Intercontinental Hotels Group (India) ... vs Waterline Hotels Pvt. Ltd. on 25 January, 2022

Author: N.V. Ramana

Bench: Hima Kohli, Surya Kant, N.V. Ramana

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION (CIVIL) NO. 12 OF 2019

INTERCONTINENTAL HOTELS GROUP (INDIA) PVT. LTD. & ANR. ….PETITIONERS

VERSUS

WATERLINE HOTELS PVT. LTD .... RESPONDENT

JUDGMENT

N.V. RAMANA, CJI.

1. This petition is filed under Section 11(6) r/w 11(12)(a) of the Arbitration & Conciliation Act, 1996 for appointment of a sole arbitrator.

2. The brief facts which are necessary for adjudication of this application are that the Intercontinental Hotels Group (India) Pvt. Ltd (Petitioner No.1) and Intercontinental Hotels Group (Asia□Pacific) Pvt Ltd. (Petitioner 2), are subsidiaries of Intercontinental Hotels Group PLC (IHG Group), based out of India and Singapore respectively. The parent company (IHG Group) is a British multi□national hotel based out of Denham, United Kingdom.

3. The respondent is an Indian company engaged in hospitality sector. The Respondent had agreed to run and operate a hotel by name Holiday Inn & Suites Bengaluru, Whitefield.

4. The respondent entered into a Hotel Management Agreement (HMA) with the petitioners for renovating the existing infrastructure in accordance with the brand standards established by the IHG group. The HMA elaborated on the rights and obligations of parties from 17.09.2015 for initial

ten years and further renewals were also provided thereunder. The petitioners alleged that under the HMA, the petitioners were required to make significant investments for setting up the hotel in accordance with the brand standards. These investments were to be recovered gradually from the profits made by the hotel in due course.

5. The HMA mandated that for the renovation undertaken by the petitioners, the respondent was contractually bound to pay the fee to petitioner no. 1, known as incentive management fee, at the end of every month. Further, Petitioner No.2 was entitled to license fee from the respondent for the use of brand and marks as well as an agreed sum towards "System Fund Contributions", "Technology Service Fee" & "Technical Service Fee".

6. The petitioners allege that the respondent failed to pay the requisite fee which it was contractually bound to under the HMA since early 2016. As of 12.10.2018, the respondent owed the petitioners a sum amounting to USD 6,18,719, excluding interest for the late payment as provided under Clause 21.3 of the HMA.

7. In any case, the respondent sent an e□mail on 12.10.2018 terminating the HMA. In the aforesaid e□mail, the respondent stated that the hotel was rebranded as Miraya Hotels, and all guests checking into the hotel after noon on 12.10.2018, were informed that the management of the hotel had been handed over to Miraya. On the same day, the petitioners replied to the aforesaid termination letter contending that unilateral termination of the HMA was not valid as there was no legal basis for the same.

8. The respondent failed to retract the email of 12.10.2018, and the petitioners invoked Section 9 of the Arbitration Act seeking interim relief before the High Court of Karnataka at Bengaluru in APIM No. 3/2018. The High Court, on 23.10.2018, passed an ad□interim order directing the respondent not to evict the petitioners from the premises without due process of law until further orders. However, the petitioners allege that the respondent has not been sincere in complying with the order and has taken steps to frustrate the aforesaid order.

9. As the settlement talks between the parties failed, and the respondent remained in persistent breach of the HMA, the petitioners were left with no option other than to invoke Arbitration under clause 18.2 of HMA, which reads as under:

> "Clause 18.2□Dispute Resolution
>
> (a) All disputes, controversies or claims arising out of or in connection with this Agreement and/or any matters incidental hereto and/or the interpretation and/or breach hereof, will first be discussed by the Owner and the Manager with the objective of resolving such dispute, controversy or claim in a fair, amicable and friendly manner. If such efforts fail to bring a resolution within ten (10) Business Days of receipt of a notice issued by one party to another seeking resolution, such disputes, controversies or claims will be finally determined by arbitration in accordance with the Arbitration Rules of Singapore International Arbitration Centre

("SIAC") for the time being in force, which rules are deemed incorporated by reference into this clause.

(b) The Tribunal shall consist of a sole Arbitrator.

