

(2010) 09 MAD CK 0340

Madras High Court

Case No: O.P. No. 477 of 2007

Arul Sigamani and A. Moni

APPELLANT

Vs

Paul Durai and Perumal,

Thangalakshmi

Sivasubramanian, Parvathi and

Chitraboopathi Ammal

RESPONDENT

Date of Decision: Sept. 8, 2010

Acts Referred:

- Arbitration Act, 1940 - Section 20, 34
- Arbitration and Conciliation Act, 1996 - Section 11(6), 34, 7

Citation: (2010) 5 CTC 833

Hon'ble Judges: M.Y. Eqbal, C.J

Bench: Single Bench

Advocate: V. Shanmugam, for the Appellant; A.L. Somayaji, for A.R. Nixon, for the Respondent

Final Decision: Dismissed

Judgement

M.Y. Eqbal, C.J.

By this Application filed u/s 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Act"), the Petitioners have prayed for appointment of an Arbitrator namely, Shri P. Pandi, Advocate, High Court, Chennai, as the sole Arbitrator to adjudicate all the disputes and claims raised by the Petitioners against the Respondents arising out of a Partnership Agreement dated 01st October, 1979. The Petitioners' case is that they entered into a Partnership Agreement under the name and style of "Kumari Minerals", a registered Firm, for carrying on business in mining of minerals and a mining lease was granted on 15th May, 1974 in favour of the Firm, and a mining lease was also executed. At the initial stage, the First Respondent was authorized by the other Partners of the aforesaid Firm to represent the Partnership Firm, and on the basis of that, the First Respondent applied to the department for

issue of permit for quarrying garnet sand and also to represent the Firm before the authorities concerned. Subsequently, under a Deed of Partnership dated 7th January, 1978, the First Petitioner was appointed as the Managing Partner. Subsequently, by another document dated 9th September, 1978, the Fourth Respondent was appointed as the Managing Partner of the firm. However, from 14th February, 1981, the First Petitioner along with Respondents 2 & 3 acted as Joint Managing Partners. As per the terms of the Partnership Agreement dated 26th September, 1984, both the First and the Fourth Respondents jointly applied for permit to quarry garnet sand and to transport on behalf of the Firm, which arrangement continued and by a Deed of Reconstitution dated 9th October, 1984 both the First and the Fourth Respondents were permitted to jointly apply for permit and for paying the royalty on behalf of the Partnership Firm.

2. In the year 1987, as alleged by the First Petitioner, the First Respondent started acting against the interest of the Firm and prevented the First Petitioner from participation in the business, signing cheques and maintaining accounts, which fact was notified under the Mineral Concession Rules by letter dated 27th January, 1987. Due representation was made to the Collector and all other authorities that the permit should not be issued if applied for by the First Respondent individually. Pursuant thereto, the District Collector called for the Partnership Deed, which was produced by the Fourth Respondent along with her reply dated 26th February, 1987. It is contended by the Petitioners that the First Respondent is acting against the interest of the said Firm and attempting to get the permit in the individual name. As a result, all the Partners namely, the Petitioners and the Third and Fourth Respondents filed a Suit bearing O.S. No. 213 of 1989 on the file of Sub-Court, Nagercoil, which was subsequently transferred to Sub-Court, Padmanabhapuram and re-numbered as O.S. No. 16 of 1990, against the First Respondent to restrain him from acting against the terms and conditions of the Partnership Deed (reconstituted) dated 9th October, 1984. In the said Suit, the fourth Respondent was also impleaded as a party. The Respondents appeared in the Suit and contended that there is an Arbitration clause in the Partnership Deed to resolve the disputes, if any arising between the parties, through arbitration. For that one Application u/s 34 of the Arbitration Act was filed and ultimately the Suit was filed.

