

IN THE HIGH COURT FOR THE STATE OF TELANGANA:
HYDERABAD
* * * *

ARBITRATION APPLICATION NOS.120 OF 2017 AND 40 OF 2018

Arb.Appln.No.120 of 2017

Dr. Mohammed Ahmed Ali Khan

... Applicant

Vs.

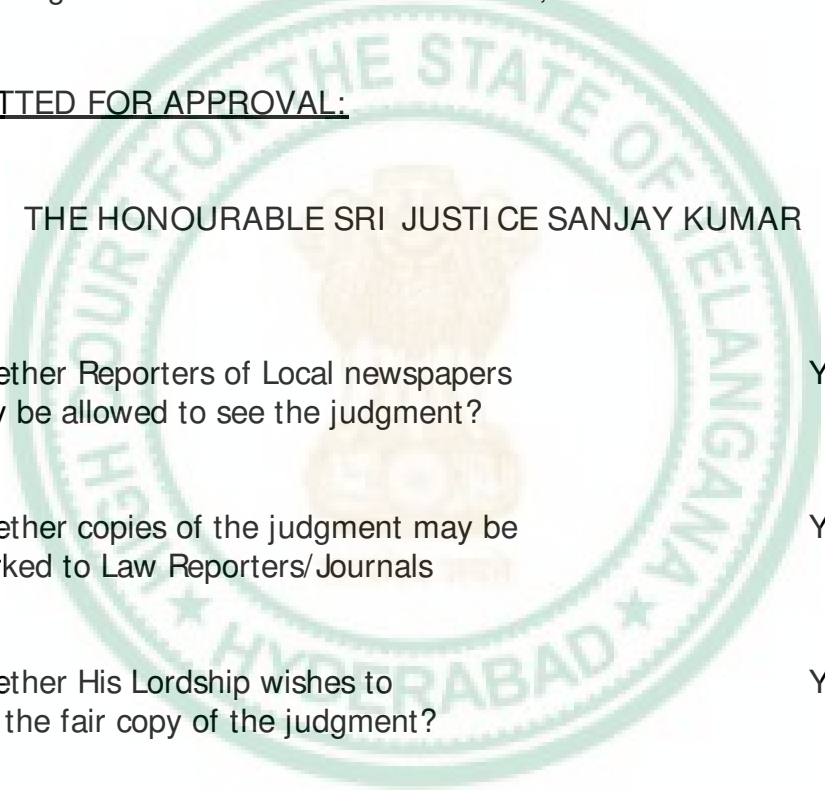
M/s. Candy Children's Hospital and others

... Respondents

Date of Judgment Pronouncement: 18th APRIL, 2019

SUBMITTED FOR APPROVAL:

THE HONOURABLE SRI JUSTICE SANJAY KUMAR

- 
1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

* THE HONOURABLE SRI JUSTICE SANJAY KUMAR
+ ARBITRATION APPLICATION NOS.120 OF 2017 AND 40 OF
2018

% DATED 18th APRIL, 2019

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Dr. Mohammed Ahmed Ali Khan

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Vs.

\$ M/s. Candy Children's Hospital and others

... Respondents

< Gist:

> Head Note:

! Counsel for Applicants : Sri M.S.Srinivas Iyengar
in both cases

^ Counsel for respondents 2 and
3 in Arb.Appln.No.120 of 2017
and respondents in Arb.
Appln.No.40 of 2018 : Sri P.S.Rajasekhar

? CASES REFERRED:

1. (2008) 16 SCC 774
2. (2012) 2 SCC 93
3. AIR 1964 SC 1882
4. ILR 30 PAT 109
5. (1995) 2 SCC 145 = AIR 1995 SC 714
6. 1999 (51) Delhi Reported Judgments 156
7. 1998 (46) Delhi Reported Judgments 453
8. (1998) 8 SCC 559
9. (2015) 4 L.W 385 = AIR 2015 Madras 266
10. (2000) 6 SCC 659
11. (2015) 1 SCC 32
12. (2005) 8 SCC 618
13. (2011) 5 SCC 532
14. (2016) 8 SCC 788

THE HONOURABLE SRI JUSTICE SANJAY KUMAR
ARBITRATION APPLICATION NOS.120 OF 2017 AND 40 OF 2018

COMMON ORDER

Dr.Mohammed Ahmed Ali Khan is the applicant in Arb.A.No.120 of 2017 filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'). He seeks appointment of a sole Arbitrator to resolve his claim for a sum of Rs.1,00,00,000/- raised against M/s.Candy Children's Hospital, Hyderabad; Dr.Ataf Naseem; and Dr.Syed Tanweer Ahmed, the respondents therein.

