

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

ORIGINAL SIDE

Present:-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

A.P. 359 of 2020

LA No. G.A.1/2020

YASMIN KHALIQUE AND ORS.

vs.

MUKHTAR ALAM

For the petitioners : Mr. Shyamal Sarkar, Sr. Adv.
Mr. Sohail Haque, Adv.
Mr. Imteyaz Aslam Lodhi, Adv.

For the respondent : Mr. Jishnu Saha, Sr. Adv.
Mr. Tarique Quasimuddin, Adv.
Mrs. Zainab Tahur, Adv.
Mr. Ishaan Saha, Adv.

Last Heard on : 15.03.2021

Delivered on : 25.03.2021

MOUSHUMI BHATTACHARYA, J.

1. This application is for setting aside of an interim Award dated 12th November, 2020 passed by a learned Sole Arbitrator by which a Deed of Partnership dated 1st April, 2006 of the petitioner no. 3, partnership firm was declared to be a Partnership at Will and the partnership firm was

further declared dissolved consequent to a notice dated 17th November, 2018 issued by the respondent Award-holder under the provisions of the Indian Partnership Act, 1932 (the Act). The petitioner, who seeks setting aside of the Award, was the claimant before the learned Arbitrator.

2. The ground of challenge to the impugned Award is that the Deed of Partnership dated 1st April, 2006 is not a Partnership at Will and that the impugned Award is perverse and is patently illegal. It is also the contention of the petitioners that the notice dated 17th November, 2018 for dissolution of the partnership firm (petitioner no. 3 herein) invalidated the orders of injunction passed by this court against the respondent. The petitioner has also challenged the imposition of costs of Rs. 10 lakhs as being exorbitant and perverse.

3. Mr. Shyamal Sarkar, learned Senior Counsel appearing for the petitioners/Award-debtors, submits that the arbitrator's finding on the issue of bad faith in the context of the origin of the business and use of the trademark MUSA KA GUL was outside the scope of the reference amounting to an error of jurisdiction. Counsel submits that there was no evidence to support the said finding of the Arbitrator and that the finding was at the "*invitation*" of the respondent, which deprived the petitioners of an opportunity to assail the said finding. Counsel further challenges the finding that Clause 3 of the Deed of Partnership would remain intact and unaffected by Clauses 13 and 14 which deal with a partner's right to

retirement and the consequences following the death of a partner, respectively. Counsel submits that the Arbitrator failed to identify the correct clauses of the contract and therefore failed to arrive at a harmonious construction of the clauses as well as the intention of the parties. Counsel seeks to place emphasis on the fact that where the Partnership Deed contained a provision for retirement of a partner, the partnership cannot be a partnership at will and hence a notice of dissolution would merely act as a notice of retirement and not as a notice for the purpose of dissolution of the partnership firm. Counsel stresses on the bad faith angle to the notice in view of the fact that the notice is against orders of injunction passed by this court. Counsel relies on a passage from Pollock and Mulla on the Law of Partnership (8th Edition) to the effect that the intention to dissolve a firm may be inferred from circumstances showing that the partner has, in fact, abandoned his interest in the business and that the inference may be made from the facts of each case as to whether a partner's interest in the partnership firm has been abandoned or not. Counsel submits that the facts of the case clearly show that the respondent has not abandoned his interest in the partnership business even after notice of dissolution and that the respondent has waived the effect of the notice of dissolution by continuing with the business of the partnership firm.

