

Relan Infracon Pvt. Ltd vs Jasvinder Kaur on 14 December, 2022

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 582/2022

RELAN INFRACON PVT. LTD.

..... Petitioner

Through: Mr. Karan Prakash, Adv.

versus

JASVINDER KAUR

..... Respondent

Through:

Mr. Padmesh Mishra, Mr.

Shivam Shukla, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% 14.12.2022

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 [The Act] seeks to invoke the powers of the Court for appointment of a sole arbitrator in light of the disputes which have arisen between the parties.

2. The disputes themselves emanate from a Collaboration Agreement dated 18 November 2018 [Agreement]. While the existence and incorporation of an arbitration clause in that Agreement is not disputed, the respondent takes the position that since the Agreement is insufficiently stamped, the same must necessarily be ignored bearing in mind the observations which were made by the Supreme Court in Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engineering Ltd.¹ and which reads thus:-

□7. However, when it came to an unstamped lease deed which contained an arbitration clause, this Court, after setting out Sections 33 and 35 of the Stamp Act held : (SMS Tea Estates case [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] , SCC pp. 73-74, paras 19-22) Digitally Signed (2019) 9 SCC 209 By:NEHA Signing Date:17.12.2022 10:34:40 □9. Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.

20. The Scheme for Appointment of Arbitrators by the Chief Justice of Gauhati High Court, 1996 requires an application under Section 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every court, that is, a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per Section 38 of the Stamp Act.

21. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.

22. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registerable) and which is not duly stamped:

22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or Section 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped. In conclusion, this Court held : (SCC p. 77, para 32) ¶32. In view of the above this appeal is allowed, the order [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co.

(P) Ltd., 2010 SCC OnLine Gau 762] of the High Court is set aside and the matter is remitted to the learned Chief Justice of the Gauhati High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law.

19. It will be seen that neither in the Statement of Objects and Reasons nor in the Law Commission Report is there any mention of SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] . This is for the very good reason that the Supreme Court or the High Court, while deciding a Section 11 application, does not, in any manner, decide any preliminary question that arises between the parties. The Supreme Court or the High Court is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect revenue. SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] has taken account of the mandatory provisions contained in the Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11. A close look at Section 11(6-A) would show that when the Supreme Court or the High Court considers an application under Sections 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] when it comes to an unregistered agreement or conveyance. However, the Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11(6-A) does not, in any manner, deal with or get over the basis of the judgment in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] , which continues to apply even after the amendment of Section 11(6-A).

22. When an arbitration clause is contained in a contract , it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6-A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] has, in no manner, been touched by the amendment of Section 11(6-A).

29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] 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 : (2019) 2 SCC (Civ) 530], as followed by us.

3. The Court notes that the principles which were laid down in Garware Wall Ropes fell for consideration before the three learned Judges of the Supreme Court in N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and Ors.2. Dealing with the issue of whether the arbitration agreement would also perish if the principal agreement were unstamped or insufficiently stamped, the Court in N.N. Global observed thus:-

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.

28. In our view, the decision in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012)

4 SCC (Civ) 777] does not lay down the correct position in law on two issues i.e. : (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered unenforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as under Section 19 of the Contract Act, 1872.

29. We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it unenforceable, since it has an independent existence of its own. The view taken by the Court on the issue of separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the Stamp Act.

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The non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite stamp duty.

31. We overrule the judgment in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] with respect to the aforesaid two issues as not laying down the correct position in law.

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 : (2021) 1 SCC (Civ) 549] . 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 : (2019) 4 SCC (Civ) 324] , which has been affirmed in paras 146 and 147 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , to a Constitution Bench of five Judges.

57. In view of the finding in paras 146 and 147 of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] by a coordinate Bench, which has affirmed the judgment in Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , the aforesaid issue is required to be authoritatively settled by a Constitution Bench of this Court.

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?

4. It becomes further pertinent to note that the judgment of Garware Wall Ropes had come to be affirmed by three learned Judges in Vidya Drolia vs. Durga Trading Corporation³. Bearing in mind the conclusions which were arrived at by the Supreme Court in N.N. Global, the matter, thereafter, has come to be referred for the consideration of a larger Bench. That reference is yet to be answered.

5. The issue of the fate of applications that may come to be Digitally Signed (2021) 2 SCC 1 By:NEHA Signing Date:17.12.2022 10:34:40 preferred under Section 11 of the Act pending that reference being answered, came to be noticed by the Supreme Court again in Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. vs. Waterline Hotels Pvt. Ltd.⁴

6. While dealing with the said issue and the impasse which was likely to crop up, the Supreme Court held as follows:-

19. At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject-

matter of numerous cases before this Court as well as the High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognised as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in *Vidya Drolia v. Durga Trading Corpn.* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a *prima facie* view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to *cut the deadwood*. Ultimately the Court held that the watchword for the Courts is *When in doubt, do refer*.

