***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD**

FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**

AND

HON'BLE SRI JUSTICE N. BALAYOGI

+ <u>Civil Miscellaneous Appeal Nos.746 and 858 of 2016</u>

% 09-07-2018

<u>C.M.A.No.746 of 2016</u>

BETWEEN:

M/s. Perfect Welded Mesh Industries, Plot No.C-23,
Cooperative Industrial Estate, Balanagar, Hyderabad,
Represented by its Proprietor Mr. Mohd. Anwar Khan
and another

… Appellant

Vs.

Mohd. Azgar Khan, S/o late Mohd. Sartaz,
Khan, aged 40 years, Occupation business,
Resident of 405, A Block, NASR Apartments,
New AC Guards, Hyderabad and another

… Respondents

<u>C.M.A.No.858 of 2016</u>

BETWEEN:

M/s. Perfect Welded Mesh Industries, Plot No.C-23,
Cooperative Industrial Estate, Balanagar, Hyderabad,
Represented by its Proprietor Mr. Mohd. Anwar Khan
and another

… Appellant

Vs.

Mohd. Azgar Khan, S/o late Mohd. Sartaz,
Khan, aged 40 years, Occupation business,
Resident of 405, A Block, NASR Apartments,
New AC Guards, Hyderabad and another

… Respondents

! Counsel for the Appellant : Mr. R. Raghunandan, Sr. counsel

^ Counsel for Respondents : Mr. D. Madhava Rao, for R-1

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HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE SRI JUSTICE N. BALAYOGI

Civil Miscellaneous Appeal Nos.746 and 858 of 2016

COMMON JUDGMENT: *(per V. Ramasubramanaian, J)*

Both these appeals arose out of the Arbitration Awards, the challenge to which under Section 34 of the Arbitration and Conciliation Act, 1996 was rejected by the Court below.

2. Heard Mr. R. Raghunandan, learned senior counsel appearing for the appellants in both these appeals and Mr. D. Madhava Rao, learned counsel appearing for the respondent No.1.

3. The second appellant herein and the 1st respondent are brothers. They started a partnership firm under the name and style of M/s. Perfect Welded Mesh Industries, who is the first appellant herein.

4. Disputes arose between brothers, leading to the 1st respondent herein filing a suit. In the suit, the 2nd appellant took out an application not under Section 8 of the Arbitration and Conciliation Act, but under Order VII Rule 11 of the Code of Civil Procedure, 1908. The said application was allowed by the trial Court as if it is an application under Section 8 of the Act, but the trial Court went over board and even appointed an Arbitrator.

5. The appointment of the Arbitrator was set aside by this Court, but the order rejecting the plaint was treated as an order under Section 8 of the Act, leaving the parties to workout their

remedies under Section 11 (6) of the Arbitration and Conciliation Act, 1996.

6. Eventually, the 2nd respondent herein was appointed as Arbitrator.

7. Before the Arbitrator, the 1st respondent filed a claim and the 2nd appellant filed a counter claim. By an award dated on 27-10-2014, the Sole Arbitrator granted reliefs in monetary terms to the 1st respondent herein and rejected the counter claim filed by the 2nd appellant.

8. Challenging the award, the appellants filed Arbitration O.P.Nos.22 and 23 of 2015 on the file of V Additional District Judge, Ranga Reddy District, under Section 34 of the Act. One O.P. was in respect of the claim and the other in respect of the counter claim.

9. The V Additional District Judge, Ranga Reddy, dismissed both the Arbitration O.P.s by a common order dated 30-06-2016. Aggrieved by the same, the appellants have come up with the present appeals.

10. The award of the Arbitrator, as confirmed by the District Court, is assailed by the appellants primarily on two grounds namely (i) that the claim made by the 1st respondent was hopelessly barred by limitation; and (ii) that the monetary reliefs granted by the Arbitrator, were not based upon any evidence.

11. Let us take up the first ground of objection revolving around the limitation.

12. The Arbitrator recorded a finding in his award that the 1st appellant firm could be taken to have been dissolved on 18-04-2010. Actually 18-04-2010 is the date of issue of the legal notice by the 1st respondent/claimant. Therefore, the Arbitrator took it as the date of dissolution of the firm as it was a partnership at will.

13. According to Mr. R. Raghunandan, learned senior counsel appearing for the appellants, the proceedings for arbitration should have been initiated by the 1st respondent on or before 17-04-2013, but the O.P. under Section 11 (6) of the Act was filed only on 01-08-2013. Therefore, the contention of the learned senior counsel is that the very initiation of arbitration was beyond the period of limitation prescribed by law.