4. Mr. Jishnu Saha, learned Senior Counsel for the respondent/Award-holder relies on Clause 17 of the Partnership Deed

dated 1st April, 1992, which expressly provides that the partnership shall be at will and may be dissolved by any of the partners by serving two months notice in writing upon the other partners. Counsel submits that a rectification of the Partnership Deed executed on 1st April, 2006 did not vary the effect of the original Clause 17 of the Deed. It is hence submitted that even after a fresh Deed of Partnership was executed on 1st April, 2006 reconstituting the petitioner no. 3 firm and inducting the petitioner no. 2 as one of its partners, the Deed continued to provide that the partnership would be at will and shall be carried on by the parties on that basis. Counsel seeks to sustain the Award on the ground that the Arbitrator placed emphasis on the intent of the parties. Counsel submits that merely because the Deed contains a provision for retirement of a partner, the Partnership Deed does not cease to be a partnership at will and that retirement of a partner would not by itself dissolve the partnership *inter se* the other partners. Counsel urges that the same principle would also apply to death of a partner and where the Deed provides that the partnership shall be at will, a provision of the effect that death of a partner shall not dissolve the firm, would not disturb the nature of the partnership which would remain as one at will. Counsel relies on *Abbott vs. Abbott* reported in (1936) 3 All ER 823 where the *Chancery Division*, relying on *Lindley on Partnership* (7thEdn.) held that the result of a contract of partnership is a partnership at will unless some agreement to the contrary can be proved. On the issue of bad faith, counsel supports the finding of the Arbitrator that the respondent has merely exercised his

statutory right under Section 43 of the Act to dissolve the petitioner no. 3 firm. Counsel submits that the respondent had disclosed its intention to dissolve the petitioner No.3 firm before the Division-Bench of this court and had proceeded to do just that in exercise of the statutory right available to him under Section 43 of the Act. There was hence no question of the respondent having acted in bad faith by issuing notice of dissolution dated 17th November, 2018. Counsel submits that contrary to the grounds in the present application, the reasoning of the Arbitrator is lucid and intelligible, where both the factual aspect as well as the relevant law has been meticulously discussed.

5. The impugned Award answered two issues, namely, whether the Partnership Deed is a partnership at will and whether the firm stood dissolved by the notice of dissolution dated 17th November, 2018. Before proceeding to adjudicate on the grounds taken for setting aside of the Award, the dispute which was before the Arbitrator is briefly stated. The dispute relates to a Partnership Deed dated 1st April, 2006 in which the petitioner nos.1 and 2 each held 25% share and the respondent held the remaining 50%. The petitioner no.3 partnership firm is engaged in the business of manufacturing tobacco gul under the brand "Musa Ka Gul". The petitioners alleged that the respondent has been carrying on a rival business to the detriment of the firm and the petitioners hence claimed an Award for damages together with a declaration that the partnership could not have been dissolved by the notice dated 17th November, 2018 served

by the respondent on the petitioner nos.1 and 2. The Arbitrator construed the nature of the Partnership Deed as a partnership at will and held that the notice of dissolution dated 17th November, 2018 issued by the respondent dissolved the partnership firm.

6. The contentions of counsel before this court centre on the nature of the Partnership Deed, the issue of bad faith in the notice of dissolution and the grounds available under Section 34 of the Act on which the Award should be set aside.

Construction of the Partnership Deed dated 1st April, 2006.

The relevant clauses of the Partnership Deed are as follows;

- “3. *THAT the Partnership is at will and shall be carried on by the parties hereto.*
- 13. *THAT any of the Partners may retire from the partnership business after giving one month’s notice in writing to the other Partners, of his intention to do so. The Retiring Partner shall not be entitled to any goodwill of the firm.*
- 14. *THAT the partnership business shall not stand dissolved on the death of any of the Partners but shall be continued and carried on with the legal heir and/or representative of the partner so dying and on the same terms and conditions unless otherwise agreed upon between them and such legal representative or heir, in which case the amount standing to the credit of the deceased Partner shall be paid off to his/her legal heir and/or representative.”*

7. A plain reading of the above clauses would show that the parties intended the partnership to be one at will and that a departure from such a construction can only be called for if there is any inconsistency between the above three clauses. The fact that the intention of the parties to treat the partnership as one at will was not changed despite the firm being re-

constituted by a fresh Deed of Partnership in April 2006 is also relevant. Section 7 of the Indian Partnership Act, 1932 provides as follows:

“7. Partnership at will. –Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is ‘partnership at will’.”

