IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 07.11.2019

Pronounced On : 19.11.2019

CORAM

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Civil Revision Petition (NPD) No.3611 of 2014

and M.P.No.1 of 2014

1. M/s.Sudharshan Insulations
Rep. By Managing Partner,
S.P.Rajah

2. Mrs.S.P.Rajah
3. Mrs.Rajakumari ... Petitioners

..Vs..

1. S.A.Bhima Raja
2. Mrs.C.Rajeswari Chandrasekar ... Respondents

Prayer: This Civil Revision Petition has been filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decreetal order passed in I.A.No.8597 of 2013 in OS No.7500 of 2012 dated 27.03.2014 on the file of the learned XV Assistant City Civil Judge, Chennai.

For Petitioner : Mr.T.S.Ramaswamy
for Mr.V.Santhanam

For Respondents : Ms. Vasudha Thiagarajan
for Mr.R.Thiagarajan

O R D E R

The plaintiffs in OS No.7500 of 2012 on the file of learned XV Assistant Judge, City Civil Court, Chennai are the petitioners herein.

2. They have filed the above referred suit, as against the respondents herein for the relief of declaration declaring that the suit schedule land of the 1st plaintiff firm is indivisible and impartible. Further, they have prayed for the relief of declaration that the defendants have retired from the partnership firm viz., 1st plaintiff firm with effect from 02.10.2012. Consequently, they have also prayed for the relief of permanent injunction, restraining the defendants from interfering in any manner with the business of the 1st plaintiff firm run by its partners viz., plaintiffs 2 and 3.

3. After entering appearance, during the pendency of the said Suit, the respondents herein filed an application in IA No.8597 of 2013, under Section 8 of the Arbitration and Conciliation Act, 1996 praying to pass orders to stop all further proceedings and refer the parties of the above suit, to the process of Arbitration, under the provisions of the Arbitration and Conciliation Act, 1996.

4. The learned XV Assistant Judge, City Civil Court, Chennai, after affording opportunity to the petitioners herein, by order dated 27.03.2014, allowed the application filed by the respondents.

5. Aggrieved over the same, the plaintiffs are before this Court, with

the present Civil Revision Petition, praying to set aside the order dated 27.03.2014 made in I.A.No.8597 of 2013 in OS No.7500 of 2012 on the file of the learned XV Assistant Judge, City Civil Court, Chennai, and consequently, to restore the suit.

6. For the sake of convenience, hereinafter, the revision petitioners are called as plaintiffs and the respondents are called as defendants.

7. In the impugned order passed, the learned trial Judge has held, that since the agreement between the parties contains an arbitration clause, the jurisdiction of the trial Court to entertain the disputes between the parties, arising under the said arbitration agreement, is curtailed. Further, the learned trial Judge has observed that when there is an arbitration clause, in the arbitration agreement, the plaintiffs ought not to have approached the trial Court by way of filing a suit.

8. The case of the 1st defendant before the trial Court in I.A.No.8597 of 2013, in short, is as follows:

(i) The suit has been filed by the plaintiffs 2 and 3 by wrongly using the name of 1st plaintiff firm. The 1st plaintiff firm, is a partnership firm in which plaintiffs 2 & 3 and defendants, are the partners. Filing the suit in the name of 1st plaintiff firm is legally found not correct. The plaintiffs have prayed for the relief of declaration to the effect that the defendants have retired from the 1st plaintiff's partnership firm, with effect from 02.10.2012, in addition to the relief of permanent injunction, restraining the defendants from interfering with the business of the 1st plaintiff firm.

(ii) The plaintiffs suppressed various facts and material information with a view to mislead the Court to pass an order against the defendants. Plaintiffs 2 and 3 have committed breach of trust, such as siphoning of funds from the partnership company to their proprietorship company as well as their relatives to an extent of Rs.20 Lakhs, in the last two years and have also acted against the interest of the other two partners viz., the defendants. The defendants wanted to settle the issue amicable. In the panchayat held on 02.12.2012, the 2nd plaintiff made a specific request to allow him to run the company and also proposed that the assets of the firm, including the premises in which the company is being run, split among the partners. For the said proposals, the defendants agreed to consider the same. A compromise was arrived and parties fixed the ratio of sharing the immovable properties at 55:45 instead of 60:40. Despite signing of the said memorandum, the 2nd plaintiff did not come forward to conclude the understanding. Therefore, the community elders declared that the compromise entered between the parties, as null and void and would not bind anyone.

(iii) Therefore, the defendants were constrained to issue notice dated 22.01.2013 dissolving the 1st plaintiff partnership firm. The bankers have also blocked / frozen the accounts of the 1st plaintiff partnership firm, in accordance with law. For the notice sent by the defendants, the plaintiffs did not respond. As per the request made by the defendants, the 2nd plaintiff, as the Managing Partner, did not furnish the accounts, till the date of filing of the Interlocutory Application.

