

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 749 OF 2011****AND****WRIT PETITION NO. 750 OF 2011**

1. Shri Mohan Shambhu Kenkre, aged about 82 years, r/o H. No. 288, Behind Durga Hotel, Sarvonem, Salcete, Goa.
(since deceased through LR's)
- i. Smt. Shantabai Mohan Kenkre, aged 82 years, widow of deceased, housewife, resident of H. No. 288, Sanvordem Navelim, Salcete, Goa.
- ii. Smt. Reshma Kenkre, after marriage Smt. Reshma Mathew, aged 56 years, daughter of late Shri Mohan Kenkre, service and her husband,
- iii. Joseph Mathew, aged 58 years, Electrical Engineer,
Resident of T/8, Phase-II, 3rd floor, Feriera Garden, Near Chowgule College, Fatorda, Salcete, Goa.
- iv. Sushma C. Samant, aged 55 years, daughter of late Shri Mohan Kenkre, service and her husband,
- v. Chandrashar Samant, aged 59 years, business,
Resident of Shiv Durga Apartment, S-01, Bhagyanagar, 2nd Cross Off, Khanapur Road, Tilakwadi, Belgaum, Karnataka 590 006.
- vi. Dr. Smt. Jaya Rajiv Gude, aged 53 years, daughter of late Mohan Kenkre, Private Practitioner and her husband,
- vii. Dr. Rajiv Phondur Gude, aged 62 years, retired, resident of Vijay Garden Jasmine Chs. Ltd. Building No. 6, Flat No. 31, Third floor, Kavesar, Near Suraj Water Park, Ghod Bander Road, Bhandar Road, Thane, West - 400 615.

- viii. Smt. Pooja Prasad Kenkre, aged 49 years, wife of Shri Prasad M. Kenkre, housewife, resident of Shanti Grah, Sarvordem, Navelim, Salcete, Goa.
- ix. Dr. Amita Kamat, aged 49 years, daughter of Shri Mohan Kenkre, service, resident of G-4 Belle Vue Apartments, Nagalli Hills Colony, Behind Krishna Temple, Dona Paula, Goa and her husband,
- x. Shri Nilesh Kamat, aged 50 years, landlord, resident of Adarsh Housing Coop. Society, Caranzalem, Goa.
- xi. Prasad M. Kenkre, aged 51 years, son of late Shri Mohan Kenkre, businessman, resident of Shanti Grah, Sarvordem, Navelim.

.... Petitioners

Versus

- 1. Smt. Nirmala alias Muktabai S. Kenkre, widow of Suresh Shambhu Kenkre, aged about 68 years, residing at H. No. 1591(1) Vassvado, Benaulim, Salcete, Goa.
- 2. Shri Narayan Shambhu Kenkre (deceased)
 - A) Smt. Laxmibai Narayan Kenkre (deceased since 10.07.2003)
 - B) Smt. Shubhangi Bipin Kenkre,
 - C) Kum. Ishan Bipin Kenkre,
All r/at Ramkrishna Talaulikar Kagaddi Katta, Sanvorkatem-Cuncolim, Goa.
 - D) Shri Pradip Narayan Kenkre,
 - E) Smt. Beena Pradip Kenkre,
Both r/at Deepvihar Bungalow, Ramnagar, Mugale, Goa.
 - F) Smt. Kunda V. Gaitonde,
 - G) Shri Ashok Gaitonde,
Both r/at Plot No. 46, Gururaj Society Pant Road, Kothrud, Pune - 49.

H) Smt. Suhas A. Salelkar,
r/at C/o Krishi Kendra, Khurwada,
Sanguem, Goa.

I) Shri Avduth Kalyan Salelkar (deceased on
09.01.2010)

J) Smt. Shilpa S. Kudchadkar,

K) Shri Shailesh Kudchadkar,
Both r/at A-4-F, Nalanda Apartments,
Aquem Baixo, Margao, Goa.

3. Shri Vinayak Shambhu Kenkre, deceased
on 24.03.2006 and the heirs were not
brought on record.

.... Respondents

Mr. V.A. Lawande with Mr. Parimal Redkar, Advocates for the
Petitioners.

Mr. Sudesh Usgaonkar with Ms. Rosette Pereira, Advocates for
Respondent No. 1.

CORAM:- C. V. BHADANG, J.

DATED:- 1st AUGUST, 2019

ORAL JUDGMENT:

Both these petitions are between the same parties
and arise out of an award dated 27.03.2001, passed by learned
Arbitrator, in pursuance of a reference made in Special Civil
Suit No. 359/1992, by the learned Additional Senior Civil Judge
at Margao. As such, both these petitions are being disposed off
by this common judgment.

