IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2024

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Civil Miscellaneous Appeal Nos.257 and 258 of 2024
and CMP Nos.2822 and 2815 of 2024

CMA No.257 and 258 of 2024

1. Mrs.K.Rajakumari

2. Mr.M.Kandasamy ... Appellants in both CMAs

Vs.

Mr.R.Vedagiri ..Sole Respondent

Prayer in CMA No.257 of 2024 : Civil Miscellaneous Appeal filed under Section 37 of the Arbitration and Concilliation Act, 1996, against the Interim Award made in I.A.No.60 of 2022 in ACP No.06 of 2022 in O.P.No.313 of 2021 dated 11.01.2024 (Served on 20.01.2024) by the Sole Arbitrator Mrs.R.Rathina Thara, in the matter of the Indian Arbitration and Conciliation Act, 1996 (Act 26 of 1996) and in the matter of the M/s.Prashant Enterprises and to set aside the same.

Prayer in CMA No.258 of 2024 : Civil Miscellaneous Appeal filed under Section 37 of the Arbitration and Concilliation Act, 1996, against the Interim Award dated 11.01.2024 made in I.A.No.40 of 2023 in ACP No.06 of 2022 in O.P.No.313 of 2021 by the Sole Arbitrator Mrs.R.Rathina Thara, in the matter of the Indian Arbitration and Conciliation Act, 1996 (Act 26 of 1996) and in the matter of the M/s.Prashant Enterprises and to set aside the same.

For Appellant in both CMAs	:	Mr.S.Sathiaseelan
For Respondent in both CMAs	:	Mr.S.I.Sharukumar

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COMMON JUDGMENT

These appeals have been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") against the interim award passed by the Arbitration Tribunal in I.A.No.6 of 2023 and I.A.No.4 of 2023 respectively dated 11.01.2024.

2. The respondent filed a claim petition before the learned Sole Arbitrator seeking for the relief of dissolution of partnership firm named M/s. Prashant Enterprises and for other consequential reliefs. The

appellants also filed their statement of defence. Apart from dealing with the merits of the case, the appellants were also willing for consenting for the dissolution of the partnership firm

3. After the pleadings were completed, the respondent filed I.A.No.4, 5 and 6 of 2023 under Section 17 of the Act ;

(a) to appoint a qualified Chartered Accountant as an Auditor for the purpose of conducting a detailed audit in the firms viz., M/s.Prashant Enterprises and M/s.Prashant Cutting Tools India Private Limited and to file a report.

(b) to permit the claimant or his representative to remain present during the process of audit and

(c) to direct the appellants to supply all the books of accounts, documents, data and all such other assistance required for conducting the audit.

4. The above applications came to be filed by the respondent on the ground that the appellants have floated M/s.Prashant Cutting Tools India Private Limited in the same premises where M/s.Prashant

Enterprises was running and they had diverted the business of M/s.Prashant Enterprises in connivance with the relatives. Thereby, it was alleged by the respondent that the appellants wanted to dislodge the business of M/s.Prashant Enterprises and continue the new firm. In this process, they had also transferred the accounted and unaccounted stock, customer based details, supplier based details and also certain important pricing details.

5. The appellants filed a detailed counter affidavit in all these applications. They objected to the reliefs (a) and (c) and they consented for the relief (b). The appellants took a stand that insofar as the audit for M/s.Prashant Enterprises, it can be done only with effect from 01.04.2020 since already a qualified chartered accountant had audited the firm for the period from 2016 till 31.03.2020 and the respondent did not raise any objections to the audit report or returns filed for the relevant assessment years. Insofar as the audit that was sought for M/s.Prashant Cutting Tools India Private Limited, the appellants took a stand that it is an independent entity which cannot become a subject matter in the relevant proceedings. The appellants also alleged that the respondent

floated a proprietorship concern named as M/s.S L Enterprises even when he was continuing as a partner of the firm and when the respondent had resorted to such a step, the appellants cannot be prevented from floating another business. In any case, there was no bar under the partnership deed for floating any company or business by the partners.

6. The Sole Arbitrator on considering the rival claims has passed an interim award by appointing a Chartered Accountant and has virtually granted the relief claimed in I.A.Nos.4 and 6 of 2023. This interim award was passed purportedly under Section 17 of the Act and the same has been challenged in these appeals.

7. Heard Mr.S.Sathiaseelan, learned counsel for appellants in both CMAs and Mr.S.I.Sharukumar, learned counsel for respondent in both CMAs.

8. It was clarified in the course of arguments that even though the learned Arbitrator had given the nomenclature as interim award, it is in fact an interim order passed under Section 17 of the Act.

