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

ARBITRATION APPEAL NO.572 OF 2019
IN
ARBITRATION PETITION NO.428 OF 2018
WITH
NOTICE OF MOTION NO.997 OF 2019
IN
ARBITRATION APPEAL NO.572 OF 2019

Ms.Sunita V. Gaonkar ...Appellant /
...Applicant

V/s.

Kalpana T. Bose & Ors. ...Respondents

Dr.Uday P. Warunjikar for the Appellant / Applicant.

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

**CORAM : R.D. DHANUKA &
V.G. BISHT, JJ.**

DATE : 22ND FEBRUARY, 2021.

P.C. :-

1. By this appeal filed under section 37 of the Arbitration & Conciliation Act, 1996, the appellant (original petitioner) has impugned the judgment delivered by the learned single Judge dated 23rd August, 2019 partly rejecting the arbitration petition filed by the appellant (original petitioner). None of the respondents have impugned the order passed by the learned single Judge.

2. Some of the relevant facts for the purpose of deciding this appeal are as under :

On 12th October, 1998, a partnership deed was executed between the parties. Mr. Tapan Bose, the husband of the respondent no.1 and the father of the respondent nos.2 and 3 was the partner of the said partnership firm holding 25% share in the partnership firm. The said Mr.Tapan Bose expired in the month of February, 2002. Upon demise of the said Tapan Bose, remaining partners executed a fresh deed of partnership – cum - retirement deed on 12th June, 2002. The appellant continued to hold 50% in the partnership firm, whereas Mr. Nitin Bose claimed 50% under the said partnership deed dated 12th June, 2012.

3. On 6th January, 2017, the respondent nos.1 to 3 (original claimants) applied for declaration that the deed of partnership dated 12th June, 2012 between the parties to the said partnership firm was *void-ab-initio*, to declare that the respondent nos.1 to 3 were entitled to be made partners in the partnership firms M/s.Saikrupa Medical & General Stores along with the appellant herein and the respondent no.4 and to enter into a partnership deed effective from 12th June, 2002. The respondent nos.1,2 and 3 claimed 8.33% share each. They also prayed for an order and direction against the appellant and the respondent no.4 to pay the sum of Rs.3,21,05,641/- being their

share in the property of the said firm from 2nd February, 2002 till the date of decree with interest at the rate of 18% p.a. and in the alternate to declare that the said firm under the partnership deed dated 12th October, 1998 is valid and subsisting. The said statement of claim was resisted by the appellant by filing statement of defence before the arbitral tribunal.

4. Learned arbitrator made an award on 20th January, 2018 declaring the partnership deed dated 12th June, 2002 as *void-ab-initio*. Learned arbitrator declared that the Respondent nos.2 and 3 herein are entitled to be made partners of the said partnership firm and their respective shares being 12.5% each. The appellant and the respondent no.4 were directed to execute a fresh partnership deed evidencing the share of the respondent nos.2 and 3 (original claimant nos.1 and 2) in the partnership firm and declared that appellant and the respondent no.4 were jointly and severally liable to pay to the respondent nos.1 to 3 an amount of Rs.40,88,250/- being their share of the profits in the firm and directed the appellant to pay the cost of Rs.3,00,000/-.

5. Being aggrieved by the said arbitral award, the appellant herein preferred arbitration petition under section 34 of the Arbitration & Conciliation Act, 1996 before this Court. The respondent no.4 did not file any arbitration petition impugning the said award. By the

judgment dated 23rd August, 2019, the learned single Judge partly allowed the said arbitration petition and reduced the profit awarded by the learned arbitrator in the sum of Rs.8,21,250/- towards 25% share in daily profit of Rs.3000/- working out to Rs.750/- as against the amount of Rs.40,88,250/- awarded by the learned arbitrator.

6. Dr.Warunjikar, learned counsel for the appellant invited our attention to some of the paragraphs of the arbitral award and the findings of the learned single Judge in the impugned judgment. The first submission of the learned counsel for the appellant is that though the learned arbitrator rightly rejected the claim made by the claimant no.1 on the ground of limitation, learned arbitrator allowed the claim made by the claimant nos.2 and 3 and did not apply the same basis on which the claim made by the claimant no.1 was rejected by the learned arbitrator. He invited our attention to the averments made in paragraph 13 of the statement of claim and would submit that though it was admitted that the respondent no.1 had come to know about the said partnership deed dated 12th February, 2002 in the year 2005, learned arbitrator did not dismiss the entire claim on the ground of limitation, which was filed on 6th January, 2017 after expiry of more than 11 years from the date of knowledge of the respondent no.1.

