Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

EXECUTION APPLICATION NO. 530 OF 2011

WITH

CHAMBER ORDER NO. 916 OF 2012

WITH

CHAMBER SUMMONS NO. 1170 OF 2017

WITH

GARNISHEE NOTICE NO. 1302 OF 2017

WITH

GARNISHEE NOTICE NO. 1303 OF 2017

WITH

NOTICE OF MOTION (L) NO. 1538 OF 2018

Nandbala Nathalal Mayani ...Applicant
Versus
Jaswantrai Chhaganlal Mayani & Ors ...Respondents

Mrs Nityoah Mehta, *with Mr Ashish Anand, Ms Siddhi Vora, I/b Nityoah Suneel & Associates, for the Claimant.*
Mr Akshay Udeshi, *I/b Sanjay Udeshi & Co, for the Respondent No. 1.*
Mr P Gandhi, *for Respondent No. 2.*

CORAM: G.S. PATEL, J
DATED: 13th August 2018

PC:-

1. These Execution Proceedings, Chamber Summonses and Garnishee Proceedings have bee going around in circles indefinitely.

2. The dispute pertains to a partnership firm called M/s. Manoj & Co ("**Manoj & Co**"; "**the firm**"). Nandbala Nathalal Mayani ("**Nandbala**"), the sole Plaintiff, was admittedly a partner of Manoj & Co with a 24% share in its profits. The dispute raised by the 1st Defendant ("**Jaswantrai**") is whether Nandbala continues as a partner of the firm. Jaswantrai is the only one to raise this dispute. He claims, shortly stated, that by various acts and deeds including an alleged Deed of Dissolution of 18th March 1999, a notice of 25th April 2003 and a public notice dated 17th June 2003 that she ceased to be a partner of the firm. Mr Udeshi on behalf of Jaswantrai draws my attention to previous correspondence (including between advocates) and, in particular, to a letter of 10th May 2004 at page 41 of the Chamber Summons paperbook, to say that Nandbala constantly claimed that she had nothing to do with the partnership firm after 18th March 1999.

3. What the argument overlooks is that Nandbala filed an arbitration application under Section 11 of the Arbitration & Conciliation Act, 1996, on which, on 4th September 2006, this Court appointed the Hon'ble Mr Justice S Suresh (retired Judge of this Court) as the Sole Arbitrator in a claim that Nandbala brought against other partners of Manoj & Co, including Jaswantrai. Nandbala is a widow, and in the arbitral claim she said she had a 24% share, right, title and interest in the partnership firm. She complained that while the Respondents continued to draw the profits of the firm in proportion to their shares, she was being entirely excluded. She therefore sought the appointment of an arbitrator. Evidently, this Petition was on the basis that the partnership *continued*, for the Arbitration Agreement was in that partnership agreement itself and nowhere else.

4. Jaswantrai contested the arbitral claim. Nandbala filed a statement of claim, and then an additional statement of claim. Jaswantrai filed a written statement in response. Respondent Nos. 2 and 5, who support Nandbala, filed their own written statement/s. Jaswantrai contended that Manoj & Co, as a partnership stood dissolved with effect from 18th March 1999, the date of Nandbala's Deed of Dissolution. They also raised a plea of limitation. The other Respondents supported Nandbala's case, but only said that there were other disputes that were not covered by the arbitration. They agreed with Nandbala that Jawantrai was in sole control of the affairs of Manoj & Co. Nandbala filed a rejoinder denying any Deed of Dissolution and denying that she had withdrawn any amounts.

5. A copy of the award dated 21st January 2011 is from page 45 to page 51 of the paperbook in the Chamber Summons. This makes it clear that the principal business of Manoj & Co seemed to be, or at least its principal source of income seemed to be, the rent received from two premises. One of these was at Neelkanth Krupa, RB Mehta Road, Ghatkopar (East), Mumbai 400 077, let out to the Bank of Maharashtra ("**the Bank of Maharashtra premises**"). The second was at 375 Narsi Natha Street, Faiz-E-Qutbi, 1st Floor, Mumbai 400 004. This was let out to Corporation Bank at the relevant time. The Award shows that Manoj & Co filed eviction proceedings against Corporation Bank. It obtained a decree. The Corporation Bank appealed but ultimately vacated the premises and delivered possession to the firm. There is a specific finding in paragraph 6(b) in regard to Jaswantrai's contention that the partnership was dissolved in 1999. The learned Sole Arbitrator appointed a Chartered Accountant as a Commissioner to take accounts of the firm. The Learned Sole Arbitrator directed the drawing up of accounts from 1st April 1993 "up to date". The Commissioner made a report dated 1st October 2010. He drew up accounts until 31st March 2004. The Learned Sole Arbitrator called for objections. Jaswantrai then virtually abandoned the arbitral proceedings. He did not even pay his share of the Arbitrator's fees and Arbitration costs. Instead, he made allegations against all and sundry, and did not spare even the learned Sole Arbitrator.

6. The Learned Sole Arbitrator proceeded to render an Award dated 21st January 2011. The question of whether or not Nandbala was a partner was specifically in issue because her right to continue to receive a share in the profit could not arise if she had retired and if the firm was dissolved. At best, on retirement, she would have been entitled to her capital account. Accepting this would have required the Learned Sole Arbitrator to return a specific finding of her retirement as a partner, and to fix a date as the date on which the firm stood dissolved or, in law, was deemed to be dissolved. There is no such finding in the Learned Arbitrator's Award at all. To the contrary, the first finding in paragraph 7(a) is that the partnership firm is still subsisting. This necessarily means that there is no change in the partnership firm or its constitution. What then follows in sub-paragraph (d) of paragraph 7 is important because it says there is no dispute about the shares of the partners. These shares were mentioned in the Commissioner's report and each party was held to be entitled to the amount due and payable as set out in that report.

