

A SUPER DIAMOND TOOLS & ORS.

v.

K. MOHAN RAO

(Civil Appeal No. 6216 of 2012)

B MARCH 02, 2023

[S. RAVINDRA BHAT AND DIPANKAR DATTA, JJ.]

C *Arbitration and Conciliation Act, 1996: s. 34 – Setting aside of arbitral award – Dispute regarding partnership accounts between the parties referred to arbitration – As a counter claim, the surviving partner of the appellant firm alleged that the respondent had falsified accounts and siphoned huge sums of money – Arbitrator concluded that the respondent was guilty of fraud – Application by the respondent for setting aside of award – Rejected by Single Judge of the High Court – Division Bench of the High Court held arbitrator’s method of proceeding backwards and looking at accounts of 21 years was unsustainable and set aside the award on the ground of public policy – On appeal, held: Appellant had knowledge of the alleged fraud, but made no attempt to positively enforce his claim for more than 3 years from the date of such knowledge – Further, no specific averments on allegation of fraud*
D *– Thus, no error by Division Bench of High Court in setting aside the award.*

Limitation Act, 1963 – s. 17 – Effect of fraud or mistake – Start of period of limitation – Held: s. 17 is an exception to the rule that the period of limitation commences from the date of cause of action – However, where the condition contemplated under the provision exists (such as fraud), then subject to proof based on specific averments, date when limitation begins to be seen is date of knowledge of the plaintiff.

G *Vallabh Glass Works Ltd. v. Union of India [1984] 3 SCR 180; Commissioner of Sales Tax, UP v. Auriaya Chambers of Commerce, Allahabad [1986] 2 SCR 430; R. Radha Bai & Ors. v. P. Ashok Kumar & Ors. [2018] 12 SCR 143 – relied on.*

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Case Law Reference

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[1984] 3 SCR 180	relied on	Para 10
[1986] 2 SCR 430	relied on	Para 10
[2018] 12 SCR 143	relied on	Para 10

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6216 of 2012. B

From the Judgment and Order dated 29.09.2008 of the High Court of Madras in OSA No. 67 of 2007.

R. Anand Padmanabhan, Pramod Dayal, Advs. for the Appellants. C

P. I. Jose, Adv. for the Respondent.

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.

1. The present appeal questions an order of the Madras High Court which upset the findings of a learned single judge of that Court. The single judge had rejected the respondent's petition under Section 34 of the Arbitration and Conciliation Act, 1996; the Division Bench set aside the single judge's order and appointed a fresh arbitrator. D

2. The award in this case was made, pursuant to a reference by the Madras High Court on 28.08.1997. The dispute between the parties was in respect of partnership accounts. The surviving partner of the appellant alleged that the first respondent was guilty of falsification of accounts and that he had siphoned off huge sums of money. The parties had initiated a dialogue with the idea of settling the dispute amicably. However, there was no resolution. As a result, the respondent approached the High Court under Section 11 of the Act which culminated in the reference. E F

3. The arbitral tribunal comprising of a sole arbitrator examined the pleadings and evidence and concluded that the first respondent was guilty as alleged. The appellant, interestingly, did not prefer a claim, and instead made a counter claim in the course of the arbitration proceedings, initiated at the behest of the first respondent. The arbitral tribunal, on the basis of its findings held that a total sum of ₹ 76,34,423.86/- had to be duly accounted after deducting the first respondent's share. The amount was ₹ 53,87,664.40/-. G H

A 4. The arbitrator also directed payment of interest @ 18% p.a. from 31.01.1994 till date of commencement of arbitration and future interest at the same rate. The first respondent's application under Section 34 was rejected by the single judge. He, therefore, approached the Division Bench, which by the impugned order, held that the award could not be sustained as it was contrary to public policy. To so conclude, the
B Division Bench was of the opinion that the method adopted by the arbitrator in proceeding backwards as it were, and taking accounts for a period of 21 years, was unsustainable.

