

RESERVED JUDGMENT

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

THE HON'BLE THE CHIEF JUSTICE SRI RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE ALOK KUMAR VERMA

10TH NOVEMBER, 2021

APPEAL FROM ORDER No.188 of 2021

Between:

Mohd Yusuf and four others ...Appellants

and

Ashish Aggarwal and another ...Respondents

Counsel for the : Mr. Arvind Vashisth, learned
appellants. Senior Advocate assisted by
Mr. Kartikey Hari Gupta,
learned counsel.

Counsel for the : Mr. Rakesh Thapliyal, learned
respondent no.1. Senior Advocate assisted by
Mr. Rajat Mittal, learned
counsel.

Reserved on : 23.09.2021
Delivered on : 10.11.2021

The Court made the following:

JUDGMENT: (per HON'BLE THE JUSTICE SRI ALOK KUMAR VERMA)

The present appeal has been filed under Section
37 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as, "the Act, 1996") against the order dated 15.09.2021, passed by the learned Additional District Judge, (Commercial Court), Dehradun in Arbitration Case No.69 of 2020, "Shri Mohd. Yusuf and four others vs. Shri Ashish Aggarwal and another", whereby the application under Section 9 of the Act, 1996, filed by the appellants, has been dismissed on the ground that the appellants have neither made out a prima facie case nor is the balance of convenience in their favour nor they will suffer any irreparable loss in the event of being denied injunction because the appellants are not "partners" in the light of the arbitration clause.

2. Heard the learned counsel for the parties and perused the records.

3. Mr. Arvind Vashisth, the learned Senior Advocate appearing for the appellants, submitted that the appellant no.5 "M/s. Indian Hospitality" is a partnership firm at will, registered under the Indian Partnership Act, 1932 (hereinafter referred to as "the Act, 1932"). The appellant nos. 1, 2, 3 i.e. Shri Mohd. Yusuf, Smt. Shamim, Shri Momin Ali and one Tehsin Malik formed the said partnership firm on 15.02.2008 for doing business of civil construction of residential and commercial buildings, roads, bridges, sewerage works, water supply (urban and

rural), purchase/sale/development of land, real estate developers, establishment and running of educational institutes, hostel, hotel, restaurant, wedding point, club etc. and such other business as mutually agreed to by all the partners. Shri Tehsin Malik, partner, retired from the said firm on 26.10.2009. Mr. Arvind Vashisth, the learned Senior Advocate, submitted that in the year, 2016, the appellant no.1 took a loan of Rs.2,06,89,000/- from the respondent no.1. The appellants and the respondent no.1 agreed that the said partnership deed along with papers of the immovable property, which was purchased by the appellants by their own money and recorded in the name of "M/s. Indian Hospitality", cheques, blank signed papers would be kept with the respondent no.1 and after the repayment of loan along with interest, all the original papers along with cheques and blank signed papers will be returned to the appellants.

4. Mr. Arvind Vashisth, the learned Senior Advocate, submitted that out of the said loan amount of Rs.2,06,89,000/-, an amount of Rs.1,63,00,000/- has already been returned to the respondent no.1. However, on 16.02.2016, the appellants' signatures were taken by the respondents on the "Partnership Admission Deed". Later on, on 19.02.2016, that Deed dated 16.02.2016 was registered as "Partnership Deed-Retirement Cum

Admission Deed". According to the said Deed dated 19.02.2016, the appellants withdrew themselves from the said firm and new partners, i.e. respondents were admitted as partners in the firm. Mr. Arvind Vashisth, the learned Senior Advocate, contended that the respondent no.1 obtained blank signature papers from the appellants under pressure and by misrepresentation and used those papers in registering the said Deed dated 19.02.2016, and now, the respondents want to grab the appellants' property, recorded in the name of the said firm i.e. "M/s. Indian Hospitality". Mr. Arvind Vashisth, the learned Senior Advocate, submitted that the said Deed dated 19.02.2016 is a void document, therefore, the appellants have a right to invoke Clause 22, an Arbitration Clause, of the "Partnership Deed-Retirement Cum Admission Deed", dated 19.02.2016. The appellants moved an application under Section 9 of the Act, 1996 with a prayer to restrain the respondents from creating any third party interests in the property-in-question, recorded in the name of the said firm; to restrain the respondents from interfering with the appellants' possession over the property-in-question; direct the respondents to return the papers of the property-in-question, cheques and blank signed papers to the appellants and to stay the effect of the said Deed dated 19.02.2016 till the decision of the arbitration and

conciliation proceeding, which was wrongly dismissed by the learned commercial court vide its impugned order dated 15.09.2021 without appreciating the Clause 22 of the "Partnership Deed-Retirement cum Admission Deed" dated 19.02.2016.

