OCD-2

IN THE HIGH COURT AT CALCUTTA
Commercial Appellate Division
ORIGINAL SIDE

AO-COM/24/2024
WITH
AP-COM/677/2024

YASMIN KHALIQUE AND ORS.
VS
MUKHTAR ALAM

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE BISWAROOP CHOWDHURY
Date : 13th February, 2025

Appearance:
Mr. Ahin Choudhury, Sr. Adv.
Mr. Sohail Haque, Adv.
Mr. M.I.A. Lodhi, Adv.
... for the appellants.

Mr. Jishnu Saha, Sr. Adv.
Mr. Ishaan Saha, Adv.
Mr. Tarique Quasimuddin, Adv.
Ms. Zainab Tahur, Adv.
... for the respondent.

1. The appeal is arising out of an order passed by learned Single Judge allowing the applications filed by the respondent challenging two orders passed by the learned Arbitrator in an arbitration proceeding initiated by the present appellants. At the initial stage an objection is raised with regard to the jurisdiction of the learned Single Judge in entertaining and deciding the orders passed by the learned Arbitrator in view of Section 16(6) of the Arbitration and Conciliation Act, 1996. It is urged that even if it assumes to be an interim arbitral award, the remedy lies in filing an application for setting aside of the award under Section 34 of the Arbitration and Conciliation Act, 1996.

2. For the present purpose, we may only state that a partnership was constituted on 1st April, 1992 and thereafter a deed of rectification was executed on 1st April, 2006 to induct the appellant no.2 as partner. It appears that the family members of Md. Musa were carrying on the said business for long under the name and style of "Musa Ka Gul Super".
3. The disputes arose with regard to a similar business being carried by the respondent during the subsistence of the partnership firm. In the arbitration proceeding initiated by the present appellants an interim award was passed in which it was held that partnership firm Musa & Co. constituted by the deed of partnership dated 1st April, 2006 was a partnership at will and that the respondent, namely, Muktar Alam by a notice dated 17th November, 2018 served under Section 43 of the Partnership Act has dissolved the same.
4. This award was challenged.
5. However, the said interim award was affirmed by the learned Single Judge and the Division Bench in affirming the order of the learned Single Judge has made the following observations in paragraph 5 in the order dated 10th August, 2023 :-

> 5. *There are, however, some observations made by the learned Arbitrator in paragraphs 5, 29, 30 and 31 of the Award to the following effect:*
>
> *"Thus, if I hold that the partnership is a partnership at will and the same has been dissolved by their letter dated*

17th November, 2018, the prayers for declaration and injunction made by the Claimants in their Statement of Facts would be rendered infructuous, such prayers having been made on the footing that the partnership has not been dissolved and is subsisting. The claim for money award also would have to be reduced only to the extent that the Claimants between them would be entitled to 50% of the share of profit calculated till the date of dissolution i.e. 17th November, 2018. Consequently, the scope of evidence in support of money claim would necessarily be limited as well."

Finally, in examining the allegation of bad faith, it may not be right to see the act of issuing notice of dissolution on the part of the Respondent in isolation, but need to be seen in the context of origin of the business and extensive use of trade mark over the years. Such practice is enmeshed in the history of the wider family beyond those who were partners under the Partnership agreement dated 1st April, 2006. In brief, the business was started by one Md. Musa way back in 1970s and on his death was continued by his sons, their spouses and descendants, in different combination of the constitution of partnership at various points of time over the years. By practice and by convention, the family members of wider family became entitled to carry on the business of Gul Tobacco under the trade mark "Masa Ka Gul Super". This contention *was raised by the Respondent in course of hearing of the Section 9 application but was rejected by the Learned Judge."*

"Learned Counsel for the Respondent invited me to see the said family aspect and wide use of trade mark over the years from a different perspective to hold that on the basis of provisions of Section 11 of the Partnership Act, an implied term is to be imported in the agreement on the footing that such wide spread practice was denotative of a course of dealing. Hence, by granting of licence to carry on the same business as of the firm and use the trade mark by the Respondent in favour of his wife was perfectly legal and nothing malafide about."

"In the light of such wide spread practice in the family tradition, as it were, the grant of licence in favour of Shaheena Makhtar, wife of Respondent cannot be questioned on any principle: What is good for goose is good for the gander."

6. Thereafter, the appeal was disposed of with the following observations and directions :

6. The aforesaid observations were not germane or necessary for the purpose of the said "Interim Award" dated 12th November, 2020. The said observations of the Ld. Arbitrator shall therefore not be deemed conclusive or binding on the parties at this stage and shall be subject to the final award.

The Arbitration shall proceed in accordance with law until final award is pronounced and published.

7. The parties are at liberty to apply under the available laws for any other reliefs pursuant to the dissolution of the partnership under the deed dated 1st April, 2006.

