A KAMAL PUSHP ENTERPRISES

v.

D.R. CONSTRUCTION COMPANY

JULY 28, 2000

B [M. JAGANNADHA RAO AND DORAISWAMY RAJU, JJ.]

Partnership Act, 1932 :

Section 69—Unregistered firm—Prohibition against—Scope and extent
C *of prohibition.*

Agreement between appellant and respondent—Respondent an unregistered firm—Dispute between appellant and respondent—Reference to Arbitrator at the instance of appellant—Award in favour of respondent—Proceedings for making the award rule of Court—Objection by appellant that respondent
D *cannot defend proceedings in view of the bar contained under Section 69—Held not maintainable—Prohibition contained in Section 69 is in respect of instituting a proceeding to enforce a right arising under a contract—It had no application before an Arbitrator—Award was not vitiated on account of prohibition contained in Section 69—Post award proceedings are not suit or other*
E *proceedings to enforce any right arising under a contract.*

Arbitration Act, 1940 : Sections 8(2) and 14(2).

Arbitration—Bar contained in Section 69 of Partnership Act—Applicability to arbitration proceedings—Held not applicable.

F **Gas Authority of India Ltd. entered into a contract with the appellant to execute certain works. The appellant in turn had entered into a separate contract with the respondent, which is an unregistered firm, for carrying out the work, the execution of which was undertaken by the appellant under its contract with the Gas Authority of India Ltd. Disputes**
G **having arisen between the appellant and the respondent, a Reference was made to the Arbitrator at the instance of the appellant. The Arbitrator passed an award in favour of the respondent. However, during the proceedings regarding making the award rule of court, the appellant raised an objection that the respondent, being an unregistered firm, could not defend the arbitration proceedings in view of the bar contained in Section**
H **69 of the Partnership Act. On this issue the Trial Court decided against**

the appellant. The revision preferred by the appellant was rejected by a single judge of the High Court holding that the provisions of Section 69 of the Partnership Act do not stand in the way of an unregistered firm defending proceedings against it and it precludes only the initiation of any proceedings by such a firm. A

In appeal to this Court it was contended on behalf of the appellant that the bar imposed under Section 69(3) is attracted to the case on hand and that inasmuch as the same prohibits the enforcement of any right arising from a contract by an unregistered firm, the objection can be taken at any stage i.e. even post award proceedings instituted to enforce the award. B C

Dismissing the appeal, the Court

HELD : 1. There is no infirmity or error whatsoever in the decision of the courts below to call for interference in this appeal. [26-H; 27-A] D

2. The prohibition contained in Section 69 of the Partnership Act, 1932 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 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 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. [26-A-E] E F G H

3. 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 under Section 69 of the Partnership Act, before any court as such. [26-G-H]

Jagdish Chandra Gupta **v.** *Kajaria Traders (India) Ltd.*, **AIR (1964) SC 1882;** *Raptakos Brett & Co. Ltd.* **v.** *Ganesh Property*, **[1998] 7 SCC 184 and** *Haldiram Bhujiawala & Anr.* **v.** *Anand Kumar Deepak Kumar & Anr.*, **[2000] 3 SCC 250, referred to.**

J. Belli Gowder **v.** *Joghi Gowder & Anr.*, **AIR (1951) Mad. 683, distinguished.**

Satish Kumar & Ors. **v.** *Surinder Kumar & Ors.*, **AIR (1970) SC 833, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2235 of 1998.

From the Judgment and Order dated 13.10.95 of the Madhya Pradesh High Court in C.R. No. 561 of 1994.

Sanjay Parikh and Suresh Sahni for the Appellant.

Vimal Dave and Shailendra Narain Singh for the Respondent.

The Judgment of the Court was delivered by

RAJU, J. The above appeal has been filed against the order of a learned Single Judge of the Madhya Pradesh High Court dated 13.10.95 in C.R. No. 561 of 1994, since reported in AIR 1996 M.P.139, rejecting the Revision Petition filed by the appellant holding that the provisions of Section 69 of the Partnership Act do not stand in the way of an unregistered firm defending a proceedings against it and it precludes only the initiation of any proceeding by such a firm.

