

(2007) 11 DEL CK 0283

In the Delhi High Court

Case No : FAO (OS) 376 of 2005 and CM 16427 of 2005

Himachal Pradesh Cooperative Group Housing Society

APPELLANT

Vs

Umesh Goel and Another

RESPONDENT

Date of Decision : 20-11-2007

Acts Referred:

Arbitration Act, 1940 — Section 20, 8, 8(2)
Arbitration and Conciliation Act, 1996 — Section 2(1), 36, 9
Electricity (Supply) Act, 1948 — Section 49
Limitation Act, 1963 — Section 14
Partnership Act, 1932 — Section 69, 69(1), 69(2), 69(3)
Registration Act, 1908 — Section 17(1)

Citation : (2007) 4 ARBLR 353 : (2008) 1 ILR Delhi 1353

Hon'ble Judges : Vikramajit Sen, J; S.L. Bhayana, J

Bench : Division Bench

Advocate : S.K. Taneja, Puneet Taneja and T.K. Tiwari, for the Appellant;
Sandeep Sethi and Sandeep Sharma, for the Respondent

Judgement

Vikramajit Sen, J.—The salient facts of the litigation are that the contract between the parties contained an arbitration clause. This was invoked by Himachal Pradesh Cooperative Group Housing Society Ltd. (Appellant) followed by its Statement of Claims dated 26.6.2003. The Respondent thereafter filed its Reply and Counter Claim dated 30.8.2003. Whilst there appears to be legal impediment to an unregistered partnership firm, such as the Respondents, defending any legal action brought against it, there seems to be some controversy on its capacity to file its own claim in arbitral proceedings. We must not forget that a Counter-Claim can be treated by the Court as a plaint in a cross-suit (See Laxmidas Dahyabhai Kabarwala Vs. Nanabhai Chunilal Kabarwala and Others, The Learned Single Judge has found that at the relevant time the Respondent was an unregistered firm. Thus, if the filing of a suit by an unregistered firm is barred, equally and logically a counter claim would not be maintainable. This point was raised before the Arbitrator as well as the Learned Single Judge, but at both stages Kamal Pushp Enterprises Vs. D.R. Construction

Company, was applied erroneously. The following Table is self explanatory so far as the claims proffered by the Respondent unregistered partnership, which if allowed cannot but tantamount to removing the statutory embargo articulated in Section 69 of the Indian Partnership Act, 1932 (for short "Partnership Act), namely, that an unregistered firm is not competent to enforce a right emanating from a contract. If a suit for claiming those damages is barred, obtaining them through the alternate or adjunct machinery of arbitration, would also be barred.

Counter Claim made by the Respondent 1. 1,52,40,102 2. 42,05,061 3. 16,40,035 4. 67,50,000 5. 9,76,589 6. 4,50,000 7. 70,22,829 8. Interest @ 18% p.a. from 30.8.2003 till payment 9. 2,00,000 Amounts Allowed by the Arbitrator in favor of Respondent Rs. 1,38,39,981 only Rs. 3,19, 000 Disallowed Disallowed Partly allowed Disallowed Partly allowed Allowed It shall be borne by both the parties equally. Total Amount Claimed = Rs. 3,64,84,616 + Interest @ 18% from 30.8.2003. Total Amount allowed = Rs. 1,36,24,886.80

2. The Appellant Society had raised ten claims, (a) to (j). So far as Item (b) is concerned a sum of Rs. 4,10,000/- had been claimed as the value of scrap had not been returned to the Claimant. This was allowed by the learned Arbitrator and upheld by the learned Single Judge. Thereafter, only claim (j) has been looked upon favorably by the Arbitrator. This was for an amount of Rs. 5,10,000/- on account of grinding and polishing work that had not been completed in all the 102 flats. After going through the available evidence the learned Arbitrator awarded a sum of Rs. 1,23,094.20/- as its claims had not been certified to be released to the Respondents by the Architect. The reasoning and conclusion on this claim has also been found favorably by the learned Single Judge.

