BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 13.09.2017
DELIVERED ON: 10.04.2018
CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A(MD)Nos.521 to 523 of 2017

1.Dr.S.Vel Aravind,
S/o.M.Subramanian,
Managing Partner,
M/s.Frontline Hospital and Research Institute,
No.37 & 39, Chinthamani Bazaar Road,
Thiruchirapalli - 620 002.

2.Dr.Jayaprakash Narayanan,
S/o.Dr.M.Karuppaiah,
Managing Partner,
M/s.Frontline Hospital and Research Institute,
No.37 & 39, Chinthamani Bazaar Road,
Thiruchirapalli - 620 002.

... Appellants / Petitioners / Petitioners
(In all C.M.As)

Vs.

1. Dr.Radhakrishnan

2. M/s.Frontline Hospital and Research Institute,
a registered partnership concern rep. by its partner,
Dr.S.Radhakrishnan

3. Dr.Santhi

. ... Respondents/Respondents/Respondents
(In C.M.A(MD)Nos.521 & 523 of 2017)

4. Karur Vysya Bank Ltd.,
Rep. by its Branch Manager,
Thillai Nagar Branch,
Thiruchirappalli - 620 018.

5. Indian Overseas Bank,
Rep. by its Branch Manager,
Chinthamani Branch, 1 C,
Renga Complex,
Karur Road,
Thiruchirapalli - 620 002.

... Respondents 3to5/Respondents 3to5/
Respondents 3to5 (In C.M.A(MD)No.522 of 2017)

COMMON PRAYER: Civil Miscellaneous Appeals are filed under Section 37(1) of the Arbitration and Conciliation Act, 1996, against the fair and decreetal order dated 01.03.2017 made in I.A.Nos.3, 4 and 5 of 2017 in Arb.O.P.No.1 of 2017 on the file of the Principal District Judge, Thiruchirappalli.

(In all Civil Miscellaneous Appeals)
For Appellant :Mr.S.Deenadhayalan

For R-1 to R-3 :Mr.T.A.Punithan

For R5 in
C.M.A.(MD)No.522/17 :Mr.B.Saravanan

COMMON JUDGMENT

These Civil Miscellaneous Appeal have been filed by the appellants challenging the fair and decreetal order dated 01.03.2017 made in I.A.Nos.3, 4 and 5 of 2017 in Arb.O.P.No.1 of 2017 on the file of the Principal District Judge, Thiruchirapalli.

2. The brief facts of the case are as follows:

(i) The first appellant and the first respondent are the founder partners of the second respondent-Partnership Firm/Hospital, vide partnership deed dated 14.04.2008. As per the partnership deed, any partner either as new partner or in the place of an existing partner, cannot be admitted without the consent of the founder partners. After sometime, two partners had gone out of the partnership and therefore, a reconstitution deed came into existence on 28.02.2013. Subsequently, the second appellant was admitted into the partnership firm by way of reconstitution deed dated 01.04.2013. In the partnership firm, the first appellant and the first respondent are having 42.50% share each and the second appellant is having 15% share. As per the partnership deed, all the partners shall look after the day-to-day administration of the hospital jointly. The first appellant is a leading Nephrologist and the second appellant is a leading Urologist. When the matter stood thus, on 20.10.2016, the first respondent issued a notice to appellants making false allegations against them in order to expel them from the partnership firm under Section 33 of the Partnership Act, 1932. Further, the first respondent prevented the appellants from entering into the hospital premises. Thereafter, Arbitrators were appointed in this matter. Subsequently, the first respondent sent a notice indicating that the date of expulsion of the appellants as 20.10.2016 and 21.10.2016.

(ii) According to the appellants, a single partner cannot expel the majority of partners. The original documents are with the first respondent and the accounts of the hospital are not performed properly and the appellants are also prevented from verifying the accounts. Hence, the appellants filed I.A.No.3 of 2017 for injunction restraining the respondents from interfering with the day to day management of the second respondent Firm by the appellants and further, they have filed I.A.No.4 of 2017 for interim injunction against the banks, respondents 4 and 5 from allowing the respondents 1 to 3 from operating the bank accounts. Further, they have filed I.A.No.5 of 2017 for appointment of receiver to take control of the management of the hospital and filed I.A.No.6 of 2017 to grant leave to file a separate suit challenging the alleged expulsion of the appellants from the second respondent firm.

