

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.10.2023
Pronounced on : 05.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR
AND
THE HONOURABLE MR.JUSTICE P.DHANABAL

O.S.A. (CAD) No.83 of 2022
& C. M .P. No.9646 of 2022

Krishna Kumar Mundhra

..Appellant

Vs.

1.Shyamdev Mundhra
2.Ashok Kumar Mundhra
3.Ms.Uma Rathi
4.Mr.Ramdev Mundhra

... Respondents

Prayer:Original Side Appeal No.83 of 2014 filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Clause 15 of the Letters Patent read with Order XXXVI Rule (1) of the Original Side Rules, read with Commercial Court under Section 13 of Commercial Court Act, 2015 against the order passed by the Learned Single Judge in A.No.97 of 2022 dated 06.06.2022 on the file of this Court.

For Appellant	:	Mr.V.Raghavachari Sr.Counsel for M/S.M.Narayanaswamy
For R1 & R2	:	Mr.Murali Kumaran Sr.Counsel

for MC Gan Law Firm
For R3 : Mr.P.Ganesan

JUDGMENT

(The Judgment of the Court was delivered by P.DHANABAL,J)

This Original Side Appeal No.83 of 2014 has been preferred as against the order passed by the Learned Single Judge in Arbitration Application No.97 of 2022 dated 06.06.2022. Wherein the Appellant herein Mr.Krishna Kumar Mundhra has filed an Arbitration Application in Application No.97 of 2022 for appointment of a Receiver to take charge of the Firm M/s.Phusaram Munthada and conduct forensic audit from 2011 to till date, pending disposal of the arbitration proceedings.

2.The Learned Single Judge after hearing both parties, closed the application by stating that it is appropriate to close the captioned application making it clear that no view or opinion is expressed by this Court either on the merits of the matter or on the sections 9 of the Arbitration and Conciliation Act, 1996 (herein after referred to as Act) as prayed in the Application and the rights of the applicant to come up with application filed

under section 9 of the Act with similar prayer subject to what happens before the Hon'ble Division Bench are also preserved and protected. Captioned applications disposed of as closed albeit preserving the rights of the applicant in the above said manner.

3. There was a partnership firm in the name and style of M/s.Phusaram Munthada entered into the business of jewellery. The partnership was more of family concern and all the family members were made as partners. In the year 1982, a deed was executed, dated 28.8.1982 between the father Mr.Jeevanlal Mundhra, this appellant and respondents 1 & 2. Thereafter, this appellant retired from the partnership firm with effect from 31.3.2011. However he continued to be the one of the Director in the Private Limited Company, incorporated under the same name i.e., M/s. Phusaram Munthada Private Limited. Thereafter, the mother of the petitioner Mrs.Maina Bai Mundhra was inducted as a partner and entered into partnership deed on 01.04.2011 and thereby she was entitled to 1/3rd share over the partnership firm. Though the petitioner was retired from partnership firm on 31.03.2011, his accounts were not settled and he also believed, since his mother was a partner in the firm, he would be entitled to

its share and profits. While the facts are being so, the petitioner's mother died on 01.04.2020 and the partners were reduced into two partners. The 2nd respondent also retired from the partnership firm on the same day i.e., 1.4.2020. Thus immediately after retirement of R2 on the date of retirement the partnership firm got dissolved by operation of law. But the first respondent included the 3rd and 4th respondent as partners in the said firm on the same day. The first respondent is only surveying partner on the death and retirement of other partners cannot continue the business by inducting his kith and kin. On the date of death of his mother, the petitioner was entitled to the share in the assets and good will of the partnership firm. The petitioner also came to know that there were several fraudulent activities and diversion of funds were also taking place under the partnership firm. The petitioner caused notice to the respondents on 12.1.2021 and there was continuous correspondences there on, but the respondents have not given any accounts to the petitioner.

4. After hearing the both parties, the learned Single Judge closed the petition. As against the order passed by the Learned Single Judge, the

present Appeal has been filed on the following grounds:-

The impugned order is against the facts and against the well settled proposition of Law.