Mrs.Elmeera Siddiqi, w/o. Dr.Mohammed Ahmed Ali Khan, is the applicant in Arb.A.No.40 of 2018. She filed this application under Section 11(5) of the Act of 1996 seeking appointment of a sole Arbitrator to resolve her claim for a sum of Rs.30,00,000/- raised against Dr.Ataf Naseem and Mrs.Farah Nishanth, the respondents therein.

The case of the applicant in Arb.A.No.120 of 2017 is as follows: Respondents 2 and 3 and he constituted a registered partnership firm under Partnership Deed dated 14.05.2012. Differences having arisen between them, a Memorandum of Understanding (MoU) was executed on 30.01.2015. As the parties were unable even then to continue with the business amicably, the applicant issued letter dated 30.05.2017 dissolving the partnership. However, the disputes persisted and civil and criminal cases came to be filed in relation thereto. As Clause 18 of the Partnership Deed dated 14.05.2012 provided that any dispute arising between the partners in respect of the partnership or its affairs, touching upon the construction or interpretation of any matter of the partnership deed, should be referred to arbitration in accordance with the law of Arbitration in force, the applicant sent legal notice dated 31.07.2017 calling upon the

respondents to agree to appointment of a named retired District Judge as the sole Arbitrator. The notice was received by respondents 2 and 3 on 03.08.2017 and 04.08.2017 respectively but neither of them chose to reply. In these circumstances, the applicant approached this Court.

Notice having been ordered on this application on 13.10.2017, Sri Nazir Ahmed Khan, learned counsel, entered appearance for the respondents. Thereafter, in his place, Sri P.S.Rajasekhar, learned counsel, entered appearance for respondents 2 and 3.

Respondents 2 and 3 filed their counter-affidavit dated 19.03.2019 through Sri P.S.Rajasekhar, learned counsel. Therein, Dr.Sayeed Tanweer Ahmed, deposing on their behalf, stated as follows: The MoU dated 30.01.2015 had nothing to do with the Partnership Deed dated 14.05.2012 and therefore, there were no arbitrable disputes existing between the parties touching upon the construction or interpretation of any matter of the partnership deed. He conceded that the partnership firm stood dissolved under the letter dated 30.05.2017 addressed by the applicant and received by them on 31.05.2017 and 01.06.2017 respectively. He asserted that the arbitration agreement contained in Clause 18 of the partnership deed also stood dissolved as it would not survive the dissolution of the partnership firm effected under the letter dated 30.05.2017 addressed by the applicant and that there was no arbitration agreement existing between the parties as on date. He stated that after dissolution of the said firm, he and respondent 2 reconstituted the partnership, *vide* Partnership Deed dated 18.01.2018, and got it registered. He claimed that there were no existing disputes between the parties and therefore, the application was not maintainable. He referred to the institution of C.C.No.157 of 2018 by the applicant on the file of the learned XVII Additional Chief Metropolitan Magistrate, Hyderabad, against

them in relation to the alleged offence of defamation and stated that they had instituted Crl.P.No.12922 of 2018 before the High Court to quash the same, under Section 482 CrPC., which was pending consideration. He also referred to registration of Crime No.116 of 2017 at their behest on the file of the Central Crime Station, Hyderabad, against the applicant for alleged offences under Sections 406 and 420 IPC, leading to the applicant filing Crl.P.No.9 of 2018, under Section 482 CrPC., which was allowed on 24.07.2018 and was confirmed by the Supreme Court, when S.L.P.No.7820 of 2018 was dismissed on 24.09.2018. He therefore stated that the disputes between the parties were incapable of settlement through arbitration and would fall within the exception carved out by the Supreme Court. He admitted that they had filed Arbitration O.P.No.1500 of 2017 on the file of the learned X Additional Chief Judge, City Civil Court, Hyderabad, and Arbitration O.P.No.1889 of 2017 on the file of the learned XI Additional Chief Judge, City Civil Court, Hyderabad, under Section 9 of the Act of 1996 in relation to operation of the bank accounts of the firm, which were frozen at the behest of the applicant. However, after dissolution of the partnership by the applicant, he said that they withdrew the same on 18.01.2018.

