A M/S. ARVIND CONSTRUCTIONS CO. PVT. LTD.

v.

M/S KALINGA MINING CORPORATION AND ORS.

MAY 17, 2007

B [TARUN CHATTERJEE AND P.K. BALASUBRAMANYAN, JJ.]

Partnership Act : 1832 :

Partnership firm—Re-registration—Effect of—Firm registered in 1949—
C *Again registered comprising some of the original partners in 2005 with the same name—Earlier firm not dissolved—Held, registration of the firm in the same name again in 2005 does not affect the status of the firm.*

Arbitration and Conciliation Act, 1996 :

D *ss. 9 and 11 (4) (b)—Interim order by District Judge u/s 9—Propriety of—Arbitration clause is an agency agreement—Agreement for a specific period having come to an end—Parties nominating their respective arbitrators but both the arbitrators so nominated failing to nominate presiding arbitrator—Application u/s 11 (4)(b) before Chief Justice of High Court for*
E *appointing third arbitrator—Meanwhile on application, District Judge granting interim order to maintain status quo until arbitral tribunal takes the matter—High Court vacating the interim order—Held, Adequate grounds are not made out at this interlocutory stage for interfering with order of High Court and parties are left to have their disputes resolved in terms of arbitration agreement—As agreed by both the parties, sole arbitrator appointed to*
F *decide the disputes between the parties—Except the question of maintainability of appeal filed by respondent before High Court on the pretext of re-registration, since, the appeal has been held to be maintainable, all the other questions are left open for decision by the sole arbitrator.*

G **Respondent no. 1, a partnership firm was constituted in the year 1949 bearing registration no. 71/1949. It was reconstituted in subsequent years taking in some additional partners. On 14.3.1991 the respondent-firm entered into an agency agreement with the appellant, a private limited company, engaging the latter as a raising contractor in respect of the mines for which the former had obtained leases from the State Government. On 25.3.1991 the**

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respondent firm executed an irrevocable power of attorney in favour of the appellant authorizing it to administer the mines and sell the iron ore extracted therefrom. The agency agreement was to end on 31.3.2006. The appellant sought a further extension of the term but respondent no.1 was not willing for an extension. Disputes arose between the parties and by a letter dated 9.12.2005 the appellant invoked the arbitration clause in the agency agreement and nominated its arbitrator. The respondent firm registered itself again on 24.12.2005 bearing registration no. 595/2005. It, however, in turn also nominated an arbitrator. The arbitrators so nominated were to name the presiding arbitrator but since they failed to do so the appellant filed a petition under Section 11(4)(b) of the Arbitration and Conciliation Act, 1996 requesting the Chief Justice of the High Court to appoint the third arbitrator. While the said application was pending, the appellant company also filed an application under Section 9 of the Act before the District Judge for interim relief to permit it to continue to carry on the mining operations and to restrain the respondent from interfering with it. The District Judge directed *status quo* to be maintained until arbitral tribunal was constituted to adjudicate the dispute between the parties. The respondent filed an appeal before the High Court which held that since *prima facie* the agreement between the parties was not a specifically enforceable one in terms of the Specific Relief Act and since the terms of the agreement had expired, it was not appropriate to grant the interim order, and reversing the order of the District Judge, dismissed the application filed by the appellant-company. Aggrieved, the latter filed the instant appeal.

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It was contended for the appellant that it had entered into agreement with the firm bearing registration no. 71/1949, and since the appeal before the High Court was filed by the firm bearing registration no. 595/205, the same was not maintainable; that since the agreement entered with the appellant was, in the light of irrevocable Power of Attorney, co-terminus with the mining lease granted to the respondent firm, the same could not be terminated and would not come to an end by efflux time; and that powers under Section 9 of the Act, were independent of any restrictions placed by Specific Relief Act.

