

CASE NO.:
Appeal (civil) 1526 of 2007

PETITIONER:
Ravi Prakash Goel

RESPONDENT:
Chandra Prakash Goel & Anr

DATE OF JUDGMENT: 21/03/2007

BENCH:
Dr. AR. Lakshmanan & Altamas Kabir

JUDGMENT:
J U D G M E N T
(Arising Out of SLP (C) NO. 6723 OF 2006)

Dr. AR. Lakshmanan, J.

Leave granted.

The above appeal is directed against the final judgment and order dated 10.02.2006 passed by the Chief Justice of the High Court of Judicature at Allahabad in Arbitration Application No. 7 of 2005 dismissing the application moved by the appellant under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator.

BACKGROUND FACTS:

Respondent Nos. 1 and 2 - Chandra Prakash Goel and Rakesh Aggarwal along with Dulari Devi, mother of the appellant - Ravi Prakash Goel and Pushplata were carrying on business of sale and purchase of sanitary goods in the name and style of M/s Kumar and Company under the Partnership Deed dated 09.08.1983. Pushplata retired from partnership w.e.f. 31.03.1992. Thereafter, other partners carried on the business and a new partnership deed was executed on 01.04.1992. Clause 5 of the same provided that the net profits of the partnership business as per accounts maintained after deduction of all necessary expenses shall be divided and distributed amongst the partners at the close of each accounting year in the following ratio:

- 1) Sri Chandra Prakash Goel, Respondent No.1- 31%
- 2) Sri Rakesh Kumar, Respondent No.2- 34%
- 3) Smt. Dulari Devi, Petitioner's Mother- 35%

Clause 13 of the Partnership Deed refers to arbitration clause. It reads as under:-

"That all the disputes touching the affairs of the partnership firm shall be referred to arbitrator in accordance to the provisions of the Indian Arbitration Act and the award of such Arbitrator shall be final and binding on the parties."

When the respondents did not render accounts of the partnership firm to the appellant's mother despite repeated verbal requests, she on 05.06.2004 sent a notice to the respondents raising dispute regarding accounts of the partnership firm and informed them that on account of her illness she has authorized her son,

Ravi Prakash Goel, the appellant herein to look into the accounts of the partnership business on her behalf and requested them to explain the accounts to her son on any working day between 05.06.2004 to 16.06.2004, but they did not respond.

The appellant visited the office of the firm but the respondents refused to permit him to have access to the accounts of the firm. On 05.09.2004, Smt. Dulari Devi the mother of the appellant executed her last will in favour of the appellant to her only son bequeathing her estate in appellant's name including the instant partnership business. Dulari Devi expired on 06.10.2004 leaving her last will dated 05.09.2004 which was registered after publication in the daily newspaper and also after due notice to all the other legal heirs of the deceased who categorically stated that they have no objection and accepted due execution of the will before the Sub-registrar, Dehradun.

On 15.12.2004, the appellant sent notice to the respondents to the effect that his mother had sent notice to them regarding dispute in relation to the accounts by partnership firm and despite her request, accounts were not shown to her authorized agent, namely, her son, hence as per the terms of the partnership deed, the disputes are to be decided by arbitration. He suggested the name of Shri P.C. Agrawal, a retired District Judge and further informed that if they are not agreeable, they may suggest the name of their own Arbitrator.

When no reply of the notice dated 15.12.2004 was received, the appellant filed application under Section 11 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Chief Justice, Allahabad High Court under the scheme called the appointment of Arbitrators by the Chief Justice of Allahabad High Court, 1996, vide High Court of Judicature at Allahabad Notification No. 11448/Rules dated 18.05.1996 published in the U.P. Gazette Pt 1-KA dated 16.11.1996.

The learned Chief Justice of the High Court on 10.02.2006 has dismissed the appellant's application concluding that the applicant has no presently establishable binding arbitration agreement with the respondents. The order passed by the Hon'ble Chief Justice reads as under: -

"Hon'ble Ajoy Nath Ray, C.J.

This is an application for an Arbitrator by the son of one of the deceased partners of the Firm.

