

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.10.2018

Delivered on : 13.11.2018

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P(NPD).No.1273 of 2012

1.Shafi T.P.

2.Miandad.P

...Petitioners

Vs

1.The Five Star Tea (Pvt) Ltd
Rep. by its Managing Director
Kalampuzha Road, Athipaly Post,
Gudalur Village & Taluk,
Nilgiris District.

2.K.K.Shaji,
Managing Director,
Five Star Tea (Pvt) Ltd

...Respondents

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PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India against the Judgment and Order in I.A.No.44 of 2009 in O.S.NO.42 of 2008 dated 20.12.2011 on the file of the Learned District Judge, Nilgiris, Udhagamandalam.

For Petitioners : Ms.Ramya
for Mr.N.Ramesh

For Respondent 1 : Mr.C.A.Diwakar

For Respondent 2 : Not ready in Notice

ORDER

The plaintiffs in the suit O.S.No.42 of 2008 are the revision petitioners before this Court challenging the order passed by the District Judge, Udhagamandalam, Nilgiris in I.A.No.44 of 2009 in and by which the learned Judge had dismissed O.S.No.42 of 2008 and directed the plaintiffs/revision petitioners to seek the remedy before the Arbitrator as provided under the Arbitration Clause in the Partnership deed dated 28.11.2007.

2.The facts in brief without traversing into the minute details of the Suit are as follows:

The Revision Petitioners had filed the suit in O.S.No.42 of 2008 on the file of the learned District Judge, Udhagamandalam, Nilgiris for the following reliefs:

"(a)Plaintiffs be granted a decree for recovery of the sum of Rs.74,00,000/- (Seventy Four Lakhs only) from defendants with the interest at the rate of 15% per annum from the date of suit, till realization and also to create a charge over the plaint schedule properties.

(b)Plaintiffs be granted a decree of permanent injunction restraining the defendants from making any encumbrance over the plaint scheduled property."

3.The suit is instituted on the basis that the 1st Respondent Company which was going through a financial crises had through the 2nd Respondent scouted around for prospective investors who could be inducted as partners to infuse funds and in that process renovate and develop the business of the 1st Respondent Company. With this object, the 2nd Respondent herein and defendant Nos.3 to 10 had approached the revision petitioner on 02.11.2007. After negotiations, a Partnership agreement dated 28.11.2007 was entered into incorporating the oral agreement. The case of the revision petitioners is that the respondents herein did not adhere to the terms of the agreement and the Partnership never came into existence. The only intent of the respondent was to swindle the money of the revision petitioners. Hence, they had come forward to file the suit. Defendant Nos.3 to 10 were impleaded as Directors of the 1st respondent Company and the 10th defendant as wife of the 2nd respondent herein. However, defendant Nos.3 to 10 are not parties to the Partnership Deed.

4. After entering appearance in the suit, the respondents herein filed an application in I.A.No.44 of 2009 under Section 8 of the Arbitration and Conciliation Act, 1996, to direct the parties to Arbitration considering that the Partnership deed dated 28.11.2007 contained an Arbitration Clause and therefore the suit could not be proceeded. They had also produced the Partnership Deed.

5. This application was opposed by the revision petitioners who would contend that the Partnership Act never came into existence and was never acted upon. Since allegations of fraud have been raised it is only a Civil Court which can go into the issue.

6. They have further contended that the respondents had been actively participating in the proceedings and had also filed a written statement and the 9th defendant had also filed their

counter. Therefore, on this account also parties cannot be referred to arbitration.

7.The learned District Judge, Nilgiris, after hearing both parties by order dated 20.12.2011, allowed the petition and directed the revision petitioners herein to seek the remedy before the arbitrator as provided under the Partnership Deed dated 28.11.2007. This order is the subject matter of challenge by the plaintiffs/revision petitioners.

8.Heard, Mr.N.Ramesh, learned counsel, on behalf of the revision petitioner. He would contend that the order is bad in as much as the revision petitioners had come forward with the suit making several statements about the fraud that had been committed by the revision petitioners. That apart, the learned counsel would argue that the Partnership agreement is only between the revision petitioners and the respondents herein, however, the suit has been intituted against eight other persons who are not parties to the Partnership deed and therefore they

cannot be compelled to go before the arbitrator. In support of his argument, he would rely on the Judgment of the Honourable Supreme Court in ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya*** reported in **2003(5) SCC 531** and the Judgment in ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others*** reported in **2011(5) SCC 532** equivalent to **CDJ 2011 SC 451**. In the Judgment first cited the learned counsel would rely upon the observation of the Honourable Supreme Court with reference to the words "in a matter which is the subject matter of an arbitration agreement" which the parties agreed to refer. However, if the suit is commenced with reference to the matter which is outside the arbitration agreement and is between parties who are not parties to the agreement then in such an event the provisions of Section 8 would not be applicable. In the case second cited, the learned counsel would rely on the penultimate paragraph of the Judgment wherein the Honourable Supreme Court had relied on with approval the Judgment in the Suganya Holdings matter.

