

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
20~06~2019	02~07~2019

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.833 of 2017 and
A.No.6390 of 2017

Mrs.Chithra Kumar,
2/789, 1st Street,
Kazura Garden,
Nelankarai,
Chennai 600041.

.. Petitioner/Respondent

.Vs.

Aarthi Amarendra,
157/7, M.G.R. Salai,
Eden Garden, Uthandi, E.C.R.,
Chennai 600119.

.. Respondent/Claimant

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 24.03.2017 rendered by the Tribunal and dismiss the claims of the claimant.

For Petitioner : Mr. Mani Shankar
Senior Counsel for
M/s. N. Kavitha Rameshwar

For Respondent : Mr. Niranjana Raja Gopalan
for M/s.G.R. Associates

ORDER

Challenging the Award of the Learned Arbitrator the present Original Petition has been filed. For the sake of convenience the parties are referred as per their own rankings in the claim petition.

2. The brief facts leading to file this petition is as follows:

2(a) This claimant is an expert in the beauty and wellness industry for over 25 years and is the proprietor of Salon Aarthi. The Respondent who had returned from USA was trained by the claimant in her Academy. She proposed to the Claimant that they could start a salon and spa as a partnership, where the Claimant would bring the technical expertise and the Respondent her corporate and IT background. Accordingly, partnership agreement came to be registered on 25.04.2013 and the partnership firm was named as "Veda Day Spa and Salon." After the rental agreement was executed on 22.06.2013 the Claimant began to recruit and train persons to run

the Spa and Salon. She has trained 35 persons. While receiving the valuable inputs of the Claimant for establishing the business, the Respondent began to object to the persons suggested by the Claimant for creating the infrastructure doing the interior etc., After enormous delay, the business commenced on 28.12.2013. It was promoted as unit of "Salon Aarthi". Since the Respondent had excluded the claimant from participating in the business, the claimant was unaware if such permission had been obtained. The claimant has invested a sum of more than Rs.40 lakhs. Besides she has also trained many prospective employees.

2(b). On 17.02.2014, the claimant issued an email suggesting that the operations of Salon and Spa be temporarily shut. However, the matter could not be settled. The accounts were never maintained by the Respondent, in fact the accounts were not disclosed to the Claimant. Thereafter, the claimant sent an email on 14.3.2014 calling for dissolution of partnership and appointment of an Arbitrator. The Respondent sent a reply through lawyer on 17.03.2014 admitting the investment of the claimant to the tune of Rs.40 lakhs. As the dispute

culminated into lodging a police complaint, the matter finally referred to the Arbitrator at the instance of the Court. The claimant made the following claim:

a) Investment amount with interest at 18% for 27 months	4000000+1620000	Rs.5620000/-
b) Loss of Profift on investment from business for 27 months		Rs.5400000/-
c) Claim on Expertise/Expert Advice: Naming the Salon as Veda Inputs for designing the logo Sourcing the top line of product Recruiting staff Training staff, Menu contents Designing the lining the uniforms Fine tuning the music and interiors Billing software contents Spa lining Incorporation of a Zen garden Client consultation training Ordering and purchasing of stock Maintaining inventory System operation training Purchase of furniture Light fitting		Rs.2400000/-
Training of staff for Veda salon		Rs. 1500000/-
Loss of reputation in business		Rs. 2000000/-
Mental agony caused by the actions of respondent including false police complaint and threats from various people		Rs. 2500000/-
Expenses incurred due to non-compliance of FRRO Procedures in respect of Spa Therapists by therespondent		Rs. 450000/-
Total Claim		Rs.19870000/-