3. Further the case of the Petitioners is that the Partnership Firm, which was originally constituted on 12th February, 1973, and subsequently reconstituted at various stages, had been applying for grant of mining permit and used to pay royalty and security deposit from and out of the funds of the Partnership Firm. It is alleged that the First Respondent in connivance with the Second and Third Respondents and three others had played a fraud on the registered Firm and caused entries to be made, as if the Firm was reconstituted, by inducting others as Partners of the Firm. It was alleged that four other persons committed fraud on the registered Firm by submitting forged documents, as if the Second Petitioner gave notice for dissolution of the Firm on 16th July, 1991. It was, further, alleged by the

Petitioners that the Respondents created false and fraudulent documents alleging that the Firm was renamed as "V.V. Minerals". Consequently, the Petitioners along with the Fourth Respondent filed O.S. No. 39 of 1993 on the file of Sub-Court, Tirunelveli impleading the partners of V.V. Minerals and the Government of Tamil Nadu and various authorities. In the said Suit, the Petitioners had prayed for a declaration that the entries made in the concerned document regarding dissolution of the Partnership Firm namely, M/s. Kumari Minerals is void, illegal and of no force. On receipt of the notice, the First Respondent filed similar Application being I.A. No. 200 of 1993 u/s 34 of the Arbitration Act, 1940 for stay of the Suit on the same ground that in view of the Arbitration clause, the Suit cannot proceed. The Trial Court allowed the Application and stayed the Suit on the same ground that there exists an arbitration clause in the agreement entered into between the parties. Against the aforesaid order, the Petitioners filed C.R.P. No. 1569 of 2002 before this Court and by order dated 8th April, 2003, the said Civil Revision Petition was dismissed and a SLP filed by the Petitioners were also dismissed by the Supreme Court on 22nd September, 2003.

4. The Petitioners' case is that, in these circumstances, they issued legal notice on 10th June, 2005 to the Respondents invoking the Arbitration clause and requested the Respondents to appoint Shri P. Pandi, as the sole Arbitrator. Since the Respondents did not heed to the request of the Petitioners, the instant Application has been filed u/s 11(6) of the Act.

5. The Respondent opposed the Application on various grounds including that the Application u/s 11(6) is barred by limitation, and that the Petition u/s 11(6) is not maintainable. The First Respondent's case is that the Partnership Firm under the name and style "Kumari Minerals" was constituted on 12th February, 1973 for buying and selling of all kinds of minerals. The above firm was reconstituted several times. Clause 15 of the Reconstituted Partnership Deed dated 01st October, 1979 states that "all the disputes arising amongst the Partners relating to the firm shall be settled only through arbitration" and the reconstituted Partnership Firm has nothing to do with the Mining lease granted by the Government. It is alleged by the Respondents that in O.S. No. 16 of 1990, the First Respondent filed an Application being I.A. No. 153 of 1990 u/s 34 of the Arbitration Act, 1940 for stay of the trial of the Suit on the ground that the Petitioners have preferred suit in derogation of Arbitration Clause contained in the reconstituted Partnership Deed. In the said Suit, the Sub-Court, Padmanabhapuram in terms of the order dated 6th August, 1990 granted stay of the trial of the Suit. The Petitioner after nine years preferred C.M.A.SR. No. 2160 of 1999 against the aforesaid order passed in I.A. No. 153 of 1990 with a Petition to condone the delay of 3233 days in filing CMA. The Principal Judge, Nagercoil dismissed the Appeal on 8th November, 1999. The Petitioners, thereafter, did not prefer any Appeal against the order passed by the Principal Judge and the said order attained finality.

6. It is further alleged by the First Respondent that the period of limitation for filing Application u/s 20 of the Arbitration Act, 1940 is three years, and as such the Petitioners ought to have filed the Petition on or before 07th August, 1993. Instead the Petitioners filed the Petition during 2007 i.e., after a lapse of more than fourteen years, and hence the Petition is liable to be rejected on the ground of limitation.

7. The Respondent's further case is that the Petitioners preferred O.S. No. 39 of 1993 before the Subordinate Judge, Tirunelveli alleging that the Respondent is acting against the interest of the Partnership Firm by inducting other partners and obtained permit for removal of minerals from the authorities contrary to the Partnership Agreement dated 01st October, 1979, It is alleged by the First Respondent that he contested the case by filing I.A. No. 200 of 1993 in the aforesaid Suit u/s 34 of the Arbitration Act, 1940 to stay the trial of the Suit on the ground that the Petitioners have preferred Suit without invoking the Arbitration clause contained in the reconstituted Partnership Deed dated 01st October, 1979. However, the Suit itself came to be dismissed on 1st September, 2004 for default, against which no Appeal has been filed.