14. But the aforesaid contention cannot be accepted for the simple reason that the 1st respondent initially filed a suit in O.S.No.833 of 2010 on the file of Principal Senior Civil Judge's Court, Ranga Reddy District, for dissolution of the firm, rendition of accounts and for division of property. The appellants did not file an application under Section 8 of the Act, but filed an application under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint. By a judgment dated 04-04-2012, the trial Court allowed the application and went to the extent of appointing an Arbitrator. But the Appellate Court, in A.S.No.221 of 2012, set aside that portion of the judgment of the trial Court by which an Arbitrator was appointed. However, the Appellate Court upheld the judgment of the trial Court holding that the application under Order VII Rule 11 CPC should be

treated as an application under Section 8 of the Act. The judgment of the Appellate Court in A.S.No.221 of 2012 was delivered on 13-03-2013.

15. The judgment of the First Appellate Court was not challenged by the 1st respondent by way of second appeal. Therefore, rightly or wrongly, the judgment treating the application under Order VII Rule 11 CPC as though it is an application under Section 8 of the Arbitration Act, attained finality.

16. Thereafter, the 1st respondent moved an application under Section 11 of the Arbitration Act on 01-08-2013 in Arbitration Application No.100 of 2013. The same was allowed on 01-01-2014 appointing the 2nd respondent herein as the sole Arbitrator.

17. The period from 18-04-2010 to 13-03-2013 is a period during which the 1st respondent was actually before the Civil Court. Therefore, this period has necessarily to be excluded under Section 14 of the Limitation Act, 1963. The contention of the learned senior counsel for the appellants is that even if this period is excluded, the last date for expiry of the period of limitation was 17-04-2013 and that from 13-03-2013 when A.S.No.221 of 2012 was allowed, the 1st respondent had more than a month to file the application under Section 11 of the Arbitration Act. Therefore, it is his contention that the party, who was not vigilant enough to initiate proceedings for arbitration, cannot take advantage.

18. But as seen from the award passed by the Arbitrator, the Arbitrator excluded the period during which the parties were before

the Civil Court. We think that the Arbitrator was right in doing so, as the parties were before the Civil Court for nearly a full period of three years. Additionally, the finding of the Arbitrator that the partnership firm could be taken to have been dissolved on 18-04-2010, was only based upon Ex.A.4 notice issued by the 1st respondent. In fact, the suit itself was filed praying for dissolution of the firm, but not relying upon Ex.A.4 pre-suit notice. When there is a doubt cast about the very dissolution of the firm, the starting point for the period of limitation need not necessarily be taken to be 18-04-2010. As repeatedly held by the Apex Court, limitation is a mixed question of fact and law. Therefore, the finding recorded by the Arbitrator that the claim cannot be taken to be barred by limitation, does not go contrary to the fundamental policy of India so as to warrant interference under Section 34 of the Arbitration Act. Hence, the finding of the sole Arbitrator in this regard, as upheld by the First Appellate Court, cannot be assailed.

19. Coming to the second issue namely that the Arbitrator arrived at a finding to grant monetary reliefs without any evidence on record, it is seen that the monetary claim of the 1st respondent was based upon his contention that the property fetched rental income. The 1st respondent-claimant had quantified the rental income. It is true that the 1st respondent did not produce documentary evidence in support of his claim that a particular amount was received as rent.

20. But unfortunately, the 2nd appellant herein was the person who was running the firm and he was in-charge. He was a person,

who had special knowledge of the property, the rental income etc. A person in possession of special knowledge is obliged to produce the best of evidence in terms of Section 106 of the Indian Evidence Act, 1872. What the appellant did was simply to make a denial of the claim of the 1st respondent about the rental income. In such circumstances, the Arbitrator thought that the pleading and the oral evidence made by the 1st respondent could be accepted in the absence of any material placed by the appellants.

21. Drawing our attention to the decision of the Supreme Court in ***Associate Builders v. Delhi Development Authority***[1], Mr. R. Raghunandan, learned senior counsel for the appellants, contended that a finding, which is based upon no evidence, would lead to perversity and that the jurisdiction of the Court under Section 34 of the Arbitration Act extends to perverse awards.

22. Paragraph 31 of the decision in ***Associate Builders v. Delhi Development Authority*** reads as follows:

> "The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-
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> *(i)* a finding is based on no evidence, or
> *(ii)* an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
> *(iii)* ignores vital evidence in arriving at its decision, such decision would necessarily be perverse."

23. There can be no doubt about the fact that if an award is based upon no evidence, it would be treated as perverse and the court can interfere with such an award. In case where the Arbitrator was left with no alternative except to rely upon the claimant's

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[1] (2015) 3 SCC 49

statement and the oral evidence, for no fault of the claimant, but for the default on the part of the person having special knowledge, but who did not produce the evidence in support of the special knowledge, the ratio in paragraph 31 of the decision extracted above cannot be applied.

24. Courts have gone to the extent of saying, even before the amendment to the Act in the year 2015 that even an error of law in the award, cannot be a ground for setting aside the award. The court of first instance under Section 34 of the Act did not find such an error for interfering with the awards and we are in agreement with the said view. Therefore, the Civil Miscellaneous Appeals are devoid of merits and hence, they are dismissed. No costs.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

N. BALAYOGI, J

Date: 09-07-2018

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