IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 01st DAY OF FEBRUARY 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

A. No.8108 of 2017
in
C.S. No.647 of 2017

G.G.Srinivasan,
S/o.G.Manavalan,
Amrutha Bhavanam,
Plot No.4, 3rd Street,
Iswarya Garden Extension,
Medavakkam, Chennai-600 100. ... Plaintiff

-Versus-

K.Babu,
S/o.S.Kuppusamy,
having office at No.320,
Flat No.A1, Sakthi Elegance,
Velachery Main Road,
Velachery, Chennai-600 042. ... Defendant

A. No.8108 of 2017:-

K.Babu,
S/o.Kuppusamy,
No.4/3, Jyotsna Alacrity Flats,
Padmavathy Nagar, Velachery,
Chennai-600 042. ... Applicant/Defendant

-Versus-

Mr.G.G.Srinivasan,
S/o.G.Manavalan,
Amrutha Bhavanam,
Plot No.4, 3rd Street,
Iswarya Garden Extension,
Medavakkam, Chennai-600 100. ... Respondent/Plaintiff

Application praying that this Hon'ble Court be pleased to be referred to arbitration as per arbitration clause 12.1 of the Memorandum of Understanding dated 31.05.2016, entered between the plaintiff and defendant.

This Application coming on this day before this court for hearing the court made the following order:-

This application has been filed, seeking to refer the suit in CS.No.647 of 2017 for arbitration in accordance with Clause 12.1 of the Memorandum of Understanding, dated 31.5.2016 entered into between the Plaintiff and the Defendant.

2. CS.No.647 of 2017 has been filed, by G.G.Srinivasan, against K.Babu. According to the Plaintiff, the Defendant was carrying on the business of clinical pathology as a Sole Proprietor under the name and style of M/s.Venkateswara Clinical Lab, at No.51, Velachery Main Road, Chennai-42. In the year 1997, the Plaintiff and the Defendant had formed a partnership Firm under the name and style of M/s.Venkateswara Clinical Lab and a partnership deed, dated 21.05.1997 was entered into between them. Both the Plaintiff and the Defendant contributed Rs.2 lakhs each towards capital. Subsequently, the Plaintiff and the Defendant had jointly purchased an undivided share of 490 sq.ft. in land measuring 20928 sq.ft. in S.No.392/1 of 137, Orandiamman Koil Street, Velachery, Chennai, by a sale deed dated 13.9.2001 registered as Document No. 3625 of 2001 in the Office of the Sub Registrar, Velachery. They also jointly constructed an apartment with a total plinth area of 1040 sq.ft. in the ground floor called 'Flat A1, Sakthi

Elgance, No.320, Velachery Main Road, Velachery, Chennai-42'.

3. In the year 2002, the Plaintiff and the Defendant had entered into a fresh partnership deed, dated 6.5.2002 and changed the name of the partnership Firm to 'Venkateswara Diagnostic Center'. The partnership firm made huge profits. The Plaintiff also advanced a sum of Rs.8,49,815/- as unsecured loan to the partnership Firm for purchase of laboratory equipments. However, the Defendant did not care for the business. The entire responsibilities were shouldered by the Plaintiff alone. Subsequently, the Plaintiff and the Defendant entered into a Memorandum of Understanding on 31.5.2016 to dissolve the partnership Firm and distribute the assets and liabilities between themselves. The loan amount advanced by the Plaintiff had to be paid back by the Defendant. The Defendant should not interfere with the business conducted by the Plaintiff's wife, J.Bhuvanasankari, in the name of Venkateswara Diagnostic Center at Medavakkam, Chennai. The Plaintiff agreed to execute a release deed, relinquishing his one half share in the suit properties subject to payment of one half of the value of the suit properties and one half share in the goodwill of the partnership Firm.

4. According to the Plaintiff, the Defendant did not comply with the conditions. By violating clause 1.5, the Defendant was also tarnishing the image of the Plaintiff and

he also conducted camps within the business circle of the Plaintiff. According to the Plaintiff, the Memorandum of Understanding was not acted upon and is not binding upon the Plaintiff. The Plaintiff issued a notice dated 27.03.2017, claiming one half share in the suit properties and also one half share in the goodwill of the partnership Firm. The Plaintiff also sought a declaration that the Memorandum of Understanding dated 31.5.2016 was not acted upon and not binding on the Plaintiff. He also filed the suit for division of the property into two equal parts and also for injunction against the Defendant.

5. Along with the plaint, the suit summons was served on the Defendant on 29.8.2017. The learned counsel has entered appearance for the Defendant and filed the present application, seeking to refer the dispute to arbitration.