The relevant part of Section 32 of the said Act provides that-

“32. Retirement of a partner. – (1) A partner may retire, --

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

8. Section 32(1)(c) hence makes it clear that a provision for retirement in a Deed of Partnership is neither a provision for duration nor a provision for determination as provided under Section 7 of the 1932 Act and the partnership firm shall continue to subsist despite the notice evincing a partner’s intention to retire from the firm. The Arbitrator has relied on Section 32 of the Act in support of the view that a partnership does not cease to be a partnership at will merely because the Deed of Partnership consists of a provision for retirement of a partner. The Arbitrator was of the view that Clause 13 does not refer to either duration or determination as a consequence of a partner’s right to retire and similarly Clause 14 does not refer to duration but specifically provides that the partnership shall not stand dissolved on the death of any of the partners. The Arbitrator was hence of the view that the scope of Clause 3 of the

Partnership Deed did remain intact and unaffected since all the three clauses can harmoniously co-exist. The conclusion of the Arbitrator can be stretched also to apply to death of a partner where the effect of such death would not dissolve the firm provided the partnership is one at will.

9. *Abbott vs. Abbott* of the *Chancery Division* reiterates this proposition of law in view that the result of a contract of a partnership is a partnership at will unless some agreement to the contrary can be proved. Further, *Keshavlal Lallubhai Patel vs. Patel Bhailal Narandas*; AIR 1968 Guj 157 clarified the concept of “partnership at will” as essentially involving two conditions, namely, that there should be no provision in the contract between the partners for the duration of their partnership and that there should also be no provision for the determination of the partnership. This decision also supports the proposition that a provision in the Partnership Deed for retirement of a partner does not constitute an express provision in the contract between the partners for determination of the partnership within the meaning of Section 7 of the 1932 Act and hence does not exclude the partnership from the category of partnership at will. *Iqbalnath Premnath Anand vs. Rameshwarnath Premnath Anand*; AIR 1976 Bom 405 held that a notice of dissolution cannot be negated if the Partnership Deed is construed as one at will. *Talakchand Kanji Vora vs. Keshavlal Dullabaji Sheth*; AIR 1973 Cal 279 rejected the contention that the partnership cannot be a partnership at will if there is a resignation clause. The Court held that in view of Section 32(1)(c), even in

a partnership at will, a partner can resign upon notice to the other partners. In *Gobardhan Chakraborty vs. Abani Mohan*; AIR 1991 Cal 195, the Court held that an implied term as to duration of a partnership cannot be contrary to the express term. In all these decisions, the courts, upon construction of the clauses of the Partnership Deeds, held that the partnerships were at will and would not be affected by any clause relating to retirement, death, resignation, etc. The decisions relied on by the petitioners before this court have been shown in support of the proposition that where there is a provision in the Partnership Deed for retirement of a partner, the partnership cannot be a partnership at will and a notice of dissolution would hence merely be a notice of retirement which would not have the effect of dissolving the firm.

10. The learned Arbitrator found that the cases relied on by the petitioners were based on facts which could not be applied to the present case. The Arbitrator also relied on the rules of construction to opine that Clauses 13 and 14 cannot be read in a manner which would dislodge the efficacy of Clause 3 since that would amount to overriding an express term of the Partnership Deed. The Arbitrator was also of the view that primacy should be given to Clause 3 which declares that the partnership would be a partnership at will and which would hence prevail over Clauses 13 and 14.

11. The cases relied upon on behalf of the petitioners proceed on the particular facts of the case where the court found the partnerships to be

terminable or of a fixed duration. *Moss vs. Elphick*; (1910) 1 KB 846 in the King's Bench Division fell within the aforesaid scope. In *Chandrika Parsad Agarwal vs. Vishnu Chandra*; 1981 SCC Online All 364, Clause 7 of the Partnership Deed provided that the partnership shall not be dissolved on the death of any of the parties. *Suresh Kumar Sanghi vs. Amrit Kumar Sanghi*; 1981 SCC Online Del 12 noted the decision in *Keshavlal Lallubhai Patel*, which contained a clear stipulation that the partnership was at will. *Mohinder Nath vs. Harender Nath*; 1998 SCC Online Del 242 noticed the relevant clauses of the Partnership Deed in question which specifically provided that retirement or death of any partner shall not dissolve the partnership which would continue between the remaining partners. *Anant Purushottam Athavale vs. Govind Purushottam Athavale*; 2005 SCC Online Bom 590 also took into account the Clauses 2, 11 and 12 of the Deed and held that the partnership was not at will having regard to the explicit language of Clause 12 of the Deed. *Ramesh Kumar vs. Smt. Lata Devi*; 2007 SCC Online MP 83 took into account Clauses 8 and 11 of the Partnership Deed which made it evident that it was not the intention of the parties to determine the partnership even in the case of the death or retirement of a partner. *Manohar Daulatram Ghansharamani vs. Janardhan Prasad Chaturvedi*; 2019 SCC Online Bom 1967 noted that the Partnership Deed stipulated that the partnership shall come to an end after the construction of the buildings on the property is completed and the court relied on Section 42 of the Partnership Act in relation to dissolution on the happening of certain contingencies. *M.O.H Uduman vs.*

