

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.01.2019

Delivered on : 15.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.M.A.Nos.312 and 1127 of 2017

and

CMP.Nos.2252 and 5622 of 2017

CMA.No.312 of 2017

R.Duraisamy

...

Appellant/2nd Respondent

Vs

1.R.Palanisamy

... R1/Applicant

2.R.Rajendran

...R2/1st Respondents

Civil Miscellaneous Appeal filed under Section 37(1) & (2) of the Arbitration and Conciliation Act, 1996, against the order passed in Application No.1 of 2016 in Arbitration Proceedings arising from OSA.No.15 of 2016 dated 05.10.2016 on the file of the learned Arbitral Tribunal, Chennai.

CMA.No.1127 of 2017

R.Rajendran

Vs

... Appellant/1st Respondent

1.R.Duraisamy

... R1/R2

2.R.Palanisamy

... R2/Applicant

3.Yasod Vardan

...R3/Arbitrator/ Respondents

Civil Miscellaneous Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996, against the order passed in Application No.1 of 2016, on the file of Arbitral Tribunal in OSA.No.15 of 2016 dated 05.10.2016.

For Appellants :

Mr.N.Umapathi

(for Appellant in CMA.312/17 &

for R1 in CMA.1127/17)

M/s.K.Annamma (in CMA.1127/17)

For Respondents:

M/s.G.Ethirajulu

(for R1 in CMA.312/17 &

for R2 in CMA.1127/17)

Mr.R.Sunilkumar

(for R3 in CMA.1127/17)

No Appearance

(for R2 in CMA.312/17)

COMMON JUDGMENT

Calling in question the order dated 5.10.2016 passed in Application No.1 of 2016 in O.S.A.No.15 of 2016 by the learned Arbitral Tribunal, the present appeals are filed by the respondents in the application.

2. For the sake of convenience, the parties are referred to as per their rank in the application. The appellants are the respondents in the application.

3. The applicant/claimant and the respondents are siblings and they are the partners of the firm in the name and style of "Dhanam's Knit Garments". The said partnership firm was constituted under a partnership deed dated 5.4.1996 for carrying on the business of manufacturing and exporting hosiery garments and other hosiery goods.

4. Disputes arose between the partners in the year 2010 and the claimant appointed a retired District and Sessions Judge, Mr.S.A.Sreeramulu as the Sole Arbitrator and filed a claim petition before the said learned Arbitrator. Immediately, the first respondent filed O.P.No.470 of 2012 before this Court to terminate the mandate of the said Arbitrator and to appoint another independent and impartial arbitrator by way of substitution. It is stated that this Court, by order dated 30.1.2015, appointed Hon'ble Mr.Justice A.S.Venkatachalamoorthy (Retired Judge) as the Sole Arbitrator.

5. In the meanwhile, it is stated that the claimant filed an application, being A.No.381 of 2015, under Section 9 of the Arbitration and Conciliation Act, 1996 (for brevity, "the Act") for grant of an order of injunction restraining the respondents from in any manner alienating or encumbering the land and the building of an extent of 1 Acre in S.F.No.424/1, Therukupalayam Pirivu, Tiruppur Road, Naranapuram Village, Palladam Taluk, Tiruppur District. By an order dated 3.9.2015, this Court ordered extension of the interim order of injunction already granted till the disposal of the arbitral proceedings.

6. Assailing the said interim order, the respondents in the application petition filed O.S.A.No.15 of 2016 before this Court. The Hon'ble Division Bench of this Court, by judgment dated 28.3.2016, replaced the Sole Arbitrator (as he was unwell) and appointed Mr.R.Yashod Vardhan, Senior Advocate as Sole Arbitrator. In the said judgment, the Hon'ble Division Bench observed that "the interim order granted by the learned Single Judge would only operate as an ad-interim order and it is for the Arbitrator to either confirm or vacate the injunction based on the plea of the respective parties."

7. Thereafter, the Arbitral Tribunal took up the Application No.1 of 2016 filed by the claimant and considered the issue as to whether the injunction granted in A.No.381 of 2015 should be confirmed or vacated. The Arbitral Tribunal ultimately held that the order of interim injunction granted in A.No.381 of 2015 be continued till the disposal of the arbitral proceedings.

8. Calling in question the said order passed by the learned Arbitral Tribunal, the present appeal is filed by the respondent in the application.

