

(2018) 01 DEL CK 0132

In the Delhi High Court

Case No : 180 of 2017 & CM APPL 35176 of 2017

BHUPINDER SINGH (SINCE DECEASED) THR LEGAL HEIRS & APPELLANT
ORS

Vs

AMARJEET SINGH RESPONDENT

Date of Decision : 08-01-2018

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 34](#) - Application for setting aside arbitral award

Citation : (2018) 01 DEL CK 0132

Hon'ble Judges : Sanjiv Khanna, Prathibam. Singh

Bench : Division Bench

Advocate : S. L. Gupta, Mithilesh Pal, Harpreet Singh

Judgement

1. "Kirpal Singh Wazir Singh" - a partnership firm (hereinafter "firm") between two brothers Kirpal Singh and Wazir Singh was established in 1949. It was operating from a tenanted shop No. 5163 at Gandhi Market, Sadar Bazar, Delhi and two godowns. The firm was re-constituted from time to time. The appellant Shri Bhupinder Singh and the respondent Shri Amarjeet Singh, descendants of the original partners, were the last constituted partners in the said firm. The appellant is now deceased having passed away on 18th April, 2011, is represented by his wife and three daughters. Disputes arose between the appellant and the respondent because of which on 14th March, 1990 the shop was closed with locks by both parties being affixed on the shop. On 16th April, 1990 a fire, which engulfed the entire market, destroyed the shop and, as per the appellant all the stock lying therein.

2. It is the case appellant that they served notice of dissolution of the firm on 15th July, 1990 on the respondent and the firm stood dissolved with effect from 31st July, 1990. It is the appellant's case that he thereafter conducted personal business in the morning hours "thadi" market at Sadar Bazaar and since the formal deed of dissolution had not been executed, he continued to use the sales

tax registration/license of the firm for his personal business. However, suit for injunction was filed by the respondent in 1993, and the appellant surrendered the sales tax license of the partnership firm.

3. Another suit was filed by the respondent in November, 1996 seeking dissolution of the firm and rendition of accounts. In the said suit, a Local Commissioner was appointed who visited the shop in Sadar Bazaar and collected all the documents. It was reported by the commissioner that the business in the said shop was being carried on by another firm namely Sachdeva Traders.

4. Initially, Shri Justice N. C. Kocchar, retired judge of this Court was appointed a sole Arbitrator in the matter and on his demise, Shri Prem Kumar, retired Additional District Judge was appointed as sole Arbitrator. On 15th April, 2009 the Sole Arbitrator dismissed the claim petition of the respondent. Thereafter, this Court on 10th December, 2010 disposed of the OMP No. 09/2009 filed by the respondent and remanded the matter to the Arbitrator. On 27th August, 2016, the sole Arbitrator passed an award directing the appellant to pay a sum of Rs.15,93,266/- along with interest @ 9% per annum from January, 1997.

5. The award came to be challenged by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act", for short) and on 7th July 2017, the Ld. Single Judge rejected the objections and upheld the award.

6. The contentions of the appellant in brief are: a. That the Arbitrator was incorrect in assuming that the sales tax license of the firm was used by the appellant between the period 1990 to 1997. The said license had been returned in 1993 itself.

b. The assumption of goodwill and average profits is contrary to the records of the firm, inasmuch as the Arbitrator has taken the average profits to be Rs.2 lakhs per year, whereas the actual profits between the years 1979-80 to 1989-90 was in the range of Rs.29,591/- to Rs.63,983/-. The figure of Rs.2 lakhs, therefore, has no basis

c. The Arbitrator also failed to consider that the appellant was no more and was represented by his wife and three married daughters. The only source of income for the appellant is the rental income of one floor in the residence at Pitampura whereas the respondent has various properties including one godown of the firm of 700 sq. ft. along with stock therein, a property at Wazirpur, and a property at Pul Bangash.

d. The award of costs and interest thereon is completely unreasonable and contrary to law.

