

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **21.11.2016**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.173 of 2016
and C.M.P.No.13089 of 2016

G.Sathyan

.. Appellant

Vs.

1. B.Vasudevan

2. Hon'ble Justice Mr.T.Somasundaram (Retd)
No.1/1686, 15th Street, H Block,
Anna Nagar West,
Chennai - 600 040.

.. Respondents

Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent Act against the Order, dated 22.04.2016 made in O.P.No.553 of 2011.

For appellant : Mr.A.K.Karunakaran

For respondents : Mr. V.Raghavachari
for Mr.M.Narayanaswamy for R1
R2 - Arbitrator

J U D G M E N T

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

This Original Side Appeal is directed against the orders of the learned single Judge, dated 22.04.2016 in O.P.No.553 of 2011

dismissing the O.P, filed under Section 34 of Arbitration and Conciliation Act, 1996, by confirming the Arbitral Award passed by the second respondent.

2. The brief facts of the case relevant for disposal of the appeal are as follows :

(i) The appellant is the petitioner in the O.P. The appellant and the first respondent constituted a Partnership Firm by entering into a partnership deed, dated 17.03.1999. As per the deed, the appellant and the first respondent had agreed to run a Nursing Home in the name and style of "Sivasubramaniam Nursing Home". Both the appellant and the first respondent also entered into a separate partnership deed, dated 14.04.2003 by which they started a Pharmacy in the name and style of "Raghavendra Medicals".

(ii) The father of the appellant, Mr.N.Gunaseelan and the first respondent jointly purchased the land measuring to the extent of 25 cents under two sale deeds, vide Doc.No.1332 / 1996 and 1340 / 1996, dated 14.03.1996. Both the parties developed the building for an extent of about 7570 sq.ft of plinth area and started Nursing Home business from 07.12.2000, as per the above

said partnership deed, date 17.03.1999. In the same premises Raghavendra Medicals was also started as per the deed, dated 14.04.2003.

(iii) The first respondent through his letter, dated 10.06.2008 submitted his resignation and had also stated that he was relinquishing his responsibilities as Managing Partner from the date of his notice. The appellant in his letter, dated 26.06.2008, expressed his intention to settle the accounts of the first respondent and further asked him to hand over all the accounts and vouchers to settle his share. Both the appellant and the first respondent thereafter entered into a Memorandum of Understanding, dated 30.10.2008 to continue the partnership business for a period of six months and within the said period, it was agreed to sell if a prospective buyer is found, the entire assets of the Partnership firm and the land, which though does not form part of the assets of the partnership firm but is jointly owned by the appellant and the first respondent in equal shares. It also contained a Clause, which stated that in the event of buyer is not found within the period prescribed in the MOU, then the above mentioned assets shall be revalued and the extension of MOU would be mutually decided between the parties.

(iv) The first respondent on 29.04.2009, a day before the expiry of the MOU wrote to the State Bank of Hyderabad, where the current accounts of the Partnership firm are being maintained and asked them to stop operation of the said account. Therefore, the appellant moved the City Civil Court and got direction for the operation of the account. Thereafter, the first respondent moved this Court under Section 9 of the Arbitration and Conciliation Act, 1996 and this Court directed to settle the dispute before the second respondent / Arbitrator.

(v) The learned Arbitrator after analysing the materials placed before him passed the Award, dated 06.07.2011, thereby winding up the partnership firm and to settle the accounts of the firm between the parties in terms of Sections 46 and 48 of the Indian Partnership Act, 1932. The learned Arbitrator has further ordered that the assets of the partnership firm is to be sold to the highest bidder in the auction to be held between the appellant and the first respondent and the successful bidder is permitted to continue the same business of the firm using the assets and goodwill of the said firm after apportionment of the sale proceeds as indicated in the Award.

(vi) Aggrieved by the said Arbitral Award, the appellant preferred an Original Petition before this Court in O.P.No.553 of 2011 and the learned single Judge dismissed the said O.P, by confirming the impugned Award. Aggrieved by the said order, this Original Side Appeal has been preferred.

