Smt. Indu Kochar and Others Vs Smt. Sharad Maheswari and Others

Court: Calcutta High Court

Date of Decision: Sept. 5, 2007

Acts Referred: Arbitration Act, 1940 â€" Section 11, 12, 20, 21, 28
Limitation Act, 1963 â€" Section 18, 27, 3
Partnership Act, 1932 â€" Section 42, 42(c), 46, 48

Citation: 112 CWN 1

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Tilok Bose, S.S. Bose and Rudraman Bhattacharjee, for the Appellant; Jayanta Mitra, Molay Ghosh, Pooja Das Chowdhury, Pratap Chatterjee, Samrat Sen, Paritosh Sinha and S.N. Pandey, for the Respondent

Final Decision: Allowed

Judgement

Sanjib Banerjee, J.
The heirs of two partners of a firm are locked in battle not so much as to how the assets of the firm are to be divided,

but as to whether they can be divided. The issue of arbitrability has, unfortunately, remained pending for over a dozen years. Mohanlal Kochar and

Mohanlal Maheswari were the only partners of firm Bharat Industries and Commercial Corporation immediately prior to Maheswari''s death on

December 17, 1984. The partnership deed of December 23, 1972 contains an arbitration agreement to the following effect:

13. That if any dispute or difference arises between the partners or between any one of them and the legal representatives of the other or, others

or between their respective legal representatives in connection with the business of the partnership or regarding the construction of the partnership

deed during or after the partnership it shall be referred to the arbitration of two Arbitrators one to be appointed by each partners whose decision

shall be conclusive, and binding on all parties and such arbitration shall be under the Indian Arbitration Act 1940 and any statutory modification

thereof in force for the time being.

2. Heirs Kochar seek a reference and heirs Maheswari have dug in their heels resisting arbitration.

3. Prior to partner Maheswari''s death, a reference was made under the same arbitration agreement by partner Kochar but such reference appears

to have been abandoned. Such earlier reference was in respect of the manner of conduct of the partnership business. Following partner

Maheswari''s death, an agreement was entered into by partner Kochar with the Maheswari heirs on February 4, 1985 for winding up the affairs of

the firm. Such agreement, however, stood cancelled on September 19, 1985.

4. Suit No. 558 of 1985 was instituted before this Court by Chandra Prakash Maheswari against the firm, partner Kochar and the Maheswari

heirs seeking a decree of about Rs. 2 lakh on account of money said to be due from the firm. Suit No. 215 of 1986 was instituted by Corporation

Bank against the firm, partner Kochar and the Maheswari heirs seeking a decree in excess of Rs. 11 lakh and claiming to be the mortgagor in

respect of the most valuable asset of the firm, an immoveable property at premises No. 8, Barrackpore Trunk Road, Calcutta. The bank''s suit has

now been transferred to the appropriate Debts Recovery Tribunal following the enactment of the Recovery of Debts due to Banks and Financial

Institutions Act, 1993.

5. On July 17, 1985, while the bank''s suit still remained in this Court, a common order was passed in the two suits by which joint receivers were

directed to take possession of all assets of the firm and also to carry on business of the firm with the existing employees and pay the employees

from out of available funds and the accruals from the business. In appeal from such order, the joint receivers were directed not to carry on any

business but the part of the order material for the present proceedings, of the joint receivers retaining possession and control of the assets of the

firm, was continued. It is not in dispute that whatever assets of the firm that may still remain are in the possession and control of the joint receivers.

6. In February 1991, the Maheswari heirs filed their written statement in the bank''s suit. They alleged that the firm''s books had not been audited

since 1981-82 and that their demands therefore were disregarded by partner Kochar. They alleged that they would be in a position to liquidate the

liabilities of the firm if the assets of the firm were made over to them.

7. Partner Kochar died on March 6, 1992. A day short of three years thereafter, the Kochar heirs instituted the present proceedings u/s 20 of the

Arbitration Act, 1940 seeking filing of the arbitration agreement contained in the deed of 1972 and for an order of reference to be made in

accordance therewith. The disputes enumerated at paragraph 32 of the petition relate, inter alia, to the assets and funds of the firm. The immediate

reason for heirs Kochar to seek a reference was their discovery allegedly on or about February 23, 1995 that heirs Maheswari were taking steps

for release of the title deeds of the B.T. Road property from the bank.

8. The petition is resisted primarily on two grounds. Heirs Maheswari claim that upon the petitioners'' predecessor-in-interest having made a

reference in 1984 alleging misconduct in the business of the firm by partner Maheswari and, subsequently, not pursuing such reference, the present

claim for arbitration cannot be maintained. The second, and more vehement, ground urged is that the claim in the arbitration is hopelessly barred by

the laws of limitation as, on the date of presentation of the petition, and even if there were to be a distinction between a claim in arbitration and a

claim for arbitration, the claim for arbitration stood condemned by the laws of limitation.

9. The Maheswari heirs assert that the Kochars conveniently chose the date of February 23, 1995, about a fortnight before this petition was

presented, to give an impression of the immediacy of the need for a reference. The respondents suggest that the underlying charge in the petition is

of the respondents'' seeking to usurp the assets of the firm and the valuable land at B.T. Road. The respondents seek to demonstrate that a Kochar

allegation of the Maheswaris seeking to take possession of the B.T. Road property is found in a document dated more than three years prior to the

institution of these proceedings. The respondents assert that the date of accrual of the petitioners'' alleged cause of action could not be the date of

death of partner Kochar and, if a person had a right to sue but died before he could sue, the heirs would be entitled only to the residuary period

under the laws of limitation and upon the death of the original person, the period of limitation would not begin afresh.

10. The respondents refer to Section 42 of the Partnership Act, 1932 to suggest that upon the death of any partner in a two-partner firm, the firm

would stand dissolved by operation of law. The Maheswaris rely on Article 5 of the Schedule to the Limitation Act, 1963 to suggest that the

period for seeking accounts had long expired following the death of partner Maheswari. According to the respondents, partner Kochar could not

have asked for accounts at any time after three years of partner Mashewari''s death, and in the absence of a claim for accounts, neither partner

Kochar nor, upon his death, his heirs could seek distribution of the assets of the firm. The respondents rely on the legal fiction found in the

Partnership Act that upon the dissolution of a firm, all its assets are to be treated as moveable property irrespective of the actual character of such

assets.

11. The respondents refer to the nature of disputes enumerated in the petition and the averments contained therein to suggest that, on the

petitioners'' showing, disputes arose as to the firm, its assets and accounts immediately after the death of partner Maheswari. The respondents

point out that the petitioners'' ""right to apply"" arose through their predecessor-in-interest on partner Maheswari''s death in December, 1984 and

there is nothing found in the petition as to any subsequent disability or inability for the period under Article 5 to stand extended for the claim in

arbitration or for the period under Article 137 to be enlarged for the claim for arbitration.

