hearing counsel for the parties, this Court had passed the following order:-

> "Mr. Shanti Bhushan, senior advocate appearing for the contemnor - Tuncay Alankus, stated that on September 04, 2006, when this Court passed the interim order of injunction against his client (which was later confirmed by order dated

December 14, 2006), there was no money in his account No. 91925 with the PICTET & CIE Bank, Geneva. There is, therefore, no question of any withdrawals from that account after that date in violation of the court's orders.

In support of the statement, Mr. Bhushan placed great reliance on the decision of the Swiss Supreme Court dated June 01, 2006. The decision of the Swiss Supreme Court indeed takes note of the fact that on November 29, 1995, the petitioner (National Fertilizers Limited) paid a sum of $3,76,20,000 into Account No. 91923 held by Karsan Danismanlik Turizm Sanayi Ve Ticaret Limited STI (shortly known as 'Karsan'). It then goes on to give a break up of the aforesaid sum of $3,76,20,000 from which, on the following day, i.e. on November 30, 1995, a sum of $2,81,00,000 was transferred to the contemnor's personal account No. 91925.

From the Swiss Court decision, it is not clear that on the date this Court passed the injunction order restraining the contemnor from withdrawing any amount from his account, the account was already bereft of any money.

Mr. Bhushan also relied upon a Certificate issued by the Bank, according to which the account in question was closed on July 25, 2006.

Mr. Gourab Banerjee, Additional Solicitor General appearing for the petitioner, submitted that on the date this Court passed the interim order against the contemnor, there was substantial money in his account. In support of this averment, he referred to the order dated June 24, 1996 passed by the Special Judge, Delhi, granting bail to the contemnor and a certificate dated September 30, 2002 issued by the Bank (a copy of which is at Annexure P-3 of the Contempt Petition).

On the basis of the materials so far produced before us, we are not satisfied and we find it difficult to hold with any conviction that on the date the interim order of injunction was passed against the contemnor, there was, in fact, no money in his account with the PICTET& CIE, Geneva.

However, one thing is clear from the decision of the Swiss Court; that is, on November 30, 1995, a sum of $2,81,00,000 was credited to the contemnor's personal account from the amount deposited by the petitioner in the account of Karsan.

> We would like to see the bank statement of the contemnor's Account No. 91925 held with PICTET & CIE Bank

from November 30, 1995 till the date of the closure of the account on July 25, 2006 to see the inflow and outflow of money from that account.

Mr. Bhushan prays for some time for producing the bank statement. As prayed by him, put up after six weeks.

Let a copy of this order be given to the counsel for the contemnor."

33. In pursuance of the aforesaid order, respondent No.1 has filed an affidavit enclosing a copy of the bank statement certified by Pictet and Cie bank, Geneva. From the bank statement it appears that the entire amount in account No.91925 was withdrawn by June 21, 2006 and on that date, the balance had become nil. The bank has also issued a certificate dated September 13, 2010 stating that account No.91925 was closed in their books on July 25, 2006.

34. Mr. Banerjee submitted that no reliance could be placed on the bank statement and the number of affidavits filed on behalf of respondent No.1. He referred to the acknowledgement made by Pictet bank on September 30, 2002 according to which, on that date, a sum of US$10,763,412 was lying in account No.91925 of Tuncay Alankus. Mr. Banerjee submitted that the aforesaid amount must have remained in the account until June 1, 2006, the date on which the Swiss Supreme Court dismissed the appeal preferred by the petitioner. Further, Pictet in its communication of January 8, 2007 had clearly acknowledged the sequestration order and had assured that it had taken good note of its contents. It is, therefore, not possible to believe that the account had come to nil on June 21, 2006 and it was closed on July 25, 2006.

35. In the letter of Pictet dated January 8, 2007, a copy of which is enclosed as Annexure P15 (collectively) the debtor's name is given as "Karsanrizm"; further, the letter does not state that on that date account No. 91925 in the name Alankus was alive and was bearing some amount. Moreover, the bank is not a party to the present proceedings and, therefore, we would not like to make any comment on the conduct of the bank. But on the materials produced before us, it is very difficult to hold the respondent guilty of contempt and to punish him for committing contempt of court.