3. The requirement of registration of a partnership is not an empty formality. It serves an extremely far reaching function. In the event of a dispute the aggrieved party should be able to easily ascertain the names and details of persons who would eventually be liable for recoveries against the firm. Unlike a company a partnership firm is not a distinct legal entity and its partners remain personally liable for all its debts subject to their inter se compact. Given the relative ease with which a firm can be registered, failure on the part of the partners to take requisite action cannot but be viewed with suspicion; namely that they intend to unethically and illegally defraud their creditors. To fully appreciate all the aspects of the introduction of this statutory requirement we have reproduced in extension the relevant extracts from the Report of the Special Committee which recommended these legislative changes. Every interpretation of Section 69 of the Partnership Act must give effect to these objectives, unless the plain language makes it impossible to do so. In *Virendra Dresses Vs. Varindra Garments, Sultan Singh, J.* of this Court had held that a suit for injunction on the grounds of passing off was maintainable notwithstanding non registration of the firm because the right sought to be enforced did not stem from a contract but was available in common law. There is now high authority for

this proposition in terms of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, .

4. In M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, their Lordships had referred to the said Report of the Special Committee (1930-1931) observing that making use thereof was perfectly impermissible. No doubt a distinction was made between enforcing a common law right and a civil right, which, however, does not arise in the before us.

5. The reasons given for introducing the Chapter on Registration of Firms are given in the Report of the Special Committee set up to examine the provisions of the Bill to amend the law relating to partnership, the relevant paragraphs for the present purposes are the following:

17. The outlines of the scheme are briefly as follows. The English precedent in so far as it makes registration compulsory and impose a penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with small and ephemeral undertakings. Instead, it is proposed that registration should lie entirely within the discretion of the firm or partner concerned; but, following the English precedent, any firm which is not registered will be unable to enforce its claims against third parties in the civil courts; and any partner who is not registered will be unable to enforce his claims either against third parties or against his fellow partners. One exception to this disability is made - any unregistered partner in any firm, registered or unregistered, may sue for dissolution of the firm. This exception is made on the principle that registration is designed primarily to protect third parties, and the absence of registration need not prevent the disappearance of an unregistered or imperfectly registered firm. Under this scheme a small firm, or a firm created for a single venture, not meeting with difficulty in getting payment, need never register; and even a firm with a large business need not register until it is faced with litigation. Registration may then be effected at any time before the suit is instituted. The rights of third parties to sue the firm or any partner are left intact.

18. Once registration has been effected the statements recorded in the register regarding the constitution of the firm will be conclusive proof of the facts therein contained against the partners making them, and no partner whose name is on the register will be permitted to deny that he is a partner, -- with certain natural and proper exceptions which will be indicated later. This should afford a strong protection to persons dealing with firms against false denials of partnership and the evasion of liability by the substantial members of a firm.

...

23. To sum up, it is anticipated that once a firm has been registered the register of firms will continue to contain a complete and up to date list of all partners who will be liable for the debts of the firm to persons who propose to deal with the firm.

24. One more point regarding the registration of firms calls for mention. It is proposed that the chapter, in so far as it provides machinery for registration, amendment of the register, grant of copies and so forth, should come into force along with the rest of the Bill, so that firms may apply for registration at once. The clause regarding the conclusive nature of the statements recorded in the register will come into force at the same time. However, it would obviously be unjust to make all unregistered firms and partners incapable of suing until they have had a reasonable opportunity to register; and it is proposed that they should be allowed one year, by enacting that the clause rendering them incapable of suing shall not come into force until one year after the commencement of the rest of the Act.

6. In *Mohatta Brothers Vs. The Bharat Suryodaya Mills Co. Ltd.*, Ahmedabad, one of the controversies centered around who all were partners of the registered firm. It was in that context that their Lordships had cautioned that the distinction between a plaintiff firm as against a defendant firm invariably ought to be kept in mind. It was opined that it would be open for the plaintiff to prove who all were partners of a firm against whom a suit for recovery had been instituted. The contrary position, that is, where the plaintiff firm was not registered or all partners were not shown in the Register of Firms, renders proceeding void. (see *Gandhi and Co. Vs. Krishnan Glass Pvt. Ltd.*, .

