

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2019

CORAM

The Honourable Ms.JUSTICE P.T.ASHA

O.P.No.555 of 2019

and

A.No.5216 of 2019

1. Mr. G.G. Srinivasan
2. M/s. Venkateswara Diagnostice Centre,
Medavakkam,
Represented by its Proprietrix,
Mrs. J. Bhuvanasankari
No.11/237, Bharathi 1st Street,
Medavakkam,
Chennai- 600 100.

...Petitioners

1. Mr. K. Babu
2. Mrs. Meera Babu

Respondents

Prayer : Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 16.05.2019 and allow the counter claim of the petitioners.

For petitioners : Ms. Tanya Kappor

Mr. Yashwanth Rajan

For Respondents : Mr. K. V. Babu, caveator counsel

ORDER

The unsuccessful respondent before the Arbitral Tribunal has challenged the award in the above OP.

2. The Main grounds of challenge by the petitioner is that the Arbitral Tribunal has not comprehended the terms of the contract entered into between the claimant and the respondent, as a result of which the Arbitral award has dealt with issues totally out of the purview of the Memorandum of Understanding which by itself is not admissible as the same was not registered. It is necessary to narrate the events culminating in the passing of the award which has led to the challenging of the award. The parties are referred to as the claimants and respondents respectively.

3. Claimant's Case

3.1. The claimants had moved the arbitral proceedings and had

submitted the following claim before the Tribunal. The claimants who are husband and wife have filed the Claim A.F. No. 591 of 2018 before the Tribunal for a direction that the first respondent should execute and release 20 per cent share in the property situated at 'Sakthi Elegance', Flat No. A1, 320, Velachery High Road, Velachery, Chennai-600 042 (hereinafter for the sake of brevity, referred as "the Property") in favour of first claimant in terms of the Memorandum of Understanding dated 31.05.2016.

3.2. The claimants would submit that the first claimant and the first respondent were carrying on the partnership business in the name and style of 'Venkateswara Diagnostic Centre', hereinafter referred as "VDC", at the property. The second respondent was the sole proprietary concern of the first respondent's wife Bhuvanasankari, who was also carrying on business in the name and style of M/s. Venkateswara Diagnostic Centre at Medavakkam hereinafter referred as 'MVDC'.

3.3. Apart from the above firm, the first claimant and the first respondent along with others were shareholders in a Private Limited Company called 'M/s. Venkateswara Imaging and Diagnostic Private

Limited', hereinafter referred as "VIDPL". This Company was formed on 31.05.2012 by the first claimant and the first respondent. They had availed a loan of Rs.1.70 crore from the Lakshmi Vilas Bank, Cathedral Road Branch for constructing a building and putting up machinery. As a security for the said loan, the immovable properties belonging to the first respondent and the property owned jointly by the first claimant and the first respondent at 'Sakthi Elegance' which is a subject matter of the claim petition were given to the Bank.

3.4. Due to certain misunderstandings, the 1st claimant felt that the partnership firm could not move forward and therefore the first claimant had offered to resign. Thereafter, on the intervention of the well wishers and their auditor, the parties had entered into a Memorandum of Understanding. The broad understanding between the parties was that the first respondent would retire from VDC and all his liabilities shall be taken over by the first claimant. It was also subject to the understanding that the first respondent would continue to provide his property as security for the loan availed by the private company till such time the loan is settled. It was also agreed that the retirement deed or retirement cum reconstitution deed as may be necessary would be executed amongst the parties as per the terms

that would be reduced in writing in the Memorandum of Understanding dated 31.05.2016.

3.5. The said Memorandum of Understanding which was entered into between the parties led to the present arbitration proceeding encompassing the following business namely: Venkateswara Diagnostic Centre, Velacherry, M/s. Venkateswara Diagnostic Centre at Medavakkam, M/s. Venkateswara Imaging and Diagnostic Private Limited, Velachery.