7. An application was filed by the present appellants for clarification of the order dated 10th August, 2023. The Hon'ble Division Bench, however, in disposing of the said application on 12th September, 2023 made the following observation:-

"This Court is of the view that the observation in paragraph 4 is subject to the observation in paragraph 5 and there is absolutely no need for any further clarification in this regard."

8. In paragraph 4 of the previous order, the Hon'ble Division Bench had observed as follows :

"4. This Court is otherwise in complete agreement with the views of the learned Single Bench".

9. The Special Leave Petition being Special Leave to Appeal (C) Nos.26006-26007 of 2023 arising out of the aforesaid orders at the instance of the appellants herein were dismissed.

10. Thereafter, in an application filed by the present appellants for appointment of a new arbitrator due to the demise of the earlier Arbitrator the present Arbitrator has been appointed. In the said proceeding an application was taken out by the present respondent

seeking a clarification with regard to the scope and ambit of the reference on which the Arbitrator newly appointed should proceed.

11. The learned Single Judge disposed of the application with an observation that it will be within the jurisdiction of the learned Arbitrator to decide as to the matters to be considered upon entering reference.

12. The relevant observation in this regard are as follows:

"The argument of the learned counsel appearing for the respondent, in essence, is that the learned Arbitrator, who was appointed by the order dated 12th December, 2023, should not re-consider or re-adjudicate on the issues which formed part of an interim Award dated 12th November, 2020, a challenge to which was repelled by the Court by a judgment dated 25th March, 2021.

According to learned counsel, the findings of the Court in the judgment dated 25th March, 2021 confirming the interim Award should be treated as sacrosanct and the learned Arbitrator should not re-open the issues in the interim Award dated 12th November, 2020. Counsel places a Minutes of Meeting dated 13th February, 2024 where the petitioner had prayed for an adjournment on the ground of pendency of the present application.

The respondent (claimant in the arbitration) is represented.

This Court is of the view that the issues which are to be adjudicated upon are entirely within the domain of the Arbitrator. The Court cannot interfere in that domain or demarcate / limit the issues. The only recourse which is available to an aggrieved party is to challenge an Award under Sections 34 or 37 of the 1996 Act, as the case may be. Till that stage arrives, the Court does not have an entry point into the arbitration proceedings for any form of interference.

Needless to say, the petitioner will be at liberty to take all points which have been urged before this Court in the arbitration."

13. While the Arbitrator was proceeding with the matter an application was filed by the respondent under Section 16 of the Arbitration and Conciliation Act, 1996 in which it was urged that the Tribunal does not have the jurisdiction to revisit the issues which have been conclusively decided in the interim award dated 12th November, 2020 passed by the earlier Arbitrator except to the extent modified by the orders of the Division Bench and an award be made rejecting such part of the claim as is rendered infructuous pursuant to the interim award dated 12th November, 2020.

14. This objection was overruled by the learned Arbitrator relying upon the observation of the Hon'ble Division Bench dated 10th August, 2023. The learned Arbitrator refused to accept the submission made on behalf of the respondent that the findings or the conclusions arrived at in the interim award by his predecessor dated 12th November, 2020 should operate as *res judicata.*

15. This order was challenged by the respondent.

16. The learned Single Judge in deciding the said application had taken into consideration the earlier orders and was of the view that the learned Arbitrator could not have reopened the issues already decided in the interim award having regard to the fact that the interim award has attained finality and this order of rejection of the application under Section 16 has the trappings of finality

attached to it and it partakes the nature of an interim award assailable under Section 37 of the Arbitration and Conciliation Act.

17. An award even if it is considered to be and treated like a decree can be challenged only in the mode and manner as prescribed under the Arbitration and Conciliation Act, 1996. The said Act is a Code in itself.

18. The reference to the provisions of the Code of Civil Procedure was with regard to the procedural matter and if the intention of the legislature was not to permit any proceeding to be initiated until an arbitral award is passed, the Court will have no jurisdiction to interfere with such orders as may be passed by the Arbitrator in exercise of his power under Section 16 of the Arbitration and Conciliation Act, 1996.

19. However, it is needless to mention that if the order of the Arbitrator is in the nature of an interim award then the said that can be challenged under Section 37 of the Arbitration and Conciliation Act, 1996.

20. Moreover, a decision under Section 16 to the extent the statute permits under Section 37(2) of the Arbitration and Conciliation Act, 1996 is assailable.

21. In the instant case, it appears from the minutes of the meeting dated 15th May, 2024 that the respondent prayed for leave to amend the statement of defence and counter claim, it was allowed. The said amendment was directed to be carried out by 24th May,

2024. It further appears that in the said proceeding an application was filed for amendment of the statement of claim and the claimant appears to have contended that in view of the changed circumstances the claimant would now claim damages from 15th November, 2018 till the end of 29th February, 2024.