M.O.H. Aslum; (1991) 1 SCC 412 relied on the settled canons of construction that a contract of partnership must be read as a whole and the intention of the parties must be gathered from the language used in the contract. The decision of the court in that case was based on contradictory nature of two clauses in the Partnership Deed.

12. None of the cases cited on behalf of the petitioners are in aid of the proposition that when the Partnership Deed expressly provides that clauses to the effect that the death or retirement of a partner will not dissolve the firm, would negate the nature of the partnership which would remain as one at will. In any event, each of these cases would have to be seen in the context of the particular clauses of the Partnership Deed which were in consideration before the court and unless the facts are found to be identical to the present case, the cases cannot be of any assistance to the petitioners.

Whether the notice dated 17th November, 2018 issued by the respondent was in bad faith.

The notice of dissolution dated 17th November, 2018 was issued by the respondent under Section 43 of the 1932 Act which is set out below;

“43. Dissolution by notice of partnership at will. – (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.”

13. The petitioners urge that the said notice was issued in bad faith and for the *mala fide* object of avoiding the orders in Section 9 proceedings before this Court. In this connection, the Arbitrator found that since the partnership was a partnership at will, the respondent, as a partner, was statutorily entitled to serve a notice for dissolution under Section 43 of the Act. The Arbitrator also found that since the notice does not suffer from ambiguity or infirmity in service, the legality of the notice cannot be called into question. On the factual score, the Arbitrator was of the view that there was nothing sinister or clandestine in issuing the notice and further rejected the contention of the petitioners that the notice had been issued to resist the orders passed by this court. The Arbitrator also took into account the origin of the business and extensive use of the trademark of the partnership firm over the years. It was noted that the family members of the wider family became entitled to carry on the business of gul tobacco under the trademark “Musa ka Gul Super” after the partnership firm was started in 1970 by one Md. Musa and was continued by his sons, their spouses and descendants over the years. Specific facts have been taken into consideration by the Arbitrator in this context, including licence agreements granted by the partnership firm to one M.M. Industries, for use of the registered trademark, which was a partnership firm connected to the family of the respondent. Similar licence agreements were granted to extended members of the family, including the wife of the respondent which persuaded the Arbitrator to consider the running of the business of the extended family.

14. Upon considering the reasons in the Award, this court finds no infirmity in the basis of the findings of the learned Arbitrator. The position of the respondent before the Appeal Court on 15th November, 2018 in A.P.350 of 2018 to the effect that the respondent had the option of dissolving the firm cannot be a factor impairing the legality of the notice of dissolution. Section 43 of the Partnership Act entitles the respondent as a partner to dissolve the firm by giving notice in writing to the other partners provided the partnership is one at will. Having found that the partnership is, indeed one at will, the finding of the Arbitrator of an absence of bad faith in the notice cannot therefore be amenable to challenge.

15. Several contentions have been made on behalf of the petitioners for setting aside the Award under the grounds enumerated under Section 34 of the Act. It has been urged that the Arbitrator wandered outside the reference and dealt with matters not within his jurisdiction. The Award has also been assailed as perverse for not being based on evidence. The petitioners have also taken point of being deprived of an opportunity to deal with the contentions of the respondent and further contend that the impugned Award is in conflict with the public policy of India. *Dyna Technologies Private Ltd. vs. Crompton Greaves Ltd.*; (2019) 20 SCC 1 required the reasons given in an Award to be intelligible and adequate; *Som Datt Builders Limited vs. State of Kerala*; (2009) 10 SCC 259 has been cited for the mandate of Section 31(3) of the Act which requires reasons to

be given in respect of an Award, unless parties agree otherwise. *Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India*; (2019) 15 SCC 131 specifies, among other requirements, that an Arbitrator must construe the contract as a fair-minded or reasonable person would and cautioned that the Arbitrator must not wander outside the contract or deal with matters not allotted to him. The aforesaid decisions are rallying-points for what an Award should not be, i.e., devoid of reasons, containing reasons which are insufficient and vague, dealing with matters outside the reference, disregarding relevant evidence or taking into account irrelevant matters and construing the terms of the contract in a manner that no reasonable man would have done. The point however is to test whether the present Award falls into any of the aforesaid categories which would render the Award vulnerable.