6. According to the Defendant, a Memorandum of Understanding dated 31.5.2006, had been entered into between him and the Plaintiff. Subsequently, after disputes arose, the Plaintiff had also written to the Manager of Bank of India, Velachery, informing them about the disputes and consequently, the joint current account of the partnership Firm had also been suspended by the said Bank. The Defendant has further stated that he had performed his obligation set out in clauses 1.6, 1.6.1 and 1.7 and had settled the

Plaintiff with respect to his dues and had also taken all the liabilities of the partnership Firm. However, the Plaintiff delayed to release his 50% share of the property at Flat A1, Sakthi Elgance, No.320, Velachery Main Road, Velachery. The Defendant had sent an email to the Plaintiff on 26.10.2016. According to the Defendant, he did not violate any of the conditions stated in the Memorandum of Understanding. The total amount of Rs.35,73,133/- invested by both the parties was divided between two parties. Consequently, the Plaintiff cannot state that the Memorandum of Understanding was not acted upon. Efforts were taken to settle the issues, but the Plaintiff did not properly respond. On 1.6.2017, the Defendant had issued a notice for invoking arbitration proceedings under Section 21 of the Arbitration and Conciliation Act, 1996. The Defendant had proposed Mr.U.M.Sankaravel Murugan, Advocate, High Court, Madras, to act as the sole arbitrator. The Plaintiff received the said notice. According to the Defendant, there was a binding arbitration clause in the Memorandum of Understanding. He had also filed OP.No.756 of 2017 under Section 11(6) of the Arbitration and Conciliation Act, 1996, in which the Plaintiff had also entered appearance. Since the Plaintiff had filed the suit, he had filed the present application, seeking to refer the same for arbitration.

7. A counter affidavit has been filed by the

Plaintiff, stating that the application is time barred under Section 8 of the Act. The application had to be filed not later than the time within which he has to file his first statement. According to the Plaintiff, the Defendant was served with the summons by this Court and had to file his written statement within six weeks. Since the Defendant did not chose to file his written statement, the suit had been entered into the list of 'Undefended Causes'. The application should have been filed within the time allowed for filing the written statement. It has been further stated that the original arbitration agreement had not been filed as stipulated under Section 8(2) of the Arbitration and Conciliation Act. It has been stated that the Memorandum of Understanding was void on account of fraud and misrepresentation. It has been stated that he did not issue the letter to the Branch Manager, Bank of India, Velachery. It has been stated that the issues involved can be decided only after trial and consequently, it has been stated that the application should be dismissed.

8. A rejoinder has been filed by the Defendant. He has stated that the vakalat was filed on 15.9.2017 and the suit was listed on 24.11.2017 under the caption 'Undefended Board, Vakalat Returned'. However, the learned counsel informed the Court about the arbitration agreement. Subsequently, the matter was posted on 7.12.2017 and his

counsel brought to the notice of this Court about the filing of the application under Section 11 of the Arbitration and Conciliation Act in OP.No.756 of 2017. It has been further stated that the present application has been filed on 24.11.2017 in Diary No.42550 along with certified true copy of the arbitration agreement. The Plaintiff had also filed the very same arbitration agreement as Document No.4 along with the plaint. It has been further specifically stated that the Plaintiff had acted upon the arbitration agreement and that the Defendant had also acted upon the arbitration agreement. It has been further stated that the application should be allowed.

9. This Court heard the learned counsel on either side. For the sake of convenience, the Applicant herein would be termed as the Defendant and the Respondent herein would be termed as the Plaintiff.

10. The Defendant was carrying on business in clinical pathology as a Sole Proprietor under the name and style of M/s.Venkateswara Clinical Lab, at No.51, Velachery Main Road, Velachery, Chennai. In the year 1997, the Plaintiff and the Defendant had formed a partnership Firm under the name and style of Venkateswara Clinical Lab, by a partnership deed dated 215.1997. They both contributed Rs. 2 lakhs each. Subsequently, by agreement of sale cum construction dated 26.9.2001, entered into between Sakthi

Builders, a partnership Firm represented by its Managing Partner, P.Rajendran and G.G.Srinivasan, the Plaintiff and A.Babu, the Defendant, who were both referred to as purchasers, both the Plaintiff and the Defendant agreed to purchase for construction purposes a land measuring 490 sq.ft. in a larger area of land measuring totally 8 grounds and 1728 sq.ft. for construction of a residential plot with a built up area of 1040 sq.ft. . This was called 'Flat A1' and it was situated in the ground floor in 'Sakthi Elgance' at Velachery. The total sale consideration was Rs.10,40,000/-.

