

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF JULY, 2022

BEFORE

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

WRIT PETITION NO.10716 OF 2022 (GM-CPC)

BETWEEN:

1. Y HARISH
SON OF LATE Y. BASAVARAJ
AGED ABOUT 49 YEARS
R/AT C-403, IV FLOOR
ADARSH RESIDENCY APARTMENTS
47TH CROSS, 8TH BLOCK
JAYANAGAR, BENGALURU-560082

2. Y. NIHAL
SON OF Y.HARISH
AGED MINOR
REPRESENTED BY HIS FATHER Y. HARISH
R/AT C-403, IV FLOOR
ADARSH RESIDENCY APARTMENTS
47TH CROSS, 8TH BLOCK
JAYANAGAR, BENGALURU-560082

...PETITIONERS

(BY SRI.R.V.S.NAIK, SR.COUNSEL FOR
SRI.NITIN PRASAD AND KING AND PARTRIDGE, ADVOCATE)

AND:

1. Y SATISH
SON OF LATE Y. BASAVARAJ
AGED ABOUT 56 YEARS

HAVING OFFICE AT NO.44
2ND CROSS, PARVATHI NAGAR
BELLARI-583103

2. Y. KAUSHIK
SON OF Y. SATISH
AGED ABOUT 23 YEARS

3. Y. KARTHIK
SON OF Y. SATISH
AGED ABOUT 23 YEARS

BOTH R/AT APARTMENT 7, MANTRI ALTIUS
17 RAJBHAVAN ROAD
BENGALURU-560001

...RESPONDENTS

(BY SRI.PRADEEP NAIK, ADVOCATE FOR C/R1)

THIS PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO a) SET ASIDE THE IMPUGNED ORDER DATED 31.03.2022, PASSED BY THE LXXXVII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE (COMMERCIAL COURT), AT BENGALURU, IN COM.O.S.NO.382/2021 (ANNEXURE-A) AND CONSEQUENTLY ALLOW THE PETITIONERS APPLICATION DATED 05.01.2022 AND REJECT THE PLAINT IN O.S. 382/2021 AND b) AWARD COSTS OF THESE PROCEEDINGS IN FAVOUR OF THE PETITIONERS.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 17.06.2022, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The captioned writ petition is filed by the defendant Nos.1 and 4 assailing the correctness of the order dated 31.03.2022 passed by the Commercial Court on I.A.No.11 filed under Order 7 Rule 11(d) read with Section 151 of CPC and Section 11 of the Commercial Courts Act, 2015.

2. The respondent No.1/plaintiff instituted a suit before the Commercial Court seeking a direction to the present petitioner No.1 to pay a sum of Rs.7,34,12,647/-. The present petitioners, on receipt of summons, have contested the proceedings and have filed the instant application under Order 7 Rule 11(d) read with Section 151 of CPC seeking rejection of plaint as being barred by law. The present petitioners claim that respondent No.1/plaintiff got issued a legal notice calling upon the present petitioner No.1 to resolve the dispute by way of arbitration. Therefore, the present petitioner contended that arbitral proceedings having already commenced at the instance of respondent

No.1/plaintiff who has issued a notice, now cannot maintain a suit before the Commercial Court and the only recourse that is available for respondent No.1 is to file an application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996') for appointment of an Arbitrator.

3. The learned Judge having heard both the parties and having examined the material has rejected the application. The learned Judge while rejecting the application has taken judicial note of the reply notice issued by the present petitioners herein. Having examined the reply notice, the learned Judge was of the view that the petitioners having objected for appointment of proposed sole Arbitrator on the ground that dispute does not fall within the arbitration clause, now cannot turn around and say that the present suit is not maintainable. The learned Judge while rejecting the application has also observed that the present petitioners have waived off their rights and therefore, they cannot insist the

respondent No.1/plaintiff to adopt a recourse under Section 16 of the Act of 1996. It is this order which is under challenge.

4. Shri R.V.S.Naik, learned Senior Counsel reiterating the grounds urged in the writ petition would contend that the respondent No.1/plaintiff having issued the legal notice on 24.02.2020 has invoked the arbitration clause and therefore, he would contend that arbitration proceedings have already commenced by respondent No.1 and therefore, the suit filed by the respondent No.1/plaintiff before the Trial Court is barred under Section 11 of Commercial Courts Act. Referring to these significant details, he would contend that only recourse that is available to respondent No.1 is to file an application under Section 11 of the Act of 1996 for appointment of an Arbitrator.