In Arb.A.No.40 of 2018, the applicant's case is as follows: She was a partner in M/s.Candy Medical and General Stores, a partnership at will. This unregistered partnership firm was created under Partnership Deed dated 10.08.2015, wherein Dr.Altaf Naseem and Mrs.Farah Nishanth, w/o.Dr.Syed Tanweer Ahmed, were partners along with her and one P.Vinod Kumar, who left the partnership later. She claimed that due to inability of the partners to continue the business amicably, she addressed letters dated 30.05.2017 and 01.06.2017 dissolving the partnership. These letters were received by the respondents on 31.05.2017 and 01.06.2017

respectively. According to her, Clause 10 of the Partnership Deed dated 10.08.2015 provided that in the event of disputes amongst the partners in respect of interpretation of any of the clauses and/or the conduct of the business, the same should be referred to the arbitrator/arbitrators chosen by them. She therefore sent legal notice dated 16.08.2017 calling upon the respondents to agree to appointment of a named retired District Judge as the sole Arbitrator to resolve her claim. Despite service of the said notice upon them on 18.08.2017, the respondents did not reply. Hence, the present application.

Notice having been ordered upon this application on 06.04.2018, Sri Nazir Ahmed Khan, learned counsel, initially entered appearance for the respondents. However, he was replaced thereafter by Sri P.S.Rajasekhar, learned counsel.

Counter-affidavit dated 19.03.2019 was filed by the respondents through Sri P.S.Rajasekhar, learned counsel. Therein, Dr.Altaf Naseem deposed on their behalf and stated as follows: The partnership firm formed under the Deed dated 10.08.2015 was an unregistered one and hence, the present application is not maintainable. He admitted that the partnership stood dissolved by issuance of the letter dated 30.05.2017 addressed by the applicant, which was received by them on 31.05.2017 and 01.06.2017 respectively. He claimed that the arbitration agreement contained in Clause 10 of the partnership deed also stood dissolved upon such dissolution of the partnership firm. He stated that neither the affidavit nor the application contained any pleading as to the disputes existing between the parties and in the absence of the same, he asserted that the present application was liable to be dismissed as there was no existing arbitrable dispute. He also referred to the criminal litigation between the parties and stated that, in any event, the dispute would be

incapable of resolution through arbitration as the same would fall within the exception carved out by the Supreme Court, and prayed for dismissal of the application.

Sri M.S.Srinivas Iyengar, learned counsel for the applicants in both cases, would argue that the scope and ambit of these arbitration applications would be governed by the provisions of the Act of 1996, as amended by Amendment Act 3 of 2016 with effect from 23.10.2015. He would stress upon Section 11(6A) of the Act of 1996, inserted therein with effect from 23.10.2015 which postulates that while dealing with an application under Section 11(5) of the Act of 1996 the High Court is to confine itself to examination of the existence of an arbitration agreement and no more, and assert that existence of an arbitrable dispute would not be within the domain of enquiry by this Court in the present applications. He would further assert that as the quantum of the claim of each of the applicants has been set out in clear terms in these applications, it is not necessary for this Court to examine as to what is the foundation of the dispute, which led to quantification of such claim.

Per contra, Sri P.S.Rajasekhar, learned counsel, would firstly contend that the arbitration agreements contained in the partnership deeds in both these applications would cease to exist upon dissolution of the partnerships and therefore, these arbitration applications are liable to be dismissed at the threshold.

However, this argument loses sight of the settled legal position that even if an agreement drawn up between the parties ceases to be in existence owing to the termination thereof, the arbitration agreement, if any, contained therein would still survive for resolution of disputes. Reference in this regard may be made to EVEREST HOLDING LIMITED

V/ s. SHYAM KUMAR SHRIVASTAVA¹, wherein the Supreme Court observed that once there is a valid arbitration agreement between the parties contained in a joint venture agreement and if any disputes arose between them in relation to the subject matter of the said joint venture agreement, they would have to be adjudicated through the process of arbitration even though the joint venture agreement may have been terminated and cancelled. The argument to the contrary that disputes could not be referred to arbitration, as the agreement was not in existence as on that date, was therefore held to be devoid of merit.

Reference may also be made to REVA ELECTRIC CAR COMPANY P. LTD. V/ s. GREEN MOBIL², wherein upon an application filed under Section 11 of the Act of 1996, the Supreme Court observed that notwithstanding the initial period under the MOU expiring by a particular date, the disputes that arose in relation to its termination and the consequences thereof would be clearly covered by the arbitration clause therein. The Supreme Court further observed that even upon termination of the agreement, the arbitration agreement would still survive.

Ergo, there can be no dispute with the settled legal proposition that an arbitration clause in an agreement survives, even after the expiry/ termination of such agreement, in relation to any disputes that arose during the subsistence of the agreement or even as to the termination thereof. It is therefore not open to the respondents to claim that mere dissolution of the partnerships would entail extinguishment of the dispute resolution mechanism provided therein by way of arbitration. Be it noted that the disputes raised for resolution under such arbitration clauses

¹ (2008) 16 SCC 774

² (2012) 2 SCC 93

would be in relation to the past and dissolution of the partnerships, which would operate prospectively, do not have the effect of extinguishing them.