21. While holding as above, this Court by majority opinion speaking through Sanjiv Khanna, J. held as under: (*Vidya Drolia case* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 :

(2021) 1 SCC (Civ) 549], SCC pp. 115-16, para 147) ¶47.1. In *Garware Wall Ropes Ltd.* [*Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324], 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 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get Digitally Signed (2022) 7 SCC 662 By:NEHA Signing Date:17.12.2022 10:34:40 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 :

(2019) 2 SCC (Civ) 530] , 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.

23. The relevant observations made in N.N. Global [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379 :

(2021) 2 SCC (Civ) 555] read as under: (N.N. Global case [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379 : (2021) 2 SCC (Civ) 555] , SCC p. 434, paras 56-59) ¶56. We are of the considered view that the finding in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] and Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and unenforceable, is not the correct position in law.

57. In view of the finding in paras 146 and 147 of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] by a coordinate Bench, which has affirmed the judgment in Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , the aforesaid issue is required to be authoritatively settled by a Constitution Bench of this Court.

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?'

59. In light of the same, the Registry may place this matter before the Hon'ble Chief Justice of India for appropriate orders/directions.

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.

26. This brings us to the only issue at hand: whether the issue of insufficient stamping raised by the respondent is deadwood and clearly indicative of an unworkable arbitration agreement, or there are deeper issues which can be resolved at a later stage. The counsel for the petitioners has sought to draw our attention to Clause 22(1)(b) of the HMA, to contend that the respondent has presented a warranty to ensure the said HMA would be valid and legally enforceable. Clause 22.1(b) of the HMA reads as follows:

□22.1. Owner represents and warrants to Manager upon execution of this Agreement and again on the Commencement Date that:

...

(b) it has obtained or shall obtain (with Manager's assistance as it is reasonably able to provide) all necessary governmental permissions, licences and permits (including but not limited to construction, occupancy, liquor, bar, restaurant, sign and hotel accommodation licences) to enable Manager to operate the Hotel in accordance with the Brand Standards and to ensure this Agreement is fully valid and enforceable in the country.

27. Having perused Clause 22.1, it is necessary to note that the respondent is under an obligation to ensure that the agreement would be legally valid in India. If such an obligation was undertaken by the respondent, the extent to which the petitioners can rely on the respondent's warranty, is clearly a debatable issue. Further, it is also a matter of adjudication whether the respondent could have raised the issue of validity of the arbitration agreement/substantive contract in view of the warranty. This aspect clearly mandates that the aforesaid issue is not deadwood. The issues whether the respondent is estopped from raising the contention of unenforceability of the HMA or the issue whether the HMA is insufficiently or incorrectly stamped, can be finally decided at a later stage.

28. Moreover, the petitioners have reiterated that without prejudice, they have paid the required stamp duty, including the penalty that may be accruable and sought appointment of a sole arbitrator in light of the same. On the contrary, the respondent, in rebuttal to the payment of stamp duty, has challenged the same, contending that payment of stamp duty has been wrongly classified and stamp duty has been paid against Article 5(j) under the Schedule of the Karnataka Stamp Act, 1957, which is erroneous. Therefore, the respondent contends that the HMA has not been properly stamped.

30. It may be noted that the petitioners have themselves attempted to self-adjudicate the required stamp duty and have paid, on 29-7- 2019, a stamp duty of Rs 2200, describing the HMA as a □bond . On 10-6-2020, the petitioners further purchased 11 e-stamps for Rs 200 each, describing the HMA as an □agreement under Article 5(j). Therefore, it falls upon the Court, under the Stamp Act to review the nature of the agreement in order to ascertain the stamp duty payable. From the above it is clear, that stamp duty has been paid, whether it be insufficient or appropriate is a question that may be answered at a later stage as this Court cannot review or go into this aspect under Section 11(6). If it was a question of complete non-stamping, then this Court, might have had an occasion to examine the concern raised in N.N. Global case [N.N. Global Mercantile (P) Ltd. v.

Indo Unique Flame Ltd., (2021) 4 SCC 379 : (2021) 2 SCC (Civ) 555] , however, this case, is not one such scenario.

31. Therefore, we deem it appropriate for this matter to be referred to arbitration, in terms of Clause 18.2 of the arbitration agreement. Accordingly, we appoint Mr Justice A.V. Chandrashekara, a former Judge of the High Court of Karnataka as a sole arbitrator to adjudicate the issues. The parties are directed to take steps to convey this order to the SIAC to proceed in terms of the SIAC Rules.

7. In view of the principles which stand laid down in Intercontinental Hotels Group, this Court is of the opinion that in order to resolve all disputes with due expedition, the ends of justice would warrant a sole arbitrator being appointed. It shall be open for the Arbitral Tribunal to examine the issue of stamp duty payable on the Agreement in question and if found to be insufficiently stamped to take such further steps as are permissible under the Indian Stamp Act, 1899.

8. Accordingly, the instant petition is allowed. The Court hereby appoints Dr. Amit George, Advocate [Official Address: T-16, Green Park Extension, New Delhi - 110016] [Mobile No. +91-9910524364] [email: amitgeorge@outlook.com] as the sole arbitrator for resolution of the disputes which have arisen.

9. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

10. The fees of the arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANT VARMA, J.

DECEMBER 14, 2022 neha