3.6. According to the claimants, they had complied with all the terms of the Memorandum of Understanding but the first respondent after retiring from the partnership firm and availing the benefits, had not come forward to execute the release deed and necessary documents as agreed upon by him. Therefore the first claimant has sent an email on 26.10.2016 calling upon the first respondent to perform his part of the obligations to execute the reconstitution deed. The first respondent on his part, instead of performing the obligations, had issued a legal notice on 27.03.2017 stating that the Memorandum of Understanding had become infructuous and the same was cancelled automatically without notice to the parties concerned. This notice was

suitably replied by the first claimant on 01.06.2017 drawing the attention of the first respondent to Clause 12.1 of the Memorandum of Understanding relating to arbitration. The first claimant had therefore invoked the clause and had proposed the name one Mr. U.M.Sankaravelmurugan, as a sole arbitrator and calling upon the first respondent to confirm the appointment.

3.7. The first claimant would further submit that even prior to the exchange of notices, the first respondent with a clear intent of putting the first claimant into trouble had issued a letter dated 01.07.2016 to the Manager, Bank of India, Velacherry Branch informing him that he had retired from the partnership firm and that the first claimant was continuing the business activities of the firm. In the said letter the first respondent had also intimated that he would no longer be responsible for the affairs of the VDC.

3.8. The claimants would submit that by reason of this letter, the account of the partnership was suspended as the retirement deed was not executed by first respondent till then. The first claimant would submit that the obligations contained in Clauses.1.6, 1.6.1, 1.7 of the Memorandum of Understanding had been performed by the first

claimant and he had settled all the dues of the first respondent as described in Schedule I-A, I-AA of the Memorandum of Understanding. Despite getting the benefits and relieving himself from the liabilities, the first respondent had not come forward to perform his obligations contained in Clause 1.7 of the Memorandum of Understanding namely releasing 50 per cent of his share in the property which is the subject matter in the present arbitral proceedings. Therefore the claimant had come forward with the present claim.

4. Respondents Contentions

4.1. The respondents 1 and 2 had filed a joint statement of defense. In the statement of defense, the respondents would briefly touch upon the circumstances in which the partnership had come into existence. The first claimant was carrying on business as a sole proprietor under the name and style of M/s. Venkateswara Clinical Lab. In order to develop the said business, the first claimant and the first respondent had in the year 1997 formed the partnership firm and were running the business in the name and style of M/s. Venkateswara Clinical Lab. The terms of understanding was reduced into writing in a

partnership deed dated 21.05.1997. A sum of Rs.2,00,000/- each was contributed for the capital of the firm by the first claimant and the first respondent. Thereafter, the first respondent and the first claimant had jointly purchased the property in question in the year 2001. The partnership was renewed by a partnership deed dated 06.05.2002 and the name of the firm was changed to " Venkateswara Diagnostic Center" (VDC). Right from the inception, it was the first respondent who was managing the affairs of the firm. The first claimant was hardly contributing to the development of the business and was only keen on taking out the profits. By the sheer dent of the first respondent's hardwork, the firm had grown. Thereafter certain misunderstanding arose between the first claimant and the first respondent and the partners had decided to part ways. In fact even as early as on 18.04.2016, the first claimant had issued a letter of the even date expressing his desire to retire from the firm. Thereafter on the intervention of the firm's auditor and others, the first respondent was induced to retire from the firm and not the first claimant. The first respondent agreed to retire, however subject to certain conditions. The deed was not prepared by the first respondent and it was only later that the first respondent came to understand that several clauses were against his interests. Since the first claimant was not coming

forward to fulfil the conditions imposed upon him under the Memorandum of Understanding, the first respondent had issued a letter to the Bank by keeping them informed about his exit from VDC and putting them on notice that he would not be liable for any future transaction.

4.2. Even before the conditions under the Memorandum of Understanding were performed, the first claimant had already started operating from the property by inducting another person as partner. The first respondent was not appreciative about the use of the joint property for the first claimant's business even before the exit of the first respondent from the firm. The parties had not executed the retirement deed though its execution was contemplated under the Memorandum of Understanding. The first respondent would therefore contend that he continued to be a partner in the firm. It was the first claimant who had flouted the terms of the Memorandum of Understanding by using the joint property for running another business by inducting his wife as a Director while their obligations remained unfulfilled. The respondents would therefore contend the claim now raised by the claimants is not maintainable.