3. The learned counsel appearing for the appellant contends that the learned Arbitrator went against Clause 17 of the Partnership Deed and effectively brought to close of the firm; fixation of Rs.7.5 lakhs per year as profits earned by the firm from 01.04.2010 is in utter contravention with the fundamentals of law and the basic concepts of justice; the learned Arbitrator went beyond the scope of the claim petition itself by directing a bidding process between the partners by the Executing Court, which even a Civil Court could not do in a suit for dissolution of partnership firm. When this Court while dealing with the matter under Section 34 of Arbitration and Conciliation Act, 1996, passed interim orders whereby appointing Chartered Engineer and valued the assets with the consent of both sides, ought to have directed the appellant / petitioner to pay 50% of the sum as determined by the Chartered Engineer in his Report; the learned Arbitrator misinterpreted the

MOU, which only contends broad understanding and the same cannot be treated as a binding agreement between the parties and therefore, the order of the learned single Judge is to be set aside.

4. The learned counsel appearing for the first respondent per contra contends that the appellant / petitioner is having grievance only against Clause 16(2) and 16(5)(d) of the Award, whereby the learned Arbitrator directed to conduct the auction between the parties to sell the assets of the partnership firm and fixation of profits and the first respondent restricted his argument only with respect to that before the learned single Judge. The learned single Judge, after hearing the contentions of both sides and perusing the impugned Award and materials placed before the Arbitrator has rightly dismissed the OP, by confirming the award and the same does not warrant any interference by this Court.

5. The Award can be set aside by the Court under Section 34 of the Arbitration and Conciliation Act, 1996, only for the grounds set out therein. Here in this case, the learned counsel appearing for the appellant argued that the learned Arbitrator mis-applied Clause 17 of the Partnership Deed, dated 17.03.1999 and the Award is beyond the terms set out in the said Clause. Another

main argument is fixation of Rs.7.5 lakhs per year as profits by the learned Arbitrator is in utter contravention of the Fundamentals of law and basic concepts of justice. Another gravamen is that the Award is not executable decree.

6. The first argument of the appellant is on the third sub-head of the principle of patent illegality, as provided under Section 28(3) of the Arbitration and Conciliation Act, 1996. Rule 28(3) reads thus :

"While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."

It is well settled that this contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground.

8. Clause 17 of the Partnership Deed reads thus :

"17. The retirement, discontinuance or death or any of the partners shall not

dissolve the partnership or cause discontinuance of the said business and the remaining of surviving partners shall be entitled to continue the business subject to the rights of the outgoing partners and adjustment of accounts."

9. In this case, there are only two partners, the appellant and the first respondent. The first respondent in his letter, dated 10.06.2008 submitted his resignation and relinquished all his responsibilities as a Managing Partner. The appellant also through his letter, dated 26.06.2009 expressed his intention to settle the accounts. Thereafter, the appellant and the first respondent entered into a Memorandum of Understanding on 13.10.2008, wherein it was agreed for retirement of the first respondent from the partnership firm and also agreed to sell the assets to a prospective buyer and continue the business for six months till the prospective buyer is found out. The learned Arbitrator after analysing the terms of the contract and the relevant provisions of the Indian Partnership Act, 1932 held that the partnership assets of only two partners stood dissolved on the retirement of one of the partners in the light of the legal and factual position stated therein.

10. The Hon'ble Supreme Court in **SAIL Gupta Brother Steels Tubes Ltd.**, case reported in **(2009) 10 SCC 63**, while summarising the legal position, after referring catena of decisions held thus :

"18 (vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award."

11. In this case, the view taken by the learned Arbitrator in respect of Clause 17 of the partnership deed, dated 17.03.1999 is based on the legal principles and also by considering the factual aspects. The view taken by the learned Arbitrator is the possible view and it cannot be said contrary to Clause 17 of the partnership deed and therefore, the interference of this Court is not warranted.

12. Another argument with respect to fixation of profits per year at Rs.7,50,000/- is that the same was fixed against the principles of fundamental policy of India. The Arbitrator after considering not only the book value of the assets but also the average out-patients per day, increase of profit of firm by three

times as per the IT Returns, the market value of the assets, fixed the share of profits of the claimant at Rs.7,50,000/- for the period from 01.04.2010. This Court does not see contravention of any principles of the fundamental police of India.

13. Another main contention of the appellant is that the Award is not executable. As pointed out earlier, the main gravamen of the appellant is against the relief under Clause 2 and 5(d) of Para 16 of the Award. Para 16(2) and 16(5) (d) of the Award reads thus:

"16(2) The assets of the partnership firm Sivasubramaniam Nursing Home detailed in para 8.10 of this Award are directed to be sold to the highest bidder in the auction to be held between the partners of the Firm, viz, the claimant and the respondent and the auction for the sale of assets of the Firm shall be confined only to the claimant and the respondent.