(ii) The first respondent filed a counter affidavit before the Court below as adopted by the respondents 2 and 3, stating that the appellants have been expelled from the partnership firm and they cannot claim themselves as partners. The partnership deed dated 01.04.2013 is not in existence and a reconstitution deed was registered on 20.10.2016. The first appellant had not invested huge money, but has spoiled the name of the hospital by his professional misconduct and misbehavior with staffs, nurses and attenders of the patients. The third respondent has been legally inducted as partner as per the reconstitution deed dated 20.10.2016. If no action was taken against the appellants, automatically the hospital will be de-listed from the Government Insurance Scheme. After expulsion, the appellants cannot claim access into the hospital as existing partners. The allegation of preventing the appellants from taking control of all the original documents is wrong. In fact, all the original documents were pledged with Karur Vysya Bank, Thillainagar, for the existing loans. The appellants' share on the profits and properties are protected and will be given as per the award by the Arbitration Tribunal. Therefore, the appellants have filed these application with an intention to spoil the hospital.

3. The Court below after analysing the facts and circumstances of the case and also considering the evidence on record, had dismissed I.A.Nos.3 to 6 of 2017, vide order dated 01.03.2017.

4. Challenging the order passed in I.A.Nos.3 to 5 of 2017 dated 01.03.2017, the appellants have filed these Civil Miscellaneous Appeals.

5. The learned counsel appearing for the appellants submitted that the first appellant and the first respondent formed the registered partnership firm in the name and style of M/s.Frontline Hospital and Research Institute and as per the partnership deed, no new partner can be inducted without the consent of the founder partners. The investment made by the first appellant is more than Rs.1,20,00,000/- and the second appellant had invested Rs.1,99,00,000/- and the first respondent herein did not invest more

than Rs.1,20,00,000/-.

6. The learned counsel appearing for the appellants would further submit that the firm was originally founded by Dr.Vel Aravind/first appellant and Dr.Radhakrishnan/first respondent and they had availed loan from KVB to the tune of Rs.12 Crores. Since difficulties arose during construction of the hospital, the second appellant was inducted as partner to infuse cash flow. Even though there are only three partners, the share of the 1st and 2nd appellants would come to 57.5% while the share of the first respondent is only 42.5%. Now, the first respondent had created records as if he is having 90% share in the second respondent firm while his wife Dr.Shanthi is having 10% share and all these changes have been fraudulently made in collusion with the officials in the Registrar of Firms.

7. The learned counsel appearing for the appellants submitted that the partnership deed contains an arbitration clause and therefore, the disputes among the parties herein will have to be resolved only through arbitration. Hence, the appellants filed Arb.O.P.No.1 of 2017 before the Principal District Judge, Thiruchrappalli under Section 9 of the Arbitration and Conciliation Act, 1996. Pending the said O.P., the appellants herein filed I.A.Nos.3 to 6 of 2017 and all the I.As were dismissed by the impugned order dated 01.03.2017 and therefore, they have filed the present Civil Miscellaneous Appeal.

8. The learned counsel appearing for the appellants submitted that I.A.No.3 of 2017 is for restraining the respondents from interfering with the appellants' right of day-to-day management, I.A.No.4 of 2017 is for restraining the respondent bank from allowing the respondents 1 and 3 from operating the bank accounts. I.A.No.5 of 2017 is for appointment of receiver. But, the trial Court without appreciating the facts put forth by the appellants, dismissed the applications filed by the appellants and therefore, prays for allowing of these Civil Miscellaneous Appeals.

9. The learned counsel appearing for the first respondent would submit that creation of records in collusion with the officials in Registrar of firms are just imaginary and vexatious and all the documents were legally submitted and accepted after due scrutiny and the allegation of fraud is a subject matter before the District Registrar of Firms, Tiruchirappalli District. He further submitted that the appellants were legally expelled from the firm and the action of expulsion was taken only to save the hospital.

10. The learned counsel appearing for the first respondent would submit that the claim made in Arb.O.P.No.1 of 2017 filed by the appellants are not in the nature of interim measure and they have filed the said O.P., seeking finality in the dispute among the partners. He further submitted that after legal expulsion, they can claim their shares as retired partners, but they cannot take part in

the administration of the hospital and therefore, the Court below has rightly dismissed the interim applications filed by the appellants and prays for dismissal of these Civil Miscellaneous Appeals.

