(2006) 12 BOM CK 0081

In the Bombay High Court

Case No : Appeal No. 1139 of 2005 in Arbitration Petition No. 194 of 2005

Masood Mohmmed Husain APPELLANT

Vs

Gulam Rasul Mohammedali Shaikh and others RESPONDENT

Date of Decision : 15-12-2006

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 20, 8(2), 9
Arbitration and Conciliation Act, 1996 — Section 11, 69(2A), 9
Partnership Act, 1932 — Section 69, 69(3), 9
Presidency Small Cause Courts Act, 1882 — Section 19
Presidency Towns Insolvency Act, 1909 — Section 56

Citation : (2006) 12 BOM CK 0081

Hon'ble Judges : S.A. Bobde, J;R.M. Lodha, J

Bench : Division Bench

Advocate : D.H. Mehta with D.O. Mehta instructed by T.A. Purohit, for the Appellant; P.K. Samdani, with V.K. Merchant instructed by M/s Kishore Thakordas and Co., for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—The original petitioner, whose application u/s 9 of the Arbitration and Conciliation Act, 1996, is rejected by order dated 22nd August, 2005 is in appeal before us.

2. Brief facts of the matter are thus:

The appellant (hereinafter to be referred as "the petitioner") set up the case in the arbitration petition that by a Deed of Partnership dated 6th September, 2002, the partnership was constituted between the petitioner and the respondents to carry on business as developers and builders in the name and style of M/s Amber Enterprises. That the said firm is unregistered is not in dispute. According to the petitioner, the said partnership was dissolved by the petitioner. The partnership firm is said to have owned various assets. The Deed of Partnership contains an arbitration clause. As per the case set up by the petitioner, disputes and differences between the parties having been arisen, are to be adjudicated upon by the arbitral tribunal. In the application u/s 9, therefore, the petitioner prays for interim relief for appointment of the Receiver of a partnership assets and other ancillary reliefs.

3. The respondents contested the arbitration petition and inter alia raised the preliminary objection that the partnership firm according to the petitioner having already been dissolved was not a registered firm and, therefore, the application u/s 9 of the Arbitration and Conciliation Act, 1996 was not maintainable in view of bar u/s 69 of the Indian Partnership Act.

4. The learned single Judge held that even if the partnership firm is not registered, the application u/s 9 of the Arbitration and Conciliation Act, 1996 was maintainable. However, the learned single Judge further held that since arbitral proceedings themselves were not maintainable, the petitioner was not entitled to any interim order from the Court.

5. The first question that arises for our consideration is whether section 69 of the Indian Partnership Act as applicable in the State of Maharashtra affects the maintainability of the application u/s 9 of the Arbitration and Conciliation Act, 1996. The Senior Counsel and Counsel for the parties cited few judgments of the Supreme Court in support of their rival contentions. We may consider these judgments now.

6. In the case of Jagdish Chandra Gupta vs. Kajaria Traders (India) Limited, 1965 Mh.L.J. (SC) 45 : 1964 66 Bom. LR 710. the Constitution Bench of the Supreme Court was concerned with the construction of the words "other proceeding" in section 69(3) of the Indian Partnership Act. The Constitution Bench held that the words "other proceeding" in section 69(3) of the Indian Partnership Act must receive their full meaning untrammelled by the words "a claim of set-off preceding these. The latter words, Supreme Court held, neither intend nor can be construed to cut down the generality of the words "other proceeding". Incidentally, we may notice that the Supreme Court in Jagdish Chandra Gupta (supra) was dealing with the proceedings u/s 8(2) of the Arbitration Act, 1940. This is what the Supreme Court said :

"The first question to decide is whether the present proceeding is one to enforce a right arising from the contract of the parties. The proceeding under the eighth section of the Arbitration Act has its genesis in the arbitration clause, because without an agreement to refer the matter to arbitration that section cannot possibly be invoked. Since the arbitration clause is a part of the agreement constituting the partnership it is obvious that the proceeding which is before the Court is to enforce a right, which arises from a contract. Whether we view the contract between the parties as a whole or view only the clause about arbitration, it is impossible to think that the right to proceed to arbitration is not one of the rights which are founded on the agreement of the parties. The words of section 69(3) , "a right arising from a contract" are in either sense sufficient to cover the present matter.

