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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO. 1 OF 2019
IN
ARBITRATION PETITION NO. 259 OF 2003
WITH
NOTICE OF MOTION NO. 454 OF 2015

Kalpana D Velaskar ...Petitioner
Versus
Francis Pelagio Candes & Anr ...Respondents

Ms Kamla Nichani, *with Smita Gaidhani, for the Petitioner.*
Mr HS Shreepad Murthy, *for Respondent No. 1.*
Mr Arvind Pinto, *for Respondent No. 2 (Income Tax).*
Mr DN Kher, *Court Receiver, is present.*

CORAM: G.S. PATEL, J.
DATED: 6th January 2020

PC:-

1. The Interim Application is by the original Petitioner in the Arbitration Petition. The arbitration is yet pending. The prayers in the Interim Application are thus:

> "(a) That this Hon'ble Court be pleased to direct the Court Receiver to recover the dues of the royalty amount payable by the Respondent No. 1, as also the interest on the delayed payments as per the said Agency Agreement for the

period from the due date till the date of handing over the premises; and thereafter the Court Receiver after recovering the amount be directed to deposit the same with the Office of the Prothonotary and Senior Master, High Court, OOCJ;

(b) That this Hon'ble Court be pleased to direct the office of the Prothonotary and Senior Master OOCJ, High Court, to disburse the Royalty amount of Rs. 3,95,90,537/- lying with the said Office / Bank, by paying 50% of the said amount to the Applicant and 50% to the Respondent No. 1;

(c) Pending the hearing and final disposal of this Application, this Hon'ble Court be pleased to release an amount of Rs. 1,97,95,268.50/- being 50% of the amount lying with the Prothonotary and Senior Master, OOCJ, High Court, forthwith;"

2. Prayer (c) will not survive in view of prayer (b).

3. In so far as prayer (a) is concerned, I do not think that it would be appropriate to make an order of this kind on an Interim Application. The reason is plain. The claim of the Petitioner is very seriously contested by the Respondent No. 1. The submission made on behalf of Respondent No. 1 by Mr. Murthy is that the premises in question were unavailable, their possession having been resumed or taken back by the licensor or the landlord. There were also legal proceedings. It is his submission that royalty can only operate in respect of premises when those premises are available to the agent appointed by the Court Receiver and not otherwise. Therefore, there was no question of payment of royalty or of arrears.

4. In my view, the correct course is to ask the Court Receiver to make a report on this issue — whether there are any arrears recoverable from the 1st Respondent, and if so in what amount. I note Ms Nichani's submission on behalf of the Petitioner that before the Commissioner for Taking Accounts on 13th December 2017 there was an observation that there were many defaults in paying monthly royalty and thus a sum of Rs. 56 lakhs is to be recovered along with interest by the Court Receiver under the Agency Agreement. It is not entirely clear to me from a reading of this paragraph at pages 31-32 whether the Commissioner for Taking Accounts was simply noting the submission made before him or was returning a finding. Certainly there appears to be no discussion of an assessment of that amount and I am, therefore, inclined to believe that this was only a noting of the submissions canvassed.

5. Prayer (b) requires a brief factual background. The Petitioner, Dr Kalpana D Velaskar, is a post-graduate doctor and a MD in Pathology. She and the 1st Respondent, Dr Francis Pelagio Candes, set up a blood bank in the name of M/s High Tech Blood Transfusion and Allied Services under a Deed of Partnership dated 21st January 1996. They were the only two partners. That firm took loans. These loans were repaid by the firm within five years. Then disputes arose between Dr Velaskar and Dr Candes. There were some criminal complaints. There was also a Civil Suit filed in this Court in the year 2003. Ultimately Dr Velaskar filed Petition No. 259 of 2003 under Section 9 of the Arbitration and Conciliation Act, 1996 in this Court. On 18th June 2003 this Court appointed a Receiver. It also appointed an Arbitrator. The firm itself was dissolved with effect from 18th June 2003 by consent of the parties.

