C.M. Makhija Vs The Chairman cum Managing Director, South Eastern Coalfields Limited and Others

Arbitration Application No. 7 of 2006

Court: Chhattisgarh High Court

Date of Decision: July 17, 2015

Acts Referred:

Arbitration and Conciliation Act, 1996 - Section 11(6), 8#Partnership Act, 1932 - Section 69, 69(3)

Hon'ble Judges: Goutam Bhaduri, J

Bench: Single Bench

Advocate: Rahul Jha, for the Appellant; N.K. Shukla and Shankar Tiwari, Advocates for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Goutam Bhaduri, J

This order shall govern the application filed by the applicant under Section 11(6) of the Arbitration & Conciliation Act,

1996 whereby the applicant has sought to enforce an arbitral agreement and prays for appointment of an Arbitrator.

2. Learned counsel for the applicant would submit that an agreement was entered into with the S.E.C.L./Non-applicants on 05.09.1994 for

construction of DAV School at Kusmunda. Acceptance of tender was communicated to the applicant vide letter dated 06.08.1994 and the value

of the contract was Rs. 76,06,147.99 (Rupees Seventy Six Lakhs Six Thousand One Hundred Forty Seven and Ninety Nine Paisa Only). Under

the terms of the agreement, it is further submitted that apart from the construction of DAV School, the ancillary work such as electrification, water

supply and sanitation work were also to be executed by the applicant and the period of completion of job was 12 months including rainy season. It is further contended that as per the terms of the agreement, the non-applicants were to pay for the escalation charges, increase in wages of

labourers, increase in the cost of construction material, increase in price of POL, Royalty increase for minor minerals, increase in sales tax rate etc.

Pursuant to that, the work order was issued to the applicant on 06.06.1994. It is stated that on demand the non-applicant failed to handover the

work site to the applicant, as the Central School Management was in possession of the plot wherein the proposed construction of DAV School

was made and 2 1/2 months delay was caused to handover the vacant possession whereby the entire work of the applicant was arrested. Lately,

the site was handed over to the applicant on 15.08.1994 and due to rainy season, the construction work and the foundation could not be done

which eventually delayed the construction and concrete connected work also. It is further contended that even the drawing for the work handed

over by the non-applicants were incomplete, which also caused the delay and in totality 9 months delay was caused.

3. Further reasons was also pleaded by the applicant that the engineering charge deviated the sanction work and refused same at two occasions

which was ultimately sanctioned on 01.08.1996 thereby the non-applicants themselves were callous to get the job done within the stipulated time.

It was further contended that though the building was incomplete its inauguration ceremony was fixed and the work could only be completed in the

month of September, 1996. With respect to the electrification work, it is contended that due to non supply of safety machines by the non-

applicants as required under the law, the decision at the end of the non-applicants was late. Consequently, it also delayed the electrification work.

Ultimately, the final bill amounting to Rs. 8,62,585.32 (Rupees Eight Lakhs Sixty Two Thousand Five Hundred Eighty Five & Thirty Two Paise

Only) was prepared which remained unpaid on the ground that the revised estimate was not sanctioned. It is further contended that the security

deposit amounting to Rs. 2,00,000/- (Rupees Two Lakhs) was also not refunded even after the period of 6 months. Consequently, it is stated that

because of the escalation in the price due to the delay at the end of the non-applicants, the amount inflated to Rs. 10,18,422/- (Rupees Ten Lakhs

Eighteen Thousand Four Hundred Twenty Two Only) which remained unpaid. Further, an amount of Rs. 4,18,000/- (Rupees Four Lakhs Eighteen

Thousand Only) was claimed as compensation on the ground that the extra work was carried out at the instance of the non-applicants and the

respective machines remained idle.

4. When the amount was not paid, as per the articles of agreement, Clause 29, the applicant invoked the arbitration clause and requested the non-

applicants for appointment of Arbitrator. Thereafter, instead of appointment of Arbitrator, the non-applicants imposed penalty of Rs. 78,624/-

(Rupees Seventy Eight Thousand Six Hundred Twenty Four Only) so as to disallow the legitimate claim of the applicant. It is further stated that despite the prayer made by the applicant, the non-applicants failed to appoint the Arbitrator and even when the request was made to the higher

authorities, the Arbitrator was not appointed. Consequently, an amount of Rs. 24,96,887.32 (Rupees Twenty Four Lakhs Ninety Six Thousand

Eight Hundred Eighty Seven and Thirty Two Paise Only) was outstanding against the non-applicants. It is further stated that since the Arbitrator

was not appointed, therefore, the instant application has been filed.

5. The non-applicants/S.E.C.L. filed its objection and predominantly opposition was made that the applicant is not a registered partnership firm

having registration number from the Register of Firms & Societies whereby by virtue of Section 69 of the Indian Partnership Act, 1932, prohibits

filing of a proceeding by an unregistered firm. It is contended that since the firm which invoked the application is not tenable. The other grounds is

raised that the jurisdiction for the dispute vests with the District Judge Bilaspur, as per agreement any dispute was subject to jurisdiction at Bilaspur

Court as per Clause 10 of the work order and further it is contended that the application is barred by limitation.