4.3. The respondents would contend that there was no concluded contract between the parties since the Memorandum of Understanding contemplated the execution of another document that is the Retirement Deed or the Retirement cum Reconstruction Deed. The respondents would submit that even after the execution of the Memorandum of Understanding, the parties were exchanging emails on the various clauses that ought to be incorporated in the Reconstitution Deed. The claim was also not maintainable on the ground that there was a total non compliance/violation of the terms of the Memorandum of Understanding by the claimants. Clause 1.1 of the Memorandum of Understanding had only taken into consideration the intention of the first respondent to retire from the firm but the very same clause further stipulated that in order to give effect to the said intention the retirement deed or retirement cum reconstitution deed had to be executed. The Memorandum of Understanding had further stipulated that the first claimant should produce the balance sheet of VDC and the same had to be reconciled and signed by both parties, since the understanding of the parties was that the first respondent had retired from the firm on the specific understanding that the liabilities would be taken over by the claimants. Therefore it was imperative for the first respondent to understand the total liability that was due by the firm to

its various creditors.

4.4. The other grievance of the respondents was that the claimants had violated clause 1.5 of the Memorandum of Understanding which clearly prohibited the claimants from setting up a similar Diagnostic Centre within 5 kilo metre radius of MVDC. The respondent would submit that the claimants had not understood the purport of the provisions contained in Clauses 1.6, 1.3 and 1.7 of the Memorandum of Understanding. It is also the case of the respondent that the Memorandum of Understanding was unenforceable as the same was inadmissible in evidence since the Memorandum of Understanding which was sought to be enforced involved transfer of immovable property and was therefore compulsorily registerable. The respondent would further contend that the Memorandum of Understanding was totally without consideration and the attempts of the claimants to project the payment of the loans extended by the first respondent to the firm VDC and the profits due to the first respondent from VIDPL as being the consideration due to the first respondent was totally erroneous. This according to the respondent was a total fallacy. The respondents would therefore contend that the claim was premature, since the obligations under the Memorandum of

Understanding had not been performed by the first claimant which was a prerequisite for the first respondent to exit from the firm. They would also contend that there is no concluded contract between the claimant and the respondent. The respondent therefore filed a counter claim for a direction to the first claimant to render true and proper accounts from the incorporation till the date of award. In spite of all business transactions, he also sought ascertainment of mesne profits in respect of the business of the firm and allowing 50 per cent to the first respondent.

5. Award of the Tribunal:

The Tribunal had framed the following issues:

- a) Whether the present arbitration proceeding is maintainable in the eye of law?
- b) Whether the claimants are entitled to their claim?
- c) Whether the respondents are entitled to their counter claim?
- d) To which reliefs are the parties entitled to?

The parties had adduced oral evidence and had also submitted documentary evidence.

5.1. The Tribunal has rejected the respondent's plea that the Memorandum of Understanding (EX.C2) being unregistered cannot be looked into for any purpose, on the ground that the same contained the ingredients required for specific performance and therefore as per the provisions of Section 49 of the Registration Act could be considered. The Arbitrator has held that the Memorandum of Understanding was a concluded contract since the first respondent had encashed the cheques issued to him as detailed in Clause 1.6.1. of the Memorandum of Understanding and realised the amounts and further the first respondent had retired from the firm on 31.05.2016 and the Memorandum of Understanding does not contain a Clause that this was subject to execution of a Retirement Deed/Retirement cum Resonstituion Deed. The Arbitrator has also relied heavily upon Ex.C7 to conclude that the first respondent had retired from VDC on 31.05.2016. The Arbitrator has also observed that the execution of the Retirement Deed is nothing but a mere formality and the failure to have the deed executed does not in any way vitiate the Memorandum of Understanding. These factors had propelled the Arbitrator to pass an award allowing the claim and rejecting the counter claim.

6. Submissions:

6.1. Ms. Tanya Kapoor, learned counsel arguing on behalf of the claimants would contend that Ex. C2, Memorandum of Undertaking dated 31.05.2016 was only a preliminary understanding that was entered into between the parties and the final terms of the agreement had to be reduced into writing in a retirement deed or a retirement cum reconstitution deed and the Memorandum of Understanding was more in the form of an in-principle agreement between the parties. She would further contend that the Memorandum of Undertaking could not be accepted and taken on file, since the same is not registered. She would contend that the document in question contemplated the transfer of property which squarely falls within the ambit of Section 17 of the Registration Act requiring compulsory registration. The Memorandum of Understanding ought not to have been taken on file. She would further argue that an additional issue had been raised which is found at page 160 of the paper book which issue had been raised by the proceedings of the learned arbitrator dated 17.09.2018, which reads as follows:

Whether Memorandum of Understanding dated 31.05.2016 is

enforceable under the eyes of law?