It remains, however, to consider whether by reason of the fact that the words "other proceeding" stand opposed to the words "a claim of setoff any limitation in their meaning as contemplated. It is on this aspect of the case that the learned Judges have seriously differed. When in a statute particular classes are mentioned by name and then are followed by general words, the general words are sometimes construed ejusdem generis, i.e., limited to the same category or genus comprehended by the particular words. But it is not necessary that this rule must always apply. The nature of the special words and the general words must be considered before the rule is applied...........

In our judgment, the words ''other proceeding'' in sub-section (3) must receive their full meaning untrammelled by the words ''a claim of setoff. 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 claim 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)."

7. The Supreme Court in the case of Kamal Pushp Enterprises Vs. D.R. Construction Company, , after noticing the judgment in the case of Jagdish Chandra Gupta (Supra) in paragraph 9 of the report held thus :

"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 destructing 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 crystalise 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 defence 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."

That was a case where the Arbitrator passed an award and suo motu filed the award before the trial Court u/s 14(2) of the Arbitration Act, 1940.When the Court issued notice to the parties, at that stage the objection was raised with regard to section 69 of the Partnership Act, as to whether the Proceedings regarding making the award rule of Court are maintainable despite the firm being not registered partnership firm u/s 69 of the Partnership Act. Dealing with the controversy, the Supreme Court ultimately held, as in paragraph 9, that section 69 has no application to the proceedings before the Arbitrator.

8. In Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., , inter alia, the Supreme Court considered the question of maintainability of application u/s 9 of the Arbitration and Conciliation Act, 1996 moved by a partner of an unregistered firm. The Supreme Court held that the bar indicated by section 69 of the Partnership Act does not affect the maintainability of an application u/s 9 of the Arbitration and Conciliation Act. It was held that the relief sought for in an application u/s 9 is neither a suit nor a right arising from contract. This is how the Supreme Court considered the matter:

''The relief sought for in an application u/s 9 of the Arbitration and Conciliation 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 Arbitration and Conciliation Act." It is true the aforesaid consideration is preceded by the observation of the Supreme Court that the opinion was ''prima facie'' and also concluded by the observation that view was taken ''tentatively''.

9. The earlier two judgments in Jagdish Chandra Gupta as well as Firm Ashok Traders came up for consideration before the Supreme Court in the case of U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and Another, , wherein the

issue was about the maintainability of the application u/s 20 of the Arbitration Act, 1940, filed by an unregistered firm. In paragraph 7 of the report, the Supreme Court said thus:

"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 vs. 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 vs. Kochhar Construction Work.)"

10. It would be seen from the aforesaid consideration that the Supreme Court did hold 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. We may notice that in Firm Ashok Traders after following Jagdish Chandra Gupta, it has been held that section 69 of the Partnership Act has no bearing on right of party to Arbitration clause to file application u/s 9 of the Arbitration and Conciliation Act. The Supreme Court went on to say that correctness or otherwise of the said decision was not in question and it was not necessary to say anything in this behalf.

11. Incidentally, we may notice that insofar as the State of Maharashtra is concerned, section 69 of the Indian Partnership Act has been substantially modified by amendment in section 69. Section 69 of the Indian Partnership Act applicable to the State of Maharashtra may be reproduced by us, which reads thus:

69. Effect of non-registration. - (1) No suit to enforce a right arising from a contract or conferred by this Act 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:

Provided that the requirement of registration of firm under this subsection shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

(2) 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.

(2A) No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm 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 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:

Provided that the requirement of registration of firm under this subsection shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realise the property of a dissolved firm.

(3) The provisions of sub-sections (1), (2) and (2A) shall apply also to a claim of set-off or other proceedings to enforce a right arising from a contract but shall not affect

(a) the firms constituted for a duration upto six months or with a capital upto two thousand rupees : or,

(b) the powers of an official assignee, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply

(a) to firms or partners in firm which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification u/s 56 this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or outside the Presidency towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

12. Though sub-section (2A) has been introduced, sub-section (3) as re-framed by deleting sub-section (2) of the Central Act and the underlying principle on effect of non-registration of the firm in enforcing the right arising from a contract or by the Act continues to be the same.