However, the second argument advanced by Sri P.S.Rajasekhar, learned counsel, requires consideration. As already noted *supra*, the partnership firm in Arb.A.No.40 of 2018 was an unregistered one. Basing on this fact, Sri P.S.Rajasekhar, learned counsel, would argue that in the light of Section 69(3) of the Indian Partnership Act, 1932 (*for brevity*, 'the Act of 1932'), Arb.A.No.40 of 2018 would be barred by law.

Section 69 of the Act of 1932 reads as under:

'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 effect,—

(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 of 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) to firms or to partners in firms 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 under section 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 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.'

In this context, Sri P.S.Rajasekhar, learned counsel, would also draw the attention of this Court to the four Judge decision of the Supreme Court in JAGDISH CHANDER GUPTA V/s. KAJARIA TRADERS (INDIA) LIMITED³. Therein, the Supreme Court was also considering appointment of an Arbitrator in terms of an arbitration agreement in an unregistered firm's partnership deed. An application under Section 8(2) of the Indian Arbitration Act, 1940 (*for brevity*, 'the Act of 1940'), came to be filed for this purpose. One of the grounds raised against such appointment being made was that Section 69(3) of the Act of 1932 barred the application, as the partnership was an unregistered one. In this context, the Supreme Court observed that the question to be decided was whether an application for appointment of an Arbitrator under Section 8(2) of the Act of 1940 would be one to enforce a right arising from the contract of the parties, as Section 69(3) of the Act of 1932 specifically used those words. The Supreme Court considered whether the words 'other proceeding' in Section 69(3) should be read *ejusdem generis* with the words immediately preceding them: 'a claim of set-off' and held that the words 'other proceeding' must receive their full meaning untrammelled by the words 'a claim of set-off' and would include an application filed under Section 8(2) of the Act of 1940. The Supreme Court further observed that in MAHENDRA V/ s. GURDEYAL⁴, the Division Bench of the Patna High Court erred in holding to the effect that Section 69(3) of the Act of 1932

³ AIR 1964 SC 1882

⁴ ILR 30 PAT 109

would not bar an application filed under Section 8(2) of the Act of 1940 and observed that the reasoning given by the Division Bench that as Section 69 allows suing for dissolution and rendition of accounts of an unregistered partnership it cannot bar such an application, appeared to be not quite in point.

Relying on these observations Sri P.S.Rajasekhar, learned counsel, would assert that as an application under Section 11(5) of the Act of 1996 stands on par with an application under Section 8(2) of the Act of 1940, the edict of the Supreme Court would be squarely applicable and it would not be open to this Court to entertain the present application arising out of an arbitration agreement in an unregistered firm's partnership deed.

With his usual fairness, Sri P.S.Rajasekhar, learned counsel, would also bring it to the notice of this Court that a two Judge Bench of the Supreme Court, in PREM LATA V/ s. ISHAR DASS CHAMAN LAL⁵, held to the contrary. Surprisingly, in this decision the Supreme Court referred to JAGDISH CHANDER GUPTA³ but the inference drawn therefrom was altogether different. According to this decision, when it is permissible under Section 69(3)(a) of the Act of 1932 to sue for rendition of accounts and for realization of the property of an unregistered firm, there can be no prohibition to invoke the arbitration clause in such an unregistered firm's deed of partnership. Sri P.S.Rajasekhar, learned counsel, would however assert that this decision completely misunderstood the import of the larger Bench decision in JAGDISH CHANDER GUPTA³ and the same was noted by the Delhi High Court in COL. H.C.CHOPRA (RETIRED) V/ s. V.C.MEHRA⁶. Therein, the Delhi High Court observed as follows:

'8. ... In my respectful and humble opinion the decision in *Smt. Premlata's case* (supra) runs counter to the earlier decision of

⁵ (1995) 2 SCC 145 = AIR 1995 SC 714

⁶ 1999 (51) Delhi Reported Judgments 156

a larger Bench of the Supreme Court in *Jagdish Chander's case* (supra). The decision of my learned brother S.N.Kapoor, J in *Kanahi Ram's case* (supra) supports my understanding of the ratio established in *Jagdish Chander's case* (supra).

9. In *Smt. Premlata's case* (supra) the learned Judges had observed that since the right to seek rendition of accounts and dissolution of partnership was available to parties even in the case of unregistered partnerships that same right should be available through the arbitration avenue. However, pronouncements in *Jagdish Chander's case* (supra) preclude a consideration of this attractive argument.'

