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U.P. STATE SUGAR CORPN. LTD.
v.
JAIN CONSTRUCTION CO. AND ANR.

AUGUST 25, 2004

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[N. SANTOSH HEGDE AND S.B. SINHA, JJ.]

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Arbitration Act, 1940—Sections 20 and 39(iv)—Arbitration and Conciliation Act, 1996—Sections 21 and 85(2)(a)—Application for appointment of arbitrator in terms of arbitration clause in case of dispute between parties—Trial Court holding that firm being unregistered as such application not maintainable even though applicant firm filed amendment application with regard to the same—High Court holding that since 1996 Act has come into force parties to relegate under the new Act—On appeal held : Since the arbitral proceedings commenced before coming into force of the 1996 Act, provisions of 1940 Act applicable and matter remitted to High Court—Furthermore firm must be registered at the time of the institution of the suit and not later—Also, the High Court is to consider the correctness of the order passed by trial court—Partnership Act, 1932—Section 69.

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Appellant-State Sugar Corporation and respondent-construction company entered into a contract. Dispute arose between the parties but the appellant did not appoint any arbitrator as per the arbitration clause in the contract. Respondent filed application under section 20 of the Arbitration Act, 1940. Civil Judge held it to be not maintainable as the respondent firm was not registered even though the respondent had admitted that it failed to make necessary averment in the plaint as regard registration of the firm inadvertently and had filed an application for amendment of the petition. Respondent then filed an appeal. High Court allowed the appeal directing that since the Arbitration and Conciliation Act, 1996 has come into force, parties are to relegate under the new Act. Hence the present appeal.

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Appellant-State Sugar Corporation contended the application for appointment of an arbitrator was not maintainable under the 1940 Act and the 1996 Act as the respondent firm was not registered; and that

in any event, the impugned judgment is unsustainable in law as the
arbitral proceeding was initiated prior to coming into force of the 1996
Act. A

Respondent-firm contended that in a similar matter this Court
directed the trial court to appoint an arbitrator in terms of arbitration
clause of the contract between the parties, on remitting the matter, and
as such there being a similar stipulation in the instant case, it must be
acted upon. B

Allowing the appeal, the Court C

HELD : 1.1. In the event it is found by the High Court that the
Civil Judge was wrong in rejecting the application for amendment of
the plaint and in fact the respondent-firm was registered under the
Partnership Act, the question of throwing out the said suit on that
ground would not arise. High Court would consider these questions. D
Further, 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 Partnership
Act, 1932. The firm must be registered at the time of institution of the
suit and not later. [830-F-G] E

*Delhi Development Authority v. Kochhar Construction Work and
Anr.*, [1998] 8 SCC 559, relied on.

Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd., AIR (1964) F
SC 1882 and *Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and
Ors.*, [2004] 3 SCC 155, referred to.

1.2. Disputes and differences between the parties arose in the year
1991 and the respondent filed an application under Section 20 of the
Arbitration Act, 1940 in the same year. It invoked the arbitration
clause in the agreement. The arbitral proceeding was set in motion. In
terms of Section 21 of the Arbitration and Conciliation Act, 1996 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. Therefore, in respect of the H

A **arbitral proceedings commenced before coming into force of the 1996 Act, the provisions of the 1940 Act would apply. Hence, the matter is remitted to High Court for afresh consideration. [831-A-B; 832-A-B]**

Milkfood Ltd. v. M/s. GMC Ice Cream (P) Ltd., **JT (2004) 4 SC 393**,
B **relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5479 of 2004.

C From the Judgment Order dated 2.12.2003 of the Uttaranchal High Court in A.O. No. 313 of 2002.

Vinay Garg for the Appellant.

D Pradeep Misra for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J : Leave granted.

E 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 :

F "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
G His Nominated Judge in the arbitration under the New Act."

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
H 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 A
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 B
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 C
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.”

By reason of a judgment and order dated 1.5.1992, the learned Civil D
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 E
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. F
No.313 of 2002. The said appeal was allowed in the manner as stated
hereinbefore.

Mr. Vinay Garg, learned counsel appearing on behalf of the appellant, G
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 v. Gurumukh Das Saluja and
Others*, [2004] 3 SCC 155. It was also contended that in any event, the
impugned judgment is unsustainable in law in view of the provisions H

A 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.

B 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.

D 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 v. Kajaria Traders (India) Ltd.*, AIR (1964) SC 1882. 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 v. Kochhar Construction Work and Another*, [1998] 8 SCC 559.

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

The only question which survives consideration is the applicability A
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 B
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.

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

“85. Repeal and saving.—(1) The Arbitration (Protocol and C
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 D
to arbitral proceedings which commenced before this Act
came into force unless otherwise agreed by the parties but E
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 F
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.”

This Court in *Milkfood Ltd. v. M/s GMC Ice Cream (P) Ltd.*, JT
(2004) 4 SC 393, relying on or on the basis of *Shetty's Constructions Co.*
Pvt. Ltd. v. Konkan Railway Construction and Another, [1998] 5 SCC 599, G
Thyssen Stahlunion GMBH v. Steel Authority of India Ltd., [1999] 9 SCC
334 = JT 1999 (8) SC 66, *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*,
[2001] 6 SCC 356 and *State of West Bengal v. Amritlal Chatterjee*, JT
(2003) Supp. 1 SC 308, held that in respect of the arbitral proceedings
commenced before coming into force the 1996 Act, the provisions of the H

A 1940 Act shall apply.

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.

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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.

C

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.

D N.J.

Appeal allowed.