22. It is in addition to the damages claimed by the claimant to the original statement of claim where damages were claimed up to 15th November, 2018. A copy of the said application showing amendment of the original statement of claim is also placed in course of hearing.

23. The learned Arbitrator has not decided the issue with regard to the settlement of the account.

24. The award insofar as the date of dissolution is concerned, appears to be final. The finding of the erstwhile Arbitrator with regard to the date of dissolution being 17th November, 2018 has not been disturbed in any of the proceedings. The exercise undertaken by the learned Arbitrator was only for the purpose of settlement of the accounts and in this regard the learned Arbitrator desired the assistance of an expert in order to go into the accounts.

25. It is not necessary for this Court at this stage to consider whether the direction upon the chartered accountant to ascertain the total sales of the product "Musa Ka Gul" sold by M.S. Industries, a proprietorship firm, and Md. Musa Tobacco Company, another proprietorship concerned from 18th April, 2017 to 29th February,

2024 would be ultimately taken into consideration at the time of passing the final awards as the respondent was given the liberty to raise all objections with regard to consideration of such account at the time of passing the final award. The said direction prima facie does not appear to be out of context in view of orders passed in GA No. 1331 of 2018 with AP 282 of 2018 to the following effect:-

"Accordingly, there shall be an order of injunction restraining the respondent whether by himself or through his agents or assignees or nominees or otherwise however from running a parallel business of manufacturing or dealing with or selling "Musa Ka Gul" or "Tobacco Gul", by the name of M/S. M. S. Industries or in any manner whatsoever until the publication of the arbitral award. The respondent is also restrained from making any false allegation or writing any frivolous letter to any statutory authority or to any person whosoever affecting the business of the petitioner no.3 firm, until publication of the arbitral award."

26. In an appeal from the aforesaid order the Hon'ble Division Bench of this Court in APO No.350 of 2018 in AP No.282 of 2018 held as follows:-

"...It is necessary to notice the essential facts before dealing with some of the fancied arguments of the appellant. The appellant is the 50% partner of a firm that carries on the business of sale of gul, a form of tobacco. Its primary brand is the Musa Ka Gul brand which is registered in favour of the firm. Such registration was obtained in 1999 and has been subsequently renewed. Prior to 2017, it is the admitted position that the Musa Ka Gul brand was licensed out in favour of entities owned or controlled by the near relatives of the two other 25% partners of the firm. It is also not in

dispute that such licences were granted against a promise of royalty to the extent of 0.5% of the sale of the product by the licencees. The case with which the respondents herein came to this Court was that they noticed that the Musa Ka Gul brand of tobacco was sought to be sold through a proprietorship business of the appellant's wife with the appellant really running the show.

It was the appellant's case before the Court of the first instance that the partnership firm had granted a licence in respect of the Musa Ka Gul brand in favour of his wife's proprietorship concern and that such concern, in turn, paid the princely amount of Rs.3677/- by way of royalty which entered the accounts of the firm on or about May 14, 2018. The only difficulty was that the document in support of the licence appears to have been executed by the appellant himself.

There is no material to demonstrate that the other partners of the firm were aware of such licence and the money trickled into the bank account of the firm after the petition under Section 9 of the said Act was already in Court.

Thus, it is evident that a 50% partner in a partnership firm had unilaterally licensed out the valuable brand of the firm without the knowledge of the other partners to the proprietorship concern of his wife and, subsequently, purported to carry on business through such concern as a rival to the original firm.

In the light of such conduct, the order impugned restraining the appellant herein from continuing in the same vein, does not appear to be unjustified in any manner or form."

27. We do not consider the said orders of the learned Arbitrator as an interim award and the said orders are not assailable at this stage. There is no final decision taken with regard to the accounts.

28. It is needless to mention that the learned Arbitrator shall follow the provisions of the Partnership Act in settling the accounts and the conduct of the parties if relevant.

29. In view of the pendency of the proceeding the respondent did not participate before the auditor and did not pay the fees of the auditor.

30. However, Mr. Jishnu Saha, learned Senior Counsel appearing on behalf of the respondent, on instructions, has submitted that an opportunity may be given to the respondent to appear before the auditor and produce the relevant documents in order to enable the auditor to prepare a final report.

31. In the facts and circumstances, we permit the respondent to produce the relevant documents before the auditor and seek any further direction in this regard from the learned Arbitrator. Subject to the payment of the proportionate remuneration of the auditor due as on date and also to bear the proportionate remuneration of the auditor for the further work to be undertaken by the auditor. In the event the arrears proportionate remuneration is not paid within a fortnight from date the respondent shall not be permitted to produce relevant documents in order to enable the auditor to file a fresh report.

32. The participation of the respondent shall be without prejudice to the rights and contention of the respondent.

33. With the aforesaid observation AO-Com/24 of 2024 with AP-COM/677 of 2024 are disposed of. The order of learned Single Judge is set aside.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)

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