IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.09.2020

C O R A M

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.No.2759 of 2019& C.M.P.No.14027 of 2019
& O.P. No.116 of 2020

C.M.A.No.2759 of 2019

1. H.Thiagaraj, S/o. Late Hutchi Gowder,
2. Sumathi Thiagaraj, W/o.H.Thiagaraj

...Appellants/Respondents

.vs.

Maryammal (died)

1. Vimala Krishnamurthy, W/o.Sr.Krishnamurthy,

2. Latha Velukumar, W/o.Velkumar,
rep. by her duly constituted Power of Attorney
Mrs.Vimala Krishnamurthy, W/o.Sr.Krishnamurthy,
117/89-A, Gandhigiri, Upper Coonoor,
Nilgiris - 643 102. ...Respondents/Petitioners

O.P.No.116 of 2020

1. Vimala Krishnamurthy, W/o.Sr.Krishnamurthy,

2. Latha Velukumar, W/o.Velkumar
Rep. by her duly constituted Power of Attorney
Mrs.Vimala Krishnamurthy, W/o.Sr.Krishnamurthy,
117/89-A, Gandhigiri, Upper Coonoor,
Nilgiris - 643 102. ... Petitioners

Vs

1. H.Thiagaraj, S/o. Late Hutchi Gowder,
2. Sumathi Thiagaraj, W/o.H.Thiagaraj ... Respondents

Prayer in C.M.A.No.2759 of 2019 : Civil Miscellaneous Appeal filed under against the fair and final Order dated 03.06.2019 passed by the District Judge of the Nilgiris at Udhagamandalam in A.O.P.No.48 of 2014 and prays to set aside the same.

PRAYER in O.P.No.116 of 2020 : Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to resolve the disputes between the petitioners and the respondents as per clause 17 (e) of the agreement dated 02.02.1999.

For Appellants in CMA & respondents in OP	:	Mr. V.Rhagavachari for Mr.Mouli L
For respondents in CMA & Petitioners in O.P.	:	Mr. R.Subramanian

C O M M O N J U D G M E N T

This Original Petition has been filed to resolve the dispute that as has arisen between the petitioners and the respondents as per clause 17(e) of the agreement dated 02.02.1999.

2. The Civil Miscellaneous Appeal has been filed against the fair and final Order dated 03.06.2019 passed by the District Judge of the Nilgiris at Udhagamandalam in A.O.P.No.48 of 2014.

3. The brief facts leading to the filing of this Original Petition and the appeal are as follows :-

The mother has filed an application under section 9 of the Arbitration and Conciliation Act in A.O.P.No.48 of 2014. The father of 1st respondent, his wife and his son are the partners in a partnership firm viz., Sri Shakthi Tea Industry. The first partner viz., father died on 31.05.2008. Thereafter, the dispute arose between mother and son. The mother has filed an application under Section 9 of the Arbitration and Conciliation Act before the District Court, Ooty restraining the respondents herein from running the tea factory and also for a direction to respondent to deposit the amounts and for other reliefs. Pending the above applications, the mother of the parties also died. Thereafter, the present applicants have been brought on record in the above AOP on the basis of the Will dated 25.01.2012 said to have been executed by the mother in favour of the applicants herein. The above application was allowed, as against which, a C.M.A. No.2759 of 2019 has been filed and the same is pending before this Court.

4. It is an undisputed fact that the mother, being a partner, has filed a suit in O.S.No.75 of 2009 before the District Munsif, Ootacamund, Nilgiris for bare injunction against her son and other partner. In the above Suit, an application under Section 8 of the Act has been taken out by the son, to refer the dispute to arbitration. Thereafter, as the injunction was negatived and appeal filed by the mother was

allowed by the appellate Court, as against which, a Civil Revision Petition in C.R.P. No. 2741 of 2009 has been filed by the respondents herein. In the Civil Revision Petition, this Court has held that as the partnership deed contains an arbitration clause, the matter has to be referred to arbitration, thereby, the above Civil Revision Petition was disposed of on 02.03.2011.

5. Now, it appears that from the year 2009 till 2019, no steps whatsoever has been taken to refer the matter to arbitration by either of the partners, mother or other partners in pursuant to the order passed by this Court dated 02.03.2011. In the year 2014, an application under Section 9 of the Arbitration and Conciliation Act has been taken out by mother for restraining the other partner viz., her son from carrying on the business of tea factory. During the pendency of the above application, it appears that mother, being one of the partner, died. Thereafter, an application has been taken out by the legal heirs on the basis of a Will said to have been executed in their name. The learned District Judge has allowed the application and granted injunction. As against which, the Civil Miscellaneous Appeal has been filed.

6. Heard both sides. Perused the materials.

7. This Court is of the view that the order passed by the learned District Judge is not sustainable in the eye of law for the following reasons :

Though one of the partners, namely the mother of the first respondent has raised the dispute in the year 2009 and this Court has directed the parties to go for arbitration as early as 02.03.2011, no steps whatsoever was taken out by the mother or some other partner to refer the matter to arbitration. Only in the year 2014, the application under Section 9 of the Arbitration and Conciliation Act has been filed. The above conduct of parties makes it clear that manifest intention to arbitrate the dispute is absent on the part of the partners, who were the parties to the earlier proceedings. Therefore, in view of absence of manifest intention shown by the petitioners, who seek interim measure under Section 9 of the Arbitration and Conciliation Act, this Court normally would be reluctant to pass interim measures, particularly, when the manifest intention is absent. In such view of the matter, the order passed by the District Court cannot be sustained in the eye of law.