16(5) (d) - The claimant shall be also paid out of the sale proceeds of the assets of the Firm, towards his share in the future profits of the Firm for the period from 01.04.2010 till the completion of the final settlement of accounts of the Firm between the parties at the rate of Rs.Seven lakhs and fifty thousand

per year as per finding in para 9.5 of this Award."

14. As far as 16 (5) (d), this Court already held that the Arbitrator fixed the profits after duly considering the profits from the documents. As far as 16(2) is concerned, it is contended that it is not executable. As per Section 36 of the Arbitration and Conciliation Act 1996, the Award passed under this Act shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 in the same manner as if it were a decree of a Court. In the Award, it has been specifically ordered that the assets of the firm are to be sold through appropriate Civil Court by the either party executing the Award under Section 36 of the Arbitration and Conciliation Act, 1996. In the Award in para 16(2), it has been clearly directed that the assets of the partnership firm is to be sold to the highest bidder in the auction to be held between the partners of the firm, viz,, the claimant and the respondent and the auction for the sale of the assets of the firm shall be confined only to the claimant and the respondent. Therefore, before Executing Court, both the appellant and the first respondent can bid and the highest bidder will be entitled to the assets of the partnership firm. The superstructure, equipments and

the business are the assets of the partnership firm. The land does not belong to the partnership firm and the partition suit in respect of land is pending between the parties. When the land is divided by metes and bounds in the pending partition suit, the land in which the superstructure situates can be allotted to the sharer, who acquires superstructure through the auction. Therefore, the contention of the learned counsel appearing for the appellant that the Award is unexecutable cannot be accepted.

15. The learned counsel appearing for the appellant cited, **Mallikarjunadu Setti and others v. Lingamurti Pantulu and Valliappa**, reported in **(1902) ILR 25 Mad 244** and contended that in a suit for dissolution of partnership and for an account, the Court is bound in the first instance pass interlocutory order or a preliminary decree, declaring the rights of the parties and then to proceed to the actual amounts due to them.

16. It is now well settled that even the final decree can straight away be passed. In this case, the learned Arbitrator passed the Award, to settle the assets between the partners after dissolution of the partnership firm. It is left to the Executing Court under Section 36 of the Arbitration and Conciliation Act, 1996 to

conduct auction between the partners and to sell the assets of the firm to the highest bidder. The above Judgment is not applicable to the facts of this case.

17. The learned counsel appearing for the appellant also cited the Judgment of the Calcutta High Court, **Pannalal Paul & Ors v. Padmabati Paul & Ors**, reported in **AIR 1960 Cal 693** and contended that the Arbitrator has full power to make allotment of assets and property of the dissolved firm to one of the partners at a valuation fixed by the Arbitrator and the same has not been followed in this case.

18. As already pointed out, the learned Arbitrator after considering the entire facts and materials, including the non-adherence of the Memorandum of Understanding by both the parties, directed the assets to be sold in auction between the partners after dissolution of the firm under Sections 46 and 48 of the Indian Partnership Act. Therefore, the above contention of the learned counsel appearing for the appellant is not sustainable and the said decision is also not applicable to the facts of this case.

19. No doubt, interim order was passed in the O.P filed under Section 34 of the Arbitration and Conciliation Act, 1996,

appointing a Chartered Engineer to value the assets of the partnership firm and he also filed the report, dated 24.06.2014. Taking advantage of the interim order passed by the learned single Judge and the valuation report of the Chartered Engineer, the learned counsel appearing for the appellant contends that the learned single Judge ought to have directed to pay 50% of the sum determined by the Chartered Engineer in his report and dismissal of the Original petition is erroneous.

20. It is well settled that the Courts jurisdiction to decide the Award is circumscribed by the provisions of Section 34 of the Arbitration and Conciliation Act, 1996. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. The court cannot correct the errors of the Arbitrator. It can only quash the Award leaving the parties free to begin the arbitration again if it is desired. Therefore, the High Court having supervisory jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 is not expected to sit on appeal against the Arbitral Award and therefore, the above contention of the learned counsel for the appellant is sans merit.

21. For the aforesaid reasons, this Court does not find any reason to interfere with the orders of the learned single Judge, confirming the Award passed by the learned Arbitrator and accordingly, this Original Side Appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

(A.S.,J.) (P.K.,J)
21-11-2016

Index : Yes

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**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Judgment in
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