9. The learned counsel appearing for the respondents in the application (appellants herein) vehemently contended, in one voice, as under:

- (a) When the learned Arbitrator was not satisfied based on evidence about the extent of funds of the partnership firm utilized for construction of building, it is not proper to direct continuation of the order of interim injunction restraining the respondents (appellants herein) from alienating their personal property, and the learned Arbitrator ought to have restricted the relief to the extent of the monetary relief claimed;
- (b) the learned Arbitrator erred in clubbing the three different entities run by the partners of Dhanmas Knit garments, as the three concerns are having different businesses and the other two concerns, viz., Honest Clothing Company and Team Spirit, had obtained loan from the firm of the respondents (appellants herein), as could be seen from the balance sheet. In effect, it is pleaded that the firm has not taken out the fixed assets of the proprietorship concern;
- (c) The learned Arbitrator erred in concluding that the funds for the building came from the partnership account, without any iota of evidence to support such conclusion;
- (d) Unless the claimant (first respondent herein) established the case before the Court that the property is a joint family property, by letting in oral and documentary evidence, the respondents (appellants herein) cannot be prevented from dealing with their personal property and such order extending interim injunction is passed without considering the prima facie case, balance of convenience and irreparable injury caused to the respondents

(appellants herein)

10. On the contrary, the learned counsel appearing for the claimant (applicant) reiterated the reasons that weighed with the Court below in granting interim injunction, which was extended until further orders by the learned Arbitral Tribunal and prayed for dismissal of the appeal.

11. Heard the learned counsel on either side and perused the documents available on record.

12. A bare perusal of the typed set of papers shows that entire cause of action for filing of an application by the claimant arises on the basis of the partnership deed dated 5.4.1996 executed between the claimant and the respondents. The property in respect of which an order of interim injunction was obtained by the claimant was purchased by the respondents (appellants herein), in their individual capacity, on 28.4.1994, much before the partnership firm was established. Some of the relevant clauses of partnership deed read as under:

"20. Whereas R.Duraisamy the second party of this deed has been carrying on business as dealers in cloth, export of hosiery garments under the name and style of 'M/s.Dhanam's Knit Garments' since 24.8.1983. And in order to expand the business and increase its efficiency he has offered Shri.R.Rajendran and Shri.R.Palanisamy to join with him as partners. They also agree to invest for their share.

21. The partnership firm takeover only current assets and current liabilities from the proprietorship firm. The fixed assets are not taken over by the new firm. The goodwill belongs to R.Duraisamy (the second party of this firm) only. The first party and third party have no right over goodwill."

(emphasis supplied)

13. When the terms of the partnership deed explicitly disclose that the fixed assets are not taken over by the new firm, it is not known as to on what basis the claimant can seek an order of injunction qua the property purchased by the respondents (appellants herein) in their individual capacity.

14. The Hon'ble Supreme Court in Adhunik Steels Limited v. Orissa Manganese and Minerals Pvt. Limited, (2007) 7 SCC 125 had considered the scope of power of court to pass interim orders and had held that the well recognized principles applicable to the exercise of general power to grant interim relief, including

specific injunctive relief under Order XXXIX of Code of Civil Procedure and the Specific Relief Act, would be applicable to exercise of power under Section 9 of Arbitration and Conciliation Act. The Hon'ble Apex Court had held that at the initial stage mere consideration of existence of arbitration clause is not justified as no special condition is contained in Section 9 of the Act and no special procedure is indicated. It was held that the grant of relief by way of injunction is, in general, governed by the Specific Relief Act and, therefore, the provisions of Specific Relief Act cannot be kept out of consideration. In paragraph (11) of the said decision, the Hon'ble Apex Court had held thus:

"11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

15. In the case on hand, the respondents (appellants herein) purchased the said property way back on 28.4.1994 and as per Clause (21) of the partnership deed "The partnership firm

takeover only current assets and current liabilities from the proprietorship firm. The fixed assets are not taken over by the new firm." Therefore, in my considered opinion, the learned Arbitral Tribunal ought to have first satisfied itself as to the personal interest of the claimant in the matter so as to seek an order of interim injunction as stipulated in Section 41(1)(j) of the Specific Relief Act, which provision is very much applicable for exercising jurisdiction under Section 9 of the Act.