Therefore, the learned counsel would argue that in the light of the revision petitioners pleading extensively about the fraud that had been committed by the respondents and considering the fact that third parties are also parties to the suit, who are not parties to the Partnership agreement it is only a suit that would lie.

9. Per contra, Mr.C.Divakar, learned counsel appearing on behalf of the respondent would submit that the plaint is nothing but an astute drafting whereby the revision petitioners had sought to introduce facts in order to avoid arbitration. He would refer to the plaint to show how the so called allegations of fraud have been made only within an intent of impleading defendant Nos.3 to 10 in order to some how get an order with reference to the suit schedule property which belongs to the defendant Nos.4 to 8 who are in no way connected with the Partnership. He would also invite the attention of the Court to paragraphs 8 and 9 where the revision petitioners has alleged that the second respondent herein and the 9th defendant had demanded more

money and further that the respondents herein and the 9th defendant had deliberately concealed the documents pertaining to the first respondent herein despite demands by the plaintiff. Infact in paragraph 10 the revision petitioner has made the following statement he would also argue that except for a stray reference to the 9th defendant and the 8th defendant there is no specific allegations against defendant Nos.3 to 10 and as to how they are interested in the Partnership. He would rely on the Judgment reported in **2018 SCC OnLine SC 487** where the Honourable Supreme Court had extensively dealt with Section 8 of the Arbitration and Conciliation Act in connection with agreements being entered into between parties who are not connected with the principal agreement in which the arbitration clause is found.

10. The Honourable Division Bench had been called upon to consider the issue in the light of the Judgment in **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya** reported in **2003(5)**

SCC 531. The Honourable Supreme Court, according to the counsel, had drawn heavily from the Law Commission reports with reference to the purport and the object behind amending Section 8 of the Arbitration and Conciliation Act. In paragraph 30 of the said Judgment, the Bench has extracted the Case of the Law Commission in its 246th report while recommending the amendment to the Section 8. The Bench has also relied upon the Judgment of the another Bench of the Honourable Supreme Court reported in **2016 (10) SCC 386**. He would therefore submit that the allegations of fraud and the inclusion of defendant Nos.3 to 10 have been made with the deliberate intent of ensuring the parties are not referred to arbitration.

11. Heard both parties and perused the records. A reading of the plaint would indicate that the plaintiff/revision petitioner was under financial crisis during the December 2006 to May 2007 for which they require funds. The plaint proceeds with the averments that the 2nd and 9th defendants had negotiated with

the plaintiffs on behalf of the first respondent Company to infuse funds by entering into Partnership with the revision petitioners. The learned counsel for the revision petitioner had further averred that the second respondent herein and the 9th defendant had promised to convene a general body meeting to authorize the reduction of the capital of the first respondent Company from Rs.100,000,000/- to Rs.1,50,00,000/- and ratify the contract of Partnership entered into between the first respondent Company and the revision petitioners. The revision petitioners had agreed to pay a sum of Rs.50,00,000/- towards their 50% share of investment in good faith. In pursuance of this agreement, the respondents herein had asked the revision petitioners to pay a token advance of Rs.5,00,000/- favouring the 8th defendant. The revision petitioner had issued a posted Cheque for Rs.5,00,000/- in favour of the 8th defendant, which was also encashed by him. After this, the revision petitioners and respondents had agreed to reduce this oral agreement into writing in a document styled as a Partnership deed on 28.11.2007. After this the second

respondent had received an additional amount of Rs.20,00,000/- from the revision petitioners for which a voucher was also issued to the revision petitioner. The revision petitioner had projected that the negotiation were done by the first respondent and the 9th defendant. Apart from introducing the 9th defendant as a person who had negotiated the deal and the 8th defendant as the person who received the initial payment of Rs.5,00,000/-. There are no other averments in the plaint regarding either defendants 8 and 10 or the other defendants. It is therefore seen that defendant Nos.3 to 10 are neither proper nor necessary parties to this suit. As regards the allegation of fraud the revision petitioners would contend that the failure on the part of the respondents to enter into the further agreement would amount to fraud. As rightly pointed out by the learned counsel for the petitioner it is a case of astute drafting made with an intent of overcoming the Arbitration Clause in the Partnership Agreement.

