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IN THE HIGH COURT OF DELHI AT NEW DELHI

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OMP 1193/2014

PRADEEP ARORA & ORS.

..... Petitioners

Through: Mr. Shaunak Kashyap, Mr. Ravjyot Singh, Mr. Rahul Mukherjee and Ms. Sriyanka Gangopadhyay, Advocates.

versus

SAMANTHA KOCHHAR

..... Respondent

Through: Ms. Deepika V. Marwaha, Ms. Gayatri Puri, Ms. Kalpana, Mr. Vaibhav Asthana and Mr. Gourav Singh, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

30.11.2016

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 8th August, 2014 passed by the sole Arbitrator.

2. The background facts are that the four Petitioners and the Respondent entered into a partnership agreement on 29th April, 2010 with a view to running a salon, spa and a health and fitness centre under the name and style of Urban Wellness Oasis. Under Clause 6 of the Partnership Deed, each of the parties i.e., the 4 Petitioners and the Respondent were to invest capital in accordance with their profit & loss sharing ratio or such proportions which may have been agreed to from time to time. Under Clause 8 of the

Partnership Deed, a profit & loss sharing ratio was set out. While Petitioner Nos. 1, 2 and 3 as well as the Respondent had a share of 22.5% each, Petitioner No. 4 had a share of 10%. In proportion to their respective shares, the total investments made by the partners were as under:

Petitioner No.1	Pradeep Arora	38,80,000
Petitioner No.2	Rahul Dev	39,50,000
Petitioner No.3	Vinay Vishal Sharma	40,00,000
Petitioner No.4	Narendra Kalahasthi	18,58,546
Respondent	Samantha Kochhar	24,50,000

3. The disputes as between the parties were referred to arbitration. The Respondent filed a claim petition whereas the Petitioners filed a counter-claim. One of the claims of the Respondent was for recovering a sum of Rs.24,50,000 invested by her in the partnership business together with interest @ 12% “on the capital contributions by the Claimant from the date of investment till the time of termination i.e. 22nd March, 2011 amounting to Rs. 2,04,280.” Interest @ 24% was claimed from 22nd September, 2011 till the date of filing of the claim and future interest as well. The Respondent also claimed damages, loss of reputation and mesne profits to the tune of Rs.10 lakhs.

4. The Petitioners in their counter-claim sought damages to the tune of Rs. 30 lakhs which was paid to the landlord on account of delay in making the business operational, Rs. 20 lakhs for replacement of the equipment and the cost of redoing the interiors, Rs.16 lakhs for further infusion of capital that was due from the Respondent and Rs. 20 lakhs being the Respondent’s share

on account of the profit & loss sharing ratio due to the loss caused on account of the minimum guarantee to be paid to the land lord. The Petitioners also claimed Rs.1.76 lakhs for the brokerage paid to Amit Leasing India on the lease deal, Rs. 12 lakhs for harassment caused on account of an abrupt exit from the partnership, and for the determination of loss of brand value.

5. On 24th January, 2013, the learned Arbitrator framed the following eight issues:

“ISSUE NO. 1 - Whether the Claimant is entitled to recover with interest the amount invested by her in the partnership as alleged?

ISSUE NO. 2 - Whether the Claimant is entitled to any claim on account of damages, loss of reputation along with mesne profits as alleged? If So, what amount?

ISSUE NO. 3 - Whether the respondent are stopped from raising the counter claim?

ISSUE NO.4 - Whether the respondents/counter claimants are entitled to recover from the Claimant Rs. 30 Lacs paid to the landlord as alleged?

ISSUE NO. 5 - Whether the counter claimants are entitled to the sums as claimed on account of losses from the claimant as alleged? If so, what amount?

ISSUE NO. 6 - Whether the respondents/counter claimants are entitled to claim from the claimant Rs. 1.76 lacs as brokerage paid as alleged?

ISSUE NO. 7 - Whether the respondents/counter claimants are entitled to damages on account of

harassment as alleged?

ISSUE NO. 8-Relief.”

