

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

+ **FAO (OS) 398/2009**

% Reserved on: 20th September, 2010

Decided on: 08th October, 2010

Shri L.C.Sharma

.....Appellant
Through: Mr. Rakesh Kumar Garg,
 Advocate

versus

P.C. Sharma & Co. & Others

.....Respondents
Through: Mr. Sandeep Sharma and
 Ms. Kanika Singh, Advocates

Coram:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not necessary |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MUKTA GUPTA, J.

1. The present Appeal arises out of the Impugned Order dated 1.9.2009 whereby the Appellant's Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter 'A&C' Act) was dismissed. By the said Petition the Petitioner had prayed for restraining the Respondents from encashing or appropriating the

amount of ₹ 45 lakhs deposited by the DDA with the Registry of this Court and also a direction to the Respondent No.8 that is the Punjab National Bank from restraining it from making any payment from the Account No.036002100012593 in Punjab National Bank, Sarvodaya Enclave Branch.

2. The facts relevant to the present controversy are that the Petitioner was a partner of 20% share in M/s. Prem Chand Sharma & Co. carrying on the business of construction vide partnership deed executed between the Petitioner and his brothers initially on 9th October, 1978 and subsequently renewed on 2nd April, 1980. In view of the ongoing construction works the disputes were referred to the Arbitrator and in one such reference an Award was passed in favour of the partnership firm, that is, the Respondent No.1 by the Arbitrator on 16th April, 1989 and subsequently made a rule of the Court vide Order dated 8th November, 2005. On an Execution Petition being filed by the partnership firm through one of its partners at that time, the Petitioner filed an Application under Section 151 CPC praying to restrain the DDA from disbursing the decretal amount to Sh. P.C. Sharma and to handover to the Appellant who executed the agreement and the Award. This Application of the Appellant was dismissed in default and on an Appeal being filed the same was dismissed as withdrawn with liberty in view of the observation of the Division Bench of this Court that if there were *inter se* disputes between the partners, the proper course for the

Appellant was to file independent proceeding/suit relating to the partnership and obtain appropriate orders in the said suit to ensure that money is not appropriated by wrong persons. It is thereafter that the Petitioner filed an Application under Section 9 of the A&C Act seeking enforcement of the Arbitration clause in the partnership deed dated 2nd April, 1988.

3. Learned counsel for the Appellant contends that the Application of the Appellant in the Execution Petition was wrongly dismissed by the learned Single Judge as his Application on 23rd February, 2007 was adjourned to 8th May, 2007 which was also the date fixed for the Execution Petition. However, the Respondent herein surreptitiously moved an Application for early hearing of the matter, of which no notice was given to the Appellant and got the matter preponed to 3rd April, 2007. Though the Application ought not to have been listed on 3rd April, 2007 as the date fixed in the Application was 8th May, 2007, however, the same was listed and dismissed as neither the Appellant nor his counsel were present. However, this issue cannot be agitated in the present Appeal as against the said grievance the Appellant had already availed his remedy vide EFA (OS) 12/2007 wherein in view of the above mentioned observations of the Division Bench of this Court the Appellant withdrew the Appeal on 28th May, 2007 with liberty to take appropriate remedy in accordance with law.

4. The next grievance of the Appellant is that the so-called retirement deed though signed was not acted upon in view of the fact that it was to come into force on the payment of the shares of the Appellant by the Respondent No.1. That contingency having not been complied with, the retirement deed dated 1st April, 1982 is a *nonest* document. The relevant clauses of the retirement deed state:-

“5. That the outstanding amounts of the parties of first part shall be paid by the parties of the second part within 12 months of this deed or such other time as may be mutually agreed upon, in cash or kind without any interest.

6. That in consideration of the sum determined to be paid to the retiring parties, the retiring parties do hereby release and relinquish their share in the firm and its assets to the continuing parties.”