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Dismissing the appeal, the Court

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HELD: 1. It was the appellant who filed the application under Section 9 of the Arbitration and Conciliation Act, 1996 impleading the respondent firm and its partners. The said firm represented by a partner, who even admittedly was a partner of the firm as constituted in the year 1949 and was also a party

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A to the agreement with the appellant-company itself, had filed the appeal before the High Court. There is no case that the firm registered in the year 1949 had been dissolved. On the other hand, it was being reconstituted from time to time. Therefore, the fact that a firm in the same name was again registred in the year 2005, does not affect the status of the firm with which the appellant-company had a contract and the filing of the appeal by that firm represented B by its partner. [Part 11] [187-B, C, D]

2. The effect of the agreement dated 14.3.1991 and the Power of Attorney dated 25.3.1991 admittedly executed between the parties and the rights and obligations flowing therefrom are really matters for decision by the Arbitral C Tribunal. [Para 12] [187-F]

3.1. In the facts and circumstances, *prima facie*, it is not possible to say that the High Court was wrong in thinking that it may be a case where an injunction could not be granted in view of the provisions of the Specific Relief Act. But, that again will be a question for the arbitrator to pronounce upon. D Suffice it to say that the position is not clear enough for this Court to assume for the purpose of this interlocutory proceeding that the appellant is entitled to specifically enforce the agreement dated 14.3.1991 read in the light of the Power of Attorney dated 2.5.3.1991. Of course, this aspect will be again subject to the contention raised by the appellant-company that the agreement created in his favour was co-terminus with the mining lease itself. But, these E are the aspects to be considered by the Arbitral Tribunal Adequate grounds are not made out by the appellant at this interlocutory stage for interfering with the order of the High Court. In that view alone, it would be proper to decline to interfere with the order of the High Court and leave the parties to have their disputes resolved in terms of the arbitration agreement between F the parties. [Para 13 and 14] [188-B, C, D, E]

4. The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot *prima facie* be accepted. Suffice it to say that *prima facie* exercise of power G under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver. [Para 15] [188-F; 189-C, D]

Firm Ashok Traders and Anr. v. *Gurumukh Das Saluja and Ors.*, [2004] 3 SCC 155, held inapplicable.

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5. It is seen that in spite of the parties naming their respective arbitrators in terms of the arbitration agreement, the arbitrators so appointed had not been able to nominate a presiding arbitrator. Since counsel on both sides agreed that this Court may appoint either a presiding arbitrator or a sole arbitrator for the purpose of resolving the disputes between the parties from the panel of names furnished, the Court appointed the sole arbitrator to decide on the disputes between the parties springing out the agreement dated 14.3.1991 and the Power of Attorney dated 25.3.1991. The arbitrator would be free to fix his terms in consultation with the parties.

[Para 16] [189-D-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2707 of 2007.

From the Final Judgment and Order dated 24.1.2007 of the High Court of Orissa at Cuttack in ARBA Nos. 8 and 15 of 2006

Dr. A.M. Singhvi, Jaideep Gupta, Sr. Adv., Ashutosh Kaitan, P.K. Bansal, Deepak Khurana, Vishvjit Das, Umesh Kumar Khaitan, Amit Bhandari for the Appellant.

A.K. Ganguly, Surya Prakash Mishra, K.K. Venugopal, Sr. Adv., S. Ravi Shankar, Rateesh, Barnali Basak, Visushi Chandana, S. Ravishankar, Yamunah Nachiar, S. Ravishankar for the Respondents.

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. 1. Leave granted.

2. M/s Kalinga Mining Corporation, a partnership firm bearing registration No. 71/1949, came into existence on 10.12.1949. During the years from 1973 to 1980, the firm obtained three mining leases from the State Government. The partnership firm was reconstituted in the year 1980, taking in some additional partners, again in the year 1991 and yet again in the year 1994.

3. On 14.3.1991, the firm entered into an agency agreement with the appellant, a private limited company for a term of 10 years. Thereby, the appellant was engaged as a raising contractor in respect of the mines for which the firm had obtained leases from the State Government. On 25.3.1991, the firm executed an irrevocable Power of Attorney in favour of the appellant authorizing it to administer the mines and sell the iron ore extracted therefrom.