Reference may also be made to KANAHI RAM V/ s. KARTAR SINGH⁷, which was referred to in COL. H.C.CHOPRA (RETIRED)⁶. Therein, the Delhi High Court did not consider PREM LATA⁵ and only went by JAGDISH CHANDER GUPTA³. It was held that arbitration proceedings are certainly covered by the term 'other proceeding' occurring in Section 69(3) of the Act of 1932 and it was no more *ratio integra*, as the aspect was settled finally in JAGDISH CHANDER GUPTA³.

The issue was again considered by the Supreme Court in DELHI DEVELOPMENT AUTHORITY V/ s. KOCHHAR CONSTRUCTION WORK⁸. This case also arose under the Act of 1940 and pertained to institution of a suit under Section 20 thereof for appointment of an Arbitrator. The partnership was however an unregistered one. The Supreme Court observed that in the light of the language of Section 69 of the Act of 1932, the proceedings under Section 20 of the Act of 1940 were *ab initio* defective, as the firm was not a registered one. Reference was also made to JAGDISH CHANDER GUPTA³ in the context of Section 69(3) making sub-sections (1) and (2) thereof applicable to the 'other proceeding', which would include an application registered and numbered as a suit under Section 20 of the Act of 1940.

⁷ 1998 (46) Delhi Reported Judgments 453

⁸ (1998) 8 SCC 559

On the other hand, Sri M.S.Srinivas Iyengar, learned counsel, would place reliance on the decision of the Madras High Court in *M/ s. JAYAMURUGAN GRANITE EXPORTS V/ s. M/ s. SQNY GRANITES*⁹. To understand the scope and import of this decision, it would be necessary to first examine the relevant statutory schemes. Hitherto, Section 8 of the Act of 1940 dealt with the power of the Court to appoint an arbitrator. It read as under:

‘8. Power of court to appoint arbitrator or umpire.—(1) In any of the following cases –

- (a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or
- (b) If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or
- (c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.’

Chapter 3 of the Act of 1940 dealt with arbitration with the intervention of a Court where there is no suit pending. Section 20 therein read as under:

‘20. Application to file in court arbitration agreement.—(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a court

⁹ (2015) 4 L.W 385 = AIR 2015 Madras 266

having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the court shall *order the agreement to be filed*, and shall make an order or reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.'

It was in the context of Section 8(2) of the Act of 1940 that the judgment in JAGDISH CHANDER GUPTA³ was rendered. Be it noted that both Sections 8 and 20 of the Act of 1940 referred to the 'Court' appointing the arbitrator in the event an arbitrator was not appointed by consent of the parties. Section 11 of the Act of 1996, as it stood prior to its amendment by Amendment Act 3 of 2016 with effect from 23.10.2015, however stood on a different footing. It read as under:

'11. Appointment of arbitrators :— (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

- (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- (b) the two appointed arbitrators fail to agree on their arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,—

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

- (a) any qualifications required for the arbitrator by the agreement of the parties; and
- (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to the “Chief Justice” in those sub-sections shall be construed as a reference to the “Chief Justice of India”.

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.’

Notably, Section 11 of the Act of 1996, as it then stood, referred only to ‘the Chief Justice’ or his designates and not to the ‘Court’. Section 2(1)(e) of the Act of 1996, as it then stood, defined ‘Court’ thus:

‘ “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.’

After its amendment by Act of 3 of 2016, with effect from 23.10.2015, Section 2(1)(e) of the Act of 1996 now reads as under:

'2(1)(e) "Court" means—

- (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
- (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;'

Comparison of the provision as obtaining then and now makes it clear that the definition of 'Court' remains unchanged in so far as domestic arbitrations are concerned and it is only in the case of international commercial arbitrations that a change has been brought about.

It is in this statutory context that the judgment of the Madras High Court in JAYAMURUGAN GRANITE EXPORTS⁹ has to be considered. The first respondent in the said case was a partnership firm. The firm was however an unregistered one. Disputes having arisen, reference to arbitration in terms of Clause 25 of the partnership agreement was sought under Section 11(5) of the unamended Act of 1996, as it stood prior to 23.10.2015. The question raised before the Madras High Court was that as the firm was an unregistered one, Section 69(3) of the Act of 1932 would create a bar to sue in respect of proceedings of arbitration. Having referred to JAGDISH CHANDER GUPTA³, the Madras High Court observed that there was no direct judgment in the context of Section 11 of the Act of 1996 and then took note of the fact that Section 11 of the

Act of 1996, as it then stood, specifically spoke only of 'the Chief Justice' or his designate and observed that the framers of the statute did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The Madras High Court opined that it was for this reason that Section 11 applications were not to be moved before the 'Court', but before 'the Chief Justice' either of the High Court or of the Supreme Court, as the case may be, or their designates.

