OCD-1

ORDER SHEET

APOT/423/2024
WITH
CS-COM/158/2024
IA NO: GA-COM/1/2025

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
(Commercial Division)

MD SARFARAZ ALAM
VERSUS
MD MOFAZZULAR RAHMAN AND ORS

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

Appearance:
Mr. Anindya Kumar Mitra, Sr. Adv.
Mr. Arik Banerjee, Adv.
Ms. Bishalaxmi Ghosh, Adv.
Ms. Swarnali Saha, Adv.
..for the appellant

Mr. Surajit Nath Mitra, Sr. Adv.
Mr. Sankarsan Sarkar, Adv.
Mr. Soumalya Ganguli, Adv.
...for the respondent no.1

Mr. S. N. Mookherjee, Sr. Adv.
Mr. Rudraman Bhattacharyya, Adv.
Mr. Dhruv Chadha, Adv.
Ms. Pooja Chakraborti, Adv.
Ms. Arti Bhattacharyya, Adv.
Ms. Debomita Sadhu, Adv.
Mr. Sagnik Aditya, Adv.
..for the respondent No.3

Mr. Utpal Bose, Sr. Adv.
Mr. D. N. Sharma, Sr. Adv.
Mr. Ankan Rai, Adv.
Mr. Yash Singhi, Adv.
Mr. Ratnesh Kr. Rai, Adv.

Ms. Devanshi Deora, Adv.
Ms. Sakshi Kejriwal, Adv.
..for the respondent nos.5 & 6

1. The appellant is the erstwhile partner of the partnership firm M/s. Serajuddin & Co.
2. In view of the arbitration clause, the dispute was referred to the Hon'ble Justice Bhaskar Bhattacharya, the former Chief Justice of Gujarat High Court, in which an order was passed under Section 32 of the Arbitration and Conciliation Act, 1996.
3. The Hon'ble Chief Justice Bhattacharya observed that, "the cause of action of termination proceeding accrued as this partnership is found to be a registered partnership at will even on the basis of the Statement of Claim". However, Mr. Bhattacharya observed that "What is prohibited under the Arbitration Clause is a prohibition upon the Arbitrator is not to award dissolution of firm even if demanded by the partners hereto constituting the partnership agreement. In this proceeding, after 13th July, 2019, there is no scope of passing any award of dissolution of the firm because all the partners ceased to be the partners of any existing firm".
4. The partners of the original partnership firm also filed a suit for expulsion of the appellant from the partnership and also a declaration that it is not a partnership at will.
5. In the suit the defendant no.1 has filed a counter claim, inter alia, praying for a preliminary decree for dissolution with effect from July,

13, 2019 followed by a final decree for dissolution in the alternative dissolution of the M/s. Serajuddin & Co. by the court.

6. The learned Arbitrator terminated the proceeding after the suit was filed.

7. In the suit, two applications were taken out by the original partners of the partnership firm seeking interim protection. The said applications were disposed of by Justice Debangsu Basak on 4th February, 2020 with the following observation:-

> "Instead of appointment of a Receiver or an observer as prayed for on behalf of the defendant No.1, in my view, interest of justice would be subserved by requiring the auditors of the partnership firm for the present financial year to submit a report as to the entitlement of the defendant No.1 as on July 13, 2019 notionally treating the firm to be dissolved as on July 13, 2019 and the entitlement of the defendant No.1 as on July 15, 2019 notionally treating the defendant No.1 to be validly expelled from the partnership firm on that date. In undertaking the exercise of preparing the account as on those two dates, the auditors will invite the views of the parties to the suit. The auditors will take into account such views while assessing the accounts and the entitlement of the defendant No.1 on those two dates. Let such exercise by the auditors of the firm be completed within six weeks from the date of communication of this order to them".

8. We have been informed that an appeal is pending. However, there is no order of stay. In the said appeal on 21st December, 2020, the Division Bench on the basis of the submission made that the present

appellant would require some money for his immediate treatment as he would be required to travel to Singapore and it involve considerable expenses, on recording an agreement on behalf of the respondent nos. 2 and 3 (which appears to be a concession) in the said proceeding, the Division Bench passed an interim order to the following effect:-