16. In the case on hand, no material whatsoever has been analyzed by the Arbitral Tribunal to hold that the claimant has interest over the schedule property as contemplated under the provisions of the Specific Relief Act.

17. The learned Arbitrator had, in fact, observed that "the issue whether the land and building was treated as the partnership property subsequent to the deed dated 5.4.1996 cannot be gone into at this stage. Prima facie, the 1 Acre of land has been purchased by the respondents and the title to the same would vest in them." However, the learned Arbitrator proceeded to hold that while the land was purchased by the respondents (appellants herein), the completion of the building took place in 1997, much after the constitution of the partnership firm on 5.4.1996 and, therefore, the plea of the claimant that funds for the building would have come from the partnership firm cannot be rejected.

18. Challenging the aforesaid finding rendered by the learned Arbitral Tribunal, the respondents (appellants herein) submit that the entire extent of 1.5 Acres of land had a common patta and common survey number 424/1 and for obtaining plan approval for construction of building in 1 Acre belonging to the respondents (appellant herein), an application had to be signed by all the parties and it was for this reason that the claimant had signed the application and he has no interest over the 1 Acre of land owned by the respondents (appellants herein).

19. In the case on hand, the rights of the parties have to be established after considering the evidence - both oral and documentary and based on the same, a decision should be rendered. The Hon'ble Division Bench in the order observed that "the interim order granted by the learned Single Judge would only operate as an ad-interim order and it is for the Arbitrator to either confirm or vacate the injunction based on the plea of the respective parties."

20. In fact, to fortify the stand of the respondents (appellants herein) that they are the title holders of the property, the respondents (appellants herein) apart from the title deeds also produced the house tax receipt, encumbrance

certificate and Title Opinion given by the learned Additional Government Pleader, Palladam, to the effect that they are having specific, clear, exclusive and marketable title and possession with regard to the property in question.

21.The learned arbitrator himself admitted that there is a question in deriving the funds for the construction for the said building for which he referred the balance sheet as on 31.03.1998 there is a references to building asset of the firm the land and building details referred by the arbitrator was not gone through proper way of auditing, the building was included in the auditor balance sheet from 1995/1996, 1996/1997 and 1997/1998 even later to claim factory building, purpose of depreciation from income tax benefits availed Rs.15,25,110.00/- in the year of 1997/1998. The arbitrator failed to go through income tax saral copies. The learned Arbitrator misguided by himself without looking into the documentary evidence. The learned arbitrator has gone beyond the pleadings and granted the interim injunction. The learned arbitrator failed to appreciate the facts that the appellant converted the partnership firm only on 05.04.1996 from his proprietorship.

22.It is an admitted case that the land was purchased by the appellants in both Appeals in the year of 1994 with their own individual income and funds for building 13,500 sq. ft. (Approx.) 3 floors in S.F.No.424, Re.S.F.No.424/1, Door No.2/481, Therkkupalayam Pirivu, Tirupur to Palladam Road, Narayanapuram Village, Palladam Taluk and the same also reflected in the proprietorship concern balance sheet dated on 1995 / 1996 of the 2nd respondent (Mr.R.Duraisamy) and the partnership firm commenced only on 05.04.1996 and there is no connected or any document whatsoever to show that the partnership firm has got the title over the said individual property.

23.The 1st respondent has relied on Judgment reported in 2013 (4) LW 609 will not be made applicable to the case of the 1st respondent for the reason that the said case has been decided based on the evidence produced by the parties. In the instance case, there is no prima facie case that the land has been purchased for the benefit of the firm. The learned arbitrator failed to see that the Honest Clothing, company, Team spirit are different entities run by the partners of Dhanmas Knit garments by obtaining separate sales tax registration certificate, PAN card in filing income tax returns respectively. Each concern is having different business and Constitution of the said concern also different and the same cannot be clubbed with the firm belongs to the Appellant which is not a subject matter of arbitration agreement. In the said balance sheet, it has been specifically mentioned that the said two concerns had obtained

loan from the firm of the appellant and in fact that was reflected in the balance sheet. The said aspect has not been considered by the arbitrator. As rightly pointed out by the learned counsel for the appellant, the learned arbitrator ought not to have held that the issue whether the land and building has to be treated as a partnership property or not subsequent to the deed dated 05.04.1996 cannot be decided at this stage is totally erroneous in the eye of law. The learned arbitrator does not have jurisdiction to decide the lis which is beyond the scope of the Arbitration Agreement as the property purchased by the appellant and the 1st respondent is much before the date of entering into the partnership firm and therefore the injunction order cannot be passed against the individual property.

