Weatherford Oil Tool Middle East ... vs Baker Hughes Singapore Pte on 20 October, 2022

Author: Bela M. Trivedi

Bench: Bela M. Trivedi, Uday Umesh Lalit

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
ARBITRATION PETITION NO. 03 OF 2022

WEATHERFORD OIL TOOL
MIDDLE EAST LIMITED .... PETITIONER

VERSUS

BAKER HUGHES SINGAPORE
PTE … RESPONDENT

WITH

ARBITRATION PETITION NO. 52 OF 2021

WEATHERFORD DRILLING
INTERNATIONAL (BVI) LTD …..PETITIONER

VERSUS

BAKER HUGHES ASIA PACIFIC
LIMITED …RESPONDENT

ARBITRATION PETITON NO. 2 OF 2022

DRIP CAPITAL INC. …. PETITIONER

VERSUS

SUPREME OVERSEAS EXPORTS
INDIA PRIVATE LTD. ….RESPONDENT

1

JUDGMENT

BELA M. TRIVEDI, J.

1. All these three Arbitration petitions filed by the petitioner under Section 11(6) read with Section 11(12) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Arbitration Act, 1996), seeking appointment of a sole arbitrator to adjudicate upon the disputes arising out of the three agreements executed between the parties, being intrinsically connected with each other were heard together, and are being disposed of by this common order.

2. The bare facts germane for deciding these petitions may be stated as under:-

(i) The petitioner is a company incorporated in the British Virgin Islands, engaged in the business of providing products and services for mud logging, drilling jars and fishing tools and exports of spare parts and oilfield equipments. The respondent is a company incorporated under the laws of Singapore and engaged in providing oilfield services, inter alia engaged in provision of well design, engineering, project management and well construction services to Vedanta Limited. ("Operator").

(ii) In the year 2018, the respondent was considering the possibility of providing services to the Operator-Vedanta Ltd. at the Operator's oil fields located in Rajasthan. The parties thereafter executed following three agreements:

a) Onshore Lease Agreement No. BHGE-DSA-

WDI-2018 dated 20th November, 2018 for the lease of Rigs on a day-rate basis ("Lease Agreement"),

b) Onshore Drilling Service Agreement No. BHGE-DSA-WDI-2018 (INTL HOLDING BVI) dated 20th November, 2018 for drilling services ("Drilling Service Agreement"), and

c) Agreement dated 05th February, 2019 to provide

(a) mud logging; (b) drilling jars; (c) fishing tools; and other services, with a full complement of crew, equipment and materials at the Oil Fields ("Onshore Service Agreement"). The said Agreement was amended vide the amendment agreements dated 22nd November, 2019 and dated 7th January, 2020.

(iii) The respondent on April 9, 2020 issued three letters (identical) to the petitioner terminating the said three agreements. Pursuant to the said Termination Letters, the petitioner on April 13, 2020 informed the respondent of its obligation to pay the amount equivalent to the residual value of the

"call out orders" in terms of the Agreements. However, the respondent denied to make payments to the petitioner. The petitioner thereafter issued three notices all dated December 18, 2020 invoking the arbitration clause contained in the respective three agreements raising its claims against the respondent.

(iv) The respondent in response to the said three Arbitration Notices gave a common reply on January 17, 2021 raising contentions inter alia that the stamp duty was not paid on the agreements and therefore, consequences would follow as per the Maharashtra Stamp Act, 1958. The respondent however made a proposal in the said letter for referring the disputes under the Agreements to Mediation. The respondent also made proposal for consolidation of the disputes under the Agreements and for referring the disputes for adjudication by a sole arbitrator, consolidating into a single arbitration. The respondent however, did not agree to any of the names of arbitrators suggested by the petitioner, and reserved its right to propose the names of arbitrators.

(v) On January 29, 2021, the petitioner agreed to the respondent's suggestion to refer the disputes to the Mediation. However, the Mediation having failed, the petitioner vide the Letter dated 1st September, 2021 agreed for the consolidation of disputes under the three agreements i.e., the Onshore Service Agreement, Lease Agreement and Drilling Service Agreement, to be heard by a sole arbitrator in one single arbitration, and further suggested two names of arbitrators. The petitioner in the alternative suggested that the Mumbai Centre of International Arbitration ("MCIA") as the appointing authority under Rule 7.8 of MCIA Rules, 2016 may appoint a sole arbitrator in the Consolidated Arbitration.