3. It is the case of the respondent that it was the claimant who induced her to start the Salon and Spa. The respondent wanted to open it at Anna Nagar where she is residing. However, the claimant insisted her to start the same at Neelangarai. Whenever the respondent sought for clarification the claimant insisted that she knew better and that she was the senior and it was the respondent who agreed the decisions of the claimant to maintain the relationship. though the firm was registered on 25.04.2013 the lease agreement was signed on 02.06.2013 and the business commenced only on 28.12.2013. It is denied that the firm was started as a unit of the claimant's proprietary concern. The firm did not have regular customers and respondent was regular to attend the firm from 10.00 a.m. to 8.00 p.m. everyday and the claimant had rarely visited the firm. The respondent never objected the claimant from coming to the firm, but every time there was confusion because of the unprofessionalism of the claimant and those customers who were in nearby area stopped coming to the firm. It is his further contention that the respondent had not terminated the services of any staff nor did the claimant train many prospective employees afresh. The entire

sum of Rs.40 lakhs was not invested by the claimant out of her own funds. The unilateral removal of the name of Salon Aarthi would not affect the firm as the proprietary concern is not in any manner connected to the firm. The partnership is one at will and the firm has been dissolved by the voluntary act of the claimant. The allegation that the documents were not furnished to the claimant cannot be accepted, since most of the documents filed by the claimant had been received from the respondent. The claimant has no right to claim any amount, since at the time of dissolution, the firm was running at a loss.

4. Based on the pleadings, the following issues were framed:

1. Whether the partnership firm named, Veda Day Spa and Saloon registered as Number 1085 of 2013 is liable to be dissolved?
2. Whether the Respondent has committed breach of Partnership Agreement dated 25.4.2013?
3. Whether the Respondent had suppressed the fact of her relationship with Naturals Spa?
4. Whether the Claimant has acted against the interest

of the partnership firm?

5. Whether the Respondent is liable to furnish due and proper accounts of the partnership firm from its inception and till date?

6. Whether the claimant is entitled to the sums claimed in the Appendix-I to the claim statement with interest?

7. To what reliefs are the parties entitled?

5. Learned Arbitrator after analysing the oral and documentary evidence has found that the respondent has committed breach of the agreement and dissolved the firm 'Veda Day Spa and Salon' on and from 14.03.2014. She has also awarded that the claimant is entitled to Rs.40 lakhs being the capital investment; Rs.15 lakhs being the remuneration for training the personnel; Rs.45,000/- per month from 14.3.2014 until the date of award for illegal use of the firm name "Veda Day Spa and Salon" and continue to pay the same rate until the respondent uses the name Veda Day Spa and Salon with cost of Rs.1,00,000/- payable to the claimant.

6. Mr. Mani shankar, Learned senior counsel appearing for the Petitioner submitted that the Award is beyond the scope of submission to arbitration. The learned Arbitrator has granted an Award which was not claimed in the claim petition. It is contrary to the provision of the Act. Accordingly the Award is liable to be set aside under Section 34 (2)(a) (iv) of the Arbitration and Conciliation Act, 1996. It is his further contention what while passing the Award for dissolution of the firm the learned Arbitrator has not even considered the Section 48 of the Partnership Act. The learned Arbitrator also not permitted to appoint Auditor to verify the accounts filed by the respondent. Further under the head for training of staff the Arbitrator awarded a sum of Rs.15 lakhs without any evidence. The question put to the claimant as to how she has trained the staff when the spa was not in operation, her answer has taken as admission by the learned Arbitrator which is the patent illegality in the Award.

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7. Further it is his submission that the claimant herself admitted that the respondent removed the name of the firm in the claim statement. Therefore awarding the compensation for using the firm

name is also not correct. It is the further contention of the learned Senior Counsel that the the Tribunal erred in ignoring Ex.R.17 filed by the claimant wherein the bank statements of the claimant's personal account as well as the accounts of the firm have been filed. Hence the entire Award is in violation of Section 48 of the Partnership Act. Learned Senior Counsel further contended that Clause 21 of the agreement is always subject to the Clause 22. The learned Arbitrator has not considered the two clauses simultaneously while deciding there is a breach or not. Hence, submitted that the entire award is liable to be set aside.