Reference was made to the decision of the Supreme Court in *KAMAL PUSHP ENTERPRISES V/ s. D.R.CONSTRUCTION CO.*¹⁰, which was also a case arising under the Act of 1940. Therein, the Gas Authority of India Limited had entered into a contract with the appellant to execute certain works and the appellant, in turn, entered into a separate contract with the respondent, an unregistered firm. Disputes having arisen between the appellant and the respondent firm, the appellant invoked Section 8(2) of the Act of 1940 and served a notice on the firm. The firm gave its consent and the Arbitrator entered upon the reference and rendered an award in favour of the respondent and filed it *suo motu* before the trial Court under Section 14(2) of the Act of 1940. The trial Court, after appearance of the parties, framed a preliminary issue as to whether the proceedings regarding making the award a Rule of Court would be maintainable in the light of Section 69 of the Act of 1932, as the respondent was an unregistered firm. The trial Court held against the appellant and the same was confirmed by the High Court holding that the provisions of Section 69 did not stand in the way of an unregistered firm defending the proceedings against it as it precludes only initiation of proceedings by such a firm. It is in this context that the Supreme Court observed that the prohibition contained in Section 69 is in respect of

¹⁰ (2000) 6 SCC 659

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 reference to an Arbitrator was at the instance of the appellant itself. The Supreme Court held that the award in that case could not be said to be vitiated on account of the prohibition contained in Section 69 of the Act of 1932 as it had no application to proceedings before an Arbitrator. It was pointed out that at the stage of enforcement of the award by passing a decree in terms thereof, what is enforced is the award itself which crystallises the rights of parties, under the Indian Contract Act, 1872, and the general law, to be paid for the work executed and not any right arising only from the objectionable contract. Consequently, the post-award proceedings could not be considered, by any means, to be a suit or other proceeding to enforce any right arising under a contract and all the more so, when, at all stages, the firm was only on the defence and had not itself instituted any proceeding to enforce any right of the nature prohibited under Section 69 of the Act of 1932 before any Court.

Reference was then made by the Madras High Court to PREM LATA⁵ and other judgments arising under Section 20 of the Act of 1940. Dealing with JAGDISH CHANDER GUPTA³, the Madras High Court summed up that the view taken therein was that irrespective of whether the contract is looked at as a whole or only the arbitration clause therein, the right to proceed to arbitration is founded only on the agreement of the parties and thus, the words in Section 69(3) 'a right arising from a contract' are in either sense sufficient to cover an application for appointment of an arbitrator under Section 8(2) of the Act of 1940.

The Madras High Court opined that guidance was also available in the judgment of the Supreme Court in STATE OF WEST BENGAL V/ s.

ASSOCIATED CONTRACTORS¹¹. This case dealt with the scope of Sections 9 and 42 read with Section 2(1)(e) of the Act of 1996. Therein, specific reference was made to the fact that instead of the 'Court', power had been conferred on 'the Chief Justice' and it was observed that the framers of the statute must have been conscious of the definition of 'Court' in the Act of 1996 and it would thus be proper to conclude that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction, as the intention was to confer power on the highest judicial authority in the State and in the country, viz., on the Chief Justices of High Courts and on the Chief Justice of India, to give greater credibility to the arbitral process. Reference was made to SBP AND COMPANY V/s. PATEL ENGINEERING LIMITED¹² in support of this opinion, as the Supreme Court had observed therein that power under Section 11(6) of the Act of 1996 was not conferred on the Supreme Court or on the High Court, but it was conferred on the Chief Justice of India or the Chief Justice of the High Court. The Supreme Court further observed that Section 11 applications are not to be moved before the 'Court' as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates, and this was despite the fact that the Chief Justice or his delegate had to decide judicially and not administratively. The Supreme Court further observed that the Chief Justice does not represent the High Court or the Supreme Court, as the case may be, as is clear from Section 11(10) of the Act of 1996, which states that the Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted to him by sub-sections (4), (5) or (6) thereof.

¹¹ (2015) 1 SCC 32

¹² (2005) 8 SCC 618

Reference was also made by the Madras High Court to Section 11(12)(b) which states that where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any arbitration, reference to the Chief Justice in those sub-sections shall be construed as a reference to the Chief Justice of the High Court, within whose local limits the principal Civil Court referred to in Section 2(1)(e) is situated, and where the High Court itself is the Court referred to in the definition, to the Chief Justice of that High Court. The Madras High Court opined that Section 11(12)(b) was necessitated in order to make it clear that the Chief Justice of the High Court will only be such Chief Justice within whose local limits the principal Civil Court referred to in Section 2(1)(e) is situated.