7. The respondent appears in person. On the last date, the Court had requested Mr. Harpreet Singh, Advocate who was present in Court, to assist the respondent. Accordingly, submissions have been heard by the Court on behalf of the respondent. The case of the respondent is that the appellant continued to do business under the name of the firm "Kirpal Singh Wazir Singh" till 1997. The

goodwill of the firm was jointly owned by the parties. The fact that the appellant enjoyed the goodwill of the firm and earned huge sums of money, by using the name of the firm and sales tax registration of the firm, makes the appellant liable to pay 50% shares in the profits. The properties in Wazirpur and Pul Bangash are not with the respondent and are part of the bigger pool of properties belonging to the family, where there are other claimants, and a suit for partition is currently pending in respect of these properties. The respondent submits that the award has taken a reasonable basis for calculating the profits and ought not to be interfered with. In particular, attention was drawn to the "alleged" surrender of the shop and creation of new tenancy in favour of M/s Sachdeva Traders.

8. This court has perused the arbitral award and the judgement dated 7th July, 2017 of the learned Single Judge under appeal. When the matter had come up for admission on 25th September 2017, this Court had directed the appellant to deposit a total sum of Rs.25 lakhs. The same has been deposited by the appellant with the Registrar General of this court and has been kept in a Fixed Deposit Receipt (FDR).

9. The scope of interference in such cases is limited as is clearly settled in several pronouncements of the Supreme Court and this court. The Arbitrator has come to a factual conclusion that the firm was not dissolved in 1990 and it was only with effect from January, 1997 that the firm could be deemed to have been dissolved. Relevant portion of the Award is as follows: "183. The question is whether the respondent has not been able to prove the service of the notice dated 15.07.1990 on the claimant which is said to have been sent under certificate of posting. It seems to me that the respondent wanted to get rid of the claimant and did not permit the claimant to join the business after the fire in Shop NO.5613 Gandhi Market Sadar Bazar, Delhi on 16.04.1990 and did not serve any formal notice upon the claimant for dissolution of the firm. The notice dated 15.07.1990 which is written in the hand of the respondent was never duly served upon the claimant. The subsequent conduct of the respondent confirms the fact that the respondent used the sales tax license of the firm M/s. Kirpal Singh Wazir Singh and inducted his own wife and brother Surender Singh in the said shop to do business under a different name and pretended that the other members of his family got the tenanted premises rebuilt from the landlord and took the same on rent from the landlord and took the plea that the respondent started his business from scratch from 01.01.1991 onwards. This was only a device to completely oust the claimant from the business and deprive the claimant of his right in the business and his entitlement to his share. The plea of the respondent that from 01.04.1993 the firm M/s. Kirpal Singh Wazir Singh had its business premises at 6666 Kothi Memwali Bara Hindu Rao, Delhi goes to show that the firm had not been dissolved till then. On 17.09.2003 the Hon'ble High Court had restrained the respondent from surrendering the sale tax number to the sales tax department besides ordering status quo regarding the possession of the premises of the partnership. Although the respondent's counsel had taken the plea that the respondent is not in possession of the partnership premises, the

fact remains that the partnership premises at 5613 was under the tenancy of both the partners namely claimant and the respondent and the said tenancy was never formally surrendered and Surender Singh and the respondent's wife could not have been inducted in the premises without the collusion and connivance of the respondent himself.

184. From the above, it would be clear that there was never dissolution of the firm prior to the filing of the suit no.2792/1996 by the claimant in the Hon'ble High Court.

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190. The claimant's case is that the respondent has been solely handling the business in collusion with his other brothers since 28.09.1988 to the exclusion of the claimant. The claimant had suffered heart attack and was thereafter not able to join the business. To win the confidence of the claimant, the respondent assured the claimant that he would be paying a monthly sum to the claimant for household expenditure. However, the respondent started frittering away the assets of the firm in collusion with his brothers. The respondent manipulated the books of accounts and showed the fictitious amount to the credit of his mother and brother. The respondent even stopped paying monthly expenses to the claimant on the plea that the partnership is not doing business well. At this stage the claimant's son Paramjit Singh had started attending to the partnership firm business and pointed out the misdeeds of the respondent who was indulging in selling the goods under forged and bogus receipts and transferred the assets by adopting illegal tricks. Meanwhile on 16.04.1990 fire broke out in Gandhi Market as a result of which there was partial loss of structure. However, valuable basement of premises no. 5613 was completely saved from fire including the stocks, goods lying in the basement. The records of the firm were lying at the residence of 6666 Koti Mem of the respondent and thus not destroyed. The respondent even deposited the sales tax on 24.09.1990 and income tax return was also filed on 29.08.1991. The premises was reconstructed by July, 1990. The partnership was resumed in the beginning of August, 1990. Moreover, goods lying in godown no. 2327, Chaudhary Market, were also brought into the shop in the beginning of 1990. Further the two telephone nos. 514121 and 512953 were also reinstalled in first half of August, 1990. The claimant however could not attend to the business of the partnership from September, 1990 and thereafter the claimant wanted to attend the shop, but the respondent did not permit the claimant to do so. The claimant did not proceed against the respondent at that time as the respondent took the excuse of the marriage of his daughter and also assured the claimant to account for the correct profit of Rs.5,000/- per day and make payment to the claimant. The respondent however did not keep his assurances. The claimant had to file suit in the High Court of Delhi and the local commissioner was appointed vide order dated 27.07.1993. The local commissioner visited the shop on 28.07.1993 and the respondent ran away from the business premises. The local commissioner submitted his report on