12. The Kochars have sought to counter the ground of limitation urged by the Maheswaris with the argument that the period of limitation under

Article 5 would apply in a case where the assets of a dissolved firm remain with an erstwhile partner of the firm or his heirs. In this case, the

Kochars submit, the assets are in the possession and control of third parties and the right to receive a share of the assets would arise upon the

assets returning to the dissolved but not yet wound up firm or its erstwhile partners or their heirs. The Kochars suggest that in view of the

appointment of joint receivers in the suits, who are admittedly in possession of the firm''s assets, the period of limitation under Article 5 has

remained suspended. In any event, the Kochars urge that upon an arguable defence to the ground of limitation as to the claim in arbitration being

shown, the court would not proceed to determine the matter conclusively in a petition u/s 20 of the 1940 Act but would leave the parties to their

bargain for having their disputes adjudicated in the agreed, alternate forum.

13. The petitioners cite Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, In that case the appellant before the Supreme Court

was awarded a contract for construction of houses by the Delhi Development Authority. The work was completed on April 2, 1980. Between

February, 1983 and December, 1985, the appellant issued written requests to the employer to finalise his bills. On September 4, 1985 the

contractor demanded release of the security and sought a reference of the disputes on account of non-payment of bills, to arbitration. In January,

1986 the contractor instituted proceedings u/s 20 of the 1940 Act. A Single Judge of the Delhi High Court dismissed the petition and such order

was upheld in appeal. The Supreme Court negated the ground of limitation on which Delhi Development Authority had resisted the Section 20

proceedings on the reasoning that no final bill had been prepared when the contractor claimed payment on February 28, 1983 and it was the

assertion of the claim for arbitration on February 28, 1983 that was reckoned to be the date for the period of three years in terms of Article 137 of

the Schedule to the Limitation Act to begin to run.

14. The next judgment relied upon by the petitioners is reported at Union of India (UOI) and Another Vs. L.K. Ahuja and Co., In paragraph 6 Of

the report, the distinction between the claim in arbitration and the claim for arbitration is found:

6. It appears that these questions were discussed in the decision of the Calcutta High Court in Jiwnani Engineering Works Pvt. Ltd. Vs. Union of

India (UOI), where one of us (Sabyasachi Mukharji, J.) was a party and which held after discussing all these authorities that the question whether

the claim sought to be raised was barred by limitation or not, was not relevant for an order u/s 20 of the Act. Therefore, there are two aspects.

One is whether the claim made in the arbitration is barred by limitation under the relevant provisions of the Limitation Act and secondly, whether

the claim made for application u/s 20 is barred. In order to be a valid claim for reference u/s 20 of the Arbitration Act, 1940, it is necessary that

there should be an arbitration agreement and secondly differences must arise to which the agreement in question applied and, thirdly, that must be

within time as stipulated in Section 20 of the Act.

15. At paragraph 8 of the report the Supreme Court cautioned against the confusion in two aspects of limitation. It was held that whether there

was any valid claim for reference u/s 20 of the Act, is for the Court receiving the Section 20 proceedings to decide. But whether the claim to be

adjudicated by the arbitrator was barred by lapse of time, would be a decision in the domain of the arbitrator unless on admitted facts it is found

that at the time of making an order u/s 20 of the 1940 Act, such claim would be ex facie barred by limitation.

16. The next judgment cited on behalf of the petitioners is reported at Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others,

where it has been held that the right to apply u/s 20 accrues when the dispute in fact arises, that is when the parties failed to resolve the matter

themselves. In the Singhania case, a partnership firm was formed by three brothers which took in a considerable amount of the family-owned

immoveable properties. In 1987 the firm was dissolved under a deed of family settlement and there was an arbitration clause in such writing.

Disputes arose as to the division of assets involved in the firm and in February, 1988, the three groups appointed nominees to work out an

arrangement. Such attempt failed and in May, 1992 the appellants before the Supreme Court instituted proceedings u/s 20 of the 1940 Act.

Limitation was the principal ground urged to resist the reference. The Bombay High Court upheld the ground of limitation but the Supreme Court,

on construction of the letters exchanged between the parties late in 1989, held that the period of three years applicable under Article 137 had not

expired before the petition u/s 20 of the 1940 Act was filed.

17. The petitioners suggest that Article 5 of the Schedule to the Limitation Act would not apply in the instant case and, even if it did, for assets that

are beyond the control of the erstwhile partners of the firm or their heirs, the time will stand extended till after the assets fall in. In support of such

contention, the judgment reported at Yarlagadda China Rattayya and Another Vs. Donepudi Venkataramayya and Others, is first placed. In such

case, Article 106 of the Schedule to the Limitation Act, 1908 which is in pari materia with Article 5 of the present Limitation Act was considered.

The relevant discussion in the report appears at paragraph 86 :

(86) We will turn our attention to the appeal of the 6th defendant. The main question that falls to be determined is whether the claim of the 6th

defendant was barred by limitation. This in its turn depends upon Art 106 of the Limitation Act. Article 106 provides a period of three years for

the suit for an account and a share of the profits of a dissolved partnership, the starting point being the date of dissolution. The trial court accepted

the contention of the plaintiff that a claim to a share in the profits of the decree in his favour pertains to a share in partnership assets of the firm

which was dissolved and therefore comes within the purview of Article 106. It was of opinion that its view was substantiated by the decision in

Gonala Chetty v. Vijaraghavachariar, ILR 45 Mad 378 We do not think that this pronouncement of the Privy Council is in any way injurious to the

6th defendant.

18. It is no doubt true it is stated there that if no accounts of a dissolved partnership had been taken and ""there is no contest that the partners have

squared up"" then the remedy open to any of the partners was only to have the accounts of the partnership taken when an asset belonging to the

partnership had been realised. But it is also equally clear from that judgment that if at the time of settlement of accounts, an asset was not taken into

consideration such an asset ought to be divided between the partners when it falls in.

19. Here, it is nobody''s case that when the accounts were taken the decree to be passed in the present litigation was in the contemplation of the

parties and it could not be in the nature of things because the lease was determined long after the taking of accounts. So, Gonala Chetty v.

Vijaraghavachariar, ILR 45 Mad 378 does not in any way put the 601 defendant out of court in regard to his claim. It was faintly argued for the

plaintiff that in view of the fact that the award passed by the 2nd defendant was set aside ultimately by the High Court of Orissa the accounts must

be deemed not to have been settled. Firstly, this point was not taken at any time before, secondly, the attitude adopted by the plaintiff till today is

inconsistent with such a plea.