5. To buttress his arguments, he has placed reliance on the judgment rendered by the Hon'ble Apex Court in the case of ***Mohammed Masroor Shaikh vs. Bharat Bhushan***

***Gupta and Others*¹**. Referring to the dictum laid down by the Hon'ble Apex Court, he would contend that Arbitral Tribunal is preferred first authority to determine and decide all questions of non-arbitrability. He has further placed reliance on the judgment rendered by the Hon'ble Apex Court in the case of ***Kvaener Cementation India Limited vs. Bajranglal Agarwal and Another*²**. He would point out that Hon'ble Apex Court has held that Section 16 of the Act of 1996 makes it explicitly clear that the Arbitral Tribunal has power to rule on its own jurisdiction even when objection is tendered with respect to existence or validity of Arbitration Act agreement. He would further contend that once arbitral proceedings commence, the same can be terminated in the manner known to law under Section 32 of Act of 1996 and therefore, he would contend that the instant suit is therefore wholly without jurisdiction. In support of the said proposition, he would place reliance on the judgment rendered by the Hon'ble Apex Court

¹ Civil Appeal No.874 of 2022 Dtd: 02.02.2022

² (2012) 5 SCC 214

in the case of **A.Ayyasamy vs. A.Paramasivam and Others**³. He would also place reliance on the judgment rendered by this Court in the case of **Moses vs. State of Karnataka**⁴ and **H.G.Kulkarni and Others vs. The Assistant Commissioner, Belgaum Sub-Division, Belgaum and Others**⁵. Citing these two judgments, he would contend that the issue involved in the present case is squarely covered in terms of the principles laid down by the Co-ordinate Bench of this Court in the judgment cited supra. He would conclude his arguments by contending that Section 11 of Commercial Courts Act imposes mandatory bar *inter alia* on a Commercial Court from entertaining or deciding any suit relating to commercial disputes in respect of which jurisdiction of Civil Court either expressly or impliedly barred under law.

6. Per contra, learned counsel appearing for caveator/respondent No.1 repelling the contentions of learned

³ (2016) 10 SCC 386

⁴ ILR 1991 Kar 770

⁵ ILR 1976 Kar 787

Senior Counsel would support the reasons assigned by the Commercial Court while rejecting the application. Referring to the principles laid down by the Madhya Pradesh High Court in the case of ***Dhulabhai etc. vs. State of Madhya Pradesh and Another***⁶, he would contend that exclusive jurisdiction of a Civil Court is not to be readily inferred. He would further place reliance on the judgment rendered in the case of ***P.Tarachand vs. Seshamal M.Jain and Others***⁷. Referring to this judgment, he would contend that Section 8 is only a provision under the Act of 1996 that purports to oust the jurisdiction of Civil Court. Placing reliance on this judgment, he would contend that the Civil Court jurisdiction is ousted only after matter is referred to arbitration and therefore, unless a party does not comply with the mandatory conditions under Section 8 by filing an application within time, it is to be deemed that he has waived his right to seek reference. He would further contend that the present petitioners cannot

⁶ AIR 1969 SC 78

⁷ 2019 SCC Online Kar 2768

contend that Civil Court has no jurisdiction without filing separate application under Section 8 and it is bounden duty of the Commercial Court to examine whether jurisdiction has been ousted. He would further contend that ouster is only by choice of defendant party. The question of referring the parties to arbitration arises only upon an application being made by a party to the arbitration agreement.

7. To buttress his arguments on this point, he has placed reliance on the following judgments:

1) Convinio Shopping Nine 2 Nine vs. Olympia Opaline Owners Association - 2019 SCC Online Mad 646;

2) Sukanya Holdings (P) Ltd. vs. Jayesh H.Pandya and Another - (2003) 5 SCC 531;

3) Mr. Saju Thomas vs. Mr. Prabhakaran Kizhakkeveetil - 2018 SCC Online Kar 365;

4) Marwadi Shares & Finance Pvt. Ltd. Company vs. Kishorkumar Nagjibhai Mavani - AIR 2009 Guj 81;

5) Mr. Ajay Wadhwa vs. Symphony Co-operative Housing Society Limited - 2014 SCC Online Bom 1779;