However, this additional issue does not feature in the final award and the arbitrator has not addressed this issue at all. In support of the above arguments, she would rely on the Judgments reported in **[(2008) 8 SCC page 564] in the case of "K.B.Saha and Sons Private Limited Vs. Development Consultant Limited" and [(2011) 14 SCC 66] in the case of "SMS.Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited"**.

6.2. She would also contend that though the claimants would submit that the claim statement is one in the nature of specific performance, the claim statement is totally bereft of any pleadings with reference to readiness and willingness. She would further contend that in order to bring about a closure with reference to the retirement of the respondents from the firm VDC, the claimants were to provide the balance sheet which had to be counter signed by both parties. She would further submit that there was no concluded contract as the Memorandum of Understanding contemplated several obligations which had to be performed by each one and therefore the claim was totally not maintainable at this stage. In support of this

argument, she would rely upon the Judgment reported in **[(2004) SCC page 252] in the case of "United Bank of India Vs. Ramdas Mahadeo Prashad and Others"**.

6.3. In response to the learned Arbitrator's finding that the execution of the Retirement cum Reconstitution Deed was a mere formality and the failure to execute this deed did not mitigate the claim, the counsel would rely upon the judgment reported in **[(1999) 9 SCC page 283] in the case of "Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises and Another"** as a counter to this argument. She would also submit that it is the claimants who have breached the terms of the Memorandum of Understanding by not providing the balance sheet and opening a similar business within 5 kilo metre radius in violation of the terms of the Memorandum of Understanding and these factors have been brushed aside by the learned Arbitrator which clearly proves bias. She would therefore challenge the award on the ground that the Arbitrator has totally ignored the terms of the agreement and suffered a patent illegality.

6.4. Per contra, Mr.K.V Babu appearing on behalf of the claimants would contend that after the execution of the Memorandum of Understanding, the first respondent has addressed the Bank on 1.07.2016 vide Ex C7 informing them that he was no longer a partner in the firm VDC and asking the Manager to up date the records in this regard, as a result of which the Bank had stopped transactions demanding the claimant to furnish a copy of the Retirement Deed. He would therefore argue that the first claimant had by giving this letter reinforced his retirement from the firm and thereafter the execution of the Retirement Deed was a mere formality. The counsel, upon a question being put by the Court, would contend that the terms of the Memorandum of Understanding did not contemplate that the claimant should act upon the terms of Clause 1.3 of the Memorandum of Understanding by executing a Retirement Deed/Retirement cum Reconstituion Deed.

6.5. The learned counsel further argued that there is no necessity to provide the balance sheet to the respondent, since liabilities of the firm VDC was already known to the first respondent which is evident from his answer to question Nos. 29 to 33 of his cross examination of CW1 (K.V. Babu). He would also rely upon the

admission of the first respondent while answering question No.22, that he would stand relieved from all the liabilities of the firm as on the date of retirement as per clause 1.3. of Ex.C2.

6.6. As regards the registration of the memorandum of Understanding, the learned counsel would rely upon Section 49 of the Registration Act and contend that the claim was more in the form of specifically enforcing the Memorandum of Understanding dated 31.05.2016 and as per Section 49 of the Registration Act, the same was not compulsorily registerable and could be looked into in the case of a suit seeking specific performance of an agreement. He would rely upon the following Judgments:-

1. [2017 (5) CTC 33] - "Bollineni Developers Ltd. Vs. K. Sailendra Kumar & others"

2. [2017 (1) LW 120] - "Mrs. Ponnammal Vs. Mr.K.V. Janarthanam"

6.7. The learned counsel would further argue that the legal notice was totally silent about the liability and in these circumstances, he would submit that the respondent cannot make a counter claim and therefore the Award of the learned Arbitrator cannot be called in

question.