20. Throughout the relevant period, he was prepared to abide by the award as could be seen from Ex. B-142. On several occasions, he requested

that a decree should be passed in terms of the award. Having induced the other party to believe that accounts have been settled so far as they are

concerned and made him act on that basis that it is not open to the plaintiff to turn round and say that there was no settlement of accounts. In these

circumstances, it is too late for him to resort to a change of front and contend that there has been no settlement of accounts so as to bring the case

within the scope of Gonala Chetty v. Vijaraghavachariar, ILR 45 Mad 378

21. The Kochars suggest that till the debts and liabilities of the firm are fully paid off, no partner can claim any particular property nor claim any

specific share or interest in any property of the firm. According to them, the bank and at least one other creditor, the plaintiff in Suit No. 558 of

1985, have live claims and the question of taking accounts and properties being divided, arise only upon such creditors'' claims being satisfied out

of the firm''s assets. The Kochars insist that an action for accounts may be premature at this stage as it may be a meaningless exercise till the

creditors'' dues are ascertained and paid off. The petitioners submit that had it not. been for their discovery of the Maheswaris'' surreptitious

attempt to obtain title deeds of the B.T. Road property from the bank, the petitioners would have waited longer before seeking distribution of the

firm''s assets. The petitioners also urge that as to whether the Maheswaris would be entitled to obtain the title deeds of the B.T. Road property

from the bank would be a dispute covered by the arbitration agreement and is one of the ancillary matters that can be decided in the reference that

they seek.

22. The petitioners refer to the Division Bench judgment of the Allahabad High Court reported at Narendra Bahadur Singh Vs. Chief Inspector of

Stamps, U.P., where the post dissolution rights of erstwhile partners of a firm fell for consideration. The court discussed the provisions of Section

46 of the Partnership Act, 1932 and the right of every partner against all other partners to have the property of the firm applied in payment of its

debts and liabilities and to have the surplus distributed among the partners according to their shares. Section 48 of the Act as to the mode of

settlement of accounts between the partners, was also noticed and the right of a partner to get the value of his share in the net assets of the firm as

on the date of dissolution was recognised. The petitioners rely on paragraph 18 of the judgment:

18. From the provisions of the Partnership Act noted above, it will be clear that a mere dissolution of a firm does not bring about a complete

extinction of the firm itself. The firm, even though for the limited purposes mentioned in the relevant sections, continues to exist until its affairs are

finally and completely wound up. It is only after the dissolution of the firm that its affairs can be wound up at the instance of any of the partners. Till

the debts and liabilities of the firm have been fully paid off no partner can claim any particular property as his own nor can he claim that he has any

specific share or interest in any property of the firm. It is only when after payment of all the debts and liabilities of the firm there is a surplus left that

a partner can have the surplus distributed according to his rights. The accounts of the firm as between the partners have to be settled, subject to

agreement by them, in accordance with the rules stated in Section 48. The partners of a firm presumably are not co-owners of ""the property of the

firm"" or its assets. This to my mind is adumbrated by the decision in Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, In

that case the following observation of Cornelious, J. in Ajudhia Pershad Ram Pershad vs. Sham Sunder, AIR 1947 Lah 13 (FB) was expressly

approved in paragraph 6 of the judgment:

... It is obvious that the Act (Partnership Act) contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement

of accounts between partners upon dissolution of the firm and it will therefore be correct to say that for the purposes of the Indian Partnership Act

and irrespective of any mutual agreement between the partners the share of each partner is in the words of Lindley :

his proportion of the partnership assets after they have been all realised and converted into money and all the partnership debts and liabilities have

been paid and discharged.

23. What the petitioners assert is that dissolution does not imply that the partnership firm and its assets and everything relating thereto come to an

end. The petitioners insist that dissolution is the beginning of another stage, that of winding up the firm for it to ultimately die.

24. The petitioners rely on a judgment rendered in a second appeal reported at 1971(1) All LJ 108 (Ram Kumar vs. Kishan Lal Chhotey Lal &

Ors.). The plaintiff in that case brought a suit on the allegation that the defendant Nos. 2 to 6 were members of a joint Hindu family and the first

defendant firm was a joint Hindu family firm owned by the defendant Nos. 2 to 6 which entered into partnership with the plaintiff for purchase and

sale of 400 bags of sugar through a firm of arhatis of Chandpur. The plaintiff alleged to have advanced money for the venture. The arhatis instituted

a suit against the plaintiff and the third defendant to recover the loss suffered by the arhatis for sale of the sugar. The plaintiff brought a suit against

the arhatis where the third defendant was arrayed as a proforma defendant claiming that the arhatis had, in fact, made considerable profit and the

plaintiff and the third defendant were entitled to a share thereof. The third defendant denied being involved in partnership with the plaintiff. The

disputes covered by the two earlier suits were referred to arbitration where it was held that the plaintiff and the third defendant were partners in the

business and that there was loss in the sugar venture. A decree was passed on the basis of the award.

25. The plaintiff thereafter brought the suit in which the second appeal arose claiming that the third defendant was liable for half the loss that the

arhatis were found to have suffered. Such suit was dismissed by the trial court on grounds other than the ground of limitation that was urged. The

lower appellate court upheld the ground of limitation and sustained the order of dismissal of the suit on such count. The first question that arose in

the second appeal was whether the partnership was subsisting when that suit was filed in the year 1959. The Allahabad High Court concluded that

since the partnership was for the single venture of sale of sugar which was completed in 1949, the partnership stood dissolved then. It is the next

question that arose in the matter that is relevant in the present case :

8. The next question which, therefore, arises is: Where the partnership stood dissolved, what would be the period of limitation applicable to the

suit which was filed for recovery of a specified amount, being half of the total investment exclusively made by the plaintiff in the partnership

business. According to the respondent the case was fully covered by Article 106 of the Limitation Act and the limitation could not be extended

beyond three years from the date of the dissolution i.e. 1949 but it appears to me that the present suit does not fall within the ambit of Section 106

of the Limitation Act. It is neither a suit for accounts nor for recovery of share of profits and consequently, the terms of the aforesaid provisions of

the Limitation Act cannot be stretched to cover a suit of this nature. The learned counsel for the respondent submitted that even though it is not

ostensibly a suit for rendition of accounts, the plaintiff being one of the partners allowed the limitation for bringing a suit for rendition of accounts to

run out and his suit even for a share of a particular asset or assets or a particular item would be time-barred. He relied on Gonala Chetty v.

Vijaraghavachariar, ILR 45 Mad 378 for the dictum that where after the dissolution and complete winding up a partnership an asset had escaped

being taken into account a suit could still lie with regard to it but where no accounts had been taken, then the proper remedy for an aggrieved

partner was to bring a suit for accounts of the partnership within the period prescribed by the Limitation Act and in case he failed to do so, the

plaintiffs suit for his share of the asset or assets alleged to have been received by the defendant as debt would also be deemed to be barred by

limitation. The Privy Council case was followed in In Re: Krishnaswami Alias Kittan, in which it was observed that where one of the partners of a

firm was compelled to discharge the whole or more than his share of a partnership debt a suit by him for contribution against his other co-partner

was not maintainable; his remedy was by way of a suit for partnership accounts which must be filed within three years from the date of dissolution.