8. It is the case of the First Respondent that even though the Arbitration and Conciliation Act, 1996 came into force on 16th August, 1996, since the dispute has already commenced on 06th August, 1990 i.e., the date on which the order passed in I.A. No. 153 of 1990 in O.S. No. 16 of 1990, only the provisions of Act, 1940 was applicable. According to the Respondent, the Petitioners should have at best taken steps as per order passed in I.A. No. 153 of 1990 in O.S. No. 16 of 1990. It is the case of the Respondent that the Petitioners having failed in all their attempts have come forward with this Petition, which is barred by limitation and the relief claimed for appointment of an Arbitrator is liable to be rejected.

9. Before going into the merits of the Petition, I would like to refer to the Constitution Bench judgment of the Supreme Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . By the said judgment, the earlier decisions of the Supreme Court in the case of Konkan Railway Corp. Ltd. and Others Vs. M/s. Mehul Construction Co., and also Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., have been overruled. In the aforesaid judgment, their Lordships have elaborately discussed the power of the Chief Justice u/s 11(6) of the Act. While exercising the power of performing the duty u/s 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the Section for the exercise of that power or the performance of that duty exist. The Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction to entertain the request, in the sense, whether the party making the motion has approached the right High Court, whether there is a valid Arbitration Agreement in terms of Section 7 of the Act and whether the person before him with the request is a party to the Arbitration Agreement or whether there was no dispute subsisting which was capable of being arbitrated upon. While exercising the power

u/s 11(6) of the Act, the Chief Justice shall have to decide the question whether the claim was a dead one or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.

10. In the light of the proposition of law laid down by the Constitution Bench, I will examine the present case. As noticed above, a Partnership Agreement was entered into in the year 1974. There was change in the Partners of the Firm and another Partnership Agreement dated 26th September, 1984 came into existence. The Petitioners" case is that in the year 1987, the First Respondent started acting against the interest of the Firm, and prevented the First Petitioner from participation in the business, signing cheques and maintaining accounts, etc. Then dispute arose with regard to the issue of mining permit by the Collector, as a result, the Petitioners and the Third and Fourth Respondents filed Suit being O.S. No. 213 of 1989 on the file of Sub-Court, Nagercoil, which was subsequently transferred to Sub-Court, Padmanabhapuram, and re-numbered as O.S. No. 16 of 1990. The First Respondent appeared in the Suit and filed an Application u/s 34 of the Act for stay of the Suit on the ground that there exists an Arbitration clause in the Partnership Deed. By order dated 6th August, 1990, the Sub-Court, Padmanabhapuram on an Application (I.A. No. 153 of 1990) stayed trial of the Suit. After about nine years the Petitioners filed an Appeal, which was ultimately dismissed and no further Appeal was filed. Instead, the Petitioners filed another Suit being O.S. No. 39 of 1993 for declaration that the Respondents are acting against the interest of the Partnership Firm. In the said Suit also, the Respondents appeared and filed an Application u/s 34 of the Act being I.A. No. 200 of 1993, which was allowed on 16th April, 2002 and the Suit was stayed. Against the said order, the Petitioners filed a Civil Revision Petition (C.R.P. No. 1569 of 2002) before this Court and the same was finally dismissed in terms of the order dated 8th April, 2003. The Petitioner then challenged the said order in the Supreme Court by filing a Special Leave Petition, which also was dismissed by the Supreme Court on 22nd September, 2003.

11. It is, therefore, clear that since 1990 till 2003, in spite of the order passed by the Sub-Court staying the Suit on the ground that the dispute could be resolved only through Arbitration, the Petitioners did not choose to invoke the Arbitration clause. It was only in the year 2005 i.e., nearly after 15 years, a notice invoking the Arbitration clause was given. Even during these 15 years, the Petitioners" own case is that several changes were made in the Partnership Agreement and dispute arose between the parties, but it could never be agitated by invoking the Arbitration clause. *Prima facie*, therefore, the instant Petition invoking the Arbitration clause and making a prayer for appointment of an Arbitrator is hopelessly barred by limitation, and it is a fit case where the power u/s 11(6) of the Act cannot be exercised. The alleged claim raised by the Petitioners is a dead claim and cannot be resolved through Arbitration proceedings. In the facts and circumstances of the

case, I do not find any merit in the Petition, which is accordingly dismissed. No costs.