8. In support of his submissions he relied upon the following judgments:

1. Addanki Naryanappa and Another vs. Bhaskara Krishnappa [AIR 1966 SC 1300]

2. Pradeep Arora vs. Samantha Kochhar [2016 SCC online Del 6268]

3. Oil & Natural Gas Corporation Ltd., vs. Saw Pipes Ltd., [(2003) 5 SCC 705]

4. *Delhi Development Authority vs. R.S.Sharma and Company, New Delhi [(2008) 13 SCC 80]*

5. *Oil & Natural Gas Corporation Ltd., vs. Off-shore Enterprises Inc [(2011) 14 SCC 147]*

6. *Oil & Natural Gas Corporation Ltd., vs. Western Geco International Ltd., [(2014) 9 SCC 263]*

7. *Associate Builders vs. Delhi Development Authority [(2015) 3 SCC 49]*

9. Mr.Niranjan Rajagopalan, learned counsel appearing for the Respondent/claimant submitted that it is not a simple case of dissolution. Learned Arbitrator considered the entire material and passed an Award on the basis of the evidence and submissions made by the parties. Therefore, it cannot be said that Award is beyond the scope of Section 34 (2)(a)(iv) of the Arbitration and Conciliation Act, 1996. The entire Award is passed based on the breach of contract, not merely dissolution. Learned Arbitrator has considered the breach of clauses in the agreement and also considered the entire evidence and income statement filed by the respondent. The arbitrator has also

considered the fact that the so called accounts relied upon by the respondent/petitioner is after thought and it only lead to creation of accounts. The arbitrator has gone into the entire evidence and passed an order which cannot be interfered.

10. In support of his submissions he relied upon the judgment of the Honourable Apex Court in ***Ssangyong Engineering & Construction Co. Ltd., v. National Highways Authority of India (NHAI) reported in [2019 SCC Online SC 677].***

11. It is settled law that the award can be interfered only when the award is conflict with public policy of India [***Associated Builders case*** (supra).]

12. In the latest judgment of the supreme court in ***Ssangyong Engineering & Construction Co.Ltd., case (supra)***, the Apex Court considered the amendment made in Section 34 of the Act and held as follows:

"37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of *Associate Builders* (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of *Associate Builders* (supra). Explanation 2 to [Section 34\(2\)\(b\)\(ii\)](#) and Explanation 2 to [Section 48\(2\)\(b\)\(ii\)](#) was added by the [Amendment Act](#) only so that *Western Geco* (supra), as understood in *Associate Builders* (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under subsection (2A), added by the [Amendment Act, 2015](#), to [Section 34](#). Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do,

cannot be permitted under the ground of patent illegality appearing on the face of the award.

40. To elucidate, paragraph 42.1 of Associate Builders (*supra*), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (*supra*), however, would remain, for if an arbitrator gives no reasons for an award and contravenes [Section 31\(3\)](#) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

41. The change made in [Section 28\(3\)](#) by the [Amendment Act](#) really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (*supra*), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under [Section 34\(2A\)](#).

42. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (*supra*), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a

finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

From the above judgment which makes it clear that the finding based on no evidence at all or an award which ignores vital evidence in arriving decision would be perverse and liable to be set aside on the ground of patent illegality.

13. It is the dispute which has been referred based on the contract stated in the partnership business. In a judgment reported in ***Addanki Naryanappa and Another vs. Bhaskara Krishnappa [AIR 1966 SC 1300]*** the Apex Court held that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to

the partnership from the realisation of the property and no partner can deal with any portion of the property as his own. Once the capital amount brought into the firm, the same was ceased to be the exclusive property of the person who brought it. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership.

14. Following the above judgment the Delhi High Court's single judge in ***Pradeed Arora and others vs. Samantha Kochhar [2016 SCC Online Del 2628]*** has held that the share has to be determined as to the date of retirement of the such partner. Interalia an investment or assets brought by a partner becomes the stock of the firm and ceased to be the property of the individual who has brought it. Once the property has become that of the partnership firm, it ceases to belong to any particular partner.

15. Division Bench of this Court in ***Mohan Rao vs. Super Diamond Tools and three others [2008 (5) CTC 613]*** while

setting aside the Award held that award could be set aside if it is contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal. It is also held in the above judgment that if the Partnership Act was not followed in settling account, the procedure adopted by the Arbitrator is in violation of substantive law. Similar view has also been taken by the Bombay High Court in **Anand Umashankar Gupta and others vs. Jayant Maniklal Lunawat [2013 (1) Mh.L.J. 65]**.