7. It is submitted by the learned counsel that the respondent

no.2 became major in the year 2009 and the respondent no.3 became major in the year 2012. The claims thus filed by the respondent nos.2 and 3 in the year 2017 were *ex-facie* barred by law of limitation. Learned counsel strongly placed reliance on the cross-examination of the respondent no.2 and more particularly reply to questions 31 to 33 and would submit that though the respondent no.2 had admitted in the cross-examination that she was aware of the complaint filed by the respondent no.1 and had also visited the police station when the respondent no.1 had filed the complaint in the year 2013, learned arbitrator did not take into consideration the date of knowledge of the respondent no.2 about the Partnership Deed in the year 2013 and did not dismiss the claim filed by the claimant no.2 filed on 6th January, 2017. He submitted that the learned single Judge also over looked this part of evidence reflecting the date of knowledge of the respondent no.2 about the partnership deed executed in the year 2012.

8. Learned counsel for the appellant invited our attention to the averments made in paragraph 12 of the statement of claim and would submit that though the respondent no.1 had admitted that after the demise of her husband, who was a partner in the said firm, the respondent no.1 was working in the partnership firm and was being paid certain amounts till September, 2016, the learned single Judge

did not take into consideration the admission on the part of the respondent nos. 1 to 3 and awarded the claim for profit in the partnership firm for the period of three years.

9. The next submission of the learned counsel for the appellant is that the respondent no.4 herein had admitted that he will have share of 50% in the partnership firm as against his original share of 25% and would take care of the family members of Tapan Bose, learned arbitrator has held the appellant equally liable to pay the awarded sum to the respondent nos. 1 to 3. In support of this submission, learned counsel invited our attention to the reply given by the respondent no.4 in his cross-examination and more particularly question 11 accepting suggestion put to him by the learned advocate that the respondent no.4 had unlawfully deprived the claimants of their share in the partnership firm since 2002.

10. Mr. Quraishy, learned counsel for the respondent nos.1 to 3 on the other hand insofar as the issue of limitation raised by the appellant is concerned submits that the respondent no.2 had derived the knowledge about the said partnership deed dated 12th June, 2002 in the year 2015. He invited our attention to the cross-examination of the respondent no.2 by the appellant's advocate and more particularly the answer to questions 26 to 28 and would submit that the respondent no.2 had stated that when her father had expired, she

was 12 years old. She came to know that her father was a partner in the partnership firm only when her mother explained the same to her in the year 2015. She admitted that she had never accompanied her mother to the partnership firm.

11. Insofar as reliance placed on the evidence of the respondent no.2 recorded in questions 31 to 33 is concerned, it is submitted by the learned counsel that the said witness had categorically denied that she was aware of the contents of the complaint filed by her mother in the year 2013. He submits that in any event the entire evidence was considered by the learned arbitrator in right perspective and had recorded the findings of fact on the issue of limitation being mixed question of fact and law and rightly did not interfere with the award on the issue of limitation in the order passed under section 34 of the Arbitration & Conciliation Act, 1996 for the entire period.

12. It is submitted by the learned counsel for the appellant that the appellant has not raised any ground in the petition filed under section 34 of the Arbitration & Conciliation Act to the effect that the cross-examination of the claimant no.2 recorded in questions 31 to 33 was though brought to the notice of the learned single Judge has not been considered in the impugned judgment. Learned counsel invited our attention to two clauses from the original partnership deed

and the partnership deed executed in the year 2002. He submits that on the date of demise of any one of the partner from the partnership firm, the legal heirs of that partner were entitled to become partner in the firm automatically. He submits that since the learned arbitrator came to the conclusion that the respondent no.1 was not entitled to seek relief of becoming the partner in the partnership firm, the other two legal heirs of the deceased partner rightly have been granted share of 12.5% each in the partnership deed.

13. Insofar as the submission of the learned counsel for the appellant that the learned arbitrator could not have held the appellant liable, learned counsel strongly placed reliance on section 37 of the Partnership Act and would submit that since the appellant and the respondent no.4 continued the business of the partnership firm without final settlement of accounts of the deceased husband of the respondent no.1 and the father of the respondent nos.2 and 3, the remaining partners were liable to pay to the legal heirs of the deceased partner the profits that had been earned by the partnership firm till such accounts were finally settled.

