

**SUPREME COURT OF INDIA**

U.P. State Sugar Corporation Limited

Vs.

Jain Construction Company

C.A.No.5479 of 2004

(N. Santosh Hegde and S. B. Sinha JJ.)

25.08.2004

**JUDGMENT**

**S. B. Sinha, J.**

1. Leave granted.

2. This appeal is directed against the judgment and order dated 2.12.2003 passed by the High Court of Uttaranchal at Nainital in A.O. No.313 of 2002 whereby and whereunder the appeal filed by the respondents herein purported to be under Section 39(iv) of the *Arbitration Act, 1940* (hereinafter referred to as 'the 1940 Act) was allowed, directing:

"Since, the *Arbitration and Conciliation Act, 1996* has come into force, therefore, appropriate remedy to relegate is available to the parties to act in accordance with the provisions of the new Act, if there is an arbitration clause in the agreement. It is an open remedy to the party to move to approach to the Chief Justice or His Nominated Judge in the arbitration under the New Act."

3. The basic fact of the mater is not in dispute. The parties hereto had entered into an agreement on or about 11.4.1988 as regard certain civil works in an unit belonging to the Appellant herein. Disputes and differences having arisen between the parties, the respondent herein filed an application under Section 20 of the 1940 Act in the Court of the Civil Judge, Dehradun for appointment of an arbitrator relying on or on the basis of a purported arbitration agreement contained in clause 34 of the aforementioned contract. The said suit was marked as O.S. No.290 of 1991. The respondent herein, inter alia, pleaded:

"That as per clause no.34 of contract bond all disputes between the parties arising under the contract, arbitrator is to be appointed by Managing Director of the Defendant Corporation. The plaintiff has written so many letters to the M.D. and Secretary of Corporation for appointment of Arbitrator but they did not pay any attention and have not appointed any Arbitrator so far, so the plaintiff is entitled to get the appointment of Arbitrator from the Court."

4. By reason of a judgment and order dated 1.5.1992, the learned Civil Judge, Dehradun rejected the said petition, inter alia, on the ground that the same was not maintainable in view of Section 69 of the Indian Partnership Act, as the plaintiff-firm was not a registered one. The said finding was arrived at despite the fact that the respondent herein had filed an application for amendment of the said petition. As it appears from the judgment of the learned Civil Judge, that the respondent herein had admitted that it failed to make necessary averment in the plaint as regard registration of the firm inadvertently and the application for amendment has been filed having regard to the contentions raised by the Appellant herein in that behalf. The respondent herein being aggrieved by the said judgment filed an appeal before the High Court which was marked as A.O. No.313 of 2002. The said appeal was allowed in the manner as stated hereinbefore.

5. Mr. Vinay Garg, learned counsel appearing on behalf of the appellant, would submit that as the respondent-firm was not a registered one, the application for appointment of an arbitrator both under the 1940 Act and the *Arbitration and Conciliation Act, 1996* (hereinafter referred to as 'the 1996 Act') was not maintainable. Reliance, in this connection, has been placed on *Firm Ashok Traders and Another vs. Gurumukh Das Saluja and Others* [ ]. It was also contended that in any event, the impugned judgment is unsustainable in law in view of the provisions contained in Section 85(2)(a) of the 1996 Act, as the arbitral proceeding was initiated as far back as on 1.5.1991, i.e. prior to coming into force of the 1996 Act.

6. The respondent appearing in person, inter alia, submitted that in a similar matter being SLP (C) No.18995 of 1995 arising out of an order in Appeal No.493 of 1995 passed by the Allahabad High Court, this Court directed the Additional Civil Judge, to whom the matter was remitted, to appoint an arbitrator in terms of clause 34 of the contract between the parties and, thus, there is absolutely no reason as to why clause 34 of the present agreement, which contains similar stipulation, should not be acted upon. A written submission has also been filed before us, inter alia, contending that the Appellant herein is guilty of commission of breach of the said agreement dated 11.4.1988.

7. The question as to whether the respondent no.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.* [ ].

8. We may, however, notice that this Court in *Firm Ashoka Traders* (supra) 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 under Section 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 and Another 4* ].

9. The said questions, thus, would fall for consideration before the High Court.

10. The only question which survives consideration is the applicability of the 1996 Act in the fact of the present case. Disputes and differences between the parties arose in the year 1991. The respondent filed an application under Section 20 of the 1940 Act on 1.5.1991. It invoked the arbitration agreement as contained in clause 34 of the contract. The arbitral proceeding was, therefore, set in motion. In terms of Section 21 of the 1996 Act, the arbitral proceedings in respect of a particular dispute commences on a date on which the request for that dispute to be referred to arbitration was received by the respondent.

11. Section 85 (2)(a) of the 1996 Act reads thus :

"85. Repeal and saving.-(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the *Arbitration Act, 1940* (10 of 1940) and the *Foreign Awards (Recognition and Enforcement) Act, 1961* (45 of 1961) are hereby repealed. (2) Notwithstanding such repeal, -

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

12. This Court in *Milkfood Ltd. vs. M/s GMC Ice Cream (P) Ltd.* ], relying on or on the basis of *Shetty's Constructions Co. Pvt. Ltd. vs. Konkan Railway Construction and Another 5* , *Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd.*<sup>1</sup>, *Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.* and *State of West Bengal vs. Amritlal Chatterjee*<sup>2</sup>, held that in respect of the arbitral proceedings commenced before coming into force the 1996 Act, the provisions of the 1940 Act shall apply.

13. In view of the aforementioned pronouncements of this Court, the impugned judgment cannot be sustained. It is set aside accordingly. The matter is remitted to the High Court for consideration of the merit of the matter afresh.

14. Keeping in view the fact that the matter is pending for a long time, we would request the High Court to dispose of the matter as expeditiously as possible, preferably within a period of eight weeks from the date of receipt of a copy of this order.

15. The appeal is allowed with the aforementioned observations and directions. In the facts and circumstances of the case, there shall be no order as to costs.

<sup>1</sup>1999 (8) JT 66

<sup>2</sup>2003 (S) JT 1 SC 308