2. The brief facts necessary for the disposal of the
petitions may be stated thus:

Shambu Kenkre had four sons (i) Suresh, (ii) Mohan, (iii) Narayan and (iv) Vinayak, all of whom are since dead. Nirmala @ Muktabai widow of Suresh Kenkre filed Special Civil Suit No. 359/1992, against Mohan, Narayan and Vinayak Kenkre, for dissolution of the partnership under the name and style as “M/s Kenkre Brothers” and for reconciliation of Accounts. It appears that by an order dated 28.02.1996, the learned Senior Civil Judge had referred the dispute to a sole Arbitrator, Mr. Gurudatt R. Mallya. The dispute referred to the Arbitrator *inter alia* included a dispute as to four leasehold shops situated at Margao. The question was whether, the tenancy rights of the shops are belonging to the partnership firm or exclusively to the plaintiff, Mrs. Nirmala Kenkre.

3. The Arbitrator framed in all eleven issues. For the present purpose, the dispute only pertains to the four shops, which dispute was covered by the following issue nos. 4 and 5:

4. Whether the applicant (original plaintiff-Nirmala Kenkre) proves that the four shops form the assets of the firm ?

5. Whether the respondent no. 1 (now deceased-Mohan Kenkre) proves that he is the tenant in respect of the four shops.

4. The learned Arbitrator found that one of the four shops forms the assets of the firm, while in respect of the rest of the three shops, the petitioner-Mohan Kenkre (respondent no. 1, before the Arbitrator) is the tenant. It may be mentioned that the reference made to the Arbitrator was under the provisions of the Arbitration Act, 1940 (old Act, for short).

5. Feeling aggrieved, the original plaintiff-Nirmala Kenkre, filed an objection to the said award, under Section 30 of the old Act, *inter alia*, on the ground that the learned Arbitrator has misconducted himself and the findings recorded are erroneous on the face of the record.

6. The learned Senior Civil Judge, by an order dated 29.03.2003, remitted the award dated 27.03.2001 to the Arbitrator, for reconsideration of issue nos. 4 and 5, as re-cast. The learned Arbitrator was directed to submit the award within one month from the receipt of the order. The learned Arbitrator after hearing the parties, passed an award dated 09.12.2003 (referred to as the "further award" by the Arbitrator), maintaining the earlier award dated 27.03.2001. The learned Arbitrator found that even on reconsideration of issue nos. 4 and 5, no different or contrary view can be taken

and therefore, confirmed the earlier award passed on 27.03.2001.

7. Feeling aggrieved, yet another objection (Exhibit-68) was filed by the original plaintiff to the “further award”.

8. The learned Trial Court by an order dated 19.03.2004, dismissed the objection and by a separate judgment and decree of the even date, decreed the suit in terms of the “further award”.

9. The original plaintiff filed Miscellaneous Civil Appeal No. 84/2010 (old A.O. No. 70/2004), challenging the order dated 19.03.2004, thereby dismissing the objection (Exhibit-68) to the “further award”. Simultaneously, the original plaintiff filed Regular Civil Appeal No. 144/2009 (old First Appeal No. 156/2004), challenging the judgment and decree dated 19.03.2004, making the “further award” a rule of the Court.

10. The learned District Judge at Margao by judgment and order dated 26.09.2011 has allowed Miscellaneous Civil Appeal No. 84/2010 in the following terms:

Impugned order dated 19.03.2004 is set aside.

Consequently application at Exh.68 is allowed by setting aside the further award dated 09.12.2003.

In view of order dated 29.03.2003, trial Court to remit the Award dated 27.3.2001 for reconsideration by a new Arbitrator of the choice of the parties.

Parties to appear before the trial Court on 7.10.2011 at 10.00 a.m. and suggest the name of the Arbitrator of their choice, who shall pass the Award within 45 days of the receipt of the order of appointment by the trial Court.

11. The said judgment and order is subject matter of challenge, at the instance of the petitioner (original defendant no. 1) in Writ Petition No. 750/2011.

12. By a judgment and decree of the even date, the learned District Judge has allowed Regular Civil Appeal No. 144/2009, thereby setting aside the judgment and decree dated 19.03.2004, by which, the further award dated 09.12.2003 was made a rule of the Court, which is subject matter of challenge, at the instance of the petitioner (original defendant no. 1), in Writ Petition No. 749/2011.

13. I have heard Mr. Lawande, the learned Counsel for the petitioners and Mr. Usgaonkar, the learned Counsel for the respondent no. 1. Perused record.

14. It is submitted by Mr. Lawande, the learned Counsel for the petitioners that the initial award dated 27.03.2001 was a reasoned award and there was no occasion for the learned District Judge to have remitted the matter back to the Arbitrator for re-determination of issue nos. 4 and 5 as re-cast. It is submitted that in any event, the learned Arbitrator was within his bounds to return the same, confirming the earlier award by virtue of further award dated 09.12.2003. It is submitted that after the remand, the Arbitrator was not obliged to modify the further award. It is submitted that whenever a suit or any other matter is remitted back, it does not necessarily mean that the lower Court has to modify the earlier order. It is submitted that the Arbitrator has given elaborate reasons to show that the leasehold rights in respect of three out of four shops, belong to the petitioners and only one shop was the asset of the partnership firm. It is submitted that in the second round of objection, raised by the plaintiff, the learned Trial Court had in fact (while dismissing the objection raised under Section 30 of the old Act) has made the further

award as a rule of the Court and both these orders namely, the one dismissing the application (Exhibit-68) and the judgment and decree making the further award as a rule of the Court, were not liable to be interfered with by the learned District Judge. The learned Counsel for the petitioners was at pains to point out that the respondent no. 1 has not demonstrated as to how the findings recorded by the learned Arbitrator, both, under the initial award and the further award are perverse. It is submitted that there are two lease deeds produced on record, one pertaining to two shops and the other to one shop, which clearly show that the petitioner, Mohan Kenkre was having leasehold rights in respect of the said shops and only the leasehold rights of one shop can be said to be the estate of the firm.