5. The Appellant represented the firm during the arbitration proceedings and in this regard the relevant order sheets of the arbitration proceeding have been relied upon wherein the presence of Appellant was recorded as the contractor virtually on all dates thereby demonstrating the non-effectuation of the retirement deed. It is stated that the learned Single Judge erred in observing these documents to be self serving documents and not relying upon the same. To the objection of the learned counsel for the Respondents with regard to delay and laches in seeking enforcement of the arbitration clause on the basis of the partnership deed dated 2nd April, 1988 it is stated that there is no delay and immediately on the disputes the Appellant moved an

Application before the Executing Court which was dismissed in default however, on an Appeal being filed liberty was granted to him to take action as per law. Accordingly the period spent in pursuing these proceedings is required to be condoned under Section 14 of the Limitation Act. The contention is that the cause of action arises only when the misappropriation of the amount takes place and not prior thereto. According to learned counsel the Appellant had issued the notice for appointment of Arbitrator in terms of the partnership deed and on the failure of the Respondent to respond he has appointed an Arbitrator who has entered upon the reference however, the Respondents have not participated. Reliance is placed on *Smt. Gangabai vs. Smt. Chhabubai, AIR 1982 SC 20* to contend that oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document was entered into between the parties.

6. In response learned counsel for the Respondent contends that the Appellant had retired from the partnership vide retirement deed dated 1st April, 1982 wherein all issues and disputes between the partners were settled and the said retirement deed contains no arbitration clause. In the absence of an arbitration clause in the retirement deed the recourse to arbitration proceedings is not permissible. Moreover, the present Petition is hopelessly barred by delay and laches as the

Appellant cannot seek the avoidance of the retirement deed dated 1st April, 1982 after 27 years. As the Appellant was working on this contract he continued to appear before the Arbitrator during the arbitration proceedings however, the same would not give him a right to be entitled to a share in the decretal amount to be received by the partnership firm. After the retirement of the Appellant and two other partners, the partnership then entered into has also changed and now P.C.Sharma and Ravi Sharma are the two partners in the firm. Further vide public notice dated 6th April, 2002 P.C.Sharma had cancelled/revoked all general power of attorneys given as partner of or on behalf of M/s. Prem Chand Sharma & Co. or M/s. P.C.Sharma & Co.

7. We have heard learned counsel for the parties. The learned Single Judge had dismissed the Petition of the Appellant under Section 9 of the A&C Act on the ground that he could not raise a dispute qua the avoidance of the retirement deed after 27 years of the execution thereof and also that he had no prima facie case in his favour. We are in agreement with the order passed by the learned Single Judge.

8. The contention of the learned counsel for the Appellant that the retirement deed was not acted upon though signed as the contingency of the payment within a period of one year to the Appellant was not acted upon, is wholly untenable. Though the learned counsel continued appearing before the arbitration proceedings pursuant to which an

Award was passed on 24th June, 1989, however, the Suit for making the said Award a rule of the Court under Section 14 (2) and 17 of the Arbitration Act, 1940 was filed by M/s Prem Chand Sharma through Shri Ishwar Dutt Sharma son of Shri Prem Chand Sharma as a registered partner on 4th July, 1989. Thus, the Appellant had no role in getting the Award made a rule of the Court. The Appellant had not filed the said proceedings and were pursued by Shri Ishwar Dutt Sharma, the registered partner of M/s Prem Chand Sharma and in case the retirement deed had not been acted upon then in view of the earlier partnership continuing, Shri Ishwar Dutt Sharma had no locus to represent the firm in the said Suit. The Appellant has not challenged the said proceedings nor the Order thereon. This Award was made a rule of the Court on 8th November, 2005 and an execution petition was filed by Shri Ravi Sharma son of Shri Prem Chand Sharma as a partner of M/s Prem Chand Sharma and Company on 16th January, 2006. The Appellant did not even file the execution petition. It is only in the execution petition that the Appellant filed a miscellaneous application in February, 2006 under Section 151 CPC for appropriate directions which as stated above was dismissed in default on 3rd April, 2007. Even if the time spent in pursuing this remedy is excluded in terms of Section 14 of the Limitation Act, the same would only exclude the time period from February, 2006 to the date of decision of the Division Bench, that is, 28th May, 2007. The petition under Section 9 is still

barred by limitation. Vide Order dated 28th May, 2007 the Division Bench certainly did not grant to the Appellant any extension of time to challenge the retirement deed dated 1st April, 1982 contrary to the law of limitation.

9. In view of the fact that we have held that the proceedings were hopelessly barred by delay and laches and thus beyond the period of limitation we need not delve into the rival contentions raised by the parties as to whether an Arbitrator could be appointed or not in terms of the partnership deed dated 2nd April, 1980.

10. The Appeal is accordingly dismissed.

(MUKTA GUPTA)
JUDGE

(VIKRAMAJIT SEN)
JUDGE

OCTOBER 08, 2010
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