The partnership deed is annexed. The lady died on 6.10.2004. If an arbitration has been commenced by the lady during her lifetime, it might have been continued by the son who is applicant before this court, by obtaining substitution. However, the arbitration is being attempted to be commenced now. Whether the heirs of a deceased partner or parties, are to be deemed as parties, to an arbitration agreement contained in a partnership deed, is a question of intention and construction in every different cases. The deed annexed does not show that any of the parties mentioned was to be construed by contract as including his/her heir, successor or assignee. That usual clause is absent. Furthermore the son claims as legatee of a will not yet probated. It is well known that Courts of law cannot look into unprobated wills. In these circumstances I am of the opinion that the

applicant has no presently establishable binding arbitration agreement with the respondent.

The application is, therefore, dismissed. A suit might be filed.

Sd/-

Ajoy Nath Ray, C.J

10.2.2006"

As stated earlier, the present appeal has been filed against the above judgment.

We heard Mr. Rakesh Dwivedi, learned senior counsel for the appellant and Mr. Chandra Shekhar, learned counsel for the respondents.

Mr. Rakesh Dwivedi, learned senior counsel for the appellant submitted that that High Court overlooking the provisions of Section 46 read with Section 48 of the Partnership Act and Section 40 of the Arbitration Act, has erred in dismissing the application under Section 11 of the Arbitration Act as in law arbitration could be commenced by the heirs of the deceased partners and since right to sue survives on the appellant as sole son and legal representative of the deceased partner is entitled to invoke clause 13 of the arbitration contained in the Arbitration Agreement. According to him, the view taken by the learned Chief Justice is wholly contrary to the earlier decision of a Single Judge of the same High Court in Sundar Lal Haveliwala vs. Smt. Bhagwati Devi reported in AIR 1967 Allahabad 400 as such the Chief Justice ought to have referred the matter to a larger Bench. He would further submit that the views expressed in the impugned order is contrary to the principles laid down by this Court in the case of Premalata & Anr. Vs. Ishwar Dass Chamanlal and Ors., AIR 1955 SC 714.

Mr. Chandra Shekhar, learned counsel appearing for the respondent submitted that the partnership deed which is unique in its character cannot be ignored as the arbitration clause is contained therein and the disputes referable for arbitration are the disputes touching upon the affairs of the partnership firm and that the partnership deed while describing three parties confined the extent of the respective partners to their respective individual person alone, namely, not extending the same nomenclature to the legal heirs, representatives, assigns or even legatees etc. This fact, according to the learned counsel for the appellant, is evident from annexure-P1 to the petition and have also been noted by the High Court of Allahabad while passing the impugned order in the following words:

"The deed enclosed does not show that any of the parties mentioned was to be construed by contract as including his/her heir, successor and assignee. The usual clause is absent."

Mr. Chandra Shekhar further submitted that the Partnership Act and the Arbitration and Conciliation Act, 1996 are characterized by "party autonomy" and accordingly are founded upon the contract giving pre-eminence to the will of the parties and even the interference of the Court has been curtailed to the minimum possible level. It is the contention of the learned counsel that the rights of the legatee under the Partnership Act are regulated and conditioned by Section

29 of the Indian Partnership Act and on the said strength he is only entitled to receive the share of the assets of the firm to which the testator, his predecessor was entitled. It is further submitted that the answering respondents have never denied the rendition of the deceased partner's account to her share as per the deed and that the respondents have always been ready and willing to pay her share if so ordered by the Court.