11. Heard the rival submissions made on either side and perused the materials placed before it.

12. The only issue to be decided in this matter is whether one of the partners has got a right to expel one other partner on the ground of allegation of misappropriation and whether the first respondent can solely claim right over the Hospital.

13. To decide the above issue, it is relevant to extract Section 33 of the Indian Partnership Act:

> "33.Expulsion of a partner:-
>
> (1) A Partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.
>
> (2) The provisions of sub-sections(2), (3) and (4) of Section 32 shall apply to an expelled partner as if he were a retired partner."

14. Section 33(1) of the Indian Partnership Act is unambiguously clear that partners cannot be expelled even by majority of partners. Partners can be removed or expelled only in exercise of good faith of powers conferred by contract between partners. The above proposition that the relationship between the partners in a partnership is that of principal to agent for one another is confirmed by a plethora of cases decided by various High Courts.

15. Therefore, in the absence of explicit provisions in the contract agreed to between the partners regarding expulsion of partners, only remedy available to the disgruntled partners is taking recourse to Section 44 of the Indian Partnership Act for dissolution to be ordered by the Court on a suit of the partner and they cannot dismiss or expel the other partner.

16. Even assuming that the appellants have committed malpractice, the Arbitrator alone has to decide the dispute according to law and therefore, the expulsion of the appellants by the first respondent is erroneous. In this regard, it is relevant to extract below Paragraph Nos.34 to 36, 40 and 41 of the decision of the Calcutta High Court in Santiram Mullick vs Hiranmony Bagechi and Others reported in (1991) 2 CALLT 399 HC.

> "34. I have carefully considered the submissions made by both the parties. It is an admitted fact that even though in the earlier Arbitration agreement there was a specific provision for expulsion ofpartners, no such

provision has been made in the agreement dated 1st April 1987 by which the partner ship firm was reconstituted and the petitioner and the Respondent nos. 1, 2 and 3 have become partners on the reconstitution of the partnership business. The partnership agreement in Clause 13 provides that retirement or a death of a partner will not ipso facto operate as a dissolution of the firm and the remaining/surviving partners shall continue the profession with or without any other partner or partners. Clause 12 provides that on retirement of a partner being incapable of carrying on profession or in the event of a death of a partner a goodwill shall be raised and the value thereof shall be computed or arrived at on 2 years purchase price and the last three years average,net profits of the firm, and the net profits for this purpose as computed in terms of Clause 12 shall be paid to the retiring or deceased partner. The only provision regarding the expulsion of a partner is contained in Section 33 of the Partnership Act and Section 33 as already been referred to in the above, does not contemplate expulsion of a partner unless the terms of agreement of the partnership firm confer upon the majority of the partners to do so and that too such power has to be exercised in good-faith. Therefore, the law of the land is that a partner may be expelled from a firm by the majority of the partners and in good-faith if the terms of partnership confer such power, otherwise not. Admittedly terms of partnership did not confer such power to the partners to expel any partner from the firm. However, the Partnership Act does not make the partners without any remedy when any of the partners commits breach of the partnership agreement. The remedy is in Section 44 of the Partnership Act. If a partner commits breach of the agreement then under Clause (d) of Section 44 at the suit of a partner, the court may dissolve the partnership firm.

35. I am unable to accept the contention of Mr. Gupta that the court has power in a similar circumstances in case of breach of agreement of partnership by a partner to order his expulsion. The Partnership Act does not confer such power upon the court. If under the agreement a majority of the partners expelled a partner then the partner who has been so expelled or the majority of the partners expelling the partner may approach the court either to challange or to uphold the action of expulsion and in such a case the court will have to decide the issue. If the court finds that the partnership agreement conferred such power to the majority of the partners to expel a partner, it has still to consider as to whether the same was done in good faith or not. But if the

partnership agreement does not provide for expulsion, no partner can approach the court seeking relief for expelling a partner from the partnership business on the allegation that the concerned partner had committed the breach of the partnership agreement.