13. As noticed above, in Jagdish Chandra Gupta''s case, the Supreme Court was

concerned with the application u/s 8(2) of the Arbitration Act, 1940, while in the case of Kamal Pushpa Enterprises, the Apex Court was concerned with the proceeding regarding making the Award rule of the Court and the effect of section 69 of the Indian Partnership Act on the unregistered firm. U. P. State Sugar Corporation Limited is a case of an application u/s 20 of the Arbitration Act, 1940. In none of these three cases, the Supreme Court was directly concerned with the maintainability of an application u/s 9 of the Arbitration and Conciliation Act, 1996, moved by a partner of an unregistered firm. This question has been directly considered by the Supreme Court in the case of Firm Ashok Traders. Though the Supreme Court has expressed its opinion to be ''prima facie'' and ''tentative'', in our considered view the opinion that an application u/s 9 of the Arbitration and Conciliation Act, is neither in a suit nor a right arising from a contract is founded on a sound legal principle that a right arising from a partnership deed or conferred by the Partnership Act is enforced in a arbitral tribunal and the Court u/s 9 is only formulating interim measure so as to protect the right before the arbitral tribunal from being frustrated. For consideration of the application u/s 9 , we think that the Court can use this decision as a precedent guiding the Courts the course to be adopted confronted with a situation like an application u/s 9 of the Arbitration and Conciliation Act being moved by a partner of an unregistered firm. We have no hesitation in adopting the reasoning given by the Supreme Court in the case of Firm Ashok Traders. We may also notice that in subsequent case in the matter of U. P. State Sugar Corporation Ltd., the Supreme Court did not say anything about the correctness of the decision in Firm Ashok Traders on the ground that it was not in question before them and it was not necessary to say anything in that behalf.

14. Even otherwise, in our considered view, the view that an application u/s 9 of the Arbitration and Conciliation Act moved by a partner of an unregistered firm is maintainable is more appropriate as it enables the parties to avail of a remedy which otherwise would not have been available by virtue of sub-section (2A) of section 69 introduced by the Maharashtra Legislature. Having held that the application u/s 9 of the Arbitration and Conciliation Act is maintainable, the next question that arises for our consideration is whether the petitioner is entitled to an interim relief and the impugned order calls for any interference. Despite the fact that the application made by the petitioner u/s 9 of the Arbitration and Conciliation Act is maintainable, in our considered view, the petitioner is not entitled to any relief in the appeal in view of the admitted fact that by the order dated 5th May, 2006 the application made by the petitioner u/s 11 of the Arbitration and Conciliation Act for constitution of the arbitral tribunal came to be dismissed. Learned Counsel for the appellant, however, relied upon the following observation made in the order dated 5th May, 2006 :

"Mere pendency of the appeal would not permit me to entertain this application on the face of the findings recorded by this Court in Arbitration Petition No. 194 of 2005 and in any case if the petitioner succeeds in the pending appeal, his remedy to file fresh application u/s 11 of the Act is not taken away by the rejection of this application now."

15. We are benefited by the following observation made by the Supreme Court in the case of Firm Ashok Traders :

"......Section 9 permits application being filed in the Court before the commencement of the Arbitral proceedings but the provision does not give any indication of how much before. The word ''before'' means, inter alia, ''ahead of; in the presence or sight of; under the consideration or cognizance of. The two events sought to be interconnected by use of the term ''before'' must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or ''within sight'' certainly. The party invoking section 9 may not have actually commenced the Arbitral proceedings but must be able to satisfy the Court that the Arbitral proceedings are actually contemplated or manifestly intended (as M/s Sundaram Finance Ltd. puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses."

".........If Arbitral proceedings are not commenced within a reasonable time of an order u/s 9, the relationship between the order u/s 9 and the Arbitral proceedings would stand snapped and the relief allowed to the party shall ceased to be an order made ''before'', i.e. in contemplation of Arbitral proceedings. The Court, approached by a party with an application u/s 9, is justified in asking the party and being told how and when the party approaching the Court proposes to commence the Arbitral proceedings. Rather, the scheme in which section 9 is placed obligates the Court to do so."

16. The fact of the matter is that, as on date, the application made by the petitioner u/s 11 of the Arbitration and Conciliation Act for constitution of the Arbitral Tribunal stands rejected. There is no question of "proximately contemplated or manifestly intended arbitral proceedings".

17. Surely, in this view of the matter, the petitioner is not entitled to an interim relief as it does not seem to us that the arbitral proceedings are likely to commence within a reasonable time, even if, the appellant applies afresh u/s 11 of the Arbitration and Conciliation Act pursuant to the liberty granted in the order dated 5th May, 2006.

18. Resultantly, the appeal has to be dismissed and is dismissed with no order as to costs.