> "The respondent nos. 2 and 3 have agreed to immediately release a sum of Rs.50 lakh in favour of Mr. Alam to facilitate his travel to Singapore for treatment. The respondent nos. 2 and 3 have also agreed that in addition to the same being released immediately which will meet the expenses for travel and the like, money will be directly paid to the hospital upon the hospital raising bills and without any delay. However, the respondent nos. 2 and 3 say that the bills must be only pertaining to the treatment of Mr. Alam, his stay in hospital and elsewhere in Singapore and the incidental expenses pertaining to his wife who will accompany him. The respondent nos. 2 and 3 have also agreed that Mr. Alam's travel by air-ambulance to Singapore and expenses in such regard would be borne from out of the common funds.
>
> It is hoped that in view of this gesture, the parties see reason and upon Mr. Alam's treatment in Singapore being successful, the parties would try to resolve the issues before the matter appears next on the second Monday of February, 2021.
>
> It is made clear that the payment to be released immediately and for the medical expenses of Mr. Alam will be completely without prejudice to the rights and contentions of the parties and will create no equity in favour of Mr. Alam. It is also agreed that upon final accounts being done, the expenses incurred for

Mr. Alam's treatment will be debited from the entitlement, if any, of Mr. Alam".

9. On 9th March, 2021, a Co-ordinate Bench directed the present appellant to file an affidavit with a detailed statement of account as an enclosure thereto showing how the sum of Rs.50 lakhs received by him in terms of the order dated 21st December, 2020 of the Division Bench has been expended and the balance in the said account after incurring that expenditure. The appellant was directed further to disclose the return cost of air ambulance travel of a person with accompanying family from Kolkata to Singapore and back, giving at least two quotations from the service providers. It was further observed that till further order the appellant will only incur expenditure which is absolutely necessary for medical treatment and for stay in Singapore and shall not make any other expenses without obtaining leave of this Court. It appears that the said amount was not utilised for which on 21st April, 2021 the appellant was directed to deposit a cheque for Rs.50 lakhs as received from the partnership firm with the Assistant Registrar, attached to that Court by 3pm on that date. A certificate of the bank that there is the requisite balance to honour the cheque was also directed to be furnished with the same Officer by 22nd April, 2021.

10. In course of hearing, we have been informed that the said cheque was encashed and is lying with the Registrar, Original Side. The

appellant showing grave urgency on account of medical treatment filed an application before the learned Single Judge on 5th December, 2024 in which on 11th December, 2024, the impugned order was passed. In the said application, the plaintiff made a prayer for disbursal of a sum of Rs.2,69,61,000/- in favour of the appellant along with other remedies. The learned Single Judge declined to pass any ad interim order after hearing the learned counsel for the parties and the learned Single Judge was of the opinion that in view of the disputed questions of facts, the prayer for interim relief is required to be decided on affidavits. Admittedly, the affidavits-in-oppositions were not filed within the time and we have been informed that an unaffirmed copy of the affidavit has been served upon the advocate-on-record of the plaintiff on 10th January, 2025 by reason whereof it becomes now impossible for the learned Trial Court to decide the application on 13th January, 2025.

11. Mr. Anindya Kumar Mitra, learned senior counsel appearing on behalf of the appellant has submitted that the learned Arbitrator has decided that it is a partnership at will and by reason of the order of Hon'ble Justice Basak, the effective date of dissolution would be 13th July, 2019. The direction of Justice Basak has not been complied with. The appellant did not receive any notice from the auditors and is not aware of the fact whether the auditor has at all filed any report in compliance of the said order. It has been categorically submitted that

the quarterly statement as directed has not been received by the appellant. It is further submitted that the balance-sheet of the partnership firm as on 31st March, 2019 would show that the appellant has a contribution of more than Rs.264 crores and is lying to his credit as on that date and having regard to the fact that till date the said account has not been settled, the appellant could not receive his due share and utilise the amount for his own purpose and meeting his medical expenses.

12. Mr. S.N. Mookherjee, learned senior counsel appearing on behalf of the respondent no.3 has submitted, on instruction, that the auditor has filed his report in a sealed envelope and it would appear from the averments made by the appellant in his own application that a substantial amount has been paid on and from 21st December, 2020. In fact, Mr. Mookherjee has relied on the MoU to show that the said document has been acted upon. The learned senior counsel has drawn our attention to paragraph 5 of the MoU to show that there is a clear undertaking and understanding that the appellant shall not proceed with any litigation pending as on the date of signing of the MoU against each other until the same is in force and none of the parties shall breach the same in any manner whatsoever till the same is in force.

13. Mr. Utpal Bose, learned senior counsel appearing on behalf of respondent nos. 5 and 6 has also referred to the accounts and the

pleadings to show that the learned Single Judge was justified in refusing to pass an ad interim order.

14. Mr. S.N. Mitra, learned senior counsel appearing on behalf of the heirs of the respondent no.1 submits that the respondent no.1 has died during the pendency of the suit and an application for substitution is pending and in any event he submits that the heirs of the deceased respondent no.1 are not interested in the partnership firm business and such fact has been disclosed in the pending proceeding before the learned Single Judge.