03.08.1993. In the meanwhile the respondent had moved an application for shifting business premises to 6666 Kothi Mem Bara Hindu Rao to which the claimant had raised objection. On 14.09.1993 the respondent moved another application with Sales Tax Officer for cancellation of registration of the partnership firm with Sales Tax Department. The claimant had to file application before the High Court in this regard and the High Court vide order dated 07.09.1993 restrained the respondent from surrendering sales tax number and directed the respondent to maintain status quo regarding partnership premises and the business.

191. The report of the local commissioner dated 03.08.1993 shows the presence of the respondent and his two brothers Sh. Surender Singh and Sh. Avtar Singh at the shop. The respondent posed that he had no link with the plaintiff (claimant) and even refused to produce the books of the accounts and the stock registers as demanded by the local commissioner and did not give any satisfactory reply to the local commissioner as to where the stock register and the books of accounts were lying."

These factual findings do not call for any interference, as rightly held by the Single Judge.

10. Once the Court upholds the finding that the firm was dissolved in January, 1997, the question of rendition of accounts arises. The claim of the respondent was for Rs.100 crores, on the basis that the firm was earning a profit of Rs.5,000/- per day of which the respondent was entitled to 50%. The Arbitrator notes the statement of volume of business as under:

Financial Year Sales Profits Stocks at the end of FY year

1979-80	943,455.64	31,253.00	166,938.25
1980-81	939,777.45	34,119.00	185,770.54
1981-82	868,694.04	40,207.48	293,971.69
1982-83	936,244.40	41,841.00	260,555.83
1983-84	916,089.99	43,600.00	244,522.35
1984-85	945,609.34	45,439.00	231,350.36
1985-86	382,842.84	61,138.00	198,515.00
1986-87	990,545.31	63,170.00	214,370.12
1987-88	10,51,322.75	63,983.00	162,947.83
1988-89	10,77,723.09	63,975.00	215,134.94
1989-90	741,768.94	29,591.00	160,984.55

11. The Arbitrator came to the conclusion that the average profits could be taken

as Rs.2 lakhs per year. When considering the average profits of the firm from 1990 to 1996, it needs to be borne in mind that the business of the firm had flourished and increased. Though profit as per books was of Rs.80,000/- to Rs.90,000/- per annum, a number of properties were purchased and added. Both families were dependent on the income of the firm and were well off. Properties were also purchased in individual names. Thus, the Arbitrator took a figure of Rs. 2 lakhs per year as the average profits and determined the share of the Respondent as Rs. 1 lakh per year. It is obvious that the amount qualified is an estimate, albeit on a reasonable basis. On this count, the Arbitrator awarded Rs. 6,41,666/- for Claim no. 2. Further, the Arbitrator gave a valuation of Rs.1 lakh to the goodwill of the firm, which is not unreasonable.

12. The second aspect that has weighed with the Arbitrator is the value of the tenancy rights in Sadar Bazaar. The Arbitrator came to the factual conclusion that the tenancy of this property was acquired several decades ago. The said tenancy had a commercial value and considering the value of the shop in Sadar Bazaar, even a "thadi" has a huge amount of value. The Arbitrator values the tenancy rights in the shop as being Rs. 9 lakhs and 50% share of the Respondent being Rs.4.5 lakhs.