To the same effect was the decision in Mannilal vs. Narain Das (AIR 1946 Oudh 118). In that case there was no settlement of accounts between

the partners and the suit for accounts had become barred by limitation. It was held that the plaintiff could not claim contribution from the other

partner or his heirs as he had failed to bring the suit for settlement of accounts within the period of limitation. The above decisions on which the

learned counsel for the respondent has placed reliance ruled that where a partner can call upon another partner to render accounts it is imperative

that a suit for accounts must be filed and the suit would be governed by Article 106 of the Limitation Act. There could be no doubt about the

correctness of that proposition and usually the disputes arising out of partnership conform to the pattern of suits contemplated by Article 106 of the

Limitation Act. As I observed at the very outset of my judgment, the present is rather an extraordinary case and its facts are peculiar. Ordinarily,

the only parties who would be concerned with rendition of accounts would be the partners themselves in the business of partnership and such

accounting does not involve the instrumentality of a third party. In the present case the point which has been greatly emphasised by the learned

counsel for the appellant is that it was not possible for the plaintiff to ask for accounts from the defendant No. 3 prior to the decree of the award

(as) the only item of business which formed the subject-matter of the partnership was the sale of 400 bags of sugar which was done through the

commission agency of the arhatis. The plaintiff as well as. Kanti Prakash must be labouring under the impression that the business would have

yielded profit but when the arhatis themselves filed suit No. 519 of 1949 it dawned on the plaintiff that losses were incurred in the partnership

business. This is what immediately induced the plaintiff to bring his own suit No. 4 of 1951 in which Kanti Prakash refused to join as a plaintiff and

had to be arrayed as defendant and in which he categorically denied the factum of partnership itself. I am satisfied that in these circumstances it is

manifest that Ram Kumar Plaintiff could not have brought suit for rendition of accounts against his partner Kanti Prakash. The accounting naturally

depended on material which was in the hands of a third party i.e. arhatis. Until the latter had settled accounts and revealed the position of profits or

losses, any accounting inter se between the partners of the partnership namely the plaintiff and Kanti Prakash was not possible. In my opinion,

therefore, the provision of Article 106 of the Limitation Act cannot be applicable to a suit of this nature, otherwise that would result in grave

injustice. The intention of law could not be to defeat the just claim of a partner who was not in a position to institute a direct suit for rendition of

accounts against his own partner on account of the intervention of a third party through (who) alone the entire partnership business consisting of a

solitary item was carried out. I am, therefore, of the opinion that a claim of this nature could not be covered strictly within the terms of any specific

provision of the Indian Limitation Act in this regard and consequently, it must be deemed to attract the residuary Article 120 of the Limitation Act,

which provides that a suit for which no period of limitation is provided elsewhere must be brought within six years from the date when the right to

sue accrues. Sri K. C. Saxena''s contention is that the right to sue in the present case accrued on 18-08-1858 when the appeals arising out of the

award were decided or at the worst on the 12th July, 1956, which was the date of the decree passed on the basis of the award. Since the present

suit was filed within six years from that date, it was clearly not barred by limitation.

26. On a parity of reasoning, the Kochars urge, that since the creditors'' actions against the firm in the present case have not been concluded, it is

only upon the determination of such creditors'' claims that accounts of the firm can finally be sought and taken between the parties and, thereafter,

the residuary assets distributed. The point that is canvassed is that Article 5 envisages a situation where there is no impediment to accounts being

taken.

27. The judgments reported at Banarsi Das Vs. Seth Kanshi Ram and Others, and AIR 1927 70 (Privy Council) have been placed by the

petitioners. In the Banarsi Das case, the plaintiff sought a declaration that the partnership firm stood dissolved on May 13, 1944 and, alternatively,

for an order of dissolution if the court was of the opinion that the firm was not dissolved, Such suit was instituted on October 7, 1948. The suit was

decreed for declaration that the firm stood dissolved with effect from May 13, 1944 and the shares of the partners were declared. One of the

defendants was held liable to render accounts to the plaintiff and the other defendants, and a commissioner was appointed for the purpose of

winding up the affairs of the firm. Appeals were preferred by some of the defendant partners before the Allahabad High Court which upheld the

declaration that the firm stood dissolved on May 13, 1944 but on a reading of Article 106 (of the old Limitation Act, held that the claims for

accounts and share of profits were time-barred as was the claim for distribution of assets of the dissolved firm.

28. Before the Supreme Court the first point that was pressed was that under the Partnership Act, the partners were entitled to have the business

of a firm wound up even though a suit for accounts may be barred under Article 106. Though such question was left unanswered in the context of

the judgment rendered by the Supreme Court, it was held that the High Court erred in upsetting the other parts of the decree on the ground of

limitation. The Kochars rely on such interpretation of Article 106 (Article 5 of the later Act) to submit that it is not as open and shut a case as the

Maheswaris make it out to be on the basis of a plain reading of Article 5. The Kochars emphasise that the suit in the Banarsi Das case was

instituted on October 7, 1948 for a declaration that the firm stood dissolved on May 13, 1944 and despite such declaration, the partners'' shares

were declared and accounts were directed to be taken in an action instituted more than four years after the date of dissolution.

29. Indeed, despite the dissolution having been accepted in the Banarsi Das case to have been four years prior to the suit being instituted, the

Supreme Court found the High Court to have been in error for not permitting the parties to adduce further evidence on the point ""that the suit was

not barred by time because of acknowledgements."" Thus, it would appear that the Supreme Court recognised that the principle in Section 18 of

the Limitation Act, 1963 (Section 19 of the 1908 Act) would apply and the word ""dissolution"" in the third column of the Schedule to the Limitation

Act would not make the date of dissolution sacrosanct while entertaining a claim for accounts beyond the period recognised in Article 5. Section

18 of the Limitation Act is not confined to money claims and acknowledgements in writing in respect of a claim for accounts would also lead to a

fresh period of limitation beginning each acknowledgement.

Paragraphs 15 and 16 of the Banarsi Das judgment, where the Supreme Court laid down the law and restored the entirety of the trial court decree,

need to be seen:

(15) The High Court has overlooked the fact that even upon the argument addressed before it on behalf of Kanshi Ram, the question of limitation

was not one purely of law but was a mixed question of fact and law and, therefore, it was not proper for it to be raised for the first time in

argument. We are satisfied that what the High Court has done has caused prejudice to some of the parties to the suit and on that ground alone, we

would be justified in setting aside its decision. If the High Court felt overwhelmed by the provisions of Section 3 of the Limitation Act, it should at

least have given an opportunity to the parties which supported the decree of the trial court to meet the plea of limitation by amending their

pleadings. After allowing the pleadings to be amended, the High Court should have framed an issue and remitted it for a finding to the trial Court.