(vi) The respondent did not agree to any of the proposals made by the petitioner vide the Letter dated September 07, 2021, nor did it propose any name for the appointment of a sole arbitrator. Thereafter, some correspondence had ensued between the parties, however the respondent did not propose any names of individuals for being appointed as a sole arbitrator in the consolidated arbitration. Hence, the petitioner has filed these three petitions.

3) The bone of contention raised by the Learned Senior Advocate, Mr. Jayant Mehta for the respondent is that out of the three agreements only one agreement was stamped and the other two were not stamped as required under the Maharashtra Stamp Act, 1958 (hereinafter referred as the "Stamp Act"). Of course, he admitted that the matter in respect of determination of stamp duty for the other two agreements is pending with the Collector. However, according to him, a three-judge Bench of this Court, in case of N.N Global Mercantile Unique Pvt. Ltd. Vs. Indo. Unique Flame Ltd. and Others1 has referred the issue as to whether the statutory bar contained in Section 35 of the Stamp Act 1899 applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Act, would also render arbitration agreement contained in such instrument which is not chargeable to the payment of stamp duty as being non- existent, unenforceable or invalid, pending payment of stamp duty on the substantive contract/instrument, to the Constitution Bench of five judges, and therefore the present petitions filed by the petitioner seeking appointment of a sole arbitrator may not be entertained at this stage. (2021) 4 SCC 379

4. Per-contra, Learned Senior Advocate, Mr. Amit Sibal for the petitioner placing heavy reliance on the decision of this Court in case of Inter-continental Hotels Group (India) Private Limited and Another versus Waterline Hotels Private Limited2 submitted that the three-judge Bench in the said case, after considering all the earlier judgments as also taking note of the reference of the issue made to the Constitution Bench, had entertained the Arbitration Petition filed under Sections 11(6) read with Section 11(12) of the Arbitration Act, holding that considering the time sensitivity in arbitration matters, the Court could not leave the matters hanging until the larger bench settled the issue. He further submitted that the insufficient payment or non-payment of stamp duty is a curable defect and there is no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract. He further submitted that even otherwise as per the settled legal position, the Court is required to examine only the issue of existence of arbitration agreement and may not go into the issue of validity of the agreements in which the arbitration clause is contained.

5. At the outset, it may be noted that Sub-section 6A of Section 11 of the Arbitration Act, 1996 was inserted by the Act 3 of 2016 with retrospective effect from 23.10.2015, which read as under:-

> "(6A) The Supreme Court or, as the case may be, the High Court, while considering any application (2022) 7 SCC 662 under sub-section (4) or sub-section (5) or sub-

section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

6. The said sub-sections 6 A came to be omitted by the Act 33 of 2019 which came into force on 30.08.2019. Meaning thereby the said sub-section (6A) stands omitted as on the date.

7. Further, Section 16 of the Arbitration Act pertains to the competence of Arbitral Tribunal to rule on its own jurisdiction. The relevant sub-section 1 of Section 16 reads as under: -

> "Section 16 - Competence of arbitral tribunal to rule on its jurisdiction- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

8. The bare reading of the afore-stated provision makes it clear that arbitral tribunal is competent not only to rule on its own jurisdiction but to rule on the issue of the existence or validity of the arbitration agreement. It further clarifies that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and that a decision

by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

9. The doctrine of separability and the doctrine of kompetenz-kompetenz encompassed in the arbitration jurisprudence, have been succinctly explained by a three-judge Bench of this Court in the recent case of N.N. Global Mercantile(P) Ltd. (supra):

> "4. It is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. This is based on the premise that when parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements viz.: (i) the substantive contract which contains the rights and obligations of the parties arising from the commercial transaction; and (ii) the arbitration agreement which contains the binding obligation of the parties to resolve their disputes through the mode of arbitration. 4.1. The autonomy of the arbitration agreement is based on the twin concepts of separability and kompetenz-kompetenz. The doctrines of separability and kompetenz-kompetenz though inter-related, are distinct, and play an important role in promoting the autonomy of the arbitral process. 4.2. The doctrine of separability of the arbitration agreement connotes that the invalidity, ineffectiveness, or termination of the substantive commercial contract, would not affect the validity of the arbitration agreement, except if the arbitration agreement itself is directly impeached on the ground that the arbitration agreement is void ab initio.
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> 4.3. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section 16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of kompetenz-

kompetenz has evolved to minimise judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the Arbitral Tribunal."