13. The Arbitrator thereafter awards a sum of Rs.5 lakhs as costs in the proceedings. The Arbitrator rejected the counter claim of the appellant. Thus, the operative portion of the award, in respect of costs reads as under: "Towards cost & compensation for defending the frivolous suits/proceedings:

According to the respondent since May 1993, the Respondent is defending the suits, applications filed by the Claimant and had also appeared in the arbitration proceedings before Hon"ble Mr. Justice N.C. Kocchar (Retd), Sole Arbitrator. The Respondent is out of business since the year 1993 on account of the perpetual harassment, torture, mental agony and tension caused by the Claimant. The Respondent assess the damage on this account to the tune of Rs.5.00 lacs, which the Claimant is liable to pay to the Respondent"

However, while computing the amounts awarded in favour of the respondent, the Arbitrator directed payment of the following sums:

Final relief.

i. Claim No. Allowed dissolution of the firm w.e.f. January, 1997

ii. Claim No.2 Rs.6,41,666/-

iii. Claim No.3 Rs.4,50,000/-

iv. Claim N0.4 @9% p.a. w.e.f. January, 1997.

v. Claim N0.5 Rs.5,00,000/-

Total Rs.15,91,666/-

vi. Stamp Duty Rs.1,600/-

Grand Total Rs.15,93,266/-

14. This is not a case where the findings of the Arbitrator are based on no evidence or that the Arbitrator has ignored vital evidence or that the Arbitrator has taken extraneous circumstances into account. The findings of the Arbitrator on the two aspects are neither perverse nor contrary to law and the judgement of the Single Judge upholding the award substantially cannot be faulted with. The Court, in an objection petition, is not sitting in appeal. However, on interest on the amount of costs there is a contradiction between para 281 and the sum finally awarded. The arbitrator did not contemplate awarding of costs with interest in paragraph 281. So the award deserves modification on this aspect. The other aspect before this Court is that quantum of costs of Rs. 5 lakhs. The only issue that this Court wishes to look at is as to whether the amount of Rs. 5 lakhs is on the higher side when the total awarded amount on the two main claims is to the tune of Rs. 11 lakhs. The respondent's initial claim was for Rs. 1 crore. The amount, thus, quantified requires some modification. We would reduce the costs to Rs. 3.50 lakhs.

15. We have also considered circumstances in which both the appellant and respondent have unfortunately landed themselves into. A family dispute has prolonged for more than 25 years, resulting in extreme emotional and financial suffering as also enormous acrimony. This was apparent when the appeal was listed before this Court on various dates, as wife and daughters of the appellant (now deceased) and the respondent have been present in person. These are factors which have prompted us to interfere in respect of the costs.

16. It is no longer in doubt that interest can be awarded on costs, despite the amendment to Section 35(3) of the Code of Civil Procedure, 1908 as held in *Uttar Pradesh Cooperative Federation Limited v. Three Circles* (2009) 10 SCC 374. However, keeping in mind the totality of facts in the present case and considering that the dispute is within the family, this Court modifies the rate of interest to simple interest @ 6% per annum with effect from January, 1997, and the costs awarded shall be modified to Rs. 3.5 lakhs. While doing so, we have kept in mind the social and economic circumstances of the appellant who is a widow.

17. Accordingly, the total sum payable would be claims number 2 and 3, with 6% simple interest for a period of 20 years per annum with effect from January 1997 to January 2017, which is determined as under:

Principal Amount Rs.6,41,666 (Claim No. 2) + Rs. 4,50,000 (Claim No. 3) = Rs.10,91,666

Interest due and payable from January, 1997 to January, 2017 (period of 20 years) Interest per annum = Rs.65,499.96 Interest (for 20 years) - Rs. 65,499.96 x 20 = Rs. 13,09,999

Award = Principal + Interest Rs. 10,91,666 + Rs. 13,09,999 = Rs.24,01,665/-

Award + Costs (of Rs. 3,50,000) Rs. 24,01,665 + Rs. 3,50,000

Total sum payable Rs.27,51,665/-

The interest amount has been calculated only till January 2017 as the interest accrued on the sum deposited lying with the Registrar General of this Court is being released in favour of the Respondent.

18. With the above modification, the award dated 09th September, 2016 is upheld. The amount lying deposited with this Court in the FDR i.e., Rs. 25,00,000/- would be released to the respondent along with the interest earned thereon. Additionally, the appellant shall pay to the respondent the balance amount of Rs. 2,51,665/- within a period of 4 weeks, failing which interest @ 10% from January, 2017 till payment is made would be payable.

19. Appeal is disposed of in the above terms. No order as to costs.