

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.84 of 2022
& C. M .P. No.9643 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.84 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.272 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 Appeal has been filed as against the order passed by the Learned Single Judge in O.A.No.272 of 2022. Wherein the learned Single Judge has closed the application.

2. Case of the appellant before the learned Single Judge is that originally 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.

3. According to the appellant he filed an application before the Arbitral Tribunal under Section 9 of the Arbitration and Conciliation Act, 1996 for granting interim order to restrain the first respondent herein and his men from using the assets, profits and goodwill of the dissolved firm M/s.Phusaram Munthada and continuing the business in the name of partnership either by operating the bank accounts of the firm more fully described in the application in O.A.No.272 of 2022.

4. The same petitioner also filed another application in O.A.No.97 of 2022, for appointment of receiver to take over the charge 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 stay order the respondents herein have filed applications in A.Nos.107 to 109 of 2022 with prayers to vacate the interim order.

5.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 another application in O.A.No.97 of 2022 was heard by another Learned Single Judge and the same was also closed by holding that already similar application filed under Section 9 of the Arbitration and Conciliation Act, 1996 was closed by the another Learned Single Judge and thereby passed the order by closing the said application.

6. As against the order passed in O.A.No.272 of 2022, the present appeal has been filed by the appellant on the following grounds:-

(1) The impugned order is against the facts and the well settled proposition of law and hence deserves to be set aside.

(2) The learned Judge ought to have seen that Partnership Firm has come to an end by operation of law on the death of appellant's mother on 01.04.2020

and on the same day, another partner has also retired from the partnership and it is settled law that single partner cannot continue the partnership firm by including his own kith and kin.

(3) The learned Judge ought to have seen that assets and good will of the firm cannot be utilized by the single partner according to his whims and fancies and the appellant is entitled to a share in the assets and goodwill, being one of the legal heirs of deceased partner.

(4) The learned judge has failed to appreciate the fact that the appellant entitled to claim a 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 failed to see that partnership firm consists of 3 partners namely 1 and 2 herein and appellant's mother and on the death of the appellant's mother on 01.04.2020, the composition has been reduced into two and on the same day the 2nd respondent has tendered his resignation. Hence by operation of law, partnership firm has come to an end. The 1st respondent herein had reconstituted the partnership firm by falsely creating a partnership deed said to have been dated 01.04.2020. This crucial

aspect has not at all been considered by the learned Judge while vacating the interim order.

(6) 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 lockdown from 24.03.2020 due to onset of covid-19 and it is alleged by the 1st respondent that he had purchased the stamp papers on 01.04.2020 from a stamp vendor at Madras High Court campus and it is further alleged that he had reconstituted the firm by executing partnership deed using the said stamp papers. Moreover appellant's mother died on 01.04.2020 at her residence at Sowcarpet Chennai and she was cremated on the very same day by 4.00 p.m., and all the children of my mother and all the family members gathered there on 01.04.2020. All the family members stayed in the Sowcarpet residence on that day till late night and thus the alleged partnership deed said to be dated 01.04.2020, could not have been executed. It is clear from the alleged partnership deed between the 1st respondent and his sons, the same has been created subsequently by anti dating the date of the deed as 01.04.2020.

(7) The learned Judge ought to have seen that the respondents 1 and 2

herein formed another partnership firm by name PJS Commodities and indulged in diverting the business from the company (PMPL) and the firm Phusaram Munthada to their new firm PJS Commodities, which necessitates the grant of interim order to preserve the subject matter of arbitration.

(8) The learned Judge ought to have seen that the 1st 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.

(9) That the learned Judge did not consider the claim of the appellant in the right perspective and ought not to have declared that the claims are barred by limitation.

(10) That the learned Judge ought to have considered the fact that limitation is a mixed question of fact and law and only through a full-fledged trial it could be even established whether a claim is time barred or otherwise.

(11) That the learned Judge was not right in concluding that the claim is barred by limitation merely because the appellant had resigned from the partnership firm on 30.04.2011.

(12) That the learned Judge having stated that the claim is barred by the limitation directs the appellant to file a suit or arbitral proceedings. The

finding on limitation would become detrimental to the initiations of any further arbitral proceedings or suit since the order of the learned Judge would come in the way of a substantial adjudication between the parties.

(13) That an impugned order also deserves to be set aside as no other reasons have been stated and a declaration that the claims are barred by limitation has been made without sufficient materials and evidence.

(14) That the learned Judge does not have any powers to decide on the claims of the parties under section 9 of the act and it is only an interim measure and if case for interim measures are not made out, at the best, the Courts sitting under section 9 only relegate the parties to arbitral proceedings to adjudicate the disputes under facts and laws.

7.1. Mr.V.Raghavachari, Senior counsel for Mr.M.Narayanaswamy would vehemently contend that the petitioner/appellant has filed arbitration application in O.A.No.272 of 2022 seeking interim injunction to restrain the 2nd respondent from operating the accounts of partnership firm. The another application was filed in O.A.No.97 of 2022, for appointment of receiver to take over the partnership business. 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.

7.2. 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 applicant in O.A.No.272 of 2022 was closed and applications nos.107 to 109 of 2022 filed by the respondents for vacating the interim stay were allowed. Thereafter another application in O.A.No.97 of 2022 was heard by another learned Single judge and the same was simply closed by holding that already similar application filed under section 9 of the Arbitration and Conciliation Act, 1996 was closed by the another learned Single Judge and thereby passed the order by closing the application.

7.3. According to the appellant, the Learned Single Judge ought to

have disposed the application on merits in O.A.No.97 of 2022. On the contrary, while passing order in O.A.No.272 of 2022, it was decided that the claim of the applicant is barred by limitation. While so, based on that order the petition in O.A.No.97 of 2022 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 since the petitioner retired from the partnership firm in the year 2011, but the mother 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.272 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 appellant filed an application in O.A.No.272 of 2022 and also obtained interim stay as against the respondents from running the partnership firm. Thereafter, these respondents have filed applications to vacate the stay in applications 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. The appellant has filed another original application in O.A.No.97 of 2022 for

appointment of receiver to take charge of the partnership firm during pending arbitration proceedings.

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 Arbitration 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 Arbitration 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. Sofar 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.84 of 2022 stands disposed. No costs. Connected Miscellaneous Petitions is closed.

(DKKJ) (PDBJ)
05.12.2023

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

D.KRISHNAKUMAR,J
and
P.DHANABAL,J

nst

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The Sub-Assistant Registrar,
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Pre-delivery order in
O.S.A. (CAD) No.84 of 2022
& C. M .P. No.9643 of 2022

05.12.2023