Instead of doing so, it has chosen to treat the pleading of one of the defendants as conclusive not only on the question of fact but also on the

question of law and dismissed the suit. It is quite possible that had an opportunity been given to the defendants they could have established, in

addition to proving the dates on which the summonses were served, that the suit was not barred by time because of acknowledgements. In the

course of the discussion, the High Court has said that it was not suggested before it by anyone that the claim was not barred by reason of

acknowledgements. Apparently, no such argument was advanced before it on behalf of the plaintiff and the defendant Banarsi Das because the

counsel were apparently taken by surprise and had no opportunity to obtain instructions on this aspect of the case. We are clearly of opinion that

the High Court was in error in allowing the plea of limitation to be raised before it particularly by defendants who had not even filed a written

statement in the case. We do not think that this was a fit case for permitting an entirely new point to be raised by a non-contesting party to the suit.

(16) In view of our decision on this point, it would follow that the High Court''s decision must be set aside and that of the trial court restored. We

may however, mention that some of the parties including the appellant Banarsi Das and the plaintiff-respondent, Kundan Lal as well as the

defendant-respondent Kanshi Ram were agreeable to certain variations in the decree. But as there were other parties besides them to whom these

variations are not acceptable, we are bound to decide the appeals on merits. For the aforesaid reasons, we allow the appeals of Banarsi Das and

Kundan Lal and restore the decree of the trial court, but make no order as to costs.

30. In the Privy Council case, a partner brought a suit on March 6, 1917 seeking dissolution of the firm, accounts and consequential relief. The

defence raised two points, one that there was a partner other than the parties to the suit; and the second on limitation. The subordinate judge

thought that such other person was a partner, the High Court thought he was not and the Privy Council agreed with the High Court. On the

question of limitation, the subordinate judge was of the view that the partnership had been dissolved considerably more than three years before the

date of the institution of the suit. The High Court found that there was no dissolution prior to the institution of the suit and the Privy Council upheld

such view, holding that by his writ and plaint claiming dissolution, the plaintiff had intimated his will to dissolve the partnership at will. But the Privy

Council made a distinction between dissolution as being cessation of business of the firm and final dissolution which would only occur upon all the

assets of the firm being realised. The discussion leading up to such conclusion runs thus:

That leaves the question of the Limitation Act. In the view of the Subordinate Judge this partnership had been dissolved considerably more than

three years before the date of the institution of the present suit. In their Lordships'' view this was not so; in their view there never had been any

dissolution until the plaintiff, by the present suit, by his writ and plaint claiming dissolution, intimated his will to dissolve which of itself is enough to

put an end to a partnership at will. Their Lordships think that the Judges of the High Court were right. It is clear that up to some stage in the

previous suit the parties were urging, and successfully urging, that the partnership was still subsisting. On one view that may be said to be the case

up to the date of the appeal judgment in 1915, which if so is within the period of limitation; but, even if that view be not taken, there is no definite

date upon which the defendants can put their fingers successfully as a date at which the partnership was dissolved, and, when their Lordships come

to consider the business which lies at the root of the whole matter, it stands in this way: The plaintiff ought at some time or other to recover some

moneys from the other parties. If the partnership was put an end to some years ago his rights arose then and either the parties ought at once to

have contributed such a sum as would make up to him his share of the loss, or they ought to have in some way disposed of the remaining assets

and then met the remainder of the loss by their contributions. But no one at the time suggested this. On the other band they were entitled to say to

the plaintiff:

Until all the assets are realized we cannot tell how much we owe to you, and we claim not to pay you anything until all the assets are realized.

31. If so; for that purpose the partnership went on; it went on, not because it would do any more business, until those assets were realized, the final

dissolution of the partnership could not take place. For this and for the other reasons given by the learned Judges in the High Court their Lordships

are of opinion that their decision was right, and they will humbly advise His Majesty that this appeal be dismissed with costs. The judgment of the

High Court, remitting the case with directions to the Subordinate Judge in the circumstances appears to their Lordships to be the right one.

32. The Maheswaris spoke through two voices, but in unison as to purpose and purport. They attempt to show that partner Kochar and heirs

Maheswari had inter se disputes shortly upon partner Maheswari''s death; that it would appear from the affidavit in reply that even in the earlier

reference partner Kochar had alleged in November, 1984 that the Maheswari sons had been ""attending office regularly and looking after day-to-

day business of the firm"" (letter dated November 20, 1984, page 50 of affidavit-in-reply). The respondents refer to paragraph 20 of the reply and

the Kochars'' assertion therein that ""on 24th May, 1986 the defendant Maheswaris broke open the locks of Tower House office and removed all

the books of accounts and dislodged the possession of the joint receivers in utter violation of the orders of the Hon''ble Court. They the defendant

Maheswaris also took over illegal possession of the factory premises at 8-B.T. Road, Belghoria, Calcutta"". The Maheswaris seek to demonstrate

that even before their father''s death, the petitioners'' predecessor-in-interest had made a charge of the Maheswari sons intermingling in and

interfering with the affairs of the firm. They claim that the Kochars'' charge of the heirs Maheswari seeking to usurp the firm''s assets, including the

B.T. Road property, was first aired shortly upon dissolution of the firm on partner Maheswari''s death. The Maheswaris say that the two matters

are only illustrative to give a preview of the stale charges that the Kochars will bring in the reference.

33. The respondents refer to the judgment reported at The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, to demonstrate that

Article 137 of the Limitation Act will apply to any petition or application filed under any Act to a civil court. Shah Construction Co. Ltd. Vs.

Municipal Corporation of Delhi, is placed on behalf of the respondents in support of their contention on limitation. In that case the contractor filed a

suit for recovery of money from the corporation. The corporation filed its written statement, taking a plea that there was an arbitration agreement

between the parties and seeking stay of the suit. Stay was refused as the objection was not taken before the written statement was filed or before

the corporation took any other step in the proceedings. The suit progressed to issues being framed and evidence being received. Thereafter an

application u/s 21 of the 1940 Act was filed and the parties sought a reference to an engineer ""to decide the matters in difference between the

parties in the suit"". Before the arbitrator the corporation made a counter-claim which was ignored. The corporation objected to the award but the

Delhi High Court disregarded the corporation''s principal objection as to its counter-claim not being considered on the ground that the reference

had been made only in respect of the claims made by the contractor. The corporation thereafter instituted proceedings u/s 20 of the 1940 Act, in

substance seeking reference of its counter-claim made before the earlier arbitrator. A Single Judge of the Delhi High Court permitted the

agreement to be filed and directed a reference. The contractor carried such order in appeal.

34. A Division Bench of the Delhi High Court relied on the Kerala State Electricity Board case and applied Article 137 of the Limitation Act

reckoning that the time begins to run from the period ""when the right to apply accrues"". The appeal was allowed and the corporation''s application

u/s 20 of the 1940 Act stood dismissed.

35. The petitioners have not contested the proposition found in either the Kerala State Electricity Board case or in the Shah Construction case but

say that the earlier disputes show the Maheswaris have relied upon are quite distinct from the more recent disputes following which the petition was

instituted.