6) *Ramakrishna Theatre Limited, Rep. by Chairman, Udupi vs. M/s. General Investments and Commercial Corporation Limited - ILR 2003 Kar 3463;*

7) *Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and Others - (2011) 5 SCC 532;*

8) *Lindsay International Private Limited and others vs. Laxmi Niwas Mittal and Others - 2020 SCC Online Cal 1658;*

9) *State of Goa vs. Praveen Enterprises - (2012) 12 SCC 581;*

10) *Ellora Paper Mills Limited vs. State of Madhya Pradesh - 2022 SCC Online SC 8.*

8. Heard learned Senior Counsel appearing for the petitioners and learned counsel appearing for the respondent No.1/plaintiff. Perused the order under challenge.

9. The respondent No.1/plaintiff issued a legal notice on 24.02.2020 calling upon the present petitioner No.1 to resolve the dispute by way of arbitration. The present petitioner has issued reply notice on 20.03.2020 which is produced at Annexure-D to the writ petition. It would be useful for this Court to refer to para 25 of the reply notice which reads as under:

"25. I am shocked that your clients have also misrepresented that the alleged disputes in relation to the affairs of M/s. YM&S fall squarely within the arbitration clause contained in the Partnership Deed. I am not sure if you have gone through Clause-12 of the Partnership Deed dated 30/6/2014 which provides as under:

12. In case of any dispute between the partners in the interpretation of the Clauses of this deed the same may be referred to an arbitrator and decision of arbitrator shall be final and binding on all the partners.

As per the above clause only the dispute in the interpretation of the clauses of the Partnership Deed can be referred to an arbitrator. The alleged dispute put forth by you is surely not covered and is entirely beyond the limited scope and applicability of the arbitration clause. Hence, the contrary claim in your Notice is not tenable."

10. On perusal of para 25 of the reply notice, this Court would notice that present petitioners have waived their right by contending that the dispute is not arbitral. The stand taken at para 25 of the reply notice disputing the application of Arbitration Act to the dispute between them tantamounts to

waiving of right to settle the dispute in an arbitration proceedings. Therefore, what emerges from the stand taken in the reply notice is that the petitioners have already waived off their right and if a right once waived cannot be allowed to be reclaimed.

11. The language of Section 8 before and after the amendment is explicit and clear. It requires a formal, independent and specific application before and or at the time of filing of written statement seeking reference to arbitration. The judgment cited by the learned counsel for the respondent No.1/plaintiff rendered by the Co-ordinate Bench of this Court in the case of ***P.Tarachand vs. Seshamal M.Jain*** (*supra*) is squarely applicable to the present case on hand. This Court in the above said judgment has held that the proceedings pertaining to domestic arbitration, the only provision that purports to oust the jurisdiction of the Civil Court is Section 8 of the Act of 1996. The Coordinate Bench of this Court was of the view that provisions of the Act of 1996 clearly indicates

that apart from Section 8, there is no provision under the Act of 1996 that ousts the jurisdiction of the Civil Court. Even Section 8 contemplates that the matter is referred to arbitration by the Civil Court only subject to party invoking and complying with mandatory requirements of Section 3 within the time stipulated therein.

12. In the light of the principles laid down by the Co-ordinate Bench of this Court and also the judgment cited *supra*, in the present case on hand, petitioners have not at all invoked Section 8 of the Act of 1996. On the contrary, the present petitioners have filed application under Order 7 Rule 11(d) of CPC seeking rejection of plaint on the ground that it is barred by law. Even till today, the present petitioners have not taken recourse to the provisions of Section 8 of the Act of 1996.

13. The order under challenge does not warrant any interference at the hands of this Court. As rightly pointed out

by the learned counsel for the respondent No.1/plaintiff, the rights cannot be kept in the sleeve and be used at will. The petitioner by issuing the reply notice has disputed in regard to existence of arbitration agreement insofar as the present dispute on hand is concerned. Therefore, it can be inferred that the petitioners have waived their right to have the dispute resolved by arbitration. Having taken such a stand in the reply notice, the petitioners now cannot be permitted to contend that arbitration proceedings have already commenced and therefore, suit filed by the respondent No.1 before the Trial Court is barred under Section 11 of the Commercial Courts Act. The grounds urged and the judgments cited by the petitioners would not displace the reasons and conclusions arrived at by the learned Judge.

14. No error is made out. Accordingly, the writ petition is dismissed.

Sd/-
JUDGE

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