The Gas Authority of India Ltd., at Vijaypur, entered into a contract with the appellant to execute certain works and the appellant in its turn had entered into a separate contract with the respondent, indisputably an unregistered firm for carrying out the work, the execution of which was undertaken by the appellant under its contract with 'GAIL'. Disputes arose between the appellant

and the respondent. Thereupon, the appellant appears to have, invoking Section 8(2) of the Arbitration Act, 1940, served a notice on the respondent seeking for consent for the appointment of an Arbitrator, in terms of the arbitration clause, out of five proposed Arbitrators and the respondent gave its consent for the appointment of a named Advocate, as the Arbitrator. The Arbitrator entered into the reference and the appellant filed its claim and the respondent apart from opposing the claim of the appellant stated its own claim. The Arbitrator passed an Award in favour of the respondent and *suo moto* filed the award before the trial court under Section 14(2) of the Arbitration Act. When the Court issued notice to both the appellant and the respondent, it is at this stage the appellant filed various objections, one of which was based upon Section 69 of the Partnership Act, and the trial court appears to have framed a preliminary issue of law under Order 14 Rule 2, CPC, for decision as follows:

> "Whether the proceedings regarding making the award rule of Court are maintainable as the non-applicant firm is not a registered partnership firm under Section 69 of the Partnership Act?"

The learned Trial Judge decided the preliminary issue against the appellant. Thereupon, the appellant moved the High Court by way of a revision unsuccessfully and has come before this Court with this appeal.

The learned counsel for the appellant, initially, attempted an argument about the propriety and illegality involved in the Arbitrator *suo moto* filing the award before the Civil Court for passing a decree but when objected to by the respondent that the revision before the High Court against which the present appeal has been filed arose out of the only preliminary issue decided by the trial court on the applicability or otherwise of Section 69 of the Partnership Act to the case on hand, the arguments were confined to the question of disability, if any, of the respondent, being an unregistered firm, for getting any decree on the award of the Arbitrator, in the proceedings initiated by the Arbitrator.

Mr. Sanjay Parikh, learned counsel for the appellant, contended that the courts below ought to have sustained the objection of the appellant based upon Section 69 of the Partnership Act holding the proceedings to be barred on account of the respondent being an unregistered firm. According to the learned counsel the proceedings arising out of an award are certainly proceedings arising out of the agreement between parties and would fall under the category of "other proceedings" envisaged in Section 69 of the Partnership Act. Strong reliance was placed in this regard upon the decision of this Court reported in

A *Jagdish Chandra Gupta* v. *Kajaria Traders (India) ltd.* AIR (1964) SC 1882; *Raptakos Brett & Co. Ltd.* v. *Ganesh Property*, [1998] 7 SCC 184 and *Haldiram Bhujiawala & Anr.* v. *Anand Kumar Deepak Kumar & Anr.*, [2000] 3 SCC 250, in addition to placing reliance upon some other decisions of the High Courts, to substantiate his claim. It is unnecessary to refer to the
B decisions of the various High Courts in the light of the decisions of this Court. Per contra, Mr. Vimal Dave, while adopting the reasoning of the courts below, contended that the provisions of Section 69 of the Partnership Act are no impediment to the respondent getting relief as a defendant in the hands of the Arbitrator in a proceeding initiated by the appellant itself and as long as the respondent was only a respondent and had not initiated or commenced any
C proceedings of its own, there is no merit in the preliminary objection raised, which, according to the learned counsel, has been rightly overruled.