11. As is seen, the Plaintiff and the Defendant had jointly entered into the said agreement. It is, therefore, safe to presume that they had given an equal portion of the consideration jointly. The Plaintiff and the Defendant also by a sale deed dated 13.9.2001 had purchased from M/s.Sree Kandhaswamy Real Estates Company, a partnership Firm, in which document, M/s.Skathi Builders was shown as the Conforming Party, the land measuring 490 sq.ft. in the above said larger property. The total consideration was Rs.2,94,000/- and again, it can be safely presumed that the consideration was jointly paid in equal proportion by the Plaintiff and the Defendant. Thereafter, on 1.4.2002, a fresh partnership agreement was entered into between the Plaintiff and the Defendant. The place of business was at

No.41, Velachery Main Road, Chennai. The name of the partnership Firm was M/s.Venkateswara Diagnostic Center. The profits and losses were to be divided equally. Both the parties were the working partners of the Firm. Remunerations payable to the partners were also given. Even in the partnership agreement, it was specifically mentioned that all disputes would be referred to arbitration.

12. Disputes arose between the parties on 31.5.2016. They entered into a Memorandum of Understanding. In the Memorandum of Understanding, it has been stated that they were running the partnership Firm in the name of Venkateswara Diagnostic Center at Sakthi Elgance, Flat A1, 320, Velachery Main Road, Velachery. It was also mentioned that they are the co-owners of the said property. It has been further stated that the property was also mortgaged with the Laxmi Vilas Bank, Cathedral Road Branch, from where a term loan of Rs.1,70,00,000/- had been obtained on 30.5.2012 towards construction of building and purchase of machinery.

13. It has been stated that the Plaintiff had decided to retire from the partnership Firm. It has been stated that the Defendants shall continue to carry on the business either by himself or with other partners. For the purpose of retirement, it has been decided that a retirement deed or retirement cum reconstitution deed shall be prepared. It had been further agreed that the Plaintiff shall be

relieved from all liabilities from the date of retirement. The Plaintiff had also agreed not to claim any compensation from the Defendant towards his capital contribution. It was further pointed out that the Defendant had issued a cheque for Rs.1,83,200/- by cheque no.002521, dated 7.6.2016 drawn on Bank of India, Velachery Branch.

14. The Defendant had also agreed to settle the balance of Rs.6,66,615/- and he also issued post dated cheques for the said amount dated 7.7.2016, 7.8.2016 and 7.9.2016 all drawn on Bank of India, Velachery Branch each for a sum of Rs.2,22,205/-. The Plaintiff agreed to release his 50% share in the property. There was also an understanding with respect to Venkateswara Diagnostic Center, Medavakkam, which was carried on by the wife of the Plaintiff, J.Bhuvanasankari and with respect to, Venkateswara Imaging and Diagnostics Private Limited. Finally, with respect to disputes or issues arising out of the agreement or claims, it was agreed as follows:-

> "12. Arbitration:-
>
> 12.1. Any and all claims, disputes, questions or controversies involving the parties or any two or more of them and arising out of or in connection with this MOU, or the execution, interpretation, validity, performance, breach or termination hereof (including, without limitation, the provisions of this clause (collectively, "Disputes") shall be resolved by final and binding arbitration held in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time (the "Arbitration Act").

> 12.2. The Disputes shall be referred for arbitration before a Sole Arbitrator to be mutually agreed upon by the parties.
>
> 12.3. The seat and venue of Arbitration shall be Chennai, Tamil Nadu, India and the proceedings of arbitration shall be in English language.
>
> 12.4. The Arbitrator's award shall be final and binding on all the parties and shall be substantiated in writing. The Arbitral Tribunal shall also decide on the costs of the arbitration proceedings. The Parties hereto shall submit to the Arbitrator's award and the award shall be enforceable in any Court of competent jurisdiction."

15. According to the Defendant, the Plaintiff had acted in accordance with the Memorandum of Understanding. He had also written a letter to the Manager, Bank of India, informing them that he had been relieved from the partnership Firm, Venkateswara Diagnostic Center, Velachery. However, the Plaintiff denied writing of letter in his counter affidavit to the application.

16. The suit had been filed for declaration that the Memorandum of Understanding is not binding on the Plaintiff. However, in the legal notice issued on 27.3.2017, prior to the institution of the suit, the Plaintiff had stated that the partnership Firm had been terminated and dissolved with effect from 31.5.2016. In order to regulate the legal formalities, like, liabilities, assets, capital contribution, they had entered into a Memorandum of Understanding on 31.5.2016. The only point made out in the notice was that

the Defendant had not acted in accordance with the Memorandum of Understanding. In the said notice, it has been stated as follows:-

> "My client states that you paid the unsecured loan of Rs.8,49,815/- (Rupees eight lakhs forty nine thousands eight hundred and fifteen only) to my client, by way of 4 cheques. 1) sum of Rs.1,83,200/-, cheque no.002552 , dated 7th June 2016, 2) sum of Rs.2,22,205/-, cheque no.002553, dated 7th July 2016, 3) sum of Rs.2,22,205, cheque no.002554, dated 7th August 2016, (4) sum of Rs.2,22,205/- cheque no. 002555, dated 7th September 2016, the above cheques are drawn on Bank of India, Velachery Branch, which has been realised."