36. From the facts stated above, it is clear that the attachment against the respondent's account was lifted on June 1, 2006 when the Swiss Supreme Court dismissed the petitioner's appeal and the petitioner was able to obtain the next attachment order only on December 15, 2006. There was, thus, a period of slightly over six months when there was no attachment order in respect of the account and according to the bank's statement, the amount was withdrawn on June 21, 2006 (i.e. , twenty days after the attachment order was lifted) and the account was closed on July 25, 2006. It is, thus, clear that on September 4, 2006 when this Court passed the order prohibiting respondent No.1 from withdrawing any money from the account there was actually no money in the account. That being the position, there could be no question of committing any violation of this Court's order by respondent No.1.

37. Mr. Banerjee referred to the many affidavits filed by respondent No. 1 and submitted that in those affidavits he has been taking inconsistent stands. It is true that the respondent has filed as many as eight affidavits and in all those affidavits his position does not appear to be completely consistent. But, it must be recalled that as far back as in September, 2006 and long before this contempt proceeding commenced, the respondent had instructed his counsel to submit before this Court, that he was not permitted to leave Delhi for the past ten years and since he was not getting any response from the Swiss banks, he was not aware of the state of his affairs in Switzerland and

was, therefore, unable to give the undertaking as asked for by this Court. Moreover, any inconsistencies in the stand of the respondent before this Court coupled with the ambiguities in the communications from Pictet may give rise to a suspicion of wrong doing. But without anything else we find it very difficult to hold the respondent guilty of contempt of court on the definite charge that he withdrew a very large amount from his account in Pictet in violation of the orders of this Court.

38. In Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh and others[1], this Court after referring to a number of earlier decisions, in paragraph 19 of the judgment, observed as under:-

> "In S. Abdul Karim v. M.K. Prakash, Chhotu Ram v. Urvashi Gulati, Anil Ratan Sarkar v. Hirak Ghosh, Daroga Singh v. B.K. Pandey and All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi, this Court held that burden and standard of proof in contempt proceedings being quasi-criminal in nature, is the standard of proof required in criminal proceedings, for the reason that contempt proceedings are quasi criminal in nature."
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> 39. In Chhotu Ram v. Urvashi Gulati and another[2], this Court in paragraph 2 and 3 of the judgment held as under:-
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> "2. As regards the burden and standard of proof, the common legal phraseology "he who asserts must prove" has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the "standard of proof", be it noted that a proceeding under the extraordinary jurisdiction of the court in terms of the provisions of the Contempt of Courts Act is quasi- criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond all reasonable doubt.
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> 3. Lord Denning (in Bramblevale Ltd., Re) lends concurrence to the aforesaid and the same reads as below: (All ER pp. 1063H-1064 C).

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.... Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt."

40. Mr. Banerjee submitted that a charge of contempt may also be established on preponderance of circumstances and in support of the submission he relied upon a decision of this Court in Rajendra Sail v. M.P. High Court Bar Association and others[3].

41. We have gone through the decision relied upon by Mr. Banerjee and we find that in Rajendra Sail, the Court held the contemnor guilty on the basis of "preponderant circumstances". In other

words, all the circumstances taken together led to the unimpeachable finding of the contemnor's guilt. But that is not to say that in Rajendra Sail this Court relaxed or diluted the standard or degree of proof to establish the guilt of contempt.

42. In the case in hand on taking into account all the circumstances as discussed above, we are of the view that it would not be wholly reasonable to hold that the respondent withdrew large amounts from his account with Pictet in violation of this Court's orders.

43. For the reasons discussed above, we hold that the respondent cannot be held guilty of contempt.

44. Coming back to the order, dated April 1, 2010 by which this Court held that the respondent had withdrawn money from his account with Pictet by flouting the orders of this Court, it is to be noted that that order is founded on the premise that the respondent had not denied the allegation made by the petitioner against him. It is, however, to be noted that the respondent in his reply to the contempt petition filed on March 3, 2010 had stated in paragraph 2 (XIV) as under:

> "The Respondent takes liberty for reiterating that he has not withdrawn any amount in spite of (sic.) the order passed by this Hon'ble Court."

45. The order dated April 1, 2010, was, thus, clearly based on an erroneous premise of fact. It is, accordingly, recalled.

46. For the reasons discussed above, we find no merit in the contempt petition. It is dismissed.

.....J. (Aftab Alam) .....J. (Ranjana Prakash Desai) New Delhi;

April 2, 2013.

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[1] (2010) 3 SCC 705
[2] (2001) 7 SCC 530
[3] (2005) 6 SCC 109 at paragraph 45