10. In the said case of N.N. Global Mercantile (P) Ltd. (supra), the issue whether the arbitration agreement contained in an unstamped contract can be acted upon had also arisen and the court observed as under:

> "21. The issue which has arisen in the present case is whether the arbitration agreement incorporated in the unstamped work order dated 28-9-2015, would also be legally unenforceable, till such time that the work order is subjected to payment of

> stamp duty. Undisputedly, the work order is chargeable to payment of stamp duty under Item 63 of the First Schedule to the Maharashtra Stamp Act, 1958.
>
> 22. In our view, the non-payment or deficiency of stamp duty on the work order does not invalidate the main contract.

Section 34 provides that an unstamped instrument would not be admissible in evidence, or be acted upon, till the requisite stamp duty is paid. This would amount only to a deficiency, which can be cured on the payment of the requisite stamp duty.

23. The point for consideration is whether the non-payment of stamp duty on the work order, would render the arbitration clause invalid, non-existent, or unenforceable in law, till the stamp duty is paid on the substantive commercial contract.

24. The arbitration agreement contained in the work order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which provides the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of stamp duty, unlike various other agreements enlisted in the Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, unenforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of stamp duty.

26. In our view, there is no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract. The adjudication of the rights and obligations under the work order or the substantive commercial contract would, however, not proceed before complying with the mandatory provisions of the Stamp Act.

27. The Stamp Act is a fiscal enactment for payment of stamp duty to the State on certain classes of instruments specified in the Stamp Act. Section 40 of the Stamp Act, 1899 provides the procedure for instruments which have been impounded, and sub-section (1) of Section 42 requires the instrument to be endorsed after it is duly stamped by the Collector concerned. Section 42(2) provides that after the document is duly stamped, it shall be admissible in evidence, and may be acted upon."

11. The three-judge Bench in the said case (N.N. Global Mercantile(P) Ltd.) overruled the judgment in SMS Tea Estates (P) Ltd v. Chandmari Tea Co. (P) Ltd.3 in which it was held that an arbitration agreement in an unstamped commercial contract cannot be acted upon and is unenforceable in law. The court further held therein that the Judgment in case of Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.4 which had followed the judgment in SMS Tea Estates (supra) did not lay down the correct position in law. However, the Court noticed that the judgment in

Garware Wall Ropes Ltd. (supra) was cited with approval by the Co-ordinate Bench of this Court in Vidya Drolia v. Durga Trading Corporation 5, and therefore the court (in N.N. Global Mercantile case) observed as under:

> "33. We notice that the judgment in Garware Wall Ropes Ltd. has been cited with approval by a coordinate Bench of this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., Paras 146-147 of the judgment reads thus: (Vidya Drolia Case SCC pp. 115-16) (2011) 14 SCC 66 (2019) 9 SCC 209 (2021) 2 SCC 1 "146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration.

Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147. We would proceed to elaborate and give further reasons:

> 147.1. (i) In Garware Wall Ropes Ltd. this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238) '29. This judgment in Hyundai Engg.

case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the

insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg.

case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607] , as followed by us.' Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement."

34. We doubt the correctness of the view taken in paras 146 and 147 of the three-Judge Bench in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1] . We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall Ropes Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209] , which has been affirmed in paras 146 and 147 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1] , to a Constitution Bench of five Judges."

12. The Court ultimately referred the following issue to be authoritatively settled by a Constitution Bench of five Judges: -

> "58. We consider it appropriate to refer the following issue, to be authoritatively settled by a Constitution Bench of five Judges of this Court:
>
> "Whether the statutory bar contained in Section 35 of the Stamp Act, 1899 applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-

existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?"

13. It may further be noted that recently a three-judge Bench of this Court in case of Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. Vs. Waterline Hotels Private Limited 6 while dealing with an application filed under Section 11(6) read with Section 11(12)(e) of the Arbitration Act for appointment of a sole arbitrator on the basis of an arbitration clause contained in the agreement which was unstamped document, took notice of the earlier decisions as also the issue referred to the Constitution Bench and observed as under:-

> "25. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration

> issues. All these matters are still at a pre- appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court—until the larger Bench decides on the interplay between Sections 11(6) and 16—should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood."