6. Mr. Rahul Jha, learned counsel for the applicant, would submit that the agreement contains an arbitration clause and despite the fact that the

applicant has invoked the arbitration clause, the Arbitrator has not been appointed, therefore, the Arbitrator may be appointed in this case.

7. Per contra, Dr. N.K. Shukla, learned senior counsel assisted by Mr. Shankar Tiwari, appearing on behalf of the Non-applicants/SECL made a

preliminary submission that the instant application cannot be gone into because of the fact the firm is unregistered one. He further submits that in

view of Section 69 of the India Partnership Act, 1932, effort to invoke the arbitration clause will be covered within the definition of other

proceeding. Therefore, in absence of the registration of firm, the proceeding to invoke the arbitral dispute cannot be gone into. It was further

contended that the said objection about the maintainability of the application was made in the year 2007 itself and no efforts were made to show

that firm is registered one and thereby the applicant has not answered the same. It is contended that therefore it will lead to draw an inference that

the firm is unregistered one. So by virtue of application of Section 69 of the Indian Partnership Act, 1932, the petition is not maintainable. He

placed his reliance on Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., AIR 1964 SC 1882 : (1964) 8 SCR 50 and would submit that

Section 69(3) of the India Partnership Act, 1932 creates a bar to the instant application since the firm is not registered.

8. I have heard learned counsel appearing for the parties, perused the pleadings and the documents on record.

9. Since the preliminary objection which goes to the root of very fact of maintainability of the application for non registration of the partnership firm

has been contended, therefore, it would be relevant to examine and quote Section 69 of the Partnership Act.

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.

(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.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract,

but shall not affect, -

(a) the enforcement of any right to sue 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, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 to 1909) or the Provincial

Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This section shall not apply, -

(a) xxxx

(b) xxxx

10. The section, speaking generally, bars certain suits and proceedings as a consequence of non-registration of firms. Sub-section (1) prohibits the

institution of a suit between partners inter se or between partners and the firm for the purpose of enforcing a right arising from a contract or

conferred by the Partnership Act 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. Sub-section (2) similarly prohibits a suit by or on behalf of the firm against a third party for the purpose of enforcing rights arising from a

contract 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. In the third sub-

section a claim of set-off which is in the nature of a counter-claim is barred as also the sub-section (3) takes within its sweep the word ""other

proceedings"".

11. The words ""other proceedings"" in sub-section (3) whether should be construed as ejusdem generis with ""a claim of set-off"", was subject of

conflicting decision. In case of Syed Wahid Hussain Vs. Maharajkumar Mahmud Hasan Khan and Others, AIR 1961 All 409 : (1960) 30 AWR

633 , the Allahabad High Court held that the rule of ejusdem generis did not apply, and accordingly rejected an application to enforce an

arbitration clause in the partnership deed of an unregistered firm. Whereas the Bombay High Court held that an application under Section 8 of the

Arbitration Act does not come within the words ''or other proceeding''. Finally the conflict was resolved by the Supreme Court in the case of

Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., AIR 1964 SC 1882 : (1964) 8 SCR 50 wherein the Court held the rule ejusdem generis

did not apply to unregistered firm and unregistered firm could not enforce an arbitration clause in the partnership deed.

12. Subsequently, the Supreme Court in case of U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and Another, AIR 2004 SC 4335 :

(2004) 3 ARBLR 1 : (2004) 122 CompCas 145 : (2004) 4 CompLJ 370 : (2004) 5 CTC 356 : (2004) 7 JT 61 : (2004) 7 SCALE 307 : (2004)

7 SCC 332 : (2004) 1 SCR 826 Supp : (2004) AIRSCW 5122 : (2004) 6 Supreme 449 delivered a judgment on 25.08.2004, in which the

judgment delivered in case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., AIR 2004 SC 1433 : (2004) 1

ARBLR 141 : (2004) 2 CompLJ 419 : (2004) 2 CTC 208 : (2004) 2 JT 352 : (2004) 137 PLR 526 : (2004) 1 SCALE 297 : (2004) 3 SCC

155 : (2004) 50 SCL 224 : (2004) 1 SCR 404 : (2004) AIRSCW 366 : (2004) 1 Supreme 754 decided on 09.01.2004 was also considered

and the Apex Court held 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.

13. As the facts narrated earlier would indicate in the instant case, despite the objection raised there is no document has been placed on record

that on the date of filing the firm was a registered partnership. Consequently, as the law laid down by their Lordship, as has been discussed above,

the bar of Section 69(3) of the Indian Partnership Act, 1932 would come into play whereby enforcement of right of arbitration proceeding would

be blocked as the application itself cannot be branded as interim in nature.

14. In the result, the application for appointment of Arbitrator cannot be gone into for the bar created under Section 69(3) of the Indian

Partnership Act, 1932. Consequently, the application is dismissed. No order as to cost.