 5. This Court has heard counsel for the parties. Mr. R. Anand Padmanabhan, counsel on behalf of the appellant submitted that both
C parties had agreed to the appointment of a neutral auditor. The parties were also assisted by their own auditor and on the basis of unanimity the method adopted towards accounting was arrived at. This material was considered objectively by the tribunal, which arrived at the finding that the first respondent was guilty of firstly, over-invoicing and secondly,
D trading surreptitiously, which resulted in loss to the partnership firm. On the basis of this finding and the agreed neutral auditor's calculations, the figures were accepted by the tribunal. It was argued that in these circumstances, the first respondent could not have contended that the award was contrary to public policy.

E 6. Learned counsel also relied on Section 17 of the Limitation Act, 1963 to urge that fraud unravels all, and that in this case since fraud was alleged in the counter claim and found by the arbitrator, fault could not have been found with the award. Therefore, there was no error of law which amounted to its being contrary to public policy.

F 7. Mr. Jose, learned counsel appearing for the first respondent, pointed out that the appellant, in fact, did not seek a reference; rather it was the first respondent who made that claim. More importantly, it was urged that in the facts of this case, the appellant had knowledge of the alleged over-invoicing and other malpractices, which resulted in the ouster of the first respondent from the partnership firm in the year 1993.
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 8. He relied upon the correspondence between the parties and argued that the demand for reconciliation was made in the second week of February, 1994. Therefore, when the reference was made in 1997 and when the claim was made, the appellant only then, preferred a counter claim in December, 1997. It was therefore, submitted that even on an
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application of the principle underlying Section 17, the claim was time barred. A

9. The impugned order was based entirely upon the fact that the award sought to crystallize liabilities based on working of the accounts for 21 years. The Division Bench, further, noticed that the arbitrator was appointed, pursuant to which the appellant made a counter claim. B
The record shows that in terms of the averments in the counter claim, the first respondent had stopped functioning as a partner in December, 1993. Although it appears that the parting of ways took place in early January, 1994, the fact remains that between that time and December, 1997 there was no attempt on the part of the appellant to positively C
enforce his claim. Furthermore, even the pleadings in the counter claim are not specific with respect to the allegations of fraud. The ground on which the counter claim ultimately succeeded was over-invoicing on the one hand and diversion of raw material, such as diamonds, into the respondent's wife's business which resulted in denuding the partnership firm's profit. D

10. The allegations in the counter claim are only to the effect that the first respondent set up a firm within 6 months of the leaving the appellant's firm. Section 17 of the Limitation Act is an exception to the rule that the period of limitation commences from the date of cause of action. However, where the condition contemplated under Section 17 - E
such as fraud exists, then subject to proof of fraud (based on specific averments) the date when limitation begins to be seen is date of knowledge of the plaintiff. The principle consistently followed by this Court in its past decisions such as *Shri Vallabh Glass Works Ltd. v. Union of India*¹ and *Commissioner of Sales Tax, UP v. Auriaya Chambers of Commerce, Allahabad*² is that the date of knowledge of fraud - or such F
misfeasance - is the starting point for limitation. Further, it has been held by this Court in *R. Radha Bai & Ors. v. P. Ashok Kumar & Ors.*³ that Section 17 of the Limitation Act:

“does not extend or break the limitation period. It only postpones or defers the limitation period. This is evident from the phrase “The period of limitation shall not begin to run.” G

¹ [1984] 3 SCR 180

² [1986] 2 SCR 430

³ [2018] 12 SCR 143

- A 11. Having regard to the fact that the appellant (through its surviving partner) made its claim beyond 3 years from the date of his knowledge of the alleged fraud, this Court is of the opinion that the impugned order, to the extent it sets aside the award, although in an appeal, is not in error of law.
- B 12. For the above reasons, the appeal fails and is accordingly dismissed. Pending application(s), if any, are disposed of.

Nidhi Jain
(Assisted by : Veda Singh, LCRA)

Appeal dismissed.