(iv) The plaintiffs misused the partnership firm's premises and resorted to divert the business to their proprietorship firm after receiving the notice of dissolution of firm and continued to manufacture the products of partnership firm using the infrastructure of partnership firm and sell the same through their proprietorship firm viz., R.K.Industries, functioning within the premises of the partnership company without the permission of the partners/defendants and further gone ahead and leased out a portion of the premises belonging to the dissolved firm, for parking of cars by a Car Dealer. Details of the rent received from the said tenant or the other details of income that are being generated and not shared with the other partners, are all not known to the defendants and thus, they craved leave of the trial Court to initiate appropriate legal proceedings, for appointment of a Receiver, to take charge of the affairs of the dissolved firm and its assets for concluding the same in terms of Section 43 of the Indian Partnership Act.

(v) The partnership deed dated 20.06.1980, was amended and altered by a Deed dated 01.04.1996. The alteration included the understanding that the disputes in the partnership shall be referred to Arbitration. As per the provisions of the Arbitration Act, in a matter which is the subject of an arbitration agreement, it is necessary to refer the same to arbitration. Since, the agreement between the parties, contains an Arbitration Clause, the jurisdiction of the Civil Court to entertain the disputes between the parties, arising under the said Arbitration Agreement, is curtailed.

(vi) The defendants have not filed any written statement defending the above suit, before filing this application and according to them, settling the dispute in the arbitration process, is the only course available to the plaintiffs.

9. The short facts of the counter affidavit filed by the plaintiffs in IA

No.8597 of 2013, are as follows:

(i) Originally the 1st plaintiff partnership firm was registered on 05.07.1980. The land was sold to the firm by the Government of Tamil Nadu on 27.03.2000 with some conditions. Simultaneously, a Memorandum of Undertaking was also executed by the firm and all the four partners. As per the condition therein, the land given by the Government, has to be used only for the purpose for which it was allotted. There was a Supplemental Partnership Deed in the year 1996, in which some alterations regarding the share of the profits have been made and an Arbitration Clause was also included.

(ii) Only the defendants have decided to retire from the partnership firm. In the meeting held on 02.02.2012, it was decided as above. Thus, the defendants retired from the firm on 02.02.2012 itself. Thereafter the lawyer has advised that the land allotted by Government is indivisible because of the conditions found in the sale deed and in the Memo of Understanding signed by the partners in the year 2000. The defendants instead of accepting the legal advice insisted for the division of the land and gave the plaintiffs a draft Deed of Dissolution of Partnership, wherein they have stated that they are retiring partners and that the plaintiffs, are continuing partners. Plaintiffs refused to sign the draft Dissolution Deed, since the land could not be divided.

(iii) In an application filed by the plaintiffs for the relief of injunction, the defendants filed a detailed counter putting forward their entire defence. The interlocutory application filed by the defendants is not maintainable, since the application was not filed by the defendants before submitting their counter, with the substance of the dispute and the statement of defence therein. After retiring on 02.10.2012, the retired partners/defendants have no locus standii to file an application for reference of the dispute to arbitration.

(iv) According to the plaintiffs there is no firm at all from January 2013 and they have been strongly contending that the firm has been dissolved already. The firm has been run by the 2nd plaintiff as the Managing Partner for the past 32 years and the accounts have been kept properly. According to the plaintiffs the interlocutory application filed by the defendants, is liable for dismissal.

(v) Based on the above said divergent pleadings set out by the plaintiffs and defendants, the Court below came to the conclusion that the application filed by defendants is entertainable and ultimately, referred the dispute to the arbitration. Challenging the same, the plaintiffs are before this Court with this Civil Revision Petition.

10. Before the trial Court, the specific case of the plaintiffs, is that the land allotted by the Government for starting the partnership firm is inseparable. Further, the defendants have filed the application under Section 8 of the Arbitration and Conciliation Act, 1996 after the lapse of 180 days that too after filing a counter affidavit in interlocutory application filed by the plaintiffs, for the relief of temporary injunction. The another one contention raised by the counsel appearing for the plaintiffs is that, since the defendants have retired from the partnership, they are not having any right to file an application for referring the matter to Arbitration.

11. On the other hand, the learned counsel appearing for the defendants would contend that, the original Partnership Deed dated 20.06.1980 entered into between the plaintiffs and the defendants did not have any arbitral clause. Only in the Supplemental Deed dated 01.04.1996, the arbitration clause was included. In otherwise, filing the counter affidavit in the interim application filed by the plaintiffs, has not been treated as a written statement. Accordingly, the impugned order passed by the Court

below, is well within the ambit of Section 8 of Arbitration and Conciliation Act, 1996 and thereby the prayer sought by the plaintiffs in this Civil Revision Petition, cannot be entertained.

12. Upon considering the arguments advanced by either side, first of all the issue that has to be decided by this Court is as to whether the dispute raised between plaintiffs and defendants are capable of adjudication and settlement by arbitration.

13. In this aspect, both the learned counsel appearing for the plaintiffs and and defendants, relied upon the judgment in ***Booz Allen and Hamilton Inc., Vs. SBI Home Finance Limited and others***, reported in 2011 (5) SCC 532 wherein our Hon'ble Apex Court in paragraph No.36, has held as follows:

> "36. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

So, the example set out by our Hon'ble Apex Court has not attracted the dispute arisen between the plaintiffs and defendants.