This, *per* the Madras High Court, does not in any manner make the Chief Justice or his designate a 'Court' for the purpose of Section 42 and the decision of the Chief Justice or his designate, not being a decision of the Supreme Court or the High Court, as the case may be, has no precedential value, being a decision of a judicial authority which is not a Court of Record. Reference was also made to para 18 of the Supreme Court judgment wherein a distinction was drawn between applications moved under Sections 8 and 11 of the Act of 1996 as opposed to applications moved under Section 9 thereof, which are to be made to the 'Court', as defined, for the passing of interim orders before, during or after the arbitral proceedings.

The Madras High Court then observed as under:

'38. If these observations are looked in the context of Section 69 of the Partnership Act, the bar created for institution of the suit or other proceedings is in respect of the same being instituted in any "courts". But the aforesaid observation shows that the power has to be exercised under Section 11 of the 1996 Act by the Chief Justice or his delegate and not by the Court. In fact, it is observed in paragraph-20 that there are a variety of reasons as to why the Supreme Court cannot possibly be considered to be "court" within the meaning of Section 2(1)(e) even if it retains seisin over the

arbitral proceedings. The Judgment is to the effect that the Chief Justice does not represent the High Court or the Supreme Court, as the case may be, when exercising power under Section 11, albeit a judicial power. This is also the reason for the decision of the Chief Justice or his designate not being the decision of the Supreme Court or High Court, as the case may be, as there is no precedential value being the decision of the judicial authority, which is not a court of record.

39. In addition, as has been discussed aforesaid, the scheme of the 1996 Act is different and the process of mechanism for alternate dispute resolution system has to be construed not identical to the 1940 Act, considering the difference in their schemes.

40. I am thus of the view that non-registration of the petitioner firm would not be a bar under Section 69 of the Partnership Act for institution of proceedings under Section 11 of the 1996 Act.'

However, in the light of the amendments now made to Section 11 of the Act of 1996, with effect from 23.10.2015, *vide* Amendment Act 3 of 2016, the reasoning of the Madras High Court, on the strength of ASSOCIATED CONTRACTORS¹¹ and SBP AND COMPANY¹², does not hold good presently. The amended Section 11 of the Act of 1996 no longer refers to 'the Chief Justice of India' or 'the Chief Justice of the High Court' or their designates. In all the sub-sections of Section 11, reference is now made to either the 'Supreme Court' or the 'High Court', as the case may be, or any person or institution designated by such Court. Applying the same logic that was adopted by the Madras High Court, the makers of the statute must be deemed to have been fully aware of the decisions rendered in the context of the unamended provisions of Section 11 of the Act of 1996, with specific reference to the use of the words: 'the Chief Justice of India' or 'the Chief Justice of the High Court', as the case may be, or their designates. The law makers therefore consciously discarded the words which existed in the statute and substituted them with the words 'the Supreme Court or the High Court, as the case may be, or any person or institution designated by such Court'.

As already pointed out *supra*, Section 2(1)(e) of the Act of 1996 still continues to define 'Court' for domestic arbitrations on the same lines as it was defined prior to 23.10.2015. The distinction drawn by the Madras High Court on the strength of the words 'the Chief Justice of India' or 'the Chief Justice of the High Court', in Section 11 of the Act of 1996, as it then stood as opposed to 'the Court' in Section 8(2) of the Act of 1940, to reject the applicability of the four Judge Bench decision in JAGDISH CHANDER GUPTA³ is no longer available, as the amended provisions now refer to the 'High Court' or the 'Supreme Court', as the case may be. The *ratio* laid down in JAGDISH CHANDER GUPTA³ with regard to Section 69(3) of the Act of 1932, providing for the application of the provisions of sub-section (1) and (2) thereof to 'other proceedings' of any kind before a 'Court', which can be said to be made for enforcement of any right arising from under a contract, would therefore revive.