6. By the impugned Award dated 8th August 2014, the learned Arbitrator allowed Claim No. 1 of the Respondent and directed the Petitioners to refund the investment made by her after deducting the loss reflected in the Profit & Loss (P&L) account for the concerned financial year. The counter-claims of the Petitioners were rejected.

7. The impugned Award has been challenged to the extent that the learned Arbitrator has held in favour of the Respondent in respect of Issue Nos. 1, 4, 5 and 8 and directed that a sum of Rs.24,47,218 should be paid by the Petitioners to the Respondent together with interest @ 6% per annum with effect from 1st April, 2011 till the date of payment.

8. Mr. Shaunak Kashyap, learned counsel appearing for the Petitioners submitted as under:

(i) The claim of the Respondent for refund of capital investment without seeking rendition of accounts after commencement of the partnership i.e., on 29th April, 2010 and as on the date of issuance of the notice of the retiring partner i.e. 22nd December, 2010 was not maintainable. In this connection he relied on the decision in **Addanki Narayanappa v. Bhaskara Krishtappa (1966) 3 SCR 400**.

(ii) The reliance by the learned Arbitrator on the decision in **Pamuru Vishnu Vinodh Reddy v. Chillakuru Chandrasekhara Reddy (2003) 3 SCC**

445 is misplaced since in that case the accounts were already rendered.

(iii) The impugned Award was perverse inasmuch as the learned Arbitrator treated the capital contribution of the Respondent as her share that had to be refunded particularly when the accounts of the firm showed consistent losses.

(iv) The learned Arbitrator committed a grave error of law by considering the case as one under Section 37 of The Indian Partnership Act, 1932 ('PA') whereas the said provision was entirely inapplicable.

9. Countering the above submissions, Ms. Deepika V. Marwaha, learned counsel appearing for the Respondent submitted as under:

(i) This was a case of a partner retiring from the partnership and not a dissolution of the partnership. Therefore, Section 48 of the PA had no application in the facts and circumstances of the case.

(ii) Since it was a case of retirement of a partner, the applicable provisions were Sections 32 and 37 of the PA. All that the learned Arbitrator had done was to determine the share that the Respondent was entitled to.

(iii) It was erroneous to contend that the accounts were not produced. In fact, the learned Arbitrator did peruse the accounts and pass the final Award only in terms of the accounts produced.

10. In order to appreciate the above submissions, a reference has to be made to the relevant provisions of the PA. Under Section 32 of the PA, a partner

may retire in accordance with the agreement between the partners. Under Section 32(2) of the PA, a retiring partner could be discharged from any liability to a third party for the acts of the firm done before such retirement by an agreement between such retiring partner with such third party as well as the partners of the reconstituted firm. Such an agreement could even be implied.

11. Under Section 37 of the PA, the outgoing partner is in certain cases entitled to a share of the subsequent profits of the firm. Section 37 of the PA reads as under:

“37. Right of outgoing partner in certain cases to share subsequent profits. –Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm:

Provided that whereby contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account

under the foregoing provisions of this section.”

12. It is required to be noticed that what a retiring partner is entitled under Section 37 of the PA is to such share of the profits where the surviving partners “carry on the business without any final settlement of accounts as between them.” In terms of the proviso to Section 37, an option can be given to the surviving partners to purchase the interest of the outgoing partner.

13. It appears from a reading of Section 37 of the PA that while an outgoing partner might be entitled to share the profits of the firm, such outgoing partner is not entitled to any return of the capital amount invested by such partner in the firm. The second factor to be noticed is that the determination of the profit of the firm, in order to ascertain the share of the outgoing partner, cannot possibly happen without the accounts of the firm being drawn up and produced.

14. In ***Gopala Chetty v. Vijayraghavachariar (1922) 49 Indian Appeals 181*** it was held that without seeking the relief of rendition of accounts, no suit for recovery of any sum can be filed by an outgoing partner against the surviving partners. Likewise, it was held in ***Sitaram Kalani v. Manmal AIR 1956 MP 60*** that unless the partner files a suit for dissolution and rendition of accounts, he cannot seek a return of the investment.