14. However, in this aspect, the learned counsel appearing for the plaintiffs relied on the judgment in ***Sukanya Holdings Pvt. Ltd., Vs. Jayesh H.Pandya and another***, reported in **2003(2) CTC 431** and submitted that in a pending suit, if an application is not filed before submitting the first statement on the substance of dispute, Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute.

15. In the judgment relied on by the learned counsel for the plaintiffs in ***Sukanya Holdings' case*** [quoted supra], our Hon'ble Apex Court has held as under.

> "12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part-I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement

> or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub-sections (1) & (2) of Section 8 of the Act."

16. In this regard, the learned counsel appearing for the defendants would contend that mere filing of the counter affidavit in the interlocutory application, do not amount to submitting the case of the defendants. Hence, learned counsel appearing for the defendants contended that only after discussing the said issue as above, the Court below has passed the impugned order, which does not have any material irregularity.

17. In the said occasion, it is relevant and useful to see the case of ***Booz Allen and Hamilton Inc., [quoted supra]***, wherein our Hon'ble Apex Court at paragraph No.27, has held as follows.

> "This Court in Rashtriya Ispat Nigam Ltd V. Verma Transport Co. [2006 (7) SCC 275] then proceeded to consider whether contesting an application for temporary injunction by filing a counter, would amount to subjecting oneself to the jurisdiction of the court. This Court observed :
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> > "39. By opposing the prayer for interim injunction, the restriction contained in Sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been

> disclosed in the main proceeding. Supplemental and incidental proceeding are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in Food Corporation of India vs. Yadav Engineer & Contractor [1982 (2) SCC 499] , the distinction between the main proceeding and supplemental proceeding must be borne in mind.
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> ......
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> 42. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex pare injunction. The Appellants were bound to respond to the notice issued by the Court."

So the direct answer for the query raised by the plaintiff is that the counter filed in the interlocutory application does not amount that the defendant submitted their case at the first instance.

18. In the case on hand, there is no dispute about the arbitration agreement, inasmuch as there is a specific arbitration clause in the Supplemental Partnership Deed. As rightly contended by the learned counsel appearing for the plaintiffs, as per the judgment of our Hon'ble Apex Court already referred above, the dispute between the plaintiffs and the defendants, is not under the category of non arbitrable.

19. Though, one of the parties have retired from the partnership firm,

as the dispute pending before the plaintiffs and defendants are only in respect of partnership, it cannot be said that the retired partners are not entitled to ask the relief to refer the matter to arbitration. Therefore, since the subject matter of the suit was within the jurisdiction of arbitration, it is necessary to see the judgment in ***Swiss Timing Limited Vs. Commonwealth Games 2010 Organizing committe***e, reported in 2014 (6) SCC 677, wherein our Hon'ble Apex Court has held as follows:

> "18. Having found that the subject matter of the suit was within the jurisdiction of the arbitration, it was held in N.Radhakrishnan Vs. Maestro Engineers [2010(1) SCC 72] that the disputes cannot be referred to arbitration. This Court approved the finding of the High Court that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the arbitrator. In my opinion, the aforesaid observations runs counter to the ratio of the law laid down by this Court in Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums [2003 (6) SCC 503], wherein this Court in Paragraph 14 observed as follows:
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> > "If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of Section 8 of the

Act, the courts below ought to have referred the dispute to arbitration."

20. According to the above verdict, it is mandatory for the Civil Court to refer the civil dispute to arbitration. It is a clear case that at no point of time the plaintiffs have denied the arbitration clause incorporated in the Supplemental Partnership Deed. As already decided, the filing of the counter affidavit in the interim application does not amount to submitting the first case of the defendants. Therefore, this Court is of the opinion that it is mandatory on the part of the civil Court, to refer the dispute to an arbitrator. In the impugned order, the said principle has been correctly followed by the learned XV Assistant Judge, City Civil Court, Chennai and furthermore, there is no inherent risk of prejudice of any of the parties in permitting the arbitration to proceed.

21. It is the duty of the Court below to decline reference to arbitration only if the Court below reach the conclusion that the contract made between the plaintiff and defendant is a void one, on a meaningful reading of the contract itself without the requirement of any further proof.

22. As already observed plaintiffs themselves have admitted in the plaint averments that Panchayat was arranged by the elderly family members

and thereafter, finality has also been reached. Only in the said circumstances the plaintiffs have not obeyed the terms fixed by the defendants, which has necessitated the plaintiffs to file the suit. So in all aspects, the findings arrived at by the Court below does not warrant any interference.

23. Therefore, in the light of the above discussion and the decisions of our Hon'ble Apex Court, the Civil Revision Petition is dismissed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

19.11.2019

Index: Yes/No.
Internet: Yes.
Speaking / Non-speaking Order

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To
The XV Assistant Judge, City Civil Court, Chennai.

R.PONGIAPPAN, J.,

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Pre-delivery order

CRP (NPD) No.3611 of 2014
and M.P.No.1 of 2014

19.11.2019