16. Section 48 of the Partnership Act reads as follows:

48. Mode of settlement of accounts between partners:-

In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:-

(a) losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:-

(i) in paying the debts of the firm to third parties ;

- (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;
- (iii) in paying to each partner rateably what is due to him on account of capital; and
- (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits."

17. From the above judgments and the dictum of the Supreme Court makes it clear that any capital brought by the partner into the partnership business ceased to be the exclusive property of the partner. In the event of settlement after dissolution the same has to be made as per the Section 48 of the Partnership Act subject to agreement by the partners. Admittedly, the learned Arbitrator has not considered this aspect in the entire award. Absolutely there is no dispute in the legal position stated by the learned counsel for the petitioner with regard to the settling of the accounts after dissolution of the partnership. But in the given case the Arbitrator has considered the entire aspect of peculiar circumstances in the case.

18. It is to be noted that though the claimant and respondent have entered into partnership agreement dated 25.4.2003 the

business was not commenced immediately. In fact the business of the partnership was commenced only on 28.12.2013. Much prior to the commencement of business there was disagreement between the parties in several aspects. However, the business has commenced only on 28.12.2013. The nature of business is running Spa. The claimant is expertise in the field. The claimant would bring the technical expertise and the respondent has corporate and IT background. In this background the agreement was entered. However, much prior to the commencement of business there were discontent among the partners. After commencement of business on 28.12.2013 the claimant has issued notice by email on 14.3.2014 for dissolution of the firm. The respondent is also admitted in the reply notice dated 25.03.2014 about the investment of Rs.40 lakhs by the claimant. After commencement of the business in the name of the firm, the evidence adduced before the Arbitrator makes it clear that in fact the claimant was never in charge of the business. Only the respondent was maintaining the business till the date of email sent on 14.3.2014 for dissolution of the firm. Though the Partnership Act makes it clear that the money brought to the partnership ceased to be

the individual amount, it is a partnership asset, it should be shared at the time of dissolution as per Section 48 of the Partnership Act.

19. Learned Arbitrator thoroughly analysed the entire evidence and found that the respondent was managing the affairs is not even maintained accounts properly from the inception. Though there is a condition in the agreement that both should maintain the accounts, the evidence clearly established the fact that the claimant has not taken part in the business of the Spa. In fact the respondent viz., the Petitioner herein was in charge of the firm till the notice. In the short period the business itself commenced on 28.12.2013 and dissolution notice was came to be issued on 14.3.2014. Within three months of commencement of business there were discontent, the partnership business was not done as per the agreement entered into between the parties. Besides the accounts also not been properly maintained by the parties. The Arbitrator also recorded the finding to the effect that even to see the accounts the claimant was not permitted by the employees of the Respondent. All these facts have been clearly analysed by the Arbitrator. Admittedly, there is no dispute about the

investment of Rs.40 lakhs. To contend that loss and profit should be shared in terms of partnership Act, there must be a proper accounts to be maintained. But accounts have not been properly maintained by the respondent as found by the Arbitrator. Only excel sheets said to have been filed as Exs.R.15,18,19 and 20. The learned Arbitrator has clearly found that if that such account allowed to be verified by the Arbitrator it will lead to fabrication. Learned Arbitrator has factually found that the Respondent was not in the affair of the firm. Therefore, this court is unable to re-appreciate the entire evidence with regard to the maintenance of the accounts. Therefore, when the partnership business is also not run as per the agreement the question of invoking section 48 of the Partnership Act for sharing loss and profit does not arise at all. Therefore, this court is of the view that the view of the Arbitrator is reasonable in awarding Rs.40 lakhs admittedly invested by the claimant.