7. Discussion:

7.1. The dispute between the parties in the case on hand revolves around Ex.C2 Memorandum of understanding dated 31.05.2016. It would be necessary to extract some of the provisions of this Memorandum of Understanding which have a bearing on the decision:-

"1. Venkateswara Diagnostic Centre,
Velacher
Retirement of Mr.G.G.Srinivasan as partner

1.1. Upon execution of this MOU, GGS, the party of the Second Part herein, shall retire from the partnership firm, Venkaneswara Diagnostic Centre, " Sakthi Elegance", Flat A1, No.320, Velachery Main Road, Velachery, Chennai- 600 042 with effect from 31st May 2016 (hereinafter referred to as "retirement date"). For the purpose of giving effect to his

clause, KB and GGS shall execute a Retirement Deed or a Retirement cum Reconstitution Deed, as the case may be (hereinafter referred to as "Retirement Deed").

1.2. On and from the retirement date, the entire business of the said Firm together with all the assets and liabilities shall stand vested in KB who shall be free to carry on the said business in any manner as he deems fit.

1.3. In consideration of the retirement of GGS as partner as aforesaid, KB agrees and undertakes to relieve GGS from all liabilities of the said Firm ascertained as on the retirement date. For this purpose, a Balance Sheet of the said Firm as on the retirement date shall be drawn up and signed by both KB and GGS. Without prejudice to the foregoing, KB undertakes to bear the liability of the said Firm on account of wages, salaries, provident fund contribution, ESI contribution, supplier payments, term loan(s) from bank(s), income

tax, VAT, service tax and any other tax, cess or duty whatsoever and all other contractual and/or statutory obligations of the said Firm as on the retirement date.

1.4. GGS undertakes not to claim any compensation from KB towards his capital contribution to the said Firm or for his retirement as partner from the said Firm, subject, however, to repayment of the unsecured loans advanced by CGS to the said Firm along with other outstandings as described hereinafter.

1.5. GGS agrees and acknowledges that on and from the retirement date, KB shall be free to carry on the business of the said Firm whether as a sole proprietor or in partnership with any other person/entity or through any other form of business organization and shall be free to open branches anywhere (except within a radius of 5 km from the present business premises of MVDC at No.11/237,

Bharathi 1st Street, Medavakkam, Chennai-600 100) without any hindrance, interference, objection or obstruction from GGS or from any other person claiming through him.

1.6. KB agrees and acknowledges that CGS has advanced a sum of Rs.8,49,815/- (Rupees Eight Lakhs Forty Nine Thousand Eight Hundred and Fifteen only) as unsecured loan to the business of the said Firm, details of which are more fully described in Schedules I-A AND I-AA hereunder, and undertake to settle the aforesaid sum to GGS as under.

1.6.1 KB has issued a cheque for Rs.1,83,200/- (Rupees One Lakh Eighty Three Thousand Two Hundred Only) vide Cheque No.002552 dated 07th June 2016 drawn on Bank of India, Velachery Branch, at the time of execution of this MOU, receipt of which cheque GGS hereby acknowledges. KB further undertakes to settle the balance amount of

Rs.6,66,615/- to GGS in three equal monthly instalments and has issued post dated cheques for the same detailed below

Cheque No. & Date	Amount (Rs.)	Bank & Branch
Chq.No.002553/ 7th July 2016	2,22,205/-	Bank of India, Velachery Branch
Chq.No.002554/ 7th August 2016	2,22,205/-	Bank of India, Velachery Branch
Chq.No.002555/ 7th September 2016	2,22,205/-	Bank of India, Velachery Branch

1.7. In consideration of KB taking over all the liabilities of the said Firm, GGS agrees to release his 50 % share in the property situated at "Sakthi Elegance", Flat A1, No.320, Velachery Main Road, Velachery, Chennai- 600 042(hereinafter referred to as "the said property") to and in favour of KB and undertakes to execute and register a Release Deed to give effect to the same, subject to the

stamp duty and registration charges and any other taxes including Capital Gains tax under Income Tax Act, 1961, being borne by KB.