The question remained about which of the two parties should be appointed an agent of the Receiver to run the facility. Both sides were asked to bid. Dr Candes was the higher bidder, and was appointed agent of the Receiver. He executed an Agency Agreement dated 27th June 2003. He had to pay an amount of Rs. 3.5 lakhs per month as royalty to carry on this blood bank business. He was also to keep a deposit of Rs. 10.5 lakhs with the Court Receiver as three months' royalty in advance. According to Dr Velaskar, Dr Candes committed several defaults. He was late in paying the royalty amounts. He has not paid interest. These claims are contested by Dr Candes.

6. In the meantime, the substituted learned sole Arbitrator, Mr UJ Makhija, learned Advocate of this Court has been proceeding with the arbitration. It seems that on 19th March 2008 there were consent terms filed and on 21st March 2010 this Court directed the Receiver to deposit with the Prothonotary and Senior Master the entire amount of royalty within a period of two weeks. This has been done after some delay. According to Dr Velaskar, arrears are not yet recovered, but that is an aspect on which I have called for a Receiver's Report.

7. The 2nd Respondent to this Interim Application is the Court Receiver. He will make a report in regard to prayer (a), serve it upon the parties and have it placed on board.

8. What is not disputed is that Dr Velaskar and Dr Candes were the only two partners in the blood bank partnership firm and each had an equal 50% share, right, title and interest in the profits of that firm. This is the reason that prayer (b) says that the royalty amount of Rs. 3,95,90,537/- lying with the Prothonotary and Senior Master be distributed equally between Dr Velaskar and Dr Candes.

9. The only real difficulty as regards prayer (b) in this Interim Application comes not from either of the parties but from the Income Tax represented by Mr Pinto. It is, so far as I can tell, a wholly uninvited guest to these proceedings. It seems to have filed Notice of Motion No. 454 of 2015 (Notice of Motion (L) No. 515 of 2015) some time in February or March of that year, essentially asking that the royalty and interest be treated as income and that the Court Receiver be directed to pay tax accordingly, directly into the revenue from the funds then in the hands of the Court Receiver (now with the Prothonotary and Senior Master). Exhibit "F" from pages 35 is a copy of an order passed by the Judicial Member and Accountant Member of the Income Tax Appellate Tribunal, Mumbai Bench "H" on 6th November 2015, well after the Income Tax's Notice of Motion. It seems that the Assessing Officer held that this amount of royalty and interest would in fact constitute taxable income. The Commissioner of Income Tax (Appeals) reversed that finding. The revenue carried the matter higher to the ITAT. After a brief, but entirely satisfactory discussion, the ITAT held that the appeals by the revenue were without substance. The necessary facts were set out and the ITAT concluded, in my view completely correctly, that the royalty received by the Court Receiver was held only in a fiduciary capacity or trustee as a representative of the High Court, and that the Court Receiver was only a temporary custodian to receive the royalty. As and when the Court so directed, the amount would be distributed. Thus, the royalty or interest in the hands of the Court Receiver could not be taxable income to the firm or a representative of the firm, because the income had not 'accrued' to the receiver but was received by him only as a custodian appointed by this Court. On this basis, the ITAT affirmed the findings of the CIT (Appeals), holding that the Court Receiver cannot be assessed on this income. This was also held to be true of the interest earned.

10. Of the argument sought to be canvassed by Mr. Pinto that this reasoning would apply only to that particular assessment year, which was the subject matter of the proceedings before the ITAT, perhaps the less said the better. The logic adopted by the ITAT is as impeccable as it is impervious to changes in assessment years. If, on distribution, it is subsequently found that in the assessment year in which the distribution takes place that there is indeed taxable income received in the hands of either of the two parties to the dispute, then obviously the revenue has its remedies and is free to pursue those. All that this means is that there is no question of recovering tax from the Court Receiver prior to an order of distribution.

11. Of necessity, this will render the Notice of Motion No. 454 of 2015 filed by the Tax Recovery Officer-30, Mumbai infructuous. Notice of Motion No. 454 of 2015 is not on board. By consent, it is taken on board and is disposed of as infructuous.

12. For the present, the Interim Application is disposed of in accordance with prayer (b).

13. It is once again clarified that once the distribution takes place and the amounts are remitted to the Petitioner and the 1st Respondent, whether or not this constitutes taxable income in that particular assessment year is an issue expressly kept open.

14. The royalty amount mentioned in prayer (b) is up to 30th November 2019. The distribution will be made as of the date of this order.

(G. S. PATEL, J)