7. The Award contains first a declaration that the firm subsists. It then makes provision for the recovery for each of the partners from the funds of Manoj & Co. There is an Award in favour of the Claimant (Nandbala), Respondent No. 1 (Jaswantrai) and Respondent Nos. 2, 4, and 5.

8. Jaswantrai never challenged the Arbitration Award. He filed no Petition under Section 34. There is only one avenue to challenge an Arbitral Award and that is the one provided under the Arbitration Act. This Act now says that once an Award has attained finality either on the dismissal of a Section 34 challenge Petition or when the time for filing of a fresh Petition has passed, that the award is to be executed like a decree of a Court. That attracts all the incidents of a judicial decree. A substantive challenge to the merits of the Award cannot be raised in execution. An executing court cannot behind the award to see if it was properly passed any more than it can go behind a decree. A party cannot assail the award on merits (leaving aside all questions of the award being a 'nullity', because that is nobody's case).

9. Yet this is precisely what Jaswantrai claims now to do. He does this repeatedly, and he does this not only in this Court in these proceedings but he also does this in Rent Act eviction proceedings in the Small Causes Court in respect of the two premises in question. He contends before the Small Causes Court that Nandbala is no longer a partner. That is not a matter that can ever fall for determination of the Court at Small Causes Court at Mumbai, either before the trial court or in appeal or in revision. That Court has no jurisdiction to try any such dispute. Jaswantrai himself has not filed proceedings at all in respect of his claim that Nandbala cease to be a partner from any given date. Indeed, he seems to have disputed the Deed of Dissolution and a public notice at one stage, then changed his mind, and yet continues constantly shift the goal-posts. What is of particular interest is that when the tenants deposit amounts in the Small Causes Court, Jaswantrai claims to be entitled to withdraw his share of those deposits, proceeding on the basis that he is a partner with a 24% share, but violently opposes any application made by Respondents Nos. 2, 5 and Nandbala. If Jaswantrai has only 24%, then he must explain who has the other 76% if it is not Nandbala and Respondents Nos. 2 and 5. He has no explanation. He can have none. The question of whether or not Nandbala is a partner has been decided by the learned Sole Arbitrator and has attained finality.

10. In the meantime, Nandbala has filed these execution proceedings. She filed Garnishee proceedings against the Bank of Maharahstra and the Union Bank of India (to which the premises at Narsi Nath Street were let out). Amounts in the hands of those banks due to Manoj & Co have been brought into this Court. The amount realised from the Union Bank of India was Rs.1,73,000/- and the amount from Bank of Maharashtra was Rs. 3,14,323.

Nandbala has been allowed to withdraw the amount of Rs.1,73,000/- and Ms Mehta now contends that having been denied her share all these years, Nandbala should be allowed to withdraw the balance Rs. 3,14,322/- as well. There is a submission on behalf of Respondents No. 2 and 5 that they too have a share in the amounts brought in to this Court. Technically this may be true. Respondents Nos. 2 and 5, i.e., Saryu Mayani and Vishal Mayani have been opposed by Jaswantrai in their application in the Small Causes Court to withdraw their respective shares from the deposits made by the tenants of rent due to Manoj & Co. Saryu and Vishal have been allowed to make that withdrawal by an order of the Court although Jaswantrai opposed this application — which raises another incongruity in Jaswantrai's stance. For, if it is his case that Nandbala, Saryu and Vishal do not have shares in the firm, and his share is only 24%, and the firm is admittedly a partnership, then he must show who the other partners are. He cannot maintain both stands simultaneously, i.e., of Manoj & Co being a partnership firm and at the same time say he is the 'only' partner, or anything of the sort.

11. Saryu and Vishal made no application to put the Award in execution and sought no reliefs. I will, therefore, permit Nandbala to withdraw the remaining amount deposited with accrued interest. Of necessity this withdrawal will have to be subject to an adjustment from all withdrawals that she is permitted to make in future by the Small Causes Court.

12. In my view, there is no question of the Small Causes Court entering into any controversy for decision regarding whether

Nandbala is or is not a partner of Manoj & Co. In fact there is no question of this Court in execution going into that issue either. The entire issue is finally concluded and has attained finality. It is no longer *res integra*. Jaswantrai cannot, having failed to challenge the Award, now seek to reopen or re-agitate his grounds of opposition to the arbitral claim in this roundabout fashion. All litigation must have some finality and there are no special dispensations for Jaswantrai. If there are other reasons to oppose to oppose any application for withdrawal those will remain unaffected but it cannot be argued in any Court that Nandbala is not entitled to a 24% in the profits of Manoj & Co.

13. The argument that the entire arbitral claim only settled accounts 'up to a given date' is wholly incorrect. That is not even the finding of the Arbitrator. What the arbitral award did was two things. It gave each of the named partners a right to withdraw a sum determined due by the Chartered Accountant's report, and it also recognised the ongoing rights of the partners of the firm. It is not enough to Jaswantrai to assail one or to say that the money decree means that the Arbitrator accepted that Nandbala had ceased to be a partner of Manoj & Co. There is no such finding and none is pointed out to me. Importantly, as I have noted, such a finding would have required a corresponding finding or decision as to the date of dissolution of Manoj & Co as it stood with Nandbala as a partner. In fact, the finding is to the contrary.

14. The Chamber Summons is disposed of in these terms. There will be no order as to costs.

15. The Notice of Motion (L) No. 1538 of 2018 filed by the Bank of Maharashtra is infructuous and is disposed of accordingly.

16. The reference in my order of 16th July 2018 to Judgment Debtor No. 1 is a reference to Jaswantrai. The request I made then to suspend the withdrawal of the amount in the Small Causes Court will of course no longer survive.

(G. S. PATEL, J)