1. The Learned Single Judge ought to have independently consider the Arbitration Application No.97 of 2022, instead of simply closing the application, in view of the order passed in another Application No.272 of 2022.
2. The Learned Single Judge failed to see that the appellant has made out the grounds for appointment of Receiver as the first respondent has unilaterally reconstituted the firm on 01.04.2020 by inducting his kith and kin when the firm itself has been dissolved by operation of law due to death of the appellant's mother and retirement of 2nd respondent out of three persons.
3. The Learned Judge ought to have seen that partnership firm has come to an end by operation of Law on the death of the appellant's mother on 01.04.2020 and on the same day another partner i.e., 2nd respondent retired from the partnership and this single partner cannot constitute the partnership firm by including his own kith and kin.

4. The Learned Judge failed to appreciate the fact that the appellant is entitled to claim to the share as the legal heir of the deceased partner who died on 01.04.2020 and as such the claim of the appellant is well within the period of limitation.
5. The Learned Judge ought to have seen that the alleged partnership deed could not have been executed on 01.04.2020 because the entire country was on lock-down from 24.03.2020 due to Covid-19.
6. The Learned Judge ought to have seen that the respondents herein form another partnership firm by naming PJS commodities and indulged in diverting the business from the company (PMPL) and the firm Phusaram Munthada to the new firm PJS Commodities which necessitates the grant of interim order to preserve the subject matter of arbitration.
7. The Learned Judge ought to have seen that the first respondent is running the business by using the assets of the firm which has been dissolved by the operation of law as early as on 01.04.2020.
8. The Learned Judge ought to have consider the fact that limitation is a necessity that directs the appellant to file a suit or arbitral

proceedings, the finding of limitation would become detrimental to the initiation of any further arbitral proceedings or suit since the order of the Learned Judge would come in the way of substantial allegation between the parties. Therefore, the order passed by the Learned Single Judge dated 06.06.2022 is liable to be set aside.

5.Mr.V.Raghavachari, Sr.Counsel for M/s.M.Narayanaswamy would vehemently contend that the petitioner/appellant has filed Arbitration Application No.97 of 2022 seeking for an appointment of a Receiver to take care of the partnership business. The another application was filed, O.A.No.272 of 2022, for interim injunction to restrain the 1st Respondent from operating the accounts of the Partnership Firm. While hearing the O.A.No.272 of 2022 at the time of admission, the learned Judge has granted interim stay, not to run the partnership business. As against the interim stay granted by this court, the respondents herein have filed Application Nos.107 to 109 of 2022 with prayers to vacate the interim order. The said applicants were heard by the Learned Single Judge.

6.The Learned Judge has passed order by holding that the claim of the petitioner/applicant who retired from the partnership firm as early as on 30.03.2011 was barred by limitation and thereby the petition filed by this appellant in O.A.No.272 of 2022 was closed and Arbitration Application Nos.107 to 109 of 2022 were allowed. Thereafter this impugned application was heard by another Learned Single Judge and simply closed the Arbitration Application No.97 of 2022 holding that already similar application filed under Section 9 of the Arbitration and Conciliation Act, 1996 was closed by a another Learned Single Judge and thereby passed the order by closing this application.

7.According to the appellant, the learned Single Judge ought to have disposed the application on merits, in O.A.No.272 of 2022. On contrary, it was decided that the claim of the applicant is barred by limitation. While so, based on that order this petition was also closed. The order passed by the Learned Single Judge in respect of the limitation will infringe the rights of the petitioner/appellant and according to the order of the Learned Single

Judge, the claim is barred by limitation but the mother of the appellant passed away in the year 2020 and thereby the appellants being the legal heir of the deceased mother is also entitled to the shares of the partnership firm and thereby the right of the appellant would affect due to the findings rendered by Learned Single Judge, therefore, the order passed by the learned Single Judge is liable to be set aside.

8.This Court has heard both sides and perused the materials on record, the order of the Learned Single Judge and grounds for appeal. The point for determination in this appeal is whether the order passed by the Learned Single Judge in O.A.No.97 of 2022 is sustainable in law and facts.