7. It is well settled that a decree obtained by an unregistered partnership is a nullity, and all such proceedings are devoid of jurisdiction, and objections in this regard can be raised in even at the stage of Appeal or in Execution. (See *K.K.A. Ponnuchami Goundar v. Muthusami Goundar* AIR (29) 1942 Mad 252 , *A.T. Ponnappa Chettiar and Others Vs. Bodappa Chettiar and Others*, , *Shriram Sardarmal Didwani Vs. Gourishankar alias Rameshwar Joharmal*, , In the matter of *In Re: Abani Kanta Pal*, and definitively in *Seth Badri Prasad and Others Vs. Seth Nagarmal and Others*, .

8. In *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*, there was a delay of about ten years from the date of the accrual of the cause of action and the making of the Reference. The Supreme Court held that "the proceedings before the Arbitrator are like civil proceedings before the Court within the meaning of Section 14 of the Limitation Act." We are also in respectful agreement with similar views expressed by a Division Bench of this Court in *Vanita Gambhir v. District Judge Delhi* 2005 (1) Arb. L.R. 166, where it has been enunciated that (a) arbitral proceedings are akin to civil proceedings are (b) that Section 69 bars adjudication of claims even through arbitration unless it is for the dissolution of the firm.

9. A plethora of precedents prevails on the conundrum whether disputes pertaining to an unregistered firm can be referred to arbitration because of an agreement to this effect. Divergent conclusions have been arrived at by Single Benches of this Court itself, even though the opinion of the Supreme Court in *Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd.*, had perforce to be

applied. In *Paras Ram Darshan Lal Vs. Union of India and Another*, Sultan Singh, J., however, has also expressed the opinion that a petition under Sections 8 and 20 of the erstwhile Arbitration Act, 1940 was not maintainable for the reason that the plaintiff was an unregistered firm. After noticing this precedent, Sultan Singh, J. nonetheless came to the opposite conclusion in *Rajinder Kumar Vs. Ravel Singh and Others*, . The reason that prevailed upon the learned Judge obviously was that the dissolution of a firm, or for accounts of a dissolved firm, or any right or power to release property of a dissolved firm, was the exception carved out under Sub-section (3) of Section 69 of the Indian Partnership Act. In *Saigal* it was this exercise which was to be undertaken, and instead of filing a civil suit the parties have contractually agreed to enter into arbitration. Therefore, a statutory relief was, in fact, being availed of. Conceivably, subsequent to the initiation of litigation those parties could have agreed to arbitrate upon their disputes, in which case a contractual agreement would not have had to be given effect to. Under the Arbitration Act, 1940 as well as in the Arbitration & Conciliation Act, 1996, adversaries can obtain orders from the Court referring them to arbitration. In such cases alone can it be regarded as availing of a statutory relief. We are supported in our understanding by the Explanations given by the Apex Court in paragraph 8 of *Kajaria Traders* (infra). Our humble endeavor is to bury and inter these discordant views. It is our understanding that when recourse is to be taken to arbitration through the intervention of the Court, the pre-condition being the existence of an arbitration agreement, it is not a statutory but a contractual right which is being exercised. With due respect, we are unable to subscribe to the later Judgment of the Single Bench in *Saigal* which necessarily ought to have been referred by the learned Single Judge to a larger Bench since he was unable to subscribe to the view taken by an earlier Single Bench. In any event we find it irreconcilable to the authoritative view in *Kajaria Traders*.

10. *Kajaria Traders* has been decided by a Four-Judge Bench. One of the clauses of the Agreement between the parties was that "in case of a dispute the matter will be referred for arbitration in accordance with the Indian Arbitration Act." The Bombay High Court had taken the position that Section 69 of the Partnership Act did not bar the entertainment of an action u/s 8 of the Arbitration Act even though the partnership was not registered. After a perspicuous consideration of the law their Lordships held as follows:

8. Some cases noticed by the High Court were cited to us but none of them appears to be really in point. In *Babulal Dhandhanias Vs. Gauttam and Co.*, proceedings were started on an award, in one to make it a rule of the Court and in the other to get it set aside. These cases are distinguishable because they deal with awards and it is not necessary to decide whether after an award the proceeding is one to enforce a right arising from a contract. We do not refer to them. In *Sreemannarayanaiah v. Arjanadu* AIR 1939 Mad 145 a petition for adjudication of a partner as insolvent was held to be a right arising not from a contract but from statute. Here the right that is being enforced through the