36. The Maheswaris have referred to various provisions of the Partnership Act as to when a firm stands dissolved and the rights and obligations

upon dissolution. Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, has been cited for the law on the interest of partners

in partnership property. Supreme Court dealt with the matter by referring to a passage from Lindley on Partnership (12th ed., page 375) :

What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and

all the partnership debts and liabilities have been paid and discharged. This it is, and this only which on the death of a partner posses in his

representatives, or to a legatee of his share... and which on his bankruptcy passes to his trustee.

37. The Maheswaris rely on the case to submit that the Kochars'' claim is in money as all partnership assets upon dissolution translate into money

irrespective of the nature of the assets. They suggest that the dispute as to the B.T. Road property that the Kochars put forward in these

proceedings has, per force, to be seen as a claim for share in the partnership funds which the Kochars cannot seek as they cannot make any claim

for accounts.

38. The respondents refer to the Division Bench judgment reported at Kashi Ram Vs. Kundan Lal and Others, for the proposition that where the

circumstances are such that shares in the assets of the partnership cannot be determined without taking accounts and where the suit for accounts is

time-barred, the suit for share in the assets must also fail on the ground of limitation. This judgment has been set aside by the Supreme Court in the

Banarsi Das case and need, thus., not be discussed at all but for one aspect of the case. Such aspect was not referred to by the respondents, and

the Supreme Court in the Banarsi Das case did not consider the issue. The proposition is that where a partner was put into possession of the

partnership properties by court as a receiver and did not retain the properties as partner, he cannot be sued for accounts as a partner, although he

would be liable to render accounts to the court that appointed him as receiver. As a proposition such position in law cannot be doubted and will

have some bearing in this matter.

39. M.M. Valliammai Achi and Others Vs. KN. PL. V. Ramanathan Chettiar and Others, has been relied upon by the respondents in support of

their contention of limitation and for the rule that on the dissolution of a firm, all its properties have to be sold and sale proceeds, after discharging

the liabilities of the firm, have to be divided among the partners according to their respective shares. The judgment was rendered in a second

appeal out of a suit for partnership accounts and share in immoveable properties of the erstwhile firm. The defendants succeeded in the trial court

but failed with respect to the immoveable properties in appeal. The second appeal was allowed and the decree of dismissal of the suit by the trial

judge was restored.

40. The Single Judge of the Madras High Court held that upon dissolution of a firm, there was no distinction between its immoveable and

moveable assets. A number of judgments were considered and the same passage from Lindley on Partnership that was approved by the Supreme

Court in the Addanki Narayanappa case was referred to.

41. The opening part of paragraph 8 of the report is apposite in the context:

8. It is now settled law that a partner''s or his representative''s lien with reference to partnership assets is on the surplus of the assets of the firm

and not on any particular item of property belonging to the partnership. On the dissolution of a firm, all the properties belonging to the partnership

have to be sold and the sale proceeds, after discharging all the partnership debts liabilities, have to be divided among the partners according to

their respective shares, and this is the general rule. The lien of a partner is not one on any specific assets of the partnership existing on the death of

a partner such as would fetter its conversion into money. The right of a representative of a partner is really a claim against the surplus assets on

realisation- whether the surplus assets consist 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. If after taking

accounts and discharging the mutual rights and obligations of the partners or their representatives an asset which has been forgotten or treated as

valueless afterwards falls in, that asset no doubt will be divided between the partners or their representatives in proportion to their shares in the

partnership.

42. It was also held that the character of any partnership asset has little to do in ascertaining the share to which a partner or his representatives may

be entitled to on dissolution. On holding that both immoveable and moveable assets of a partnership firm stood on the same footing, Article 106 of

the old Limitation Act was applied even in respect of the plaintiffs claim of a share in the immoveable properties and the lower appellate order was

set aside.

43. The respondents have placed Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Seth Govindram Sugar Mills, to rely

on the effect of Section 42(c) of the Partnership Act in a firm of two partners. It was held by the Supreme Court at paragraph 7 of the report that

unless there is a contract to the contrary, a partnership firm dissolves upon the death of any partner. But in a firm with only two partners, it

automatically comes to an end on the death of one of the partners and there is no partnership for a third party to be introduced therein. Section

42(c) of the Partnership Act is clearly applicable in the present case and it is not the Kochars'' case that the firm continued with partner Kochar

and heirs Maheswari after partner Maheswari''s death or that the firm continued with heirs Kochar and heirs Maheswari as partners after partner

Kochar''s death.

44. The respondents have cited the judgment reported at Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, to assert that the period

of limitation for commencement of arbitration runs from the date on which the cause of arbitration arose. The special leave petitioner before the

Supreme Court, a contractor, sent bills in July, 1979 but no payment was made. In November, 1989 the contractor issued notice to the employer

for referring the disputes to arbitration. The employer applied to the High Court under Sections 5, 12 and 33 of the 1940 Act. The principal

contention in such proceedings was that as the request for a reference had been made 10 years after submitting the bills, the cause of action was

hopelessly barred and, as such, there was no need to make a reference at all. The Single Judge agreed with the employer. The Division Bench also

concurred.

45. The contractor urged before the Supreme Court that the employer''s invocation of Section 5 of the 1940 Act was misconceived and that, in

any event, the High Court erred in holding that there was no live dispute to be taken to arbitration. Even though Section 5 of the 1940 Act refers to

the revocation of the authority of an appointed arbitrator, the Supreme Court laid down that there exists ""implied power vested in the court

permitting a party to avail a remedy under Sections 5 and 12 to rescind the arbitration agreement."" It was found as a legal proposition that it is not

a condition precedent that there should first be an arbitrator and only thereupon would the court assume jurisdiction to revoke the authority of such

appointed arbitrator.

46. But it is the other aspect of the Panchu Gopal Bose judgment that the respondents seek to draw sustenance from in support of their defence on

the ground of limitation:

11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause,

the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of

years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the

specified number of years from the date when the claim accrued.

47. The Supreme Court finding on law as above has to be seen in the context. The passage quoted above, does not imply that there is no

distinction between the period of limitation for a claim in arbitration and the period of limitation far a claim far arbitration. Contractor Panchu Gopal

Bose claimed to have raised the last bill in 1979 and made a request far reference in 1989. There was nothing that happened during the 10-year

hiatus. There could be no live claim to take to arbitration. But, say, that the contractor sought a reference in June, 1982 far his last bill of July, 1979

remaining unpaid, and the employer disregarded the request far a reference. Paragraph 11 of the Panchu Gopal Bose judgment cannot be relied

upon to suggest that the contractor''s application u/s 20 of the Arbitration Act would be barred if it were filed in August, 1982 or even in May,

1985. For, the contractor''s cause of action for instituting Section 20 proceedings would accrue from m the date of his deposit of the request for a

reference to the other party and, by virtue of Section 37(3) of the 1940 Act read with Article 137 of the Limitation Act, his claim for arbitration

would survive for a period of three years from the date of service of a notice requiring the appointment of an arbitrator. The Panchu Gopal Bose

case does not extinguish the distinction between a claim in arbitration and a claim for arbitration.