14. In the light of the afore-stated legal position, if the facts of the present petitions are examined, it deserves to be noted that the execution of three agreements, namely, Onshore Service Agreement, Lease Agreement and Drilling Service Agreement between the petitioner and the respondent has not been (2022) 7 SCC 662 disputed. The identical clause-23 for Arbitration contained in all the three agreements has also not been disputed. The said clause reads as under:

> "ARBITRATION:
>
> Any dispute, controversy or claim between the parties arising out of, relating to, or connected with this Agreement, the breach, termination or invalidity hereof, or the provisions contained herein or omitted here from (collectively, a "Dispute") will be referred to and finally resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and the rules made thereunder, which are deemed to be incorporated by reference into this Article 23. The arbitration shall be conducted as follows: i. A sole arbitrator shall be mutually appointed in case the value of claim under dispute is less than US$10 million and in any other event by a panel of three arbitrators will be appointed with one arbitrator nominated by each Party and the presiding arbitrator selected by the nominated arbitrators. ii. The language of the arbitration proceedings shall be English.
>
> iii. The seat of arbitration shall be Mumbai, India. iv. The award made in pursuance thereof shall be final and binding on the Parties.
>
> v. The arbitrators will have no power to award damages of a type described in Article 11(k)."

15. The letters of termination terminating the said three agreements by the respondent on 9th April, 2020, and other correspondence that ensued between the parties as stated in the earlier part of the judgment are also not disputed. Though the respondent, in response to the arbitration notices given by the petitioner had raised a contention in the letter dated 17th January 2021 that the agreements were not stamped and that consequences would follow as per the Maharashtra Stamp Act, the respondent proposed to amicably resolve the disputes through Mediation, and also suggested in the alternative to consolidate the disputes under the three agreements to be heard by a sole arbitrator in one single arbitration. The efforts to amicably resolve the disputes through Mediation having failed, the petitioner thereafter also agreed vide letter dated 1st September, 2021 to consolidate the disputes under the three agreements to be heard by a sole arbitrator in one single arbitration, as proposed by the respondent. The petitioner also proposed the names of the arbitrators, however, the said names were not agreeable to the respondent. The respondent also failed to propose any names

for the appointment of a sole arbitrator.

16. In view of the above, since the arbitration agreements contained in all the three agreements namely, Onshore Service Agreement, Lease Agreement and Drilling Service Agreement were not disputed by the respondent, and since the respondent itself had proposed to consolidate the disputes under the said agreements and to refer them to a sole arbitrator in one single arbitration, the court is of the opinion that now it does not lie in the mouth of the respondent to say that the petitions seeking appointment of a sole arbitrator should not be entertained, as the matter with regard to the determination of requisite stamp duty under the Maharashtra Stamp Duty Act on the two agreements is pending before the Collector. As held by this Court in N.N. Global Mercantile (supra) there is no legal impediment to the enforceability of the arbitration agreement pending payment of stamp duty on the substantive contract. Of course, the said issue is pending under consideration by the Constitution Bench, nonetheless as observed by this Court in Intercontinental Hotels Group (India Pvt. Ltd.) (supra), the matters which are still pending at a pre-appointment stage, cannot be left hanging until the larger Bench settled the issue. Following the said proposition and considering the time sensitivity in the arbitration cases, we deem it appropriate to entertain the present petitions and allow the same.

17. Since the respondent had proposed and the petitioner had agreed to consolidate all the disputes arising out of the three agreements, namely, Onshore Service Agreement, Lease Agreement and Drilling Service Agreement, and to refer them to a sole arbitrator in a single arbitration for adjudication, it is ordered as such. Accordingly, we appoint Mr. Suresh C. Gupte, former Judge, High Court of Bombay as a sole arbitrator to adjudicate upon the disputes arising out of the said three agreements treating it as one single arbitration. The other terms and conditions of the arbitration shall be as per Clause 23 contained in the three agreements, as may be suitably made applicable to the arbitration proceedings.

18. All the three petitions stand allowed accordingly.

.....CJI.

[UDAY UMESH LALIT] .....J. [BELA M. TRIVEDI] NEW DELHI;

20.10.2022