medium of the Arbitration Act arises from the contract between the parties and is a part of it. In *Jamal v. Firm Umar Haji Karim* (1943) Nag 543 the bar of Section 69(3) was claimed during the execution of a consent decree and was disallowed. Grille, C.J., observed that the expression "other proceeding" indicated something which was "suit generis of a claim of set-off". If the partners of an unregistered firm go to court without either asking for a dissolution of the firm or dissolving it themselves and enter into an agreement and compose their differences it is possible to say that the enforcement of the consent decree is no more than the enforcement of a right arising from a contract and is within the ban. It is, however, not necessary to decide this point here in *Ram Lal Harnam Dass Vs. Bal Krishen and Others*, it was expressly pointed out that the expression "other proceedings" in the third sub-section applied to proceedings of the nature of a claim of set-off and nothing else. This case cannot be said to interpret the sub-section correctly. Similarly, *Mahendra v. Gurdeyal* 30 Pat 109 which lays down that Section 69 does not bar a partner of an unregistered partnership firm from applying to the court u/s 8 of the Arbitration Act for referring the dispute between partners to arbitrator as provided in the condition of their agreement, cannot be accepted as sound. The reason given by the Divisional Bench that as Section 69 allows dissolution and accounts of unregistered partnership it cannot bar such an application appears to us to be not quite in point.

9. In our judgment, the words "other proceeding" in Sub-section (3) must receive their full meaning untrammelled by the words "a claim of set-off". The latter words neither intend nor can be construed to cut down the generality of the words "other proceeding". The sub-section provides for the application of the provisions of Sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in Sub-section (3) and Sub-section (4).

10. The appeal is, Therefore, allowed. The decision of the High Court will be set aside and the application u/s 8(2) of the Arbitration Act shall stand dismissed with costs throughout on the applicant in the High Court.

11. It has been seen that a distinction has been drawn in several decided cases between litigation where the unregistered partnership firm is the plaintiff and where it is the defendant. Both Sub-sections (1) and (2) contemplate a lis in which the plaintiff is an unregistered firm and categorically proclaim that such proceedings are not maintainable. Sub-section (3) further clarifies that even a "set off" would be inadmissible if put forward by an unregistered firm thus encapsulating and perpetuating the statutory disqualification or penalty that visits partner's obduracy, recalcitrance or devious design for non compliance with the salutary stipulation of registration of the partnership firm. A Counter Claim is in reality a plaint itself except that it accompanies a Written Statement and there is no conceivable reason why it can be adjudicated upon even though a "set-off" is disqualified. What needs now to be seen is whether the opinion of the

Two-Judge Bench in Kamal Pushp charters a contrary course in essential aspects from Kajaria Traders. The very first paragraph of Kamal Pushp sets down the parameters of the problem before their Lordships, namely, whether Section 69 does not stand in the way of an unregistered firm defending proceedings against it and/or whether it precludes only the initiation of any proceedings by such a firm. In this context the ratio is in the following words:

9. The prohibition contained in Section 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any Court by an unregistered firm, and it had no application to the proceedings before an Arbitrator and that too when the reference to the Arbitrator was at the instance of the appellant itself. If the said bar engrafted in Section 69 is absolute in its terms and is destructive of any and every right arising under the contract itself and not confined merely to enforcement of a right arising from a contract by an unregistered firm by instituting a suit or other proceedings in Court only, it would become a jurisdictional issue in respect of the Arbitrator's power, authority and competency itself, undermining thereby the legal efficacy of the very award, and consequently furnish a ground by itself to challenge the award when it is sought to be made a rule of Court. The case before us cannot be said to be one such and the learned Counsel for the appellant though was fully conscious of this fact, yet tried to assert that it is open to the appellant to take up the objection based upon Section 69 of the Partnership Act, at any stage - even during the post award proceedings to enforce the award passed. The Award in this case cannot either rightly or legitimately said to be vitiated on account of the prohibition contained in Section 69 of the Partnership Act, 1932 since the same has no application to proceedings before an Arbitrator. At the stage of enforcement of the award by passing a decree in terms thereof what is enforced is the award itself which crystallise the rights of parties under the Indian Contract Act and the general law to be paid for the work executed and not any right arising only from the objectionable contract. It is useful in this connection to refer to the decision of this Court in Satish Kumar and Others Vs. Surinder Kumar and Others, , wherein it has been stated in unmistakable terms that an Award is not a mere waste paper but does create rights and has some legal effect besides being final and binding on the parties. It has also been held that the Award is, in fact, a final adjudication of a Court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceedings, an Award which is on the face of it regular, is conclusive upon the merits of the controversy submitted for Arbitration. Consequently, the post Award proceedings cannot be considered by any means to be a suit or other proceedings to enforce any rights arising under a contract. All the more so when, as in this case, at all stages the respondent was only on the defense and has not itself instituted any proceedings to enforce any rights of the nature prohibited u/s 69 of the Partnership Act, before any Court as such. We see no infirmity or error whatsoever in the decision of the courts below to call for our interference in this appeal. The appeal fails and shall stand dismissed.