8. That apart, the daughters of one of the partners have impleaded themselves and sought the order of injunction restraining the other partners from carrying on the business. It is to be noted that such an order restraining the existing partner from carrying on business by the third party, who claims

right on the basis of the Will or assignment or transfer cannot be sustained and they cannot restrain the business of the firm. In fact, such approach is totally against the provisions of Section 29 of the Partnership Act.

9. In this regard, I had an occasion to deal with the matter reported in 2017 (2) Law Weekly 877, in the matter of M/s.SB Steel Industries Vs. India Re-rolling Mills, wherein in para 33, after considering various judgements in this field, I have held as follows :-

> "33. A careful reading of the above Section makes it very clear that even any transfer made by one of the partners in respect of his interest in the firm, the transferree cannot interfere in the conduct of the business and even he cannot demand accounts during the continuance of that firm. At the most, he is only entitled to receive share of profits of his transferring share in the partnership firm and he is bound to accept the accounts of profits agreed to by the partners. Therefore, except to receive any profits agreed to by the partners he will not get any right to claim title or interest either in the property or assets of the partnership firm. Only when the firm is dissolved, his rights if any to the share of the assets will accrue as per sub-section (2) of Section 29. Therefore, the appellant all along prolonged the issue to squat on the property without paying any rent to the firm now cannot take advantage of the alleged assignment."

10. Having regard to the above position, this Court is of the view that the order passed by the District Court restraining the respondents from carrying on the business of tea factory is not sustainable in law. Now, the applicants are seeking to enforce the partnership agreement on the basis of the Will said to have been executed in their name. It is to be noted that, even assuming that, the Will has been proved as per law, as held by the District Court under Section 9 of the Arbitration and Conciliation Act, the applicant, at the most, is entitled to claim accounts of profits of the partnership firm with regard to the share of profits of the respective partner viz., mother as per Section 29 of the Indian Partnership Act. In fact, they are not entitled to interfere into the conduct of the business or even to require accounts, or to inspect the books of the firm. They are entitled only to receive the share of the profits of the transferring partner. Even though the mother of the partner being the partner has not evinced or interested to refer the matter for arbitration, the applicants, being legal representatives of the one of the partner, at the most are entitled to the share of profits of the erstwhile partner, viz., their mother.

11. Though the applicants claim to be partners on the basis of the Will executed by the mother, it is to be noted that they cannot restrain the other partners from carrying on the business and they can only claim profits of shares of the mother. At this stage, the learned counsel appearing for the applicant Mr.R.Subramanian has submitted that an arbitrator can be appointed to decide the share of profits of the mother, who was erstwhile partner, for which Mr.Raghavachari has no objection for appointment of Arbitrator to refer the dispute pertaining to share of the profits of the erstwhile partner, viz., mother.

12. Having regard to the conduct of the parties and exchange of notices, particularly, the notice dated 05.07.2019 and the reply notice sent by the applicant on 12.07.2019, the parties have themselves agreed to refer the dispute in respect of the share of erstwhile partner, this Court is of the view that even though there is no contract governing the parties to refer the dispute to arbitration, in view of the conduct of the parties, the dispute can be referred only in respect of the profits and loss in respect of erstwhile partner in the firm, for which Mr. R.Subramanian, learned counsel appearing for petitioner has agreed for the same and he has submitted that the arbitrator has to be appointed only to resolve the dispute with regard to the share of profits of the erstwhile partner.

13. In the result,

(i) the Civil Miscellaneous Appeal is allowed and the Order passed by the learned District Judge, Nilgiris in A.O.P.No.48 of 2014 dated 03.06.2019 is hereby set aside. Consequently, the connected miscellaneous petition in Civil Miscellaneous Appeal is closed.

14. Accordingly, the Original Petition is Ordered as follows :

(i) Mr.P.Nagasubramaniam, Advocate at No.225, Satyamoorthy Street, Ram Nagar, Coimbatore. (Contact No.98430 77776) is appointed as an Arbitratorto enter upon reference and adjudicate the disputes inter se the parties. Both sides also consented to have above name Learned Arbitrator to resolve the issues.

ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order.

iii) That the learned Arbitrator appointed herein shall be at liberty to fix his remuneration and other incidental expenses, which shall be borne by the parties equally.

iv) it is open to the arbitrator to conduct the proceedings through video conferencing also, taking note of the pandemic situation.

The parties to bear their own costs.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

To.
1. The District Judge,
   Nilgiris at Uthagamandalam.

2. The Sub Assistant Registrar (O.S),
   High Court, Madras.

Copy to :

Mr.P.Nagasubramaniam, Advocate,
No.225, Satyamoorthy Street, Ram Nagar,
Coimbatore.
Contact No.98430 77776)

+1cc to Mr.R.Subramanian, Advocate, S.R.No.28951

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O.P. No. 116 of 2020

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