48. It is in such context that a Division Bench judgment of this Court reported at 2001(1) Cal LT 99 (Smt. Santosh Agarwal vs. Smt. Raja Devi

Agarwal) cited by the Maheswaris needs next to be seen. In such case, the appeal arose from an order dismissing a petition u/s 20 of the 1940

Act on the ground of limitation. The Division Bench framed the following question at paragraph 7 of the report:

7. When does the right to apply, as being the starting point of the Limitation, accrue to a petitioner in so far as it relates to a petition u/s 20 of the

Act is concerned?

49. The Division Bench noticed the Inder Singh Rekhi and L. K. Ahuja cases noticed earlier in this judgment and arrived at the following

conclusion :

13. Undoubtedly Article 137 of the Limitation Act does say that the period of limitation of 3 years would run from the time the right to apply

accrues and the settled proposition of law as would be culled out from the aforesaid decisions -of the Supreme Court clearly being that the right to

apply for reference of disputes to arbitration would accrue only when a dispute in terms of the arbitration agreement would be brought into

existence and further that the dispute cannot be brought into existence unless there is an assertion by the claimant and either assertion or denial by

the opposite party. This being the legal position, therefore, we have to see whether on a date when a petition u/s 20 of the Arbitration Act is filed,

and the claim is barred by limitation on that date itself, can the petition not be held to be barred by limitation merely because the dispute, on the

basis of the factum of assertion and denial is deemed to have arisen at a point later than the accrual of cause of action with respect to the

maintainability of the claim itself on the touchstone of Limitation aspect. Even though in Union of India (UOI) and Another Vs. L.K. Ahuja and

Co., Their Lordships had observed that it would be entirely wrong to mix up the two aspects about maintainability of the claim and the

maintainability of the petition u/s 20 of the Arbitration Act on the touch stone of limitation, yet if on admitted facts a claim is found at the time of

making an order u/s 28 of the Arbitration Act to be barred by limitation, section 20 petition can be considered to be time barred and hence found

to be not maintainable. We are saying so because undoubtedly it is for the Arbitrator to decide whether a claim is barred by limitation or not. But if

on the facts not disputes and being totally admitted, Section 28 petition itself reveals that as on the date of its presentation the claim is patently

barred by limitation, no purpose would be served by going through the motions of technical observance of law, with reference to the concept of

assertion and denial and to hold that even though Section 20 application, reckoning the period from assertion date and denial date is within

limitation period, the claim patently is time barred. That would, in our opinion, be contrary to the well-settled proposition of law regarding the

maintainability of claims on the touchstone of limitation. We are therefore of the view that the 3-year period as prescribed in Article 137 of the

Limitation Act with reference to the maintainability of an application u/s 20 of the Arbitration Act has to be read in conjunction with the limitation

prescribed for the claim forming the subject matter of such an application and if on the date when the application u/s 20 is made in a Court, if the

Court finds that the claim itself is clearly, patently and on the very face of it, is barred by limitation, section 20 application has to be held as barred

by limitation.

50. In the Panchu Gopal Bose case and Santosh Agarwal case, the rationale was that the reference would be an exercise in futility if it were

evident on the admitted facts that the claim in the arbitration would be ex facie barred by the laws of limitation. But ascertaining as to whether the

claim in arbitration would be barred or not would depend on the test of Section 37(3) of the 1940 Act and the date to be reckoned would not be

the date for making the Section 20 proceedings if the Section 20 petition follows an earlier request to the other party or appointing authority for a

reference. In the facts and circumstances of the present case, the applicability of these two judgments has to be confined to the issue whether, on

admitted facts, the claim in arbitration would be barred by law as there is no inter partes request for an arbitration before the Section 20 petition.

51. The Maheswaris submit that limitation is a statute of repose and there is no room for the court''s sympathy. It is also urged that a court should

have no sympathy for a laggard who is oblivious to his rights and wakes up from his slumber to appeal to the court''s conscience that his rightful

due should not be denied him only on the ground of delay. The judgments reportedat State of Orissa and another etc. Vs. Sri Damodar Das, ;

Prem Singh and Others Vs. Birbal and Others, and Punjab State and Others Vs. Dina Nath, are cited for such proposition.

52. In the Damodar Das case, the first contract was of the year 1967-68 and was executed in 1967 itself and part payment thereunder was

received in September, 1967. The contractor issued a notice in September, 1980. Since such notice, even if it included a request for reference,

was way beyond the period within which an action for recovery of balance payment could be instituted, the Supreme Court found the claim in

arbitration relating to such notice being ex facie barred. In respect of two other claims in the same matter, the Supreme Court held that ""it would be

difficult to decide whether the two claims are barred by limitation. That would be a matter for decision by an arbitrator.

53. Paragraphs 11 and 12 from the Prem Singh case have been placed to rule out the court exercising any discretion on grounds of sympathy for

the claimant:

11. Limitation is a statute of repose. It ordinarily bars a remedy, but, does not extinguish a right. The only exception to the said rule is to be found

in Section 27 of the Limitation Act, 1963 which provides that at the determination of the period prescribed thereby, limited to any person for

instituting a suit for possession of any property, his right to such property shall be extinguished.

12. An extinction of right, as contemplated by the provisions of the Limitation Act, prima facie would be attracted in all types of suits. The

Schedule appended to the Limitation Act, as prescribed by the articles, provides that upon lapse of the prescribed period, the institution of a suit

will be barred. Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out or is raised by the

defendant or not, in the event a suit is found to be barred by limitation, every suit instituted, appeal preferred and every application made after the

prescribed period shall be dismissed.

54. In the Dina Nath judgment, the Supreme Court held that the right to petition ""court has to be made within three years from (when) the claim of

the arbitration accrues."" On facts, the order impugned in such case was reversed as the Supreme Court found that the proceedings for a reference

had been instituted within three years from the first inter partes claim for reference,

55. The principles that should be kept in mind by a court exercising discretion u/s 20 of the 1940 Act have been recognised in the judgment last

cited by the respondents reported at Gannon Dunkerley and Co. Vs. Union Carbide (India) Ltd., . The arbitration clause in such case required the

executive engineer, Central Public Works Department or his nominee to be appointed arbitrator and no other. The executive engineer refused to

act or to appoint an arbitrator. The Section 20 petitioner argued that once it is held that there is an arbitration agreement and the disputes between

the parties are covered by such agreement, the court is bound to order that the agreement be filed and a reference be made to the arbitrator. It

was, however, held that u/s 20 the court is required not only to order filing of the agreement but also to make a reference and as, in terms of the

relevant clause, no reference could be made, the court would refuse to file the agreement because filing the agreement would be meaningless if the

more important part, that of making an order for reference, could not be passed.