12. It needs to be clarified that Satish Kumar and Others Vs. Surinder Kumar and Others, did not deal with the execution of an arbitral award passed at the instance of an unregistered firm. On the contrary their Lordships had to cogitate on the narrow issue of whether "an award given under the Act on a private reference requires registration u/s 17(1)(b) of the Registration Act, if the Award effects partition of immovable property exceeding the value of Rs. 100." Obviously Satish Kumar as also Kamal Pushp could not lay down any law irreconcilable with Kajaria Traders, which was delivered by a larger Bench. When we keep in perspective the fact that their Lordships had categorically commented that the case before them concerned an unregistered firm defending proceedings, it becomes clear that Kajaria Traders is not an authority for the proposition canvassed before us that arbitration can be commenced or indirectly invoked by an unregistered firm. Therefore, even if arbitration is initiated against an unregistered firm, the latter would not become enabled to raise claims of their own thereby bypassing or annulling the disability created by Section 69 of the Partnership Act. An arbitral award passed in respect of claims filed against the unregistered firm, allowing them or rejecting, would alone be legally efficacious. In the case in hand, the Kajaria Traders ratio militates against an arbitral award granting the claims raised before it by an unregistered firm. This is altogether different from according sanction to a rejection of or only a partial grant of a claim brought against an unregistered firm, which would attract finality as well as executability. Accordingly, the impugned Award is severable, and the portion thereof which allows the claim raised by the Respondent which is an unregistered partnership before the Arbitrator, notwithstanding the fact that it is the Appellant who invoked arbitration, must be set aside. If a Firm is desirous of having its own claims adjudicated either as an independent or distinct claim, or as a Counter-Claim, it must be registered on the date when such an action is filed before the Arbitrator.

13. Mr. Sethi, learned Senior Counsel for the Respondent has drawn attention to Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., which is a decision of a Two Judge Bench. If only the Head Notes are read the Judgment appears to read in favor of the Respondents. However, we must not lose sight of two facts; firstly, that the disputes were inter se partners of an unregistered firm which prima facie may fall within the exceptions carved in Section 69 of the Partnership Act itself. Secondly, the Apex Court was concerned with the appointment of a Receiver and not the adjudication of claims filed by an unregistered partnership before the Arbitrator. The Court noted its decision in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., and by similar dialectic concluded that much like an injunction can be granted as a statutory relief, a Receiver could also be appointed u/s 9 as an interim measure before all aspects are considered. The Court did not, as it could not, speak differently to law enunciated by it in Kajaria Traders. The following paragraphs make it abundantly clear that Firm Ashok did not intend to lay down the law in respect of Section 69 of the Partnership Act, and certainly not in variance to Kajaria Traders which it

noted to be that of a Constitution Bench.

10. To begin with, for the controversy centring around the above said two provisions, we told the learned Counsel for the parties that we are not inclined to go in depth into the issue inasmuch as a prolonged hearing on the issue and decision thereon may take time and that would have devastating effect on the rights of the parties. The learned Counsel for the parties agreed that de hors the issue, the Court may proceed to determine the appeal on merits. Yet, we feel duty-bound to record at least our prima facie opinion on the issue; lest we should be misunderstood as having sidetracked the same.

11. Sub-sections (1) and (2) of Section 69 of the Partnership Act strike at the very root of the jurisdiction of the court to entertain a suit to enforce a right arising from a contract, if the applicability of Section 69 is attracted. By virtue of Sub-section (3), the bar enacted by Sub-sections (1) and (2) applies also to a claim of set-off or "other proceedings to enforce a right arising from a contract" which, in the submission made by the learned Counsel for Groups "B" and "C", includes a proceeding commencing on an application u/s 9 of the A&C Act.