24. The learned Arbitrator to extend the interim order ought to have considered the evidence on either side. When the personal property of the respondents (appellants herein), purchased in their individual capacity is being enjoined from being used by the respondents (appellants herein), it is not just and proper on the part of the learned Arbitrator to hold that by continuation of the interim order no prejudice would be caused to either side. The order passed by the learned Arbitrator is prejudicial to the personal right of the respondents (appellants herein).

25. In the result:

(a) both the Civil Miscellaneous Appeals are allowed by setting aside the order in Application No.1 of 2016 in Arbitration Proceedings arising from OSA.No.15 of 2016 dated 05.10.2016 on the file of the learned Arbitral Tribunal, Chennai;

(b) the sole Arbitrator is directed to dispose the Arb. O.P.No.470 of 2012 within a period of six months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

सत्यमेव जयते

Sd/-

Assistant Registrar

//True Copy//

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Sub Assistant Registrar

vs

To

1.The Arbitral Tribunal,
Chennai.

2.The Section Officer,
V.R. Section,
High Court Madras-104.

+1cc to Mr.G.Ethirajulu, Advocate, S.R.No. 14393

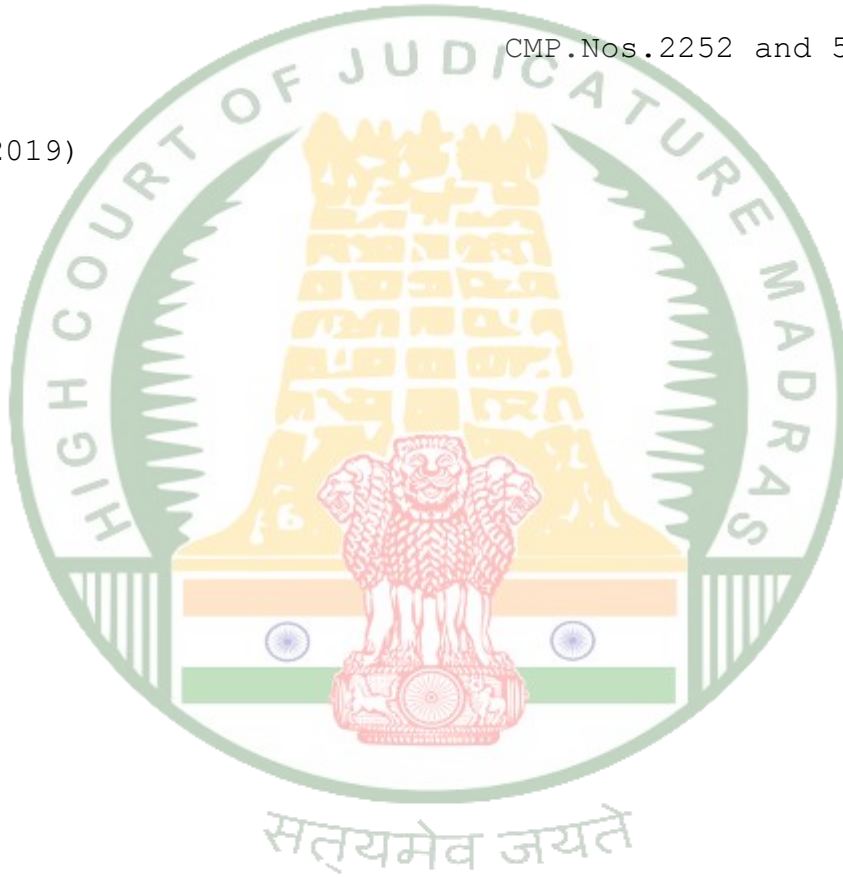
+1cc to Mr.N.Umapathi, Advocate, S.R.No. 14162

+1cc to Mr.K.Annamma, Advocate, S.R.No. 14658 (05/03/2019)

C.M.A.Nos.312 and 1127 of 2017
and

CMP.Nos.2252 and 5622 of 2017

RV(CO)
GN(22/02/2019)



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