The learned Counsel for the petitioners has placed reliance on the decision of the Calcutta High Court in the case of **Sukesh Chandra Mallik Vs. Amiyalal Mallick & Others, MANU/WB/0432/1970**, in order to submit that merely because the business of the firm was carried in a shop of which, rent was being paid out of the partnership firm, is not sufficient to hold that the leasehold rights of the said shop belong to the partnership firm. It is submitted that in any event, the learned District Judge was not justified in remitting

the initial award for reconsideration of a “new Arbitrator”. It is submitted that the learned District Judge was not clothed with any such jurisdiction under Section 16 of the old Act.

15. Mr. Usgaonkar, the learned Counsel for the respondent no. 1 has supported the impugned order. It is submitted that the petitioners did not challenge the judgment and order dated 29.03.2003, by which, the learned Trial Court in the first round of the objection had remitted the issue nos. 4 and 5, for reconsideration of the Arbitrator. It is therefore, submitted that now the petitioners are estopped from claiming that the findings recorded by the Arbitrator are legal and proper. It is submitted that the learned Trial Court in its order dated 29.03.2003 had rightly found that the award passed by the Arbitrator is discrepant on issue nos. 4 and 5. The learned Counsel has taken me through paras 15.1 to 15.21 of the award, in order to urge that the findings recorded are perverse and thus, the Arbitrator ought to have considered the findings on issue nos. 4 and 5 afresh, which the Arbitrator has failed to do. The learned Counsel, however, in all fairness, did not dispute that under Section 16 of the old Act, the Court can only remit the award or any matter referred to arbitration to the Arbitrator or the Umpire for reconsideration and not to a new

Arbitrator.

16. I have given my anxious consideration to the rival circumstances and the submissions made. It is true that the petitioners did not challenge the order dated 29.03.2003, by which, the learned Trial Court had remitted the issue nos. 4 and 5, for reconsideration of the Arbitrator. However, that alone, may not clothe the learned District Judge with jurisdiction under Section 16 of the old Act to remit these issues to a new Arbitrator. Such a course of action was clearly not permissible within the powers available to the learned District Judge under Section 16 of the old Act. It is necessary to note that unlike the Arbitration and Conciliation Act, 1996 (the new Act), under the old Act, the Court had power even to modify the award. Thus, if in the second round of the objection raised on behalf of the first respondent (original plaintiff), the learned District Judge was of the opinion that there was no proper consideration by the learned Arbitrator, it was open to the learned District Judge to modify the award appropriately. This is not to suggest that a case for modification is made out in this case. What is necessary to emphasize is that there was certainly no occasion for the learned District Judge to have remitted the award for a second time and that too, to a new

Arbitrator, which power, in my considered view, is not available under Section 16 of the old Act. On a careful consideration of the rival circumstances and the submissions made, I find that Miscellaneous Civil Appeal No. 84/2010 is required to be remitted back to the learned District Judge, for deciding it afresh, on its own merits in accordance with law. The order passed in Regular Civil Appeal No. 144/2009, is only consequential to the objection (Exhibit-68), filed to the award being upheld in Miscellaneous Civil Appeal No. 84/2010. In fact, whether or not, the award passed by the learned Arbitrator can be made a rule of the Court, would depend upon the question as to the whether, the objection raised to the award is upheld or not. Thus, the decision in Regular Civil Appeal No. 144/2009 would depend upon the outcome of Miscellaneous Civil Appeal No. 84/2010.

17. In the result, the following order is passed:

O R D E R

- (i) Both these petitions are partly allowed.
- (ii) The order dated 26.09.2011, passed in Miscellaneous Civil Appeal No. 84/2010 and the judgment and decree passed in Regular Civil Appeal No. 144/2009, are hereby set aside.
- (iii) Miscellaneous Civil Appeal No. 84/2010 and Regular Civil Appeal No. 144/2009, are hereby

restored back to the file of the learned District Judge at Margao, for disposal on their own merits and in accordance with law, in the light of the observations as made above.

- (iv) The learned District Judge shall decide Miscellaneous Civil Appeal No. 84/2010 and Regular Civil Appeal No. 144/2009 as expeditiously as possible and preferably within a period of six months from the receipt hereof.
- (v) Parties to co-operate for time bound disposal of the Appeals.
- (vi) Parties to remain present before the learned District Judge on 04.09.2019 at 10:00 a.m.
- (vii) Rule is made partly absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.