12. In our opinion, which we would term as prima facie, the bar enacted by Section 69 of the Partnership Act does not affect the maintainability of an application u/s 9 of the A&C Act.

13. The A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application u/s 9 under the scheme of the A&C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application u/s 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of the A&C Act to mean "a party to an arbitration agreement". So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of court u/s 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in Sundaram Finance Ltd. v. NEPC India Ltd. the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application u/s 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the court u/s 9 must possess is of being a "party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the court for protection u/s 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the court or the right which is sought to be canvassed in support of the relief. The reliefs which the court may allow to a

party under Clauses (i) and (ii) of Section 9 flow from the power vesting in the court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power u/s 9 is sought to be exercised is the Arbitral Tribunal. Under the scheme of the A&C Act, the arbitration clause is separable from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A&C Act. The relief sought for in an application u/s 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court u/s 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application u/s 9 of the A&C Act.

14. In Jagdish Chandra Gupta case the Constitution Bench approved of a liberal and full meaning being assigned to the phrase "other proceedings" in Sub-section (3) of Section 69 of the Partnership Act untrammelled by the preceding words "a claim of set-off". The Court refused to countenance the plea for interpreting the words "other proceedings" ejusdem generis with the preceding words "a claim of set-off". Shreeram Finance Corpn. calls for the effect of bar created by Section 69 being determined by reference to the date of institution of the suit and not by reference to any subsequent event. In Delhi Development Authority case this Court held Section 69 of the Partnership Act applicable to an application u/s 20 of the Arbitration Act, 1940, as such an application (under the scheme of that Act) would be included within the meaning of "other proceedings" in Section 69(3) of the Partnership Act. In Kamal Pushp Enterprises this Court held that the bar u/s 69 of the Partnership Act is not applicable at the stage of enforcement of the award by passing a decree in terms thereof because the award crystallises the rights of the parties and what is being enforced at that stage is not any right arising from the objectionable contract. None of the cases throws any direct light on the issue at hand. Rather, the undercurrent of dictum in Kamal Pushp Enterprises lends support to the view we are tentatively taking herein. We leave the matter at that and proceed to examine the merits of the appeal as agreed to by all the learned Counsel appearing.

14. It is necessary to refer to Delhi Development Authority Vs. Kochhar Construction Work and Another, in which their Lordships categorically held as follows:

3. Section 69(1) provides that no suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of any person suing as a partner

in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm. This sub-section begins with the words: "No suit...shall be instituted in any court...", which prima facie bars the institution of the suit by a firm which is unregistered. Sub-section (2) next provides that no suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. This sub-section also begins with the words: "No suit...shall be instituted in any court...", which clearly bars the institution of a suit by a firm which is not registered. The provisions of Sub-sections (1) and (2) have been made applicable to other proceedings to enforce a right arising from a contract by virtue of Sub-section (3) of Section 69. It would thus seem on a plain reading of Section 69(2) that a suit instituted in any court by or on behalf of a firm against any third party shall not be valid unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners of the firm. Plainly, the institution of the suit itself is barred both by Sub-section (1) and Sub-section (2) of Section 69 of the Partnership Act. Section 20 of the Arbitration Act provides that where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II (Chapter II refers to arbitration without intervention of a court) may apply to a court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court. Such an application, says Sub-section (2) thereof, shall be in writing and shall be numbered and registered as a suit. Therefore, an application filed by an unregistered firm u/s 20 would also be treated as a suit and would be hit by Section 69(2) if the firm filing the application is not registered with the Registrar of Firms. This appears to be the position in law which emerges on a plain reading of Section 69 of the Partnership Act and Section 20 of the Arbitration Act. This is the view which this Court took in the case of *Shreeram Finance Corporation Vs. Yasin Khan and Others*, . The fact that it is an application to be registered and numbered as a suit would not make any difference for the obvious reason that though Sub-sections (1) and (2) of Section 69 of the Partnership Act refer to a suit, Sub-section (3) thereof makes those sub-sections applicable even "to other proceedings which would include an application registered and numbered as a suit u/s 20 of the Arbitration Act". [See *Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd.*,