Provided that KB and GGB shall jointly approach and obtain a "no-objection" and/or concern for the said release of his 50 % share by GGS in favour of KB from Lakshmi Vilas Bank Cathedral Road Branch, Chennai, to whom the said property has been given as collateral security for the term loan availed by VIDPL.

Provided further that KB agrees to give an undertaking to Lakshmi Vilas Bank, Cathedral Road Branch, Chennai, to the effect that the said property shall continue to be held by the said Bank as collateral security even after execution of the Release Deed by GGS in his favour, so long as the term advanced by the said Bank to VIDPL remains undischarged."

7.2. The conjoint reading of these Clauses would indicate that the first respondent had undertaken to retire from the partnership firm subject to his being relieved from all the liabilities of the firm. After this, the first claimant should take over and carry on the business. The understanding was also that the first claimant and the first respondent would continue to offer their joint properties along with their other properties as security towards the term loan availed by the VIDPL from the Lakshmi Vilas Bank, Velacherry and continue to contribute and work for the business of the company till such time as the term loan is satisfied. A reading of the Memorandum of Understanding would indicate that the parties have to perform the following obligations in the sequence narrated hereinbelow:

a) The first respondent would, in-principle cease to be a partner of VDC with effect from 31.05.2016 (date of retirement) on the execution of the Memorandum of Understanding. To give effect to this clause, namely, the first respondent retiring from the partnership firm, parties were required to execute a Retirement Deed or the Retirement cum Reconstitution Deed.

b) Since the retirement of the first respondent was effective 31.05.2016 the entire business of the VDC with effect from the said date would stand vested with the first claimant.

c) The consideration for the retirement was the first claimant taking over the liabilities completely and relieving the first respondent from the liability of the firm with effect from retirement date. To give effect to this, the balance sheet on the date of retirement was to be reconciled and counter signed by the first claimant and the first respondent. Effective from the date of retirement, the first claimant was solely liable for the liabilities of the firm.

d) No compensation was payable by the first claimant to the first respondent towards capital contribution for the firm. However, Clause 1.6 and 1.6.1 quantifies the amount payable to the first respondent towards the unsecured loan given by the first respondent to the firm and the share of the first respondent in the profits of VIDPL. Once the liabilities of the firm is crystallised in the Balance Sheet and on the performance of the obligation envisaged in Clause 1.6 of the Memorandum of Understanding, the first respondent was obligated as per Clause 1.7 of the Memorandum of Understanding to execute a Release deed in favour of the first claimant. Clause 1.7 would state that in consideration of the first claimant taking over the liabilities of

the firm, the first respondent would release his 50 per cent share in "the property". The execution of the release deed was however subject to the following provisos:-

a) The first claimant and the first respondent were jointly required to approach the Lakshmi Vilas Bank, Cathedral Road Branch, Chennai and obtain their "no objection" and/or consent for the above release.

b) The first claimant should give a undertaking to LVB that even after the first respondent releases his 50 per cent share in the property in favour of the first claimant, the said property will continue to be held by the said bank as collateral security till the term loan availed by the VIDPL remains undischarged.

7.3. The reading of clause 1.7 along with its provisos clearly indicates that the execution of the Release Deed by the first respondent in favour of the first claimant was subject to the above two provisos. Neither in the claim statement nor in the oral evidence of the claimant is there any indication that the proviso to clause 1.7 has been complied with. Further the "**consideration**" for the first respondent to retire from VDC was the taking over of the entire liabilities by the first claimant and this also constituted the

"CONSIDERATION" for the execution of the Release Deed. The parties, as per the provisions of Clause 1.3, were required to draw out a balance sheet showing the liabilities standing as on the date of the retirement namely 31.5.2016. The balance sheet as envisaged has not been provided despite request by the first respondent and in the course of argument it was also contended that there was no requirement to submit the same since the first respondent was aware about the liability as he was managing the firm till his retirement. Such an argument falls flat in the light of the specific incorporation of this term in the Memorandum of Understanding entered into between the parties. The amounts that were paid to the first respondent as per the clause 1.6 and 1.6.1 were not his share in the profits of the firm or the consideration for his retirement, but were amounts that were payable to him towards the loan extended by him to the firm and the 50 per cent of his share in the profits of the Company VIDPL. In the light of the fact that the provisos to clause 1.7 and the terms of clause 1.3 have not been performed the claim made is premature. The Arbitral Tribunal has not considered the terms of the agreement as a whole while passing the award. This is a patent illegality since the claimant seeks to enforce only a part of one clause in the Memorandum of Understanding and the Tribunal has totally ignored

the provisos to this clause. The Award is therefore violative of the provisions of Section 28 (3) of the Arbitration and Conciliation Act.