5. Per contra, Mr. Rakesh Thapliyal, the learned Senior Advocate appearing for the respondent no.1, has supported the impugned order dated 15.09.2021 and submitted that the "Partnership Deed-Retirement Cum Admission Deed" dated 19.02.2016 was executed by the appellants and the respondents with their free will and without any pressure or misrepresentation. He further submitted that according to the terms and conditions of the said Deed dated 19.02.2016, the said Deed dated 19.02.2016 is effective from the 16th day of February, 2016 and supplements the Original Partnership Deed dated 15.02.2008 and the Deed dated 26.10.2009. According to the said Deed dated 19.02.2016, the name and style of the firm shall continue as M/s. Indian Hospitality. The Head Office of the partnership business shall be in Dehradun and Branch Office shall be at the place as the partners may mutually decide from time to time. The learned Senior Advocate further submitted that a sum of Rs.68,47,000/-, was determined to pay to the retiring partners and was paid in full settlement of their

dues. He argued that the appellants have no right to invoke the Arbitration Clause as mentioned under Clause 22 of the "Partnership Deed-Retirement Cum Admission Deed", dated 19.02.2016, because, the appellants are not "partners" after execution of the said Deed dated 19.02.2016, rather, the appellants became retired partners after the execution of the said Deed.

6. Clause 22 of the said Deed dated 19.02.2016 is as follows :-

"22. That in case any dispute arises among the partners in respect of any other matter, which cannot be resolved among themselves, shall be referred to the Arbitrators as per the provisions of Arbitration Act as may be in force, from time to time. Any decision or award there under shall be binding upon all the partners hereto."

7. The question involved in this appeal is whether the appellants have a right to claim the said reliefs under Section 9 of the Act, 1996.

8. In order to decide the said question, it is necessary to refer the provisions of Sections 4, 6, 7, 9, 14, 15 and 32 of the Act, 1932 and Section 7 and Section 9 of the Act, 1996.

9. Partnership is an agreement between two or more persons. The term "Partnership", "partner", "firm" and "firm name" are defined under Section 4 of the Act, 1932, which is as follows :

"4. Definition of "partnership", "partner", "firm" and "firm name" - "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually, "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name".

10. According to the said definition, a partnership contains three elements, viz (1) an agreement entered into by all the persons concerned the agreement must be to share the profits of a business; (2) the business must be carried on by all or any of the persons concerned acting for all; and, (3) the persons of the group who conduct the business do so as agents for all the persons in the group and are liable for account to all and who have entered into partnership with one another are called individually "partners", collectively " a firm" and the name under which their business is carried on is called the "firm name".

11. Section 6 of the Act, 1932 lays down the mode of determining existence of partnership. The provision of Section 6 of the Act, 1932 is as follows:

"6. Mode of determining existence of partnership - In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation I : The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation II : The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not itself make him a partner with the persons carrying on the business;

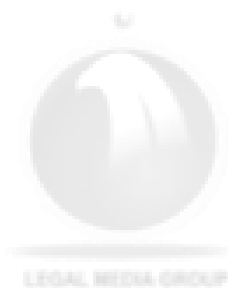
and, in particular, the receipt of such share or payment –

(a) by a lender of money to persons engaged or about to engage in any business,

(b) by a servant or agent as remuneration,

(c) by the widow or child of a deceased partner, as annuity, or

(d) by a previous owner or part-owner of the business, as consideration for the sale of the goodwill or share thereof,



does not of itself make the receiver a partner with the persons carrying on the business."

12. Section 6 of the Act, 1932 lays down that the question of partnership is a question of intention, which must be decided on a consideration of the conduct of the partners and of all the surrounding circumstances and whether a person is or not a partner of the firm is to be determined on the basis of the totality of the circumstances.

13. Section 7 of the Act, 1932 defines "Partnership at will" as follows :-

"7. Partnership at will- Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership-at-will".

14. Section 7 of the Act, 1932 defines partnership at will. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will". Therefore, in a "partnership at will", the partnership deed should not contain any provisions, (1) as to the duration of the partnership, and (2) for the determination of their partnership.

15. Section 9 of the Act, 1932 deals with the general duties of partners as follows :

“9. General duties of partners - Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.”

16. Section 14 of the Act, 1932 defines what is property of the firm, Section 14 is as follows :



“14. The property of the firm - Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm.”

17. Section 15 of the Act, 1932 makes it clear that subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

18. Section 32 of the Act, 1932 deals with the retirement of a partner. It lays down as follows :-

“32. Retirement of a partner.- (1) A partner may retire –

- (a) with the consent of all the other partners,
- (b) in accordance with an express agreement by the partners, or
- (c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.”