4. Counsel for the respondents, however, invited our attention to two decisions which took a view that subsequent registration of the firm can cure the initial defect provided the registration is before the period of limitation has run out. Our attention was drawn to *M.S.A. Subramania Mudaliar v. East Asiatic Co. Ltd.* AIR 1936 Mad. 991 and *Atmuri Mahalakshmi and others Vs. Jagadeesh Traders*, . However, the High Court of Patna in *Laduram Sagarmal v. Jamuna Prasad*

Chaudhuri AIR 1939 Pat 239 and the High Court of Madras in T. Savariraj Pillai Vs. M/s. R.S.S. vastrad and Company, took a contrary view and hold that the suit is incompetent ab initio. We have considered these decisions, but in the light of the plain language of Section 69 of the Partnership Act read with Section 20 of the Arbitration Act and in view of the decision of this Court reported in Shreeram Finance Corpn. we are clearly of the opinion that proceedings u/s 20 of the Arbitration Act were ab initio defective since the firm was not registered and the subsequent registration of the firm cannot cure that defect.

5. In view of the above, we allow this appeal, set aside the order of the High Court and hold that the proceedings were ab initio defective as they could not have been instituted since the firm in whose name the proceedings were instituted was not registered at the date of the institution of the proceedings. We, however, make no order as to costs.

15. Quite recently, in U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and Another, the Supreme Court has sounded a caution against any view contrary to Kajaria Traders in these words --

7. The question as to whether Respondent 1 firm is registered or not is essentially a question of fact. It is true that the arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act, 1932. It has been so held in Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd. We may, however, notice that this Court in Firm Ashok Traders despite following Jagdish Chandra Gupta held that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration clause u/s 9 of the 1996 Act. As correctness or otherwise of the said decision is not in question before us, it is not necessary to say anything in this behalf but suffice it to point out that in the event it is found by the High Court that the learned Civil Judge was wrong in rejecting the application for amendment of the plaint and in fact the respondent firm was registered under the Indian Partnership Act, the question of throwing out the said suit on that ground would not arise. There cannot, however, be any doubt whatsoever that the firm must be registered at the time of institution of the suit and not later on. (See Delhi Development Authority v. Kochhar Construction Work.)

16. In this analysis we think it necessary to sever and truncate the impugned Award into two parts. Firstly, claims advanced by the Appellant Society and secondly, claims advanced by the Respondent unregistered partnership firm. So far as the second set of claims is concerned we are of the view that they are clearly and plainly non judicable, either through the avenue of the civil suit or through the alternate route of arbitration. We clarify that unlike in other cases where parties have agreed that their claims be adjudicated through arbitration either at the instance of the Court or on a mutual understanding, both the parties were indubitably acting pursuant to the arbitration clause contained in the Agreement. The present legal adversaries were not attempting to dissolve the

partnership concern and/or seeking rendition of accounts from each other, which is the exception carved out in the second sub-section of Section 69 of the Partnership Act. The Award, insofar as it allows partially or otherwise, any of the claims of the Respondent unregistered partnership firm is accordingly set aside.

17. We now turn to the Claims put forward by the Appellant Society. In this context the following observations of the Apex Court in Union of India (UOI) Vs. A.L. Rallia Ram, , have not been varied and still hold the field despite the passage of forty years, and numerous subsequent judgments on the subject.

An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous.

18. Acknowledging that the Arbitrator is the final judge of facts, the Apex Court in State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., held that the High Court erred in considering the matter as a court of appeal and in re-evaluating the evidence and that it further erred in recording a finding in reversal of the conclusions of the arbitrator. In Hindustan Tea Co. Vs. K. Sashikant Co. and Another, the Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator had not reached wrong conclusions or failed to appreciate the facts.