7.4. The parties had signed the Memorandum of Understanding in which the first claimant has in very clear terms undertaken to provide the balance sheet as on 31.05.2016, which was to be signed by both the parties. Such a balance sheet has not been drawn up and the first respondent has not been put on notice as to firm's liability on the date of his retirement. The correspondence between the parties after the Memorandum of Understanding was executed would clearly demonstrate that the parties, particularly the first claimant was very much aware that the Retirement Deed or Retirement cum Reconstitution Deed was required to be executed to give effect to the Retirement. Ex C3 series at page 58 of the paper book contains an email which has been sent by the first claimant to the first respondent wherein he has stated as follows: *"Therefore you are hereby called upon to execute the reconstitution deed in my (K.Babu) favour failing which I will be constrained to take appropriate legal action against you, including criminal action for misappropriation of accounts."* That apart, the correspondence marked as R6 would reveal that pursuant to the Memorandum of Understanding a Reconstitution Deed was being

made ready and the parties have been suggesting amendments, as evidenced by the emails dated 11.06.2016, 12.06.2016, 16.06.2016, 17.10.2016 and 21.06.2016. In fact, under the email dated 17.06.2016 the advocate had sent a draft Reconstitution Deed to the first respondent as well as the first claimant and in the mail dated 21.06.2016 the advocate has mentioned the reason for executing the Reconstitution Deed to the first respondent with a copy marked to the first claimant in which he has stated as follows: *"Kindly also understand that this reconstitution deed is the actual deed which dissolves your partnership and so it has to be clearly stated that the above amount of Rs.849815/- is in full and final settlement of capital, unsecured loan, profits, interest, etc."*

7.5. Therefore from a reading of the Memorandum of Understanding and the subsequent correspondence, it is evident that parties, including the claimants were very much aware that in order to give effect to the retirement, there were certain other obligations which had to be performed and the final closure was to be done by executing the Retirement Deed. The first respondent has retired from the firm "with effect from" 31.05.2016 and the first claimant has taken over the business of the firm but however the obligations that were to

be done by him namely in the form of giving the balance sheet, obtaining the prior permission of LVB for permitting the releasing of the first respondent's 50 per cent share in the property itself has not been performed by the first respondent. Therefore the terms of the Memorandum of Understanding not having been followed up that it would not be appropriate for the claimant to contend that they have performed their part of the Memorandum of Understanding and therefore entitled to the execution of release deed by the first respondent. The learned Arbitrator has not considered the entire terms of the Memorandum of Understanding while passing the award and this error has compelled it to dismiss the counter claim filed by the respondent.

7.6. The Arbitration and Conciliation Act, 1996 as amended by Act 3 of 2016 and Act 33 of 2019 seeks to ensure the least judicial intervention in the awards passed by the Arbitral Tribunal and the grounds on which the Courts can interfere in arbitral awards has been set out in Section 34 of the Act. One of the grounds for judicial intervention which has been carved out by judicial pronouncements of the Hon'ble Supreme Court while interpreting the provisions of Section 34 of the Act is "Patent illegality"

7.7. In the judgment, ***Oil and Natural Gas Corporation Ltd, Vs. Saw Pipes Ltd reported [(2003) 5 SCC 705]***, the Hon'ble Supreme Court had reiterated as follows:

"73. It is to be reiterated that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the basis of the civilized society and also the jurisdiction of the arbitrators. Hence, this part of the award passed by the Arbitral Tribunal granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act."

The learned Judges had observed that in order to achieve the object of speedy disposal, justice in accordance with law could not be sacrificed. They had further observed that permitting a patently illegal award would promote injustice. With this view, the Hon'ble Supreme

Court had observed that an Award if it is patently illegal could be set aside.

