

Erach F. D. Mehta

Vs

Mino F. D. Mehta

Civil Appeal No. 2535 of 1969

(J. C. Shah, K. S. Hegde, A. N. Grover JJ)

09.09.1970

JUDGMENT

SHAH, J. -

1. This appeal with special leave is filed against the judgment of a single Judge of the High Court of Bombay dismissing a petition under Section 33 of the Indian Arbitration Act, 1940.

2. On December 22, 1966, the appellant and the respondent, who are brothers entered into an agreement to carry on in partnership three business : (1) Messrs. F. D. Mehta and Company; (2) The Great Western Stores and (3) Dr. Writer's Chocolates and Canning Company. The relevant terms of the deed of partnership were as follows :

"1. The agreement has come into effect from the 2nd day of November, 1966.

# X X X X##

3. The duration of the partnership shall be at will.

# X X X X##

7. The net profits of the partnership after payment of all the outgoings incidental to the partnership business shall belong to the partners in equal shares and they shall likewise bear all losses including loss of capital.

# X X X X##

15. All disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or between one of them and the personal representatives touching these presents or the interpretation of this deed or the construction of the application thereof or any clause or thing herein contained or any account valuation or division of assets debts or liabilities to be made hereunder or as to any act deed or commission of either partner or as to any act which ought to be done by the partners in dispute or as to any other matter in any way relating to the partnership business or the affairs and transactions thereof or the rights, duties or liabilities of either partner under these presents shall be referred to two Arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Indian Arbitration Act, or any statutory modification thereof for the time being in force."

3. Disputes arose between the two partners. The respondent claimed that on January 17, 1968, the partners reached an oral agreement stipulating that the appellant shall retire from the partnership and shall assign and transfer to the respondent his right, title and interest in the partnership business against payment of the price fixed by Mr. Jal Desai a Chartered Accountant. The appellant denied the agreement set up by the respondent. On June 13, 1968, the respondent addressed a letter to the appellant setting out the terms of the oral agreement, dated January 17, 1968, and intimated that "having regard to the attitude adopted by" the appellant "there was no alternative left but to have a legal arbitration", and that Mr. K. M. Diwanji Solicitor of the High Court of Bombay was nominated an arbitrator by the respondent, and the appellant was called upon to nominate his, arbitrator "so that the disputes and differences between the parties may be resolved" by the partnership deed. This request was repeated in a letter, dated June 14, 1968. By his reply, dated June 26, 1968, the appellant denied the agreement and without prejudice to his contention nominated Mr. J. B. Maneckji as arbitrator. He simultaneously intimated that if the arbitrators seek to arbitrate on "the issue of the alleged agreement of" the appellant "to go out of the firm", he "would contend that they had not power to do so".

4. The arbitrators were unable to make an award within the period prescribed by the Arbitration Act. There was a reference to Mr. Mehta an Advocate of the High Court of Bombay as umpire to adjudicate the dispute. The appellant then submitted an application to the High Court of Bombay under Section 33 of the Arbitration Act praying (a) for a declaration that there was no existing arbitration agreement in regard to the dispute in petition as to whether or not the agreement was entered into between the parties on January 17, 1968, as stated in the statement of claim filed by the respondent before the arbitrators on October 8, 1969; (b) for a declaration that even if the deed of partnership contained an arbitration agreement the dispute before the umpire "fell outside the scope of the arbitration clause "; (c) for a declaration that the arbitration agreement, if any, relating to the said dispute was invalid; and (d) for a declaration that the umpire had no jurisdiction to enter upon an adjudication of the said dispute between the parties.

5. The petition was heard by Kantawala, J. Before the learned Judge four contentions were raised in support of the petition :

1. that the agreement, dated January 17, 1968, as alleged by the respondent gave rise to new rights and obligations between the parties and to a dispute relating to those rights and obligations created by the new agreement Clause 15 of the partnership agreement had no application;
2. that the claim made by the respondent relating to the agreement, dated January 17, 1968, was not a claim which arose out of the deed of partnership;
3. that the dispute related to an agreement completely independent of the deed of partnership and consequently it fell outside the ambit of the arbitration clause contained in Clause 15 of the deed of partnership; and
4. that in any event the umpire could not grant specific performance of the agreement.

The learned Judge rejected all the contentions and dismissed the petition. With special leave, the appellant has appealed to this Court.

6. There were only two partners who agreed to carry on the business in partnership. Under the agreement, dated January 17, 1968, set up by the respondent, the appellant had agreed "to go out of the partnership" and to accept in consideration thereof the value of his share as determined by the named valuer. It was in substance an agreement for dissolution of the partnership and for payment to the appellant value of his share in the partnership assets. There is no dispute that an agreement of partnership at will may by mutual agreement be dissolved and the rights and obligations of the parties settled under the term thereof. The clause "all disputes and questions whatsoever which may arise during the partnership or afterwards between the partners touching the partnership agreement including division of assets, debts or liabilities" clearly covered a dispute whether the parties agreed the partnership be dissolved.

7. We are not concerned at this stage to determine whether the agreement set up by the respondent was in fact reached between the partners on January 17, 1968; that is a matter to be decided by the arbitrators. A dispute whether the partnership was dissolved by mutual agreement was clearly a dispute between the parties touching the partnership agreement. We are unable to agree with counsel for the appellant that the agreement set up by the respondent which he had set up in the correspondence, that it was agreed between him and the appellant that the latter was to retire from the partnership. When the partnership consisted of only two partners and one partner agreed to retire there can be no doubt that the agreement that one of the partners will retire amounts to dissolution of the partnership.

8. The argument that the agreement, dated January 17, 1968, supersedes the partnership agreement, dated December 22, 1966, including the arbitration clause is, in our judgment, futile. The agreement set up by the respondent while maintaining its covenants seeks to dissolve the partnership and to settle the rights and obligations of the partners arising out of the dissolution of the partnership.

9. It was not urged that the arbitrator was incompetent to direct that the appellant shall carry out the terms of the agreement to which he was a party. But counsel for the appellant contended that the agreement set up by the respondent extinguished the authority of the authority of the arbitrators because it provided for a subsidiary agreement to refer to arbitration the dispute to the valuer relating to the value of the share payable to the appellant. The agreement set up by the respondent provides that the appellant will retire from the partnership upon payment of a price to be fixed by the valuer. But it is not the case of the respondent that the valuer had the authority of an arbitrator. We need not express any opinion on the question whether in a dispute which is agreed by the parties to be submitted to arbitration, reference to arbitration cannot be made merely because subsequent to the arbitration agreement the parties have agreed that a part of the dispute shall be referred to or decided by some person other than the arbitrator. Whether or not the arbitrators are bound by that subsequent agreement and the arbitration qua such an arrangement could be deemed to supersede, is not a matter which we are concerned to decide at this stage. Primarily the dispute between the parties is as to the truth of agreement set up by the respondent relating to the dissolution of the partnership and the dispute with regard to that agreement raised by the appellant can, in our judgment, be referred to the arbitrators under Clause 15 of the partnership agreement.

10. No argument has been advanced before us on the last plea raised before the High Court. We are not called upon to decide the extent of the power of the arbitrators under an arbitration agreement; that question does not strictly arise in a petition under Section 33 of the Arbitration Act, 1940.

11. The appeal therefore fails and is dismissed with costs.

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