19. In Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, the Court held that if the reasons appear per se to be not unreasonable and

irrational the Court ought not to reappreciate the evidence. It approved the observations made in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Limited* (1948) 2 ALL ER 186, which are as follows - "A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavor to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award." That this is a well settled proposition of law was reiterated in the decision of the Apex Court in *Coimbatore District Podu Thozillar Sangam Vs. Balasubramania Foundry and Others*, It was opined that it is only an error of law and not a mistake of fact, committed by the arbitrator, which is justiciable in the Application/Objection before the Court. If no legal proposition emerges from a perusal of either the Award or any document annexed with the Award which is erroneous, and the alleged mistakes or alleged errors, are only mistakes of fact, and if the Award is made after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the Award is not amenable to the correction of the Court. Similar views were again expressed in *Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd.*, ; *Jawahar Lal Wadhwa and Another Vs. Haripada Chakroberty*, ; *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, ; *Sudarsan Trading Co. v. Government of Kerala and Anr.* (1989) 2 SCC 30 ; *Food Corporation of India Vs. M/s. Veshno Rice Millers*, where even a plausible view taken by the Arbitrator was held not to be open to Court interference, if the latter preferred a contrary or alternate view.

20. In *U.P. Hotels and Others Vs. U.P. State Electricity Board*, , the decision of the Umpire had been challenged in respect of his interpretation of Section 49 of the Electricity (Supply) Act. Even on this aspect, which quite palpably takes on the characteristics of a point of law in contradiction to point a fact, the Apex Court did not favor jural intervention. It observed that "the view taken by the Umpire on Section 49 was a possible view in the light of the decision of this Court in *Indian Aluminium*"s case. In the premises, a question of law arose certainly

during the course of the proceedings. Such a question has been decided by the Umpire on a view which is a possible one to take. Even if there was no specific reference of a question of law referred to the Umpire, there was a question of law involved. Even on the assumption that such a view is not right, the award is not amenable to interference or correction by the courts of law as there is no proposition of law which could be said to be the basis of the award of the Umpire, and which is erroneous."

21. In *M/s. Hind Builders Vs. Union of India*, the Court cautioned that where two opinions were possible it could not be predicated that there was an error apparent on the face of the Award. In *Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others*, the view was expressed that the reasonableness of reasons given by the arbitrator were not open to challenge and that the proper approach would be for the Court to support the Award. Similarly, in *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, it was repeated that the Court cannot reappreciate the material on the record. In *Trustees of The Port of Madras Vs. Engineering Constructions Corporation Limited*, the decision of a Division Bench of the High Court of Madras, which reversed the Award on a question of fact and not a question of law, was set aside by the Supreme Court. After considering its previous decisions, the Apex Court in *B.V. Radha Krishna Vs. Sponge Iron India Ltd.*, again held that the Court could not substitute its own view in place of that of the Arbitrator. In *Army Welfare Housing Organisation Vs. M/s. Gautam Construction and Fisheries Ltd.*, the Court declined to vary an award for the reason that without reappreciating evidence it would not be possible to fault the quantum awarded towards anticipated expenses.

22. On the other hand, in *Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor*, the Apex Court found the Award to be illegal as it was passed by the Arbitrator against the conditions agreed upon by the contracting parties and in conscious disregard of stipulations of the contract from which the Arbitrator derives his authority. The Apex Court also found fault with the Award since it granted claims which were palpably barred by limitation. The Courts interference with an Award would be expected and justified where the Arbitrator has travelled beyond the frontiers fixed by the contract between the parties. In *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, , the Hon"ble Supreme Court exercised jurisdiction in context of the interpretation of two clauses in the subject contract since it held the opinion that their construction was "absolutely clear and unambiguous". The Court observed that in ignoring these clauses the Arbitrator had travelled beyond his jurisdiction since the Award was irreconcilable with those clauses.

23. On an analysis of the judgments of the Apex Court spanning several decades, what emerges is that jural interventions with Awards is proscribed, rather than prescribed. The role of the Appellate Court is logically minuscule, and would be restricted to errors of law or jurisdiction of immense import. The learned Single

Judge has considered the factual matrix of these claims, has perused the grounds set-out in the Objections, and after giving due consideration to the law laid down in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. 2003 (2) ALR 5 found that the Award in respect of the claims pressed by the Society is without merit. We find neither scope nor justification for interference with this part of the impugned Judgment.

24. In conclusion the impugned Judgment is reversed only in respect of the claims put forward by the Respondents unregistered firm on the ground that these claims were not justiciable by virtue of Section 69 of the Partnership Act.

25. Appeal is decided in these terms. Parties shall bear their respective costs.