9. Section 17 of the Act, deals with interim measures that can be ordered by the Arbitral Tribunal. The object behind passing such an interim order is to ensure that an interim measure or a protection is given pending the proceedings so as to ensure that at the time of passing the final award, the claimant is not deprived of the fruits of the award.

10. In the case in hand, the pleadings are complete. The partners have come to loggerheads and they want to dissolve the firm. At the time of dissolution of the firm, the income and expenditure has to be properly arrived at and whatever profits ultimately remain must be shared between the partners as provided under the partnership deed. The appellants are willing for the dissolution of the partnership firm. However, the respondent does not want to complete that process on the apprehension that the 2nd appellant and the husband of the 1st appellant incorporated an identical and similar business in the name and style of M/s.Prashant Cutting Tools India Private Limited on 01.12.2021 in the same premises and they had diverted the business and thereby, had misappropriated huge funds. That apart, they have also transferred the

stock, customary based details, supplier based details etc., to the new entity. In view of the same, the respondent contends that the said entity must also be subjected to audit so that all the transactions in which the new entity is involved can be scrutinized and whatever that belongs to M/s.Prashant Enterprises had gone to M/s.Prashant Cutting Tools India Private Limited, can be quantified and it can also be included in the accounts of M/s.Prashant Enterprises and thereafter, the final settlements can be arrived at the time of dissolution of the firm.

11. On carefully reading the interim award (interim order) passed by the sole Arbitrator, it is seen that the arbitrator had taken into account various documents that was relied upon by both sides. It must be borne in mind that the proceedings are now at the stage of completion of pleadings and the parties will have to let in evidence and mark documents. This process has not commenced. The appellants are coming up with the case that the respondent also started a proprietorship concern named M/s.SL Enterprises, even when the respondent was a partner.

12. On the other hand, the respondent is alleging that the 2nd

appellant and the husband of the 1st appellant have parallelly started another entity. Whether any business had been diverted to those entities which came into being during the subsistence of the existing partnership firm, is a matter for evidence which has to be *prima facie* established. The Arbitrator can come to a conclusion for appointment of an auditor only after the evidence is let in and the arguments are heard from both sides. On considering the same, if the arbitrator is able to come to some conclusion that the business has been diverted and one of the party has received a wrongful gain, thereafter in order to quantify the wrongful gain, an auditor can be appointed to scrutinize the entire documents and transactions. That stage has not reached in the present case since it is now at the stage of allegations and counter allegations made by the parties against each other. The appellants have denied the allegations made against them as if the business has been diverted to the new entity. These facts can only be established in the trial and only thereafter, the learned arbitrator should take a decision on the appointment of an auditor.

13. Even though, it was contended on the side of the respondent

that the arbitrator has not passed any interim award, on carefully reading the order, it definetly sounds like an interim award. In other words, the learned arbitrator has reached a conclusion for appointment of an auditor even without going through the process of recording the evidence, marking the documents and hearing the final arguments of both the parties. The interim award passed by the learned arbitrator certainly does not fall within the scope of Section 17 of the Act and it looks like a final order.

14. In the light of the above discussion, this Court holds that the order passed by the learned Arbitrator in I.A.No. 4 and 6 of 2023 dated 11.01.2024 is liable to be set-aside and accordingly, the same is hereby set-aside.

15. The matter is remanded back to the file of the arbitrator. The learned arbitrator shall start the process of recording evidence, marking documents and hearing the final arguments on both sides. Thereafter, the learned Arbitrator shall take a decision with respect to appointment of an auditor. This Court has not gone into the merits of the case and it is left

open to both sides to raise all the contentions before the learned Arbitrator and the same will be considered on its own merits and in accordance with law.

16. It is brought to the notice of this Court that the pleadings got over on 01.12.2022, when the reply was filed for the rejoinder filed by the respondent. Thereafter, the proceedings should have been completed by 01.12.2023. Even if the parties want to extend the time, they could extend only for a period of six months. That period came to an end in may 2024. In view of the same, both the parties shall take steps to extend the mandate of the learned Arbitrator by filing an appropriate application. On such mandate being extended, the learned Arbitrator shall keep in mind the observations made by this Court and proceed further in accordance with law.

17. In the result, both these Civil Miscellaneous appeals are disposed of in the above terms. No costs. Consequently, the connected miscellaneous petitions are closed.

05.07.2024

Speaking Judgment/Non-speaking Judgment
Index :Yes/No
Neutral citation: Yes/No
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N.ANAND VENKATESH.,J
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To,

M/s.R.Rathna Thara

Sole Arbitrator

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