

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.428 OF 2018

Sunita Vilas Gaonkar ... Petitioner

Versus

Kalpana Tapan Bose

And Others ... Respondents

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Mr. Uday P. Warunjikar for the Petitioner.

Mr. Nigel Quraishy i/b Mr. Dushyant Krishnan for Respondent Nos.1 to 3.

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CORAM : S.C. GUPTE, J.

DATE : 23 AUGUST 2019

(Oral Judgment)

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a partnership agreement. Respondent Nos.1 to 3, who were claimants in the reference, are legal representatives of a deceased partner having 25 per cent share in the suit partnership. The learned arbitrator accepted the Respondents' case that they were entitled to profits attributable to the share of their deceased predecessor.

3 The suit partnership was entered into between two families in

the year 1987, namely, the family of Bose, who were represented by two brothers, Tapan Bose ('Tapan') and Nitin Bose ('Nitin'), and the family of one Mohan Pawar. The Petitioner before this Court is a transferee of the share of Pawar. The Petitioner became a partner in the year 1998 through a deed of reconstitution of partnership. The Petitioner, as such transferee, held 50 per cent share in the partnership, originally belonging to Pawar, whilst the two brothers, Tapan and Nitin, between them held the balance 50 per cent, each having 25 per cent share. In February 2002, Tapan died. Pursuant to his death, Nitin and the Petitioner herein executed a fresh partnership deed. Tapan was shown to have retired from the firm as of 2002 and his share was shown as having been taken over by Nitin. The deed further recorded that all assets and liabilities of the partnership belonged to the continuing partners and legal heirs of the deceased partner, Tapan, had no claim whatsoever.

4 It is the case of Respondent Nos.1 to 3 herein, who are legal heirs of Tapan, being his widow, daughter and son, that they were entitled to become partners in the firm and inherit the share of Tapan in view of specific provisions to that effect contained in the partnership deed of the year 1998. In their claim before the arbitrator, they sought a declaration that the partnership deed of 2002, entered into between Nitin and the Petitioner herein, was void *ab initio*; they sought to be made partners in the firm along with Nitin and the Petitioner and also sought profits attributable to the share of Tapan from the date of his death till date. In defence, it

was pleaded by the Petitioner herein that the suit claim was, in the first place, barred by limitation. It was submitted that Tapan died in February 2002, whereas the notice invoking the arbitration agreement under the partnership deed of 1998 was sent on 25 February 2015, that is to say, more than three years after the death of Tapan. The Petitioner also contested the claimants' case on voidness of the deed of partnership of 2002 or their entitlement to be made partners and also their respective shares in the firm as well as profits.

5 Based on the pleadings of the parties, the learned arbitrator framed issues which included the issue of bar of limitation as also of merits concerning the validity of the partnership deed and entitlement of the claimants to be made partners as also their respective shares in the firm as well as past profits. The arbitrator, in his impugned award, held that so far as Respondent No.1, i.e. the widow of deceased Tapan, is concerned, her claim was clearly barred by the law of limitation, since despite her knowledge about the share of deceased Tapan in the partnership, she had not filed her claim for a share in the partnership or its profits within a period of three years from the date of his death. So far as Respondent Nos.2 and 3, i.e. the other heirs of deceased Tapan, are concerned, the learned arbitrator observed that these two were minors, when Tapan died in February 2002; though the two gained majority, respectively, in the years 2008 and 2012, the evidence on record showed their knowledge of the share of the deceased in the suit partnership as of the year 2015 and that, accordingly, their claim for a share in the partnership

and to its account was within time. As far as merits of their claims are concerned, the learned arbitrator held that the agreement of partnership executed in June 2002 was void *ab initio*. The learned arbitrator held that both Respondents were entitled to their father's share in the suit partnership and consequently, to 12.5 per cent each of the partnership rights, including their father's share in the profits of the firm. So far as their share in past profits is concerned, the learned arbitrator observed that evidence on record indicated a fair estimate of average profit of the firm at 7.5 per cent of the daily turnover, which was estimated to be Rs.40,000/-, yielding a profit of Rs.3000/- per day. Accordingly, the learned arbitrator worked out the claimants' share in the profit and awarded a total sum of Rs.40,88,250/- to the two claimants. In addition, the learned arbitrator awarded them the cost of arbitration computed at Rs.3,00,000/- and rejected all other monetary claims.

6 This award has been challenged by the Petitioner mainly on the ground that it is in breach of public policy of India. It is submitted that the arbitrator has disregarded the law of limitation and in any event, has come to a perverse conclusion on the issue of limitation. Learned Counsel submits that it was the Respondents' own case before the learned arbitrator, i.e. in their common written statement (written statement of the three Respondents together) that their knowledge concerning the share of deceased Tapan was gained in the year 2005, and yet the claim filed on their behalf in the year 2016 was held to be within time. Learned Counsel further submits that so far as his

client is concerned, her share continued to be 50 per cent as it was in the partnership of 1998. It is submitted that 25 per cent share of deceased Tapan was taken over by Nitin, and therefore, it was Nitin alone who should have been asked to pay the share of profits attributable to that share. It is submitted that Nitin has even admitted in his cross examination that it was he, who had deprived the legal heirs of deceased Tapan of their share in the partnership. Learned Counsel lastly submits that there was no legitimate basis for computing the share of profits attributable to 25 per cent share of deceased Tapan. Learned Counsel submits that the share, as has been determined by the arbitrator, is on pure guesswork.