Sri M.S.Srinivas Iyengar, learned counsel, would argue that in para 9 of JAGDISH CHANDER GUPTA³, the Supreme Court observed that this bar would not apply to those rights expressly mentioned as exceptions in Section 69(3) and (4) of the Act of 1932. However, as rightly pointed out by Sri P.S.Rajasekhar, learned counsel, this observation in para 9 has to be read in continuation of the concluding portion of para 8, wherein the Supreme Court specifically observed that the Patna High Court's decision in MAHENDRA⁴ that Section 69 of the Act of 1932 did not bar a partner of an unregistered partnership firm from applying to the Court under Section 8 of the Act of 1940 for referring the dispute to arbitration cannot be accepted as sound as the reason given by the Division Bench that as Section 69 allows suing for dissolution and accounts of unregistered partnerships it cannot bar such an application, appeared to be not quite in point. The final opinion of the Supreme Court

is therefore manifest and it is to the effect that Section 69(3) would bar an application under Section 8(2) of the Act of 1940 for appointment of an Arbitrator, if the partnership deed containing the arbitration clause was of an unregistered firm, thereby attracting Section 69(3) of the Act of 1932.

As the only ground for the Madras High Court to take a different view was the use of the words in Section 11 of the Act of 1996, as it then stood, which is not the position obtaining after 23.10.2015 when the law makers, in their wisdom, introduced the words 'the Supreme Court or as the case may be the High Court, or the person or institution designated by such Court' in the place of 'the Chief Justice of India' or 'the Chief Justice of the High Court', as the case may be, or their designates, the said decision does not hold good *vis-à-vis* the amended provisions.

In that view of the matter, Arb.A.No.40 of 2018 is not maintainable as Section 69(3) of the Act, as interpreted and applied in JAGDISH CHANDER GUPTA³, would posit a bar to the maintainability of this application in relation to the arbitration clause contained in the partnership deed of this unregistered firm.

However, in so far as Arb.A.No.120 of 2017 is concerned, the partnership firm is a registered one and existence of the arbitration agreement under Clause 18 of the Partnership Deed dated 14.05.2012 is manifest and unquestionable. Though Sri P.S.Rajasekhar, learned counsel, would raise questions as to the very existence of an arbitral dispute, he fairly admits that Section 11(6A) of the Act of 1996, inserted therein by Act 3 of 2016 with effect from 23.10.2015, would be applicable. In the light of this provision, it is not open to the High Court to go beyond examination of the case for determining existence of the arbitration agreement. All other aspects would have to be raised for consideration before the arbitral Tribunal. The objections raised by Sri P.S.Rajasekhar,

learned counsel, in the context of this arbitration application therefore stand rejected on that ground leaving it open to the respondents to raise such issues, if they so choose, before the arbitral Tribunal in accordance with the due procedure.

Another contention of the respondents is that institution of criminal cases by and between the parties would be sufficient to attract the exclusionary clause adumbrated by the Supreme Court in *BOOZ ALLEN AND HAMILTON INC. V/ s. SBI HOME FINANCE LIMITED*¹³. Sri P.S.Rajasekhar, learned counsel, would draw the attention of this Court to para 36 of this judgment, wherein well-recognised examples of non-arbitrable disputes were set out, one of which is disputes relating to rights and liabilities which give rise to or arise out of criminal offences. He would point out that even after amendment of the Act of 1996 with effect from 23.10.2015, the Supreme Court rendered a decision on 17.08.2016 in *VIMAL KISHOR SHAH V/ s. JAYESH DINESH SHAH*¹⁴, whereby one more category of cases was added to the list of six categories of cases specified in *BOOZ ALLEN AND HAMILTON INC.*¹³ as those which could not be decided by arbitration. Learned counsel would therefore contend that even after amendment of the Act of 1996, inclusion of a new category would mean that the non-arbitrability of disputes can be looked into. However, this argument loses sight of the fact that this aspect is no longer within the domain of the High Court while dealing with an application under Section 11(5) of the Act of 1996. It is no doubt a ground which could be raised before the Arbitrator himself under Section 16 of the Act of 1996, but while considering an application under Section 11(5)

¹³ (2011) 5 SCC 532

¹⁴ (2016) 8 SCC 788

thereof, the High Court cannot go beyond the examination of existence of an arbitration agreement.

In the result, Arb.A.No.40 of 2018 is dismissed as not maintainable. Arb.A.No.120 of 2017 is ordered appointing Ms.G.Rohini, retired Chief Justice of Delhi High Court, residing at H.No.3-3-108/153 & 172, Surya New Friends Colony, Phase-II, Attapur, Hyderguda, Rajender Nagar, Ranga Reddy District - 500 048, as the sole Arbitrator for resolution of the disputes between the applicant and the respondents therein, arising out of the Partnership Deed dated 14.05.2012, in accordance with the provisions and mandate of the Act of 1996. The learned Arbitrator shall be entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Amendment Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal measure. No order as to costs.

18th APRIL, 2019

SANJAY KUMAR, J

Note : L.R.Copy to be marked.

(B/O) PGS