The question as to the scope and ambit of Section 69 (3) was considered by this Court in the decision reported in *Jagdish Chandra Gupta* (supra). An application filed under Section 8(2) of the Arbitration Act for the appointment
D of a named person or anyone else to go into the disputes between the parties was objected to, among other things on the ground that Section 69(3) of the Partnership Act afford a bar to the petition because the partnership was not registered. As against the conclusion of the High Court that the application was maintainable, an appeal was filed in this Court. In construing the words, "a
E claim of set off or other proceeding to enforce a right arising from a contract .....", it was held that the section thinks in terms of (a) suits and (b) claims of set off which are in a sense of the nature of suits and (c) other proceedings and while the section first provides for exclusion of suits in sub-sections (1) & (2) of Section 69 the same ban is also applied to a claim of set off and other
F proceedings to enforce any right arising from a contract. This Court ultimately construed the words "other proceedings" in sub-section (3) of Section 69 giving them their full meaning untrammelled by the words "a claim of set off", and held that the generality of the words "other proceedings" are not to be cut down by the latter words. The said case, being one concerning an application before Court under Section 8(2) of the Arbitration Act, 1940 in the light of the
G arbitration agreement, this Court finally held that since the arbitration clause formed part of the agreement constituting the partnership the proceeding under Section 8(2) was in fact to enforce a right which arose from a contract/ agreement of parties.

The above referred to decision was adverted to and the principles therein
H were also applied in the subsequent decision reported in *Raptakos Brett & Co.*

Ltd. (supra) and on the facts of that case that the cause of action for the suit was not the agreement of tenancy which lapsed by efflux of time but really one arising under the General Law and Transfer of Property Act it was held that the bar of suit or other proceedings based upon the lack of registration of the firm does not apply to the case. In yet another decision of this Court reported in *Haldiram Bhujiawala* (supra) rendered by a Bench to which one of us (M. Jagannadha Rao, J.) was a party, following the earlier decision reported in 1998 (7) SCC 184 (supra) it was held that the bar under Section 69 (2) was not attracted to that case since the suit for permanent injunction to restrain the defendants from using the plaintiff's trade mark/name was based upon the statutory rights under the Trademarks Act and on common law principles of tort applicable to passing off actions and not under the unregistered partnership agreement.

The persistent plea made on behalf of the appellant before us is that the bar imposed under Section 69(3) is attracted to the case on hand and that inasmuch as the same prohibits the enforcement of any right arising from a contract by an unregistered firm, the objection can be taken at any stage i.e., even post award proceedings instituted to enforce the award. Inspiration is drawn for this claim from the decision of a learned Single Judge of the Madras High Court reported in *J. Belli Gowder* v. *Joghi Gowder and Another*, AIR (1951) Mad. 683. That was a case wherein an award came to be passed by an Arbitrator on an oral reference or submission made. Unlike the law in force prior to the Arbitration Act, 1940, the said Act in Section 2(a) defined an arbitration agreement to be one made in writing to submit present or future differences to arbitration and, therefore, it was held that after the coming into force of the Act an award passed on an oral submission or reference can neither be filed and made a rule of Court under the Act nor enforced apart from the provisions of the Act. This decision which is based on the principle that the Arbitrator is a creature of the contract between the parties and a reference to the Arbitrator could be only by means of an agreement in writing only indicates that such infirmity goes to the root of the very jurisdiction of the Arbitrator to enter into the reference and decide by passing an award and in our view the same can be of no assistance to the case of the appellant. It is not the case of the appellant before us that there was no arbitration clause in writing or that the dispute is not arbitrable but yet the Arbitrator has undertaken it for decision. As rightly pointed out for the respondent the very reference came to be made at the instance of the appellant and what is really objected to in the form of a preliminary issue is only the infirmity based upon Section 69 of the Partner-

A ship Act, 1932.

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
B 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,
C 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 -
D 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
E 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 & Others v. Surinder Kumar & Others*, AIR (1970) SC 833, wherein it has been stated in
F 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. Conse-
G quently, 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 under Section 69 of the Partnership Act, before any Court
H 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. A

We make it clear that we have decided only the point relating to the preliminary issue raised and decided by the trial judge as well as by the High Court, and all or any other objections and contentions may be raised and pursued by the respective parties in the proceedings pending before the Trial Court. The parties will bear their respective costs. B

T.N.A. Appeal dismissed.