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20. It is also admitted fact that the claimant is expertise in the field, she has claimed that she trained as many as 35 persons for the purpose of running the firm from the date of agreement. Taking note

of the suggestion of the Respondent in cross examination the Arbitrator has awarded a sum of Rs.15 lakhs. In Appendix-I the claimant has claimed Rs.24 lakhs on various heads including the training of staff. Whereas similarly she has claimed independently another Rs.15 lakhs for training of staff. In fact, her claim there is duplication in two heads. In fact the learned Arbitrator has rejected the claim of Rs.24 lakhs under the above head. Whereas having rejected the claim of Rs.24 lakhs including training of staff the learned Arbitrator merely on the basis of the question put in the cross examination, has awarded Rs.15 lakhs towards the training of staff. In fact, there is no evidence available on record as to number of staff, nature of training and the nature of payment made to the said trainees. In the absence of any evidence in this regard, the Arbitrator awarded a sum of Rs.15 lakhs towards the training of staff is in view of this Court is without evidence and it is patent illegality. In the judgment in ***Ssangyong Engineering & Construction Co. Ltd., case*** (*supra*) the Honourable Apex Court has held that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on

the ground of the patent illegality. Therefore, this Court is of the view that when there is no evidence to substantiate the claim of Rs.15 lakhs towards the training of the staff, Arbitrator awarding such claim based on the suggestion in the cross examination certainly perverse and goes to the root of the matter and the same is liable to be interfered by this Court. In view of the same a portion of the **Award amount of Rs.15 lakhs towards training the personnel is hereby set aside.**

21. Similarly, for breach of agreement viz., the Respondent has been using the name "Veda Day Sap and Salon" on the contrary to the agreement, the Arbitrator awarded a sum of Rs.45,000/- per month from 14.3.2014 till the date of award. It is to be noted that in the claim petition the claimant has not claimed this amount. Learned Arbitrator has in fact awarded the amount. Section 34(2)(iv) of the Arbitration and Conciliation Act 1996 deals as follows:

"34. Application for setting aside arbitral award.

1.

2. An arbitral award may be set aside by the Court only if-

a. the party making the application furnishes proof that-

I. or

ii. or

iii. or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

v. "

22. The above makes it clear that when the award relates to the dispute not submitted for Arbitration the portion of the Award which was not submitted for arbitration can be set aside as per Section 34 (2) of the Act. Learned Arbitrator has considered that there is breach of agreement, therefore, the claimant is entitled to the said amount. Clause 21 of the Agreement reads as follows:

"21. In case of retirement, the goodwill/Brand Name of the firm shall belong to the party of the First Part and the party of the Second part shall not use or claim the same in any respect."

and Clause 22 of the Agreement reads as follows:

"22. It is agreed among the parties that death, retirement or insolvency of any party/parties will not dissolve the partnership firm. The remaining party/parties are entitled to carry on the business by admitting the nominee of the deceased partner in case of admitting one or more partners depending upon the circumstances from time to time under concern of the remaining partners."

23. The learned Arbitrator has considered only Clause 21. Clause 22 of the agreement also makes it very clear that even as agreed to the parties that the retirement of a party will not dissolve the partnership deed, remaining party will entitle to carry on the business. Reading of two clauses, Clause 21 cannot be isolated, it should be read along with Clause 22. When the party is agreed to carry on the business in the partnership firm even after retirement or death it cannot be held that there was violation in using the firm name. Considering the above aspect the award of the Arbitrator in this aspect is not only against the terms of contract but also to the fact that the very amount itself was not claimed by the claimant, which is not submitted in the dispute. In view of the same the portion of the

amount awarded viz., Rs.45,000/- per month for the illegal use of the firm name "Veda Day Spa and Salon" from 14.3.2014 till the date of award is liable to be set aside. Accordingly it is set aside.

24. In the result, the **original petition is partly allowed.** Award of Rs.15 lakhs towards remuneration for training the personnel, and Award of Rs.45,000/- per month for the illegal use of the firm name "Veda Day Spa and Salon" from 14.3.2014 till the date of award are alone set aside. The rest of the Award is confirmed. No costs. Connected Application is closed.

02.07.2019

Speaking/Non-speaking Order

Index : Yes / No

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