4. On 13.3.2001, the term of 10 years fixed in the agency agreement

A expired. New terms were negotiated between the parties and on 22.9.2001, the agreement was extended for a period of three years commencing from 14.3.2001. The term was to end with 31.3.2003. Again, on 3.9.2003, the term of the agreement was extended for a further period of three years commencing from 1.4.2003. Thereby, the period was to end with 31.3.2006.

B 5. The appellant sought a further extension of the term of the agency agreement. Apparently, the firm was not willing for an extension. Certain disputes thus arose and by letter dated 19.11.2005, the appellant-company sought resolution of the said disputes. The appellant-company followed this up by a letter dated 9.12.2005 invoking the arbitration clause in the agency C agreement and nominating Mr. Sanjeev Jain as its arbitrator in terms of the arbitration agreement.

6. It is seen that the respondent firm, for reasons best known to itself, sought for and got a fresh registration on 24.12.2005 and a firm having the same name was again registered and assigned registration No. 595/2005. D *Prima facie*, this was unwarranted and the excuse put forward was that the partners, some of whom were partners even originally, could not trace the papers relating to the registration of the firm in the year 1949. Be that as it may, on receipt of the communication in that behalf from the appellant-company nominating an arbitrator, the firm in its turn named an arbitrator. In terms of the arbitration clause, the arbitrators had to name the Presiding E Arbitrator. In spite of lapse of time, the arbitrators did not meet and nominate a Presiding Arbitrator. In that context, the appellant-company filed a petition under Section 11(4)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the Act") requesting the Chief Justice of the High Court of Orissa to appoint the third arbitrator on the basis that the firm had failed to F act in terms of the procedure agreed to by the parties. The said application is said to be pending.

7. The appellant-company also moved an application under Section 9 of the Act before the District Court, Cuttack seeking interim relief essentially to permit it to continue to carry on the mining operations and to restrain the G respondent firm from interfering with it. According to the appellant, the agreement between the parties was co-terminus with the subsistence of the mining lease granted by the State in favour of the respondent firm and since the leases continue to subsist, the appellant-company was entitled to an extension of the period of the contract and what remained was only a H negotiation regarding the terms at which the agreement has to be worked by

the appellant-company. The appellant further pleaded that it had made all the investments for the purposes of carrying on the mining operations and had brought in the requisite machinery for that purpose. All the necessary investments had been made by it and in that situation, the balance of convenience was in favour of the grant of an interim order as sought for by the appellant. The respondent firm resisted the application, *inter alia*, contending that the agreement between the parties was essentially an agency agreement. Such an agreement could not be specifically enforced. On the expiry of the term, the appellant-company had no subsisting right or status to carry on mining and in that situation the injunction sought for could not be granted. It was also contended that going by Section 14 and Section 41 of the Specific Relief Act, such a contract is unenforceable. Therefore the injunction prayed for could not be granted.

8. The District Court, while entertaining the application had made an order on 8.3.2006 directing the parties to maintain the *status quo*. After hearing the parties, the District Court took the view that it would be just and appropriate to maintain the order of *status quo* until the disputes are referred to the Arbitral Tribunal and the Tribunal takes seisin of the dispute. Thus, the order of *status quo* originally granted was directed to continue until the Arbitral Tribunal was constituted to take up the disputes between the parties. Feeling aggrieved, the respondent firm — there is a plea that the appeal was filed by the firm of 2005 and not by the firm of 1949 which we shall deal with — filed an appeal before the High Court of Orissa. The High Court took the view that the District Court was in error in granting an order to maintain the *status quo* since *prima facie* the agreement between the parties was not a specifically enforceable one in terms of the Specific Relief Act and since the term of the agreement had expired it was not appropriate to grant an interim order as granted by the District Court. Thus, the High Court reversed the decision of the District Court and dismissed the application filed by the appellant-company under Section 9 of the Act.