19. The word "retire" in Section 32 of the Act, 1932 relates to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business without dissolution as between them.

20. A partnership business is run in accordance with the terms of the contract of partners. The relation between the partners is quasi fiduciary and is expressed in the maxim *in societatis contractibus fides exuberet*. The relation of the partners is based on mutual confidence and it is the duty of the partners to one another and carry on the business of the firm to the greatest common advantage, to be just and faithful to each other and to render true accounts and full information of all things affecting the firm to any partner or his legal representative. Therefore, a retired partner has no right to affect the business of the partnership.

21. According to Mr. Arvind Vashisth, the learned Senior Advocate appearing for the appellants, the "Partnership Deed-Retirement cum Admission Deed", dated 19.02.2016 is a void document and the said void document causes harm to the appellants, therefore, the appellants wanted to refer the matter, as a party to the said Deed dated 19.02.2016, to the arbitration and for the

interim measure, the appellants had filed the application under Section 9 of the Act, 1996.

22. This Court is not inclined to accept the said contentions of the learned Senior Advocate Mr. Arvind Vashisth. On one hand the said Deed dated 19.02.2016 has been called void Deed by the appellants and on the other hand Clause 22 of the same Deed is being relied upon by them. In Clause 22 of the said Deed dated 19.02.2016, there is no provision to the effect that the retiring partners can invoke the said provision for the purpose of arbitration and, secondly, Section 31 of the Specific Relief Act, 1963 provides that only "court" has jurisdiction to cancel any void or voidable document. Admittedly, the appellants have not filed any suit before any competent court to cancel the said Deed dated 19.02.2016. Section 31 of the Specific Relief Act states as follows :

"31. When cancellation may be ordered –

- (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
- (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to

the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

23. Section 7 of the Act, 1996 is as follows :

"7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

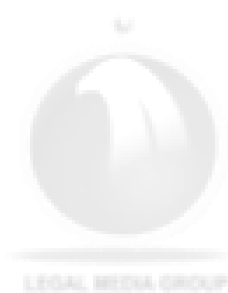
(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."



24. Section 9 of the Act, 1996 is as follows:

“Section 9. Interim measures, etc., by Court.— (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

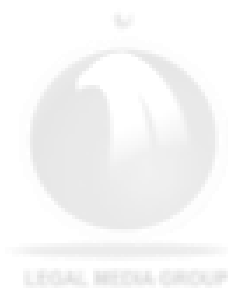


(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine.

(3) Once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."



25. Section 9 enables the parties to arbitral proceedings to obtain interim relief from a court. Section 9 entitles 'any party' to obtain interim relief from the court at three stage i.e. (i) before the commencement of arbitral proceedings, (ii) during the course of the arbitral proceedings, and (iii) after the arbitral award is made but prior to its enforcement. The term 'party' has been defined under Section 2(1) (h) of the Act, 1996 as a "party to an arbitration agreement." Section 2(1) (b) defines

“arbitration agreement” as an agreement referred to in Section 7.

26. Section 9 of the Act, 1996 is enacted with the intention of preserving and protecting the subject matter of the arbitral proceedings. Therefore, for invoking the jurisdiction of the court, under Section 9 of the Act, 1996, the person should be a party to an arbitration agreement. Thus, a person not a party to the arbitration agreement cannot invoke the jurisdiction of the court for the interim relief under Section 9 of the Act, 1996.

27. In **Civil Appeal No.5700 of 2021 “Arcelor Mittal Nippon Steel India Ltd. vs. Essar Bulk Terminal Ltd.”**, the Hon’ble Supreme Court observed on 14.09.2021, “It is reiterated that Section 9 (1) enables **the parties to an arbitration agreement** to approach the appropriate court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act.”

28. In the instant matter, the appellants were not “Partners” under the “Partnership Deed-Retirement cum Admission Deed”, dated 19.02.2016. The appellants are not “parties” to the arbitration agreement to invoke the

arbitration clause. Therefore, the appellants have neither made out a prima facie case nor is the balance of convenience in their favour and in the facts and circumstances of the case, we do not think any irreparable injury would be caused to the appellants if interim injunction is not granted.

29. For all the reasons as discussed above, no interference is warranted in the impugned order dated 15.09.2021, passed by the Additional District Judge (Commercial Court), Dehradun. The instant appeal sans merits. The present appeal is hereby dismissed at the admission stage. No costs.

RAGHVENDRA SINGH CHAUHAN, C.J.

ALOK KUMAR VERMA, J.

Dt: 10th November, 2021
JKJ/Pant