Mr. Chandra Shekhar further submitted that no dispute have ever arisen during the lifetime of Dulari Devi and she was the tax payer, all the accounts were conducted in her presence and with her consent during her lifetime and that no dispute was ever even alluded during her lifetime. Accordingly, the appellant as a legatee on her behalf can continue the claiming for resolution of the disputes which arose during her lifetime. No certificate of service, not even the receipt of registration have ever been filed. In view of the fact Mr. Chandra Shekhar submitted that it is clear that the appellant by no stretch of imagination can claim to be the party to the Agreement of Arbitration contained in the partnership deed. According to Mr. Chandra Shekhar the will of the parties is pre-eminent and the same is to be given effect to by all means and, therefore, the appellant cannot be said to be a party to the Arbitration Agreement and accordingly, cannot avail mode of alternative resolution of disputes by way of arbitration as claimed. The learned counsel has also made submission under Section 29 of the Partnership Act. According to him, that the right of the appellant as legatee/legal representative of Dulari Devi are conditioned by Section 29 of the Partnership Act and in case if Section 40 of the Arbitration and Conciliation Act is read along with Section 29 of the Partnership Act, it becomes clear that the appellant's right of account is confined to rendition of accounts as permitted by Section 29 of the Partnership Act. So far as the appellant's right to claim arbitration is concerned, the same cannot be taken benefit of particularly in view of the unusual character of the partnership deed where the definition of party deliberately excludes legal heirs, legal representatives and legatees. According to him, it is also relevant to mention that the commencement of arbitration proceedings is the judicially recognized and statutorily defined concept as is evident from Section 21 of the Arbitration and Conciliation Act and if the proceedings had commenced, the right of the legal heir would remain to carry on the same further but in the instant case, the proceedings have not commenced during the lifetime of Smt. Dulari Devi. In view of the submissions made above, learned counsel for the respondent submitted that the petition deserves to be dismissed as the appellant is not a party to the arbitration agreement.

On the above pleadings, the following questions of law emerge for our consideration.

- a) Where right to sue for rendition of accounts survives on the legal legal representative of a deceased partner, are the legal representatives not entitled to invoke arbitration clause contained in the Partnership Deed?
- b) Whether the arbitration can be commenced by the heirs after the death of partner especially where the dispute had arisen already during the life time of the partner?
- c) Whether in view of section 46 read with section 48

of the Indian Partnership Act as well as section 40 of the Arbitration Act, 1999, the petitioner is entitled to claim appointment of arbitrator under the arbitration clause of the Partnership Deed and the Hon'ble Chief Justice of the Allahabad High Court has erred in overlooking these provisions? Before we proceed further, it is useful to reproduce Section 40 of the Arbitration Act and Sections 46, 47 and 48 of the Indian Partnership Act.

"40. Arbitration agreement not to be discharged by death of party thereto.- (1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person."

"46. Right of partners to have business wound up after dissolution. \026 On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

47. Continuing authority of partners for purposes of winding up.- After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise:

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

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."

It is clear from Section 40 of the Arbitration Act that an arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased, nor is the authority of the arbitrator revoked by the death of the party appointing him, subject to the operation of any law by virtue of which the death of a person extinguishes the right of action of that person. Section 2(1)(g) defines "legal representative" which reads thus:

"Legal Representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased person, and, where a party acts in a representative character, the person on whom the estate develops on the death of the party so acting."

The definition of 'legal representative' became necessary because such representatives are bound by and also entitled to enforce an arbitration agreement. Section 40 clearly says that an arbitration agreement is not discharged by the death of a party. The agreement remains enforceable by or against the legal representatives of the deceased. In our opinion, a person who has the right to represent the estate of deceased person occupies the status of a legal person. Section 35 of the 1996 Act which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the "parties and persons claiming under them". Persons claiming under the rights of a deceased person are the personal representative of the deceased party and they have the right to enforce the award and are also bound by it. The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives.

We have already extracted Sections 46, 47 & 48 of the Partnership Act. Section 46 provides two things, namely, 1) first is to realize the assets of the business and then to apply the same for discharge of liabilities and finally to distribute the surplus, if any, among the partners. All that Section 46 empowers is that every partner shall claim that this is to be done for ultimate distribution of the surplus to the partners according to their shares. A suit to enforce the latter right relating to the distribution of surplus is generally called a suit for an account which means account taken up accordingly. This right to a partner to file a suit for account is not affected by the fact that the retiring partner has already inspected the accounts of the firm. Section 46 is, however, merely declaratory of the rights of the partners or their legal representatives in the surplus and does not

set out the mode of calculating the surplus. The share of a partner upon the winding up of a dissolved firm, is only in the residue which is left after the liabilities mentioned in the various clauses of Section 48 have been paid out. Payment of capital and advances to partners is not out of the residue. The amount paid as capital investment to a partner will have to be deducted in order to find the value of the residue, because the value of a partner's share is only his proportion of the residue.