17. It is, thus, seen that the original stand of the Plaintiff was that the Memorandum of Understanding was a document, which was meant to be acted upon and as a matter of fact, the Plaintiff had also realised the amounts paid by four cheques to an extent of Rs.8,49,815/- (Rs.1,83,200/-, Rs.2,22,205/-, Rs.2,22,205/- and Rs.2,22,205/-). Having realised the amounts under those cheques, the Plaintiff has now turned around and stated that the Memorandum of Understanding is not binding on him. In the notice, it has been further stated that the Defendant had not paid any amount to the Plaintiff to the value of 50% of his share in the partnership Firm and 50% of the value of the building. The notice was issued, claiming such shares. These shares had been arrived at only in the Memorandum of Understanding.

18. It is also seen that on 1.6.2017, the learned

counsel for the Defendant had issued a notice, calling upon the parties to refer the disputes to arbitration and appointing a Sole Arbitrator, in accordance with the arbitration clause. The Defendant had appointed Mr.U.M.Sankaravel Murugan, Advocate, High Court, Madras as the sole Arbitrator. This notice was also received by the Plaintiff. The contention of the Plaintiff that the Memorandum of Understanding was not acted upon cannot be accepted since he had realised the cheques issued at the time when the Memorandum of Understanding was entered into. If there are other disputes, the only way to resolve them is to seek arbitration proceedings.

19. It is the contention of the learned counsel for the Plaintiff that the application is time barred and should have been filed within two weeks from the date of service of suit summons. A perusal of the records shows that the Defendant was served on 29.8.2016. In the rejoinder filed by the Defendant to the counter, it has been specifically stated that the vakalat was filed on 15.9.2017 and the application had been filed on 24.11.2017. However, even much earlier, the Defendant had filed an application under Section 11 of the Arbitration and Conciliation Act in OP.No.756 of 2017. As a matter of fact, the present application is only a second application filed by the Defendant.

20. It is clear that the disputes are arbitral in

nature. They arose directly out of the Memorandum of Understanding. In accordance with the Memorandum of Understanding, as stated above, all disputes shall be resolved by arbitration. It was also agreed that the disputes shall be referred to a Sole Arbitrator. The Defendant had also nominated a Sole Arbitrator. The Plaintiff did not join the proceedings, but on the other hand, he had instituted the present suit. The Defendant had also exhausted his remedy by filing an application under Section 11 of the Arbitration and Conciliation Act in OP.No.756 of 2017.

21. It is the further contention of the Plaintiff that the original agreement had not been filed. What has been filed into the Court is the signed certified copy of the Arbitration Agreement. It is for the Arbitrator to decide all those issues.

22. In **2000 4 SCC 539 (P.Anand Gajapathi Raju and Others Vs. P.V.G.Raju (dead) and others)** the Honourable Supreme Court had held that even if a party had applied for arbitration after submission of his statement, there is no bar on the Court for referring the parties to arbitration. It had been held as follows:-

> "**5.** The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:
>
> (1) there is an arbitration agreement;

> (2) a party to the agreement brings an action in the court against the other party;
>
> (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;
>
> (4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.
>
> This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration."

23. In **2006 7 SCC 275 (Rashstriya Ispat Nigam Limited Vs. Verma Transport Co.)** wherein it had been stated as follows:-

> "A party cannot be said to have waived its right to invoke Arbitration Clause or Acquiesced itself to jurisdiction of Court before filing of first statement on the substance of the dispute.
>
> Filing of a reply to the injunction application could also not be a ground to refuse to entertain the plea taken by the Appellants that the suit should be referred to Arbitral Tribunal. Distinction between main proceedings and supplemental proceedings must be borne in mind."

24. In the present case, there are disputes, which are referable to arbitration. The parties had entered into a Memorandum of Understanding, agreeing to refer the disputes to arbitration. The Plaintiff had also acted in terms of the

Memorandum of Understanding by realising the amounts issued under the cheques. He had also realised the amounts, which were issued by cheques, which were post dated. Therefore, he did not raise any grievance so long as he realised the amounts from the cheques. Thereafter, he had raised grievances, which are certainly arbitral in nature. Consequently, this application is to be allowed as prayed for.

25. In the result, this application is allowed, as prayed for. No costs.

Sd./-C.V.K.J

01/02/2018

//Certified to be true copy//

Dated at Madras this the day of 2018.

jj 27/03/2018

COURT OFFICER(O.S.)

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