7 So far as the issue of limitation is concerned, it is not in dispute that the period of three years reserved under the law of limitation is to be reckoned from the date of the claimants' knowledge of such share. The submission is that this knowledge, on their own showing, was of the year 2005. It is equally not in dispute, however, that in 2005, Respondent Nos.2 and 3 were minor. If that is so, their knowledge, assuming that there be any, acquired during their minority cannot be treated as knowledge according to law so as to result into any civil consequence to them. It is equally no good to say that limitation must anyway run against the minors upon their attaining majority, for the basis of even this submission would be the very knowledge which they had purportedly acquired during their minority. Based on this knowledge, the clock cannot start ticking for them upon attaining of majority. If knowledge acquired by them during

their minority is no knowledge in the eyes of law, so as to give rise to any civil consequence for them, they could not be held to be bound by it so as to give them a cause of action on the date they attained majority. The learned arbitrator has come to a conclusion, based on assessment of evidence before him, that the minors obtained knowledge of the share of their predecessor, deceased Tapan, and their entitlement to succeed to that share in the year 2015. This being a conclusion of fact, supported by some evidence on record, cannot be termed as an impossible or perverse finding, such as no reasonable person duly instructed in law could have ever arrived at. The assessment of evidence in this behalf does not indicate any breach of public policy of India. There is, thus, no merit in this particular ground of challenge.

8 Coming now to the argument that the liability, if any, to the extent of the share of legal heirs of deceased Tapan in the suit partnership as well as in past profits, must be borne by Nitin, it is pertinent to note that there was no such case pleaded by the Petitioner before the arbitrator. At any trial, it is perfectly permissible to a defendant to alternatively plead that the plaintiff's claim, if at all payable, and assuming without admitting that it is so payable, is to be paid by his co-defendant. There is indeed no such case pleaded in the Petitioner's written statement. Learned Counsel for the Petitioner draws my attention to two particular submissions of his client in her pleadings. It is submitted that the Petitioner did plead in her reply statement that Nithin had represented to her that

in keeping with their family understanding, he would make monthly payments to the claimants, who were from the family of his deceased brother Tapan, and that it was Nitin, who took charge of the share of Tapan assuring the Petitioner that necessary arrangements for providing for Tapan's family would be made. As a partner of the firm, it was the Petitioner, who was, equally with her co-partner, responsible for providing the share of the deceased partner in the property as well as profits of the firm to the legal heirs of the deceased. If that is so, she owed a liability to the legal heirs in her individual capacity for such payment. That liability cannot be done away with by any unilateral arrangement made by her with her co-partner, Nitin; no such arrangement can exonerate her from that liability. For that she had to plead not only that her co-partner, Nitin, took upon himself to provide for the share of the deceased partner to his legal heirs, but that the latter had even acceded to such responsibility on the part of Nitin to the exclusion of the Petitioner. There is no such case pleaded; and none can naturally be countenanced.

9 Coming now to the merits of the quantification of the profits attributable to the share of the deceased, the learned arbitrator has made pertinent observations about the conduct of the parties before him. The learned arbitrator noted that when the claimants sought documents pertaining to the suit firm, particularly, with a view to assess its profits, neither of the two respondents to the reference, namely, the Petitioner and Nitin, produced any document; Nitin

contended that the documents were with the Petitioner, whilst the Petitioner contended that they were with Nitin. The end result was that nothing was brought on record by either of the two continuing partners; no income tax returns or books of accounts of the firm were produced. In the absence of this material, the learned arbitrator had to rely on the details of daily turnover of the firm brought out in the oral evidence of the partners. The details of daily turnover and the percentage of profit to be reasonably estimated were, thus, culled out from the oral evidence of the parties as also the diaries concerning the business of the partnership firm maintained by the Petitioner. The learned arbitrator observed that the Petitioner had stated in her affidavit that maximum profit in medicine business would be in the range of 5 to 10 per cent. In her cross examination, she brought on record handwritten entries in diaries maintained by her. The entries in diaries were admitted in evidence and marked as exhibits. Even Nitin admitted in his oral evidence that whilst he was managing the shop in the year 2003-04, average daily turnover of the firm was around Rs.40,000/- and that average profit was around 12-15 per cent of that turnover. Based on the evidence of entries brought on record by the Petitioner, which incidentally corroborated oral evidence of Nitin, the learned arbitrator estimated the average turnover of the firm for the period from 1 June 2015 until April 2017 to be around Rs.40,000/- per day. So far as the estimate of profits is concerned, as per the Petitioner, it was between 5 to 10 per cent. The learned arbitrator estimated the average profits of the firm to be around 7.5 of the daily turnover of Rs.40,000/-. The assessment of evidence by

the learned arbitrator and his estimate of share of profits for the past three years, cannot be said to be either an impossible view or a perverse view. It, accordingly, does not call for any interference. It is, however, to be noted that the learned arbitrator has awarded the claim of share of profits not only for the past three years, but for about fifteen years. Learned Counsel for the Respondents does not dispute that the share of profits ought to have been restricted only to three years of invocation of the arbitration reference. Accordingly, the actual calculation of the share of profits can be read down to Rs.8,21,250/-, that is to say, $365 \times 3 \times 750 = 8,21,250/-$ (25 per cent share in daily profit of Rs.3000 working out to Rs.750).

10 Accordingly, the arbitration petition is disposed of by reducing the amount of Rs.40,88,250/- awarded by the learned arbitrator to the claimants being their share of profits in the firm, to Rs.8,21,250/-. Rest of the award is sustained.

(S.C. GUPTE, J.)