9. Feeling aggrieved by the said decision, the appellant-company has filed this appeal. It is contended on its behalf that the appeal filed before the High Court was not by the firm bearing registration No. 71/1949 with which the appellant-company had the agreement. The arbitration clause, which the appellant-company had invoked, was in relation to that agreement and hence the appeal before the High Court, at the instance of the firm bearing registration No. 595/2005, was not maintainable. It was further contended that since the agreement relied upon by the appellant in the light of the irrevocable Power

A of Attorney was co-terminus with the mining lease granted to the respondent firm by the State Government, the same could not be terminated and would not come to an end by efflux of time. The entire approach made by the High Court to find otherwise was erroneous. It was further submitted that this was a case in which the agreement could be specifically enforced in the light of Sections 10 and 42 of the Specific Relief Act. It was also faintly suggested B that the powers under Section 9 of the Act were independent of any restrictions placed by the Specific Relief Act and viewed in that manner, nothing stood in the way of the appellant-company being granted an order of injunction or at least an order to maintain *status quo* until the Arbitral Tribunal decided the dispute.

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10. On behalf of the respondent firm, it was contended that it was only a case of reconstitution of the 1949 firm. It was a mistake to have the firm registered again in the year 2005 under a different registration number. Steps have been taken to rectify the mistake in that regard. It was further submitted that the appeal before the High Court was filed by the firm represented by D its partner, who was also a partner in the firm registered in the year 1949. The appellant-company had impleaded in its application under Section 9 of the Act all those who were presently partners of the firm and there was no grace in the contention of the appellant-company that the appeal in the High Court was not filed by the firm which was a party to the contract with the appellant. E On merits, it was submitted that the agreement was for a specific term, there was no irrevocability in the agency agreement and an agreement like the one entered into between the parties by way of a raising contract, could not be specifically enforced as rightly held by the High Court. It was also pointed out that the respondent firm had lost confidence in the appellant-company and in such a situation, the appellant-company cannot claim to continue as F an agent of the respondent firm since the creation or continuation of an agency arrangement depends on the confidence reposed by the principal on the agent. It was also pointed out that subsequent to the expiry of the term, a tripartite agreement had been entered into with a labour union and it contained a recognition that the period of the contract between the respondent G firm and the appellant-company had come to an end. It could be seen therefrom that the appellant-company had taken over, directly, the liability in respect of the labourers who were being employed by the appellant-company during the subsistence of the raising contract. It was also submitted that the respondent firm had started mining operations on its own and the balance of convenience was not in favour of grant of any interim order as was done by the District H Court. At best, the damages, if any, suffered by the appellant-company was

determinable in terms of money and this was a case in which no injunction to perpetuate the agreement could be granted, especially as it involved supervision of minute details which the court would not normally undertake. It was also pointed out that grant of any injunction in favour of the appellant-company would put the respondent firm in danger of being exposed to prosecutions and other liabilities under law since it was the mining agency under the State Government. It was therefore submitted that the appellant-company had no *prima facie* case for an injunction as sought for.

11. The objection that the appeal filed before the High Court was not competent need not detain us much. It was the appellant who filed the application under Section 9 of the Act impleading the firm and its partners. The said firm represented by a partner, who even admittedly was a partner of the firm as constituted in the year 1949 and was also a party to the agreement with the appellant-company itself, had filed the appeal before the High Court. There is no case that the firm registered in the year 1949 had been dissolved. On the other hand, we find that it was being reconstituted from time to time. Therefore, the fact that, foolishly or otherwise, a firm in the same name was again registered in the year 2005, does not affect the status of the firm with which the appellant-company had a contract and the filing of the appeal by that firm represented by its partner. It was brought to our notice that the respondent firm had sought a rectification of the register realizing the mistake that was made in having the same firm registered all over again, and that the said matter is pending. Considering the circumstances, we are of the view that the argument that the appeal before the High Court was not competent, it not having been filed by the firm with which the appellant-company had the contract, is unsustainable. The said contention is therefore overruled.