7.8. In the Judgment of the Hon'ble Supreme Court reported in **[(2008) 13 SCC page 80], Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi**, the Judgment of the learned Single Judge setting aside the award of the Arbitrator on the ground that the Arbitrator has ignored a clause in the contract was upheld. The Bench had observed as follows:

" The award is completely silent on the relevant clause viz. Clause 3.16 of the agreement which makes it clear that the contractor is wholly responsible for all the extra leads. In fact, the arbitrator has given no reason whatsoever so far as the rate claimed for the extra lead by the claimant is concerned and has verbatim accepted the claim without giving any jurisdiction for the same. We are satisfied that this is an error apparent on the face of the record as well as

contrary to the terms of the agreement."

7.9. The Hon'ble Supreme Court in the Judgment in ***Associate Builders Vs. Delhi Development Authority reported in [(2015) 3 Supreme Court page 49]*** after discussing the various judicial pronouncements with regard to the grounds of challenge to the Arbitral Award provided under Section 34 of the Act elaborated on circumstances under which an award could be termed as a 'Patent illegality'. In the course of the discussion, the Hon'ble Supreme Court had observed as follows:

"42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute-(1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transactions."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

7.10. Therefore on a conspectus of the facts narrated hereinabove and the dicta laid by the Hon'ble Supreme Court it is clearly evident that award suffers from a patent illegality since the learned Arbitrator has not adverted to the terms of the Memorandum of Understanding particularly the provisos to Clause 1.7 thereby violating the provisions of Section 28(3) of the Act.

OP.No.555 of 2019

P.T.ASHA, J.

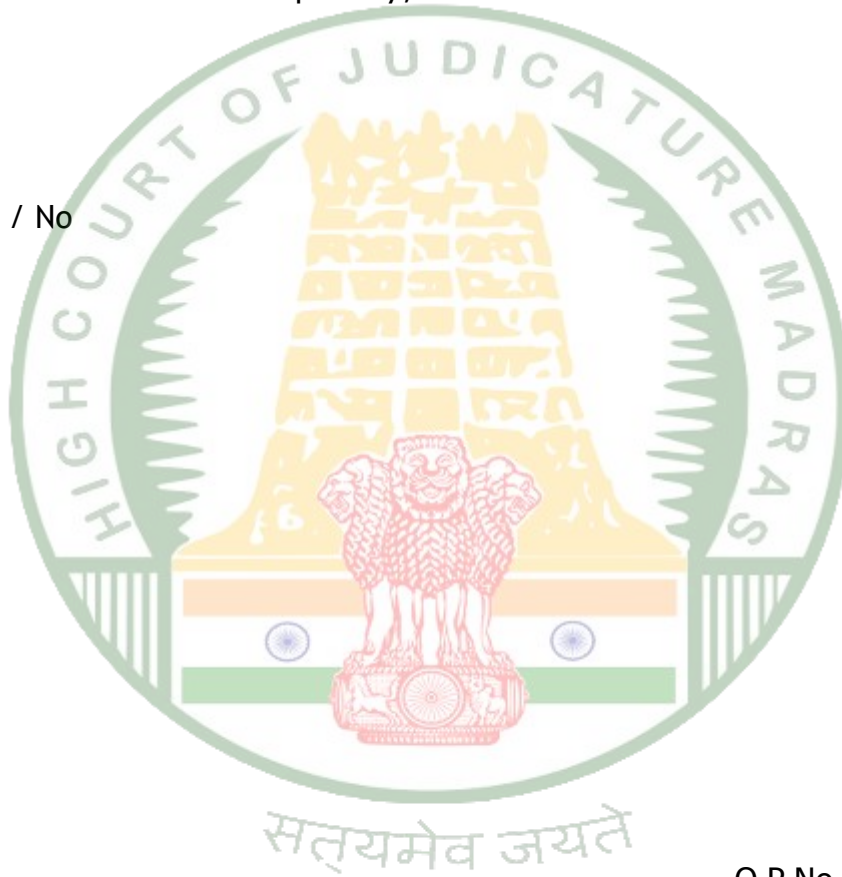
mrn

In the result, the OP is allowed and the impugned Award is set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Index:Yes / No

mrn

20.12.2019



O.P.No.555 of 2019

and

A.No.5216 of 2019

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