12.The Honourable Supreme Court in its Judgment

reported in **2016 (10) SCC 386** in paragraph 18 has dealt with the issue of fraud. The Honourable Supreme Court has held as follows:

"When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demands extensive evidence for which the civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become

a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court. The judgment in N.Radhakrishnan does not touch upon this aspect and the said decision is rendered after finding that allegations of fraud were of serious nature."

13. Therefore, unless the allegations of fraud is of such a serious nature parties who have agreed to arbitrate the disputes cannot be forced to continue the suit before the Civil Court. In the case of hand such serious allegations of fraud have not be set out.

14. The next ground, namely, the persons or parties who are not signatories to the arbitration agreement are parties to the suit and therefore cannot be forced to Arbitration it is seen that the pleadings does not show as to how the lis has been made

against Defendant Nos.3 to 10, the breach if any committed by them, so as to give rise to claim against them by the revision petitioner/plaintiff. The revision petitioners have not been able to make out any agreement between them and defendant Nos.3 to 10, that being the case, the revision petitioners cannot object to referring the dispute to arbitration on the ground that parties who are strangers to the arbitration agreement contained in the Partnership deed is before the Court and a claim is made against them.

I therefore find no infirmity in the Order passed by the Learned District Judge, Udagamandalam, Nilgiris. In the result this Civil Revision Petition is dismissed.

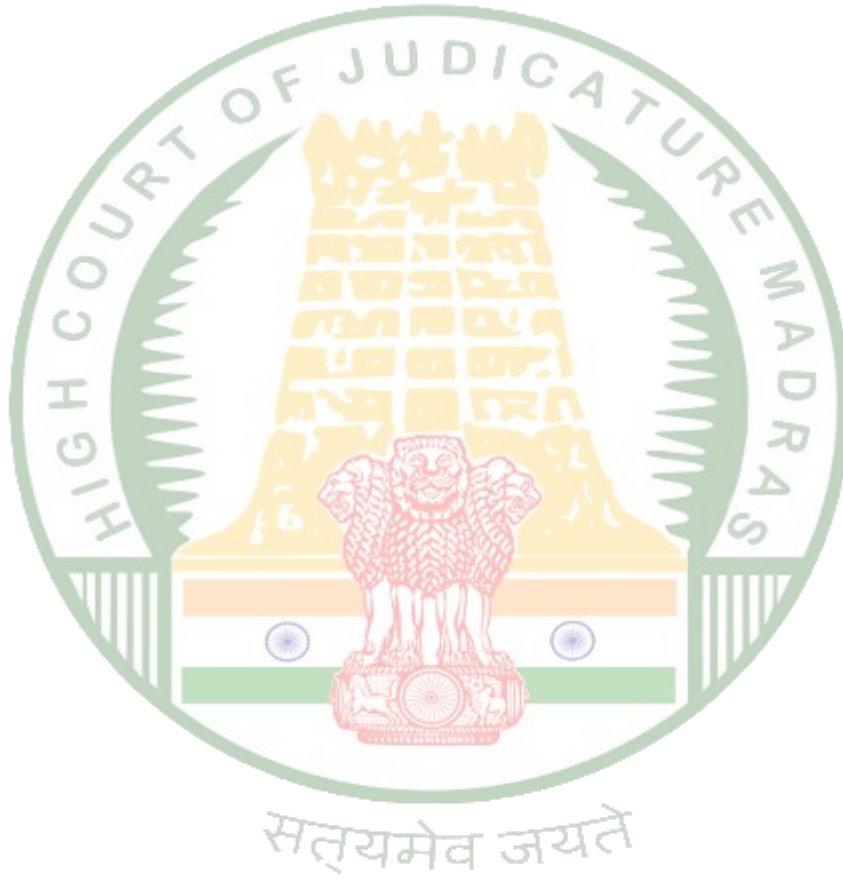
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Index : Yes/No
Speaking order/non-speaking order

To
The Learned District Judge,
Udhagamandalam,
Nilgiris.



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P.T.ASHA, J.,

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Pre-delivery order in
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