12. The effect of the agreement dated 14.3.1991 and the Power of Attorney dated 25.3.1991 admittedly executed between the parties and the rights and obligations flowing therefrom are really matters for decision by the Arbitral Tribunal. We do not think that it is for us, at this interlocutory stage, to consider or decide the validity of the argument raised on behalf of the appellant-company that the agreement between the parties was co-terminus with the mining leases and the respondent firm could not terminate the agreement so long as the mining leases in its favour continued to be in force. Nor do we think it proper to decide the sustainability of the argument on behalf of the respondent firm that it was mainly an agency agreement for a fixed term and on the expiry of the term, no right survives in the appellant-

company unless of course the respondent firm agreed to an extension of the period. We leave that question open for decision by the Arbitral Tribunal.

13. *Prima facie*, it is seen that the mining lessee had entered into an agreement with the appellant-company for the purpose of raising the iron ore from the area covered by the mining lease. The term of the original agreement expired and this was followed by two extensions for three years each. Thereafter, the respondent firm had refused to extend the agreement and claims that it wants to do the mining itself. *Prima facie*, it is not possible to say that the High Court was wrong in thinking that it may be a case where an injunction could not be granted in view of the provisions of the Specific Relief Act. Here again, we do not think that we should pronounce on that question since that again will be a question for the arbitrator to pronounce upon. Suffice it to say that the position is not clear enough for us to assume for the purpose of this interlocutory proceeding that the appellant is entitled to specifically enforce the agreement dated 14.3.1991 read in the light of the Power of Attorney dated 25.3.1991. Of course, this aspect will be again subject to the contention raised by the appellant-company that the agreement created in his favour was co-terminus with the mining lease itself. But, as we have stated, these are the aspects to be considered by the Arbitral Tribunal. We refrain from pronouncing on them at this stage.

14. We think that adequate grounds are not made out by the appellant at this interlocutory stage for interfering with the order of the High Court. In that view alone, we consider it proper to decline to interfere with the order of the High Court and leave the parties to have their disputes resolved in terms of the arbitration agreement between the parties.

15. The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot *prima facie* be accepted. The reliance placed on *Firm Ashok Traders & Anr.* v. *Gurumukh Das Saluja & Ors.*, [2004] 3 S.C.C. 155 in that behalf does not also help much, since this Court in that case did not answer that question finally but *prima facie* felt that the objection based on Section 69 (3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same

power for making orders as it has for the purpose and in relation to any proceedings before it. *Prima facie*, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not *prima facie* purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are *prima facie* inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.

16. It is seen that in spite of the parties naming their respective arbitrators, in terms of the arbitration agreement, more than one year back, the arbitrators so appointed had not been able to nominate a Presiding Arbitrator in terms of the arbitration agreement. We therefore put it to counsel on both sides as to why we shall not constitute an Arbitral Tribunal in view of their failure to constitute the Arbitral Tribunal in terms of the arbitration agreement and in view of the urgency involved in resolving the disputes between the parties. Counsel on both sides agreed that this Court may appoint either a Presiding Arbitrator or a sole arbitrator for the purpose of resolving the disputes between the parties. A panel of names was furnished. Having considered the names shown therein and taking note of the submissions at the bar, we think that it would be appropriate and just to both the parties to appoint Mr. Justice Y.K. Sabharwal, former Chief Justice of India as the sole arbitrator for deciding all the disputes between the parties. We therefore appoint Mr. Justice Y.K. Sabharwal, former Chief Justice of India as the sole arbitrator to decide on the disputes between the parties springing out the agreement dated 14.3.1991 and the Power of Attorney dated 25.3.1991. The arbitrator would be free to fix his terms in consultation with the parties. We would request the arbitrator to expeditiously decide the dispute on entering

A upon the reference and to give his award as early as possible.

17. In the result, we decline to interfere with the order of the High Court and dismiss this appeal. While doing so, we revoke the nomination made by the parties of two arbitrators. We appoint Mr. Justice Y.K. Sabharwal, former Chief Justice of India as the sole arbitrator to decide the dispute between the B parties. The parties are directed to suffer their respective costs.

R.P. Appeal dismissed.