REASONS AND CONCLUSION :-

14. Insofar as the issue of limitation raised by the learned counsel for the appellant is concerned, the cross-examination of the respondent no.2 would clearly indicate that on a specific question

asked to the said witness as to when she came to know that her father was a partner in the partnership firm, the said witness answered that she came to know that her father was a partner in the firm only when her mother explained to her in the year 2015. There was no further cross-examination on that aspect by the appellant. She also denied that she was aware of the contents of the complaint made by the respondent no.1 before the concerned police station. It was thus proved beyond reasonable doubt that the respondent no.2 came to know about the partnership executed in 2002 only in the year 2015. Admittedly the arbitration clause was invoked within three years from the date of knowledge of the respondent no.2. The respondent no.3 supported the case of the respondent no.2. Limitation did not commence from the date of the respondent nos.2 and 3 attaining the age of majority but commenced from the date of their knowledge about the Deed of Partnership in 2015.

15. Learned arbitrator has considered this aspect in detail in the impugned award and after considering oral evidence as well as the pleading and submissions made by both the parties rendered a finding that the claims made by the respondent no.2 and 3 were not barred by law of limitation and accordingly granted various reliefs. Learned single Judge also considered this aspect in great detail however reduced the claim of profit which was granted by the

learned arbitrator for the period of 15 years to the period of three years prior to the date of invocation of the arbitration agreement. The respondent nos.1 to 3 (original claimants) have not challenged that part of the judgment rendered by the learned single Judge.

16. Insofar as the submission of Dr.Warunjikar that the learned arbitrator or the learned single Judge did not consider the cross-examination of respondent no.2 in question nos. 34 to 37 in the impugned judgment is concerned, it is not in dispute that the appellant did not apply for clarification of the order before the learned single Judge nor has raised any such ground in the appeal memo. We are thus not inclined to accept this submission of the learned counsel for the appellant.

17. The issue of limitation is a mixed question of fact and law. Learned arbitrator as well as learned single Judge has considered the issue of limitation in detail. We find no patent illegality or perversity on the part of the learned arbitrator or any infirmity in the order passed by the learned single Judge on the issue of limitation raised by the appellant.

18. Insofar as the submission of the learned counsel for the appellant that though it was admitted by the respondent nos.1 to 3 in the statement of claim that the respondent no.1 was working since 1998 and had been paid certain amount till 2016, learned arbitrator

did not consider that part of the submissions in the impugned award nor by the learned single Judge in the impugned judgment is concerned, no such ground has been raised by the appellant before the learned single Judge. We cannot thus allow the appellant to urge this submission for the first time across the bar at this stage.

19. Insofar as the last submission of Dr.Warunjikar, learned counsel for the appellant that the respondent no.4 had admitted in his cross-examination that the legal heirs of the deceased partner was not paid any amount and thus the learned arbitrator at most could have awarded the claim only against the respondent no.4 and not the appellant herein is concerned, we have perused the cross-examination of the respondent no.4 by the appellant. In question 10 of the cross-examination, the respondent no.4 in a suggestion put to the respondent no.4 by the appellant that the legal heirs of the appellant were not paid their dues since 2002, respondent no.4 admitted such suggestion. In our view, this suggestion would support the case of the respondent nos.1 to 3 and not the appellant. The fact that the respondent nos.1 to 3 were not paid their share has been admitted by the appellant herself by putting her case to respondent no.4.

20. Be that as it may, in view of sections 25 and 26 of the Partnership Act, 1932, every partner is liable, jointly and severally

with all other partners and also for all acts of the firm done while he was a partner. Learned counsel for the appellant did not dispute that he was also the signatory to the said partnership deed entered in the year 2002 and was entitled to 50% share. If according to him, the respondent no.4 could not have entered into such partnership deed, the appellant would not have signed such partnership deed. We are thus not inclined to accept the said submission made by the learned counsel that the learned arbitrator ought to have granted monetary relief only against the respondent no.4 and not the appellant. The appellant being the partner of the partnership firm and had not settled the accounts of the deceased partner and continued the partnership firm and did not accept the legal heirs of the deceased partner as partner by entering into the partnership firm, was equally liable to pay jointly and severally with the respondent no.4.

21. Section 37 of the Partnership Act, 1932 clearly indicates that if the other partners have not settled the account as between them and the out going partner or his estate, the outgoing partner or the estate would be entitled to claim the share in the profit earned by the partnership firm till such accounts are settled in future.

22. The power of Court under section 37 of the Arbitration & Conciliation Act, 1996 are more limited than the powers of the Court under section 34 of the Arbitration & Conciliation Act, 1996. Though

our powers are limited, we have granted sufficient hearing to the appellant on all the issues raised by the appellant.

23. In our view, the appeal is totally devoid of merit and is accordingly dismissed. There shall be no order as to costs.

24. In view of dismissal of the arbitration appeal, the notice of motion does not survive and is accordingly dismissed.

(V.G. BISHT, J.)

(R.D. DHANUKA, J.)

Vasant
A. Idhol

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by Vasant A. Idhol
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