15. In reply Mr. Mitra, learned Senior Advocate although admitted that the appellant had received some payments during this period, has strongly objected with regard to the validity and existence of the Memorandum of Understanding dated 11th November, 2024 and receipt of any amount thereunder. It is submitted that the present partners have surreptitiously forwarded some amount to the designated bank account of the appellant without any intimation and the said Memorandum of Understanding is *ex facie* bad in law and cannot be enforced. Mr. Mitra submits that the learned Single Judge has completely ignored the prescription of two eminent doctors of Singapore who are experts in kidney transplantation dated 12th November, 2024 opinion of another specialist Dr. Lalit Kumar Agarwal on 3rd December, 2024 and the estimated expenses approximately of Rs.2.69 crores raised by the hospital where the appellant is likely to

undergo kidney transplantation. It is submitted that the respondents having earlier agreed to a sum of Rs.50 lakhs to be paid towards such treatment, should not have objected to the release of the said amount at least for the present purpose, if not for anything else, on humanitarian ground.

16. Mr. Mitra has submitted that there is every possibility that the accounts have been manipulated and the auditor has not given any notice before filing the report. In fact, the appellant is not aware as to whether any report has been filed. Mr. Mitra has prayed for appointment of an independent auditor for a forensic audit to be conducted in this matter.

17. We have been informed that the application for substitution of the legal heirs of the respondent no.1 is pending before the learned Single Judge.

18. The basis of the application appears to be the prescription of two eminent doctors of Singapore, opinion by another specialist Dr. Lalit Kr. Agarwal on 3rd December, 2024 and the estimated cost for undergoing such treatment. Before the Co-ordinate Bench, the respondent nos. 2 and 3 had agreed to provide Rs.50 lakhs for the purpose of providing the treatment and on the basis of such assurance, the said amount was released in favour of the appellant on terms and conditions as indicated in the order dated 21st December, 2020.

19. It is not in dispute that the said sum of Rs.50 lakhs is with the Registrar, Original Side and the said amount was invested. Neither of the parties has applied before the Court for withdrawal or utilisation of the said amount. This application has been filed now for utilisation of the said amount along with other reliefs. The requirement of the said amount for a medical treatment is *prima facie* established in view of several medical documents along with an estimate of the hospital where the kidney transplantation is likely to take place.

20. Now that the said amount is lying with the learned Registrar, Original Side and the documents disclosed *prima facie* show that it involves substantial expenses to be incurred for the purpose of transplantation and the doctors have advised that immediate steps are required to be taken for kidney transplantation, we are of the view that the amount lying with the learned Registrar in terms of the order dated 21st April, 2021 passed in APO/29/2020 shall be released forthwith along with accrued interest in favour of the present appellant for the purpose of his medical treatment and the said amount for the time being shall be treated as an interest free loan till the accounts are finalised. The failure to pass such interim relief could be fatal and irreversible.

21. It is evident from the orders and the materials on record that the accounts have not yet been finalised.

22. The Registrar, Original Side shall file a report before the learned Single Judge on the returnable date placing on record the auditor's accounts in order to enable the parties to make appropriate submission on the said account.

23. We also direct the learned Registrar, Original Side to circulate the said report to the advocate-on-record of the parties in the meantime.

24. It would be open for the parties to take exception to the said report in the pending proceeding and pray for appointment of an independent auditor and forensic audit if required. However, we emphasise that the settlement of accounts should be done at the earliest to obviate all future complications. Any further order with regard to disbursement of further amounts to meet expenses for the medical treatment shall be considered by the learned Single Judge in the pending proceeding.

25. We make it clear that the learned Single Judge shall decide the matter uninfluenced by any observation made in this order.

26. Needless to mention, the suit filed by the plaintiff was rejected by an order dated 7th April, 2021 and an appeal is pending against the said judgment in which an order was passed on 13th April, 2021 in which it has been made clear that all subsisting interim orders in the suit shall continue to operate, without prejudice to the rights and contentions of the parties.

27. The time to file affidavit-in-opposition by the respondent nos. 5 and 6 is extended till tomorrow upon payment of Rs.10,000/- to State Legal Services Authority, West Bengal. The said amount shall be utilised towards meeting the expenses for Lok Adalat held by the Calcutta High Court Legal Services Committee. Affidavit-in-reply shall be filed within a fortnight from tomorrow. After completion of affidavits, the appellant shall be at liberty to mention the matter before the learned Single Judge for early disposal of the application.

28. The time to file affidavit-in-opposition by the respondent no.3 is extended till today.

29. The aforesaid directions with regard to filing of affidavits are peremptory.

30. The appeal and the application are disposed of. However, there shall be no order as to costs.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)

bp/R.Bhar