56. The clause in the present case does not contemplate a situation in which the Gannon Dunkerly judgment was rendered. Though, it cannot be

denied that in Section 20 proceedings there is an element of discretion that the court exercises, but the exercise of discretion is based on the

sufficiency of the cause shown by the respondents resisting the filing or reference.

57. Both the Banarsi Das and the Sathappa Chetty cases contemplate a claim of the nature made by the Kochars here to be permissible even after

expiry of the period of three years from the date of dissolution of the firm. The Supreme Court in the Banarsi Das case recognised that subsequent

acknowledgements by the parties would keep a claim accounts alive. In the Sathappa Chetty case the Privy Council accepted the argument that

unless all the assets of the firm were realised, one set of partners could not tell the other set of partners how much they owed each other. This leads

to what may be the most important issue to decide the rival cases run in the context of the scope of the court''s power and discretion u/s 20 of the

1940 Act. The court does not have to conclusively pronounce on the issue of limitation, unless the admitted facts and documents by themselves

present an indisputable answer. If there is an arguable case made out by the petitioner in the Section 20 proceedings, the court would probe no

further as the contract for arbitration between the parties would deter the court from embarking on such exercise.

58. The Kochars do not seek to give a complete answer to scotch the point of limitation raised by the Maheswaris. What they endeavour to do is

to demonstrate that there is an arguable case to take before the arbitrator. The Privy Council case would show that till all the assets of a firm come

in, there is no final dissolution or, in other words, the dissolution is not effective. If it is recognised that the dissolution is not effective or final merely

upon the firm standing dissolved by operation of law and that the erstwhile partners must wait till all the assets come home, before their inter se

rights and liabilities can be measured, the Kochars make out a case in support of the claim in arbitration and it is not an altogether absurd answer to

the question of limitation raised by the Maheswaris.

59. Neither the Kochars nor the Maheswaris are in possession of the partnership properties. It is possible that neither set of heirs may be able to

seek accounts from the other in view of the receivers retaining the partnership firm properties. But again, it is not necessary to conclusively answer

such question, it would suffice to recognise that a claim for accounts, in such circumstances, would remain alive till the partnership properties fall in

and all the assets of the firm are converted into money and the debts of the firms are discharged to arrive at the surplus for distribution. Whatever

be the position for accounts being sought, surely either set of heirs may seek winding up of the firm and a claim for winding up is one of those

enumerated in the petition that is both alive and can be referred to arbitration.

60. Shorn of the legal complexities, the matter at hand can also be viewed from the practical perspective. The claims against the firm have to be

discharged upon the value thereof being ascertained. The parties have a right to know if they are liable, to the extent they inherited from the

partners of the firm, for discharging such liabilities. The parties also have a right to find out how best the liabilities of the firm may be discharged

from the available assets and to apply the surplus, if there by any, or ascertain the liability to meet the shortfall.

61. A claim for arbitration would not be considered fit for a reference'' to be made thereupon if by the time such claim is made the claim in

arbitration can no longer be pursued. The clock of limitation starts running in a claim in arbitration when the claimant''s right to sue accrues and

stops when the claim for arbitration is made. The making of the claim for arbitration is akin to the filing of a suit in pursuance of the substantive

claim. If such claim for arbitration is made to the appointing authority under the arbitration agreement or to the other party to the arbitration

agreement, whichever is applicable, and either the appointing authority or the other party does not act as provided under the arbitration agreement,

the claim for arbitration can be carried to court. Such petition to court has to be made within three years, under Article 137 of the Limitation Act,

from the time when the right to apply arises. In the scheme of Section 20 of the 1940 Act, if the petition is the claimant''s first assertion of his claim

for arbitration, it must be made at a time when his substantive claim in arbitration is still alive, for an order of reference to be made thereon. Though

quite irrelevant in the context, the situation under the 1996 Act would be slightly different as the Chief Justice''s designate u/s 11 of the later Act

would have no authority to receive a request u/s 11 unless a prior request to adhere to the agreed procedure for appointment or, in the absence of

any agreed procedure, a prior request for appointment, has gone unheeded.

62. An arbitration agreement is not exhausted upon a reference being made under it. There can be more than one reference arising out of the same

arbitration agreement in respect of divers disputes covered by the substantive agreement. A similar earlier dispute in another context and set of

facts in an earlier reference under the same arbitration agreement would not preclude a subsequent dispute of similar nature being raised in a later

reference under the same arbitration agreement.

63. The dispute that partner Kochar raised in course of the earlier reference as to the Maheswari sons intermingling in the firm''s affairs is a dead

dispute that died with partner Maheswari or upon the earlier reference having been abandoned. The allegation made by the Kochars that the

Maheswari heirs had entered upon the Tower House office or the B.T. Road property has to be seen as an allegation of disobedience of the court

order appointing joint receivers and is a dispute covered by the order of appointment and not a dispute covered by the arbitration agreement. The

Kochars" allegation of the Maheswari heirs attempt to obtain the title deeds of the B.T. Road property in February, 1995 has to be taken at face

value before a fact-finding exercise as to the veracity thereof is undertaken. Such allegation is distinct from the earlier charge of interfering with the

joint receivers" possession of the Tower House and the B.T. Road properties. Implicit in the Kochars" complaint that the Maheswari heirs were

seeking to obtain the B.T. Road title deeds is the dispute as to the Maheswaris" right to exclusively settle the firm''s liabilities with the bank and the

other creditor and to receive the firm''s assets. Such dispute is covered by the arbitration agreement in the partnership deed. The cause of action in

the context of the claim in arbitration, arose, in the absence of it being demonstrably proved false, in February, 1995. Upon no earlier request

therefore having been made for the immediate dispute of February, 1995, the claim for arbitration was made at the institution of these proceedings.

The claim for arbitration was made within a month of the cause of action in the claim in arbitration accruing. The Kochars have established their

claim for a reference upon their prima facie showing a live claim to take to such reference.

64. The petition succeeds. The Kochars will nominate one arbitrator by a writing to be issued to the second respondent {on behalf of all the

respondents) within a fortnight from date and the Maheswaris will nominate their arbitrator within 15 days of receipt of Kochars" writing by the

second respondent. The reference will begin within six weeks from date and will be in respect of all the disputes between the parties covered by

the arbitration agreement, including the disputes enumerated in the petition or such of them as would be permissible to be raised in the opinion of

the arbitrators. The two arbitrators, immediately on their appointment, will nominate an umpire and it will be open to the two arbitrators and the

parties to agree as to whether the umpire should sit in the reference from the inception so as to avoid repetition and delay if the two arbitrators

ultimately differ. The reference should be concluded within a period of six months from the submission of the statement of claim.

65. The Kochars will be entitled to a sum of Rs. 50,000/- by way of costs of these proceedings in the reference. Urgent photostat certified copies

of this judgment, if applied for, be issued to the parties upon compliance with requisite formalities.

Later:

Stay of the operation of the order is prayed for. In view of the mechanism of the operative part of the order, no stay is called for.