"Right of Representative of a Partner:

The right of a representative of a partner is really a claim against the surplus assets on realisation-whether the surplus consists entirely of the proceeds of realisation or whether they include some specific items of property, which existed on the death of the partner. The proper remedy of a partner in the circumstances is to have accounts taken to ascertain his share and if the right to sue for accounts is barred by limitation, the partner cannot sue any partner in possession of the assets for a share therein, and the limitation will be governed by Art.5 of the Limitation Act."

On the dissolution of the firm, the arbitration clause does not come to an end and so if a dispute had arisen during the lifetime of the deceased partner, his legal representatives would be entitled to take proceedings under Section 20 of the Arbitration Act, 1940.

When a partner dies and the partnership comes to an end it is not only right but also the duty of the surviving partner to realize the assets for the purpose of winding up of the partnership affairs including the payment of the partnership debts. However, it is true that in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of his interest in the partnership and taking the partnership account.

Section 47: It is clear that the commencement of the dissolution does not at once terminate the authority of the partners. Such authority continues at least for 2 purposes, namely, 1) so far as necessary to wind up the affairs of the firm; and 2) to complete the transaction begun but had not yet been completed.

Section 48: It lays down two fundamental propositions which are in line of the provisions of Section 46 of the Partnership Act, namely, 1) as to the payment of the losses; and 2) as to the application of the assets. It is to be noted that the provisions of Section 48 are the culmination of the provisions of Section 46 of the Partnership Act. Therefore, both the sections have to be harmoniously read together and interpreted.

We are of the opinion that in view of the provisions of Section 46 read with Section 48 of the Indian Partnership Act as well as Section 40 of the Arbitration and Conciliation Act, 1996, the application for appointment of an arbitrator under the arbitration clause of the partnership deed was liable to be allowed and the learned Chief Justice has erred in overlooking the said provisions. While right to sue for rendition of accounts of partnership firm survives on the legal representative of a deceased partner, he is also entitled to invoke the arbitration clause contained in the partnership deed. In the instant case, the appellant being the only son of his deceased mother, undisputedly a partner in the

partnership firm with the respondents especially where the dispute concerning the partnership affairs had arisen already during her life time. The view taken in the impugned order with the appellant has no presently establishable binding arbitration agreement with the respondent is erroneous in law and facts. The impugned order is also bad in law in the teeth of the law laid down by this Court in Smt. Premlata & Anr. Vs. M/s Ishwar Dass Chamanlal & Ors. AIR 1955 SC 714. This apart, the appointment of arbitrator could not be rejected on the ground of non-production of the will executed by the mother when no family member is disputing the will and the appellant's claim vis-à-vis the partnership firm, even otherwise also the appellant is the legal heir of the deceased partner being her only son. In our view, non-probate of will is not a germane factor to be considered at the time of appointment of arbitrator under Section 11 of the Arbitration Act. In our opinion, the partnership deed clearly recites that all the disputes touching the affairs of the partnership firm were referable to arbitrator and it cannot be gainsaid that the dispute regarding accounts of the partnership firm is a dispute touching the affairs of the firm. As already stated, it was not legally essential to specifically make a mention that the partners included their legal heirs, representatives, assigns or legatees etc. and the arbitration clause could be invoked by the appellant as the legatee as well as the legal heir/legal representative of the deceased Dulari Devi particularly where the dispute had arisen during her life time. The appellant's claim in the instant case is based on the will as well as being a legal heir of the deceased Dulari Devi. The appellant, in our opinion, possessed a legal and enforceable right to invoke arbitration clause and moved application under Section 11 of the Arbitration Act before the High Court for appointment of arbitrator. The word "party" as used in the partnership deed does not exclude inclusion of legal heirs, legal representatives etc. as being canvassed by the respondents. Thus, in our opinion, in view of the provisions of Sections 40 and 46 of the Partnership Act read with Section 40 of the Arbitration Act, the appellant has a legal right to commence arbitration by moving an application under Section 11 of the Arbitration Act in the High Court as in our view, the right to sue survives on him as legal representatives of the deceased Dulari Devi and he is entitled to invoke clause 13 of the partnership deed. Moreover, the dispute referable to arbitration had already arisen during the life time of Dulari Devi which is also well settled that where a dispute is referable to arbitration, the parties cannot be compelled to take recourse to in the civil courts. In view of the aforesaid facts, the civil appeal filed by the appellant stands allowed. However, there will be no order as to costs.