36. It is true that the partnership agreement may either expressly or by implication provide the provision regarding expulsion. It is also true that a partnership agreement may be varied by subsequently to incorporate the provision of expulsion if originally in the agreement there was no such power. But there is nothing to show save and except that in the statement of facts before the Arbitrators the partners for the first time asked the arbitrators to exercise the power of expulsionthat there was no contract either express or implied that the partners of the present partnership business at any time agreed that the majority of the partners would be competent to expel a partner. On behalf of the respondents, it is submitted that in the statement of the claim of the petitioner before the Arbitrators he sought for the expulsion of the Respondent no. 2 and the Respondent nos.1, 2 and 3 sought for the expulsion of the petitioner before the Arbitrators and there-fore the Arbitrators were clothed with the jurisdiction to expel a partner on coming to the finding that he committed the breach of the partnership agreement. The relief was sought for before the arbitrators in their separate statements of claim that the partners themselves no doubt but the parties were not at ad idem on the question of expulsion. But each of them made separate allegations against each other and sought for expulsion of a particular partner. The petitioner sought for expulsion of the Respondent no. 2 and the respondents sought for expulsion of the petitioner.

40. In that view of the matter, I am convinced that even if in the statements of claim the partners demanded expulsion of the partners committing breach of the agreement, the arbitrators who are to decide the disputes according to law and are bound to follow and comply the law definitely committed an error of law by ordering expulsion of the petitioner when under the law a partner cannot be .expelled unless there is a specific agreement between the parties authorising such expulsion of a partner by majority of the partners. Therefore, that part of the award of the majority of the arbitrators ordering expulsion of the petitioner being an error apparent on the face of the award being contrary to law is liable to be set aside. The arbitrators have also committed misconduct in law by ordering expulsion when under the law the arbitrators could not expel a partner in the

absence of such sanction of expulsion in the partnership agreement and when Section 33 of the Partnership Act only authorised expulsion. When the partnership agreement empowers the majority of the partners to expel a partner.

41. In the petition, however, the petitioner has also challenged the money award, I find from the award that the arbitrators on own admission of the petitioner about the realisation of the amount of Rs. 68,800/- by earning made from the other parties which was in violation of the partnership agreement directed the said amount to be returned to the firm within 30 days from the date of the award has been passed by the majority of the arbitrators. But I do not find any error apparent on the face of the award. I have already indicated that Section 16(b) of the Partnership Act provides that if a partner carries on a business of the same nature and is competing with the firm he shall account for the payment received by him in that business. Therefore, there was definite sanction in the law for the majority of the arbitrators passing that money award. That money award is severable from the other part of the award, namely, the expulsion of the petitioner. Therefore, even if that part of the award regarding expulsion is set aside by this court, the money award can be upheld as the said award is in accordance with law and there is no error apparent on the face of the award to justify setting aside of the money award made by the majority of the arbitrators."

17. In the present case, there is no explicit provision regarding expulsion of partners and in my considered opinion, the only remedy available to the disgruntled partners is taking recourse to Section 44 of the Indian Partnership Act, for dissolution to be ordered by the Court on a suit of the partner and they cannot dismiss or expel the other partner. The petitioners have got all the rights to participate in the administration.

18. In the facts and circumstances of the case, the order passed by the learned Principal District Judge, Tiruchirappalli, dated 01.03.2017, dismissing the applications filed by the petitioners in I.A.Nos.3 to 5 of 2017 in Arb.O.P.No.1 of 2017 on the file of the Principal District Judge, Thiruchirappalli, is set aside and the matter is remitted back to the Principal District Judge, Thiruchirappalli, for fresh consideration.

19. With the above direction, these Civil Miscellaneous Appeals are allowed. No Costs.

Sd/-
Assistant Registrar (T&P)

/True Copy/

Sub Assistant Registrar

To,

1. The Principal District Judge,
   Thiruchirappalli.

2. The Record Keeper,
   Vernacular Section,(2 Copies),
   Madurai Bench of Madras High Court,
   Madurai.

+3CC to Mr.S.Deenadhayalan, Advocate,
in SR.No.60548,60549&60550

+1 CC to Mr.T.A.Punithan ,Advocate in SR.No.60914,

+1CC to Mr.B.Saravanan, Advocate in SR.No.60818.

PM
DS/SV/MMS/SAR-1 :16.05.2018: 9P/9C

C.M.A(MD)Nos.521 to 523 of 2017
10.04.2018