9.In this case, there is no dispute with regard to the existence of arbitral agreement between the parties. The learned Judge has closed the application by holding that the claim of the petitioner is barred by limitation as he was retired from the partnership firm in the year 2011 itself.

10. The contention of the appellant is that the learned Single Judge

has closed the petition without passing any order on merits. The appellant has filed the original application in O.A.No.97 of 2022 for appointment of receiver to take charge of the partnership firm during pending arbitration proceedings. The appellant filed another application in O.A.No.272 of 2022 and also obtained interim stay from running the partnership firm. Thereafter, these respondents have filed applications to vacate the stay in application Nos.107 to 109 of 2022 and the same were allowed. Since the above said petitions were allowed, the main arbitration application No.272 of 2022 was closed by holding that the claim of the petitioner was barred by limitation as the petitioner has retired from the partnership firm in the year 2011. In fact the petitioner's mother who was partner in the firm died in the year 2020 and thereby, the petitioner is entitled to share of his mother. Therefore, the petition is well within the limitation period and not barred by limitation.

11. The respondents contention is that the petitioner retired from partnership firm in the year 2011 itself, therefore, he cannot claim any share in the business but at the same time his claim is towards the share of his

mother. Therefore, the claim of the petitioner is not barred by limitation for claiming share of his mother. Subsequent to the order passed by the learned Single judge, the petitioner herein issued notice for appointment of arbitrator under Section 11 of the Arbitration Act.

12. Learned Counsel for the respondents had not adverted the said fact that the petitioner has taken steps for appointment of an Arbitrator under Section 11 of the Arbitration Act. In spite of the above facts, without going into the merits of the case, this Court can dispose of the Appeal with liberty to the appellant to approach the Arbitrator, by raising all the grounds raised in the Appeal. The order passed by the Learned Single Judge would be in force till the appointment of an Arbitrator and it is a well-settled law that the interim order passed under Section 9 of the Act before the appointment of arbitrator, will exist till the appointment of an arbitrator and the arbitration proceedings to be commenced within 90 days. In this context Section 9 of the Arbitration Act is extracted hereunder for ready reference:-

....9.Interim measures, etc., by Court – A party may, before or during arbitral proceedings or at any time after the

making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:-

*(i).for the appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings;
or*

(ii).for an interim measure of protection in respect of any of the following matters, namely:-

(a). the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d)interim injunction or the appointment of a receiver;

(e)such other interim measure of protection as may appear to the Court be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

[(2)Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-Section (1), the arbitral proceedings

shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine.

[(3)Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-Section (1), unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.”.....

13. On careful perusal of the said provision, it is clear that if any interim order passed under Section 9 of the Act before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under subsection (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine. In this case, order was passed as early as on 06.06.2022, thereafter the petitioner has taken steps to appoint an Arbitrator. Therefore, liberty is granted to the petitioners, to agitate all the grounds raised by the petitioner/appellant before the arbitrator. The order passed by the learned Single Judge also will be in force till the appointment of Arbitrator who has to commence the proceedings within 90 days as per the Act. So far as limitation is concerned, the learned Single Judge failed to consider that the petitioner as a legal heir of his

mother is entitled to share of his deceased mother who died on 01.04.2020, thereby the case is not barred by limitation. Hence, the arbitrator has to decide the application without being influenced by the order of learned Single Judge in respect of finding of limitation and to conduct the proceedings on merits.

14. With the above said directions O.S.A. (CAD) No.83 of 2022 stands disposed of. No costs. Connected Miscellaneous Petitions is closed.

(DKK.J) (PDB.J)
05.12.2023

Index : Yes/No
Speaking : Yes/No
Neutral Citation Case : Yes/No
nst

D.KRISHNAKUMAR,J
and
P.DHANABAL,J

nst

O.S.A. (CAD) No.83 of 2022

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The Sub-Assistant Registrar,
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& C.M.P.No.9646 of 2022

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