15. There is a clear distinction drawn between the position that emerges on the dissolution of the firm and that which emerges upon the retirement of one of the partners and the remaining partners continuing as such in the reconstituted firm. In ***Addanki Narayanappa v. Bhaskara Krishtappa***

(*supra*), the Supreme Court emphasized that whatever was brought in as capital by one of the partners ceases to be the trading asset of such partner and the person who brought it in would “not be able to claim or exercise any exclusive right over any property which he has brought much less over any other partnership property.” It was further emphasized that

“he would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership, of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges.”

16. In ***Board of Revenue v. Auto Sales, Allahabad AIR 1979 All 312***, a Full Bench of the Allahabad High Court explained the concept after noticing the above judgment of the Supreme Court as under:

“8...[a partner] “can get his share in the properties of the partnership only after the assets have been converted into money, and that too after the debts and liabilities have been paid and discharged. It is after the discharge that the residue is liable to be partitioned. Sections 46, 48 and 49 of the Partnership Act enjoin this process being gone through before a partner can get his share in the assets of a partnership...”

11. The law laid down above would show that the interest of a partner in the partnership is not an interest in a specific item of the partnership property. But, as pointed out above by the Supreme Court itself, a partner has a right only to get his share of profits during the period that a partnership subsists and on its dissolution to get the value of his share in the assets of the partnership firm. The law in regard to dissolution of partnership would equally apply in the case of retirement. There is no difference in principle on the basis of which the position of a

partner may be different in case of his retirement. He stands in the same position qua the properties of partnership when he is retiring from the firm as his position becomes on dissolution.

12. *In Velo Industries v. Collector, Bhavnagar [1971] 80 ITR 291 (Guj)*, a Full Bench of the Gujarat High Court was called upon to consider this controversy. It held:--

“When, therefore a partner retires from the partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts on the footing of a notional sale of the partnership assets and given to him, what he receives is his share in the partnership and not any price for sale of his interest in the partnership. His share in the partnership is worked out by taking accounts in the manner prescribed by relevant provisions of the partnership law and it is this and this only, namely, his share in the partnership, which he receives in terms, of money...”

18.... Since there is no difference between a case of retirement and that of dissolution, the law laid down in regard to dissolution will apply with equal force in the case of retirement.”

17.1 However, the learned Arbitrator in the present case has sought to distinguish the above judgment by relying on the decision of the Supreme Court in *Pamuru Vishnu Vinodh Reddy v. Chillakuru Chandrasekhara Reddy* (*supra*). Since the central plank of the Respondent’s submission is based on the said decision of the Supreme Court it requires to be examined in some detail. The facts of the said decision were that after the retirement of a partner, the firm in question was reconstituted and thereafter continued to operate. The retiring partner filed a suit for dissolution and accounting of the partnership assets. The Defendants argued that having retired from the firm, the Plaintiff was not entitled to seek dissolution and rendition of accounts.

However, the suit was decreed. In appeal, the High Court set aside the decree to the extent that it had ordered dissolution of the firm but directed the Defendants to pay the amount due to the Plaintiff towards his share in the assets of the firm on valuation without resorting to the sale of the assets of the firm. The Trial Court was asked to make an enquiry into the valuation and to decide the date on which the valuation of the Plaintiff's share would be arrived at. The Trial Court appointed a Commissioner for undertaking of the above exercise.

17.2 The date of retirement of the Plaintiff from the partnership firm was 5th April, 1971. An application was filed by the Plaintiff to decide the date on which the valuation of the Plaintiff's share was to be made. This was allowed by the Trial Court by holding that the date on which the Commissioner values the property would be the relevant date to ascertain the valuation of the Plaintiff's share in the partnership firm. The High Court allowed the revision petition setting aside the above order holding that the relevant date would be the date of retiring of the partner i.e., 5th April 1971.

17.3 Consequently, the only question that arose before the Supreme Court in appeal was "which is the relevant date for the purpose of ascertaining the value of the share of the Plaintiff in the partnership firm?" The Supreme Court agreed with the High Court and held that the relevant date had to be the date of retirement of the partner.