16. This Court is of the view that the Arbitrator has done a commendable job in deciding the two essential issues which form the basis of the Award. It may be clarified that the Award impugned is an interim Award which was decided at the instance of an application filed by the respondent for interim Award under Section 31(6) of the Act for claiming that the partnership firm Md. Musa & Co. stood dissolved by the notice dated 17th November, 2018 under Section 43 of the Partnership Act. The Arbitrator recorded that the application was heard and decided with the consent of counsel appearing for the parties and in consultation with them. The Award has dealt with each of the two issues framed, in

detail and is replete with reasons which are lucid and sufficient taking into account all the relevant facts. Accepting the grounds that the Arbitrator did not give equal opportunity of hearing to learned counsel appearing for the petitioners would be an unfair assessment of the Award since the Arbitrator has noted that counsel for the petitioners was permitted to dictate his submissions “*in his own language and with his own emphasis*” which were incorporated as part of the Minutes of the proceedings. Even otherwise, the recording of the facts in the Award makes it amply clear that the Arbitrator took great pains to consider each and every factual contention made on behalf of the petitioners. This Court is, therefore, of the view that the Award cannot fall under any of the grounds which have been urged on behalf of the petitioners or any of the other grounds available under Section 34 of the Act.

17. The Award has also been challenged on the issue of cost of Rs.10 lakhs being imposed on the petitioners. The petitioners have challenged the imposition of the costs of the aforesaid quantum as being disproportionate and perverse. With regard to the said contention, it is relevant to point out that Section 31A – “*Regime for costs*” – gives discretion to an Arbitrator to determine whether costs are payable by a party to the proceeding, including the amount of costs and the time when such costs are to be paid [Section 31A(1)(a) to (c)]. The explanation to 31A further provides that “costs” means reasonable costs relating to the fees of the Arbitrators, legal fees and administration fees of the institution, etc.

Section 31A(3) further provides that in determining the costs, the Arbitral Tribunal shall have regard to all the circumstances such as the conduct of the parties, including any step taken by a party for delaying the arbitration proceedings [31A(3)(a) and a part of (c)].

18. It is evident, therefore, that the 1996 Act, after the 2015 amendment, empowers an Arbitral Tribunal to impose costs provided such imposition comes under any of the grounds enumerated under Section 31A. In the present case, the Arbitrator has noted that the petitioners have taken the advantage of the leave granted by the Arbitrator to have their submissions recorded in the Minutes of the proceedings which prolonged the hearing of the respondent's application for an interim Award. It is also evident from the papers before this court that the petitioners did not make any attempt to shorten the proceedings despite the adjudication being on a clear-cut and focused issue relating to the construction of the Partnership Deed itself. Although the reasons given by the learned Arbitrator for imposing the costs are discernible from the Award itself, this court is inclined to reduce the quantum of the costs which have been imposed on the petitioners and substitute Rs.10 lakhs with Rs.5 lakhs. The Award is hence modified to the extent of the petitioners being liable to payment of a sum of Rs.5 lakhs towards costs of proceedings which has to be paid by the petitioners to the respondent.

19. This court finds no reason to interfere with the other parts of the Award which shall remain unchanged and hence undisturbed in the context of the present application. It is also made clear that this judgment has been pronounced on both of the applications filed by the petitioners, namely, under Section 36(3) and Section 34 of the 1996 Act as had been agreed by counsel appearing for the parties at the very beginning.

20. A.P.359 of 2020 and G.A.1 of 2020 are accordingly dismissed in terms of this judgment. The impugned Award dated 12 November, 2020 is upheld and only modified to the extent of the costs imposed on the petitioners as indicated above.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)