17.4 The Supreme Court in ***Pamuru Vishnu Vinodh Reddy v. Chillakuru Chandrasekhara Reddy*** (*supra*) further observed as under:

"9. ... Section 32 provides for retirement of a partner but there is no

express provision in the Act for the separation of his share and the intention appears to be that it would be determined by agreement between the parties. Section 37 deals with rights of outgoing partners. Although the principle applicable to such cases is clear but at times some complicated questions arise when disputes are raised between the outgoing partner or his estate on the one hand and the continuing or surviving partners on the other in respect of subsequent business. Such disputes are to be resolved keeping in view the facts of each case having due regard to Section 37 of the Act. Section 48 deals with the mode of settlement of accounts between the partners after dissolution of the partnership firm.”

18. The Court does not see the relevance of the above decision to the case in hand except to the extent that the retirement of a partner from the firm does not result its dissolution. Nevertheless, the Supreme Court emphasised that accounts would have to be rendered. It noted in para 9 of the decision that the retirement “severs the partnership and continuing partners, leaving the partnership amongst latter unaffected and the firm continues the changed constitution comprising of the continuing partners.”

19. The above decision is not an answer to the question that arises in the present case, viz., whether the retiring partner is entitled to recover the amount brought by him at the time of the constitution of the partnership firm.

20. The question whether a partner is entitled to recover the amount invested by him appears to be answered by the Supreme Court in **Addanki Narayanappa v. Bhaskara Krishnappa** (*supra*) in the following passage:

“The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought

in would cease to be the trading asset of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by Section 29 (1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners.”

21. A reference in this regard may also be made to the decision of the Supreme Court in *Purushottam v. Shivraj Fine Arts Litho Works (2007) 15 SCC 58* where the Supreme Court held that once any asset or money becomes part of the capital of the partnership, a partner has no exclusive right over any portion nor can he seek to recover the same from the persons in their individual capacity. It is entirely owned by the firm and the partners in their individual capacity do not owe capital contribution to the other partners.

22. What emanates from the above decisions is the following position in law:

(i) retirement of a partner and the reconstitution of the firm thereafter is the

situation contemplated under Section 32 of the PA;

(ii) the rights of a retiring partner are specified in Section 37 of the PA; and

(iii) a retiring partner can seek rendition of accounts for determination of his share of the profits.

(iv) The share has to be determined as of the date of the retirement of such partner. *Inter alia* an investment or assets brought by a partner becomes the stock of the firm and ceases to be the property of the individual who brought it. Once the property has become that of the partnership firm, it ceases to belong to any particular partner.

23. There appears to be no difficulty in the proposition that for retiring partner to seek relief of recovery of his share in the property, it must be preceded by prayer for rendition of accounts. In the present case, the serious error that the learned Arbitrator appears to have committed is to treat the capital brought in by the Respondent partner as the profit of the firm which the Respondent was entitled to recover, not realizing that it was utilized in the business of the firm. What perhaps was mistakenly presumed was that the said amount was available for being returned to the Respondent.

24. The learned Arbitrator referred to an email dated 22nd December, 2010 and has interpreted it as promise made by the Petitioner to the Respondent to refund the capital brought in by her. As rightly pointed out by learned counsel for the Petitioner, apart from the fact that the said email cannot constitute a binding contract to refund the capital contribution without

setting off losses or third party debts, the said contract would be hit by Sections 46 and 48 of the PA and would never have been enforceable in law.

25. In that view of the matter, the Court is satisfied that there is an error apparent on the face of the Award which is contrary to the scheme of the PA and is also contrary to the fundamental policy of the Indian law.

26. In view of the above determination, the Court does not consider it necessary to examine the further plea of the Petitioner that the suit is not maintainable under Section 69 (1) of the PA since no specific plea was claimed for rendition of accounts. It is pointed out that the firm was an unregistered firm and therefore, an individual person in their personal capacity does not file a suit against the partners for return of monies invested in the firm as capital contribution.

27. For all the aforementioned reasons, the impugned award 8th August, 2014 to the extent it has answered Issues (1) and (4) is hereby set aside.

28. The petition is allowed, but in the facts and circumstances of the case, with no orders as to costs.

S. MURALIDHAR, J

NOVEMBER 30, 2016

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