However, in the event that the Parties are unable to agree on the sole Arbitrator the tribunal shall consist of three Arbitrators, one to be appointed by each of Manager and Owner, and the third to be appointed by mutual agreement of the two appointed Arbitrators. In the event the Arbitrators appointed by the Manager and the Owner fail to mutually agree on the third Arbitrator, such third Arbitrator shall be appointed by a Competent Court of Law in Bangalore. The Parties herein mutually agree to exclude the applicability of rules of SIAC to this extent (i.e., regarding appointment of third Arbitrator). The place of arbitration will be SIAC in Bengaluru and the official language of the arbitration will be English. In reaching a decision, the Arbitrators, will be bound by the terms and provisions of this Agreement. The decision and award of the Arbitrator will be final and binding and shall be enforceable by the Indian Courts..."

10. In the Notice of Arbitration, the petitioners claimed the following reliefs:

a. A declaration that:

i. The Respondent is in breach of the Management Agreement dated 7th August 2015; and

ii. The Respondent has illegally and wrongfully purported to terminate the Management Agreement by its email dated 12th October 2018.

b. Direct the Respondent to pay to the Claimants,

i. The outstanding dues of USD 618,719 as on 8 October 2018 owed to the Claimants under the Management Agreement;

ii. Interest on the above outstanding amounts from the dates the amounts became due until the filing of this notice invoking arbitration, in accordance with Clause 21.3 of the Management Agreement;

iii. Damages due to the wrongful termination of the Management Agreement for the remainder Term of the Management Agreement which has as Initial Term of 10 years from 15 September 2015 with a potential 2 x 5 years of Renewal Term, in an amount to be assessed later; and iv. Such other future sums towards damages and as may fall due under the Management Agreement and as the Claimants may put forth before the Hon'ble Tribunal in its Statement of Case.

c. Pendente Lite and future interest on all sums awarded to it at such rate as the Tribunal may deem fit, in accordance with Rule 32.9 of the SIAC Rules and Arbitration & Conciliation Act, 1996;

d. Award of costs from the Respondent and interest on the costs awarded, till payment. e. Any other prayer the Hon'ble Tribunal may deem fit in the interest of justice.,"

11. The respondent is alleged to have replied to the aforesaid Notice of Arbitration by stating that the said notice dated 21.01.2019 was not a notice, and consequently did not require a reply.

12. Accordingly, the petitioners communicated their intention to invoke arbitration to the Singapore International Arbitration Centre (SIAC). They also approached the SIAC for suggesting names of sole arbitrators or to invoke the mechanism of appointing a three□member tribunal if the respondent does not agree on a single name. SIAC further sent a notice dated 15.02.2019 to the respondent for appointment of a suitable arbitrator. Interestingly, the respondent replied to the notice sent by the SIAC stating that the notice of arbitration dated 21.01.2019 was defective and was not curable. In any case, the respondent alleges as under:

> "Strictly without prejudice, we do not accept IHG's proposal to appoint any of the 3 Arbitrators named in its Notice, dated 08.02.2019, as a sole arbitrator. Nor do we wish to propose and names of a sole arbitrator. Further, there is no question of proposing or agreeing to Arbitration by a Tribunal of 3 Arbitrators for the same reason. The reasons have been elaborately narrated hereinabove and bear no repetition.

Clearly SIAC and its Associate Counsel have turned a complete blind eye to the legal position, facts of the case and conduct of IHG and its Advocates. It would not be out place to mention that, in the given circumstances SIAC would not be entitled to exclusion of liability under Rule 38, SIAC Rules."

13. Aggrieved by the respondent's denial to appoint a suitable Arbitrator, the petitioners have filed this petition seeking appointment of an Arbitrator.

14. When this matter was listed on 16.04.2019, this Court was pleased to issue notice. Thereafter, the respondent entered appearance and filed a counter□affidavit dated 24.07.2019, pointing out that the purported HMA, which contains the arbitration agreement, was an unstamped document. It notes that this Court, in Garware Wall Ropes Ltd. v Coastal Marine Constructions and Engineering Ltd., (2019) 9 SCC 209 has earlier held that an agreement which is not duly stamped cannot be relied on or acted upon unless the unstamped document is impounded, and the applicable stamp duty and penalty is assessed and paid.

15. On 02.03.2020, this Court, at the request of the petitioners, allowed four weeks to file an application. In line with the aforesaid permission, the petitioners filed an application for permission to file additional documents dated 23.06.2020 which reads inter alia as under:

> " .....
>
> 3. Without prejudice to the above, the Petitioner No.1 has taken the necessary step to pay the stamp duty applicable to the HMA. In accordance with Section 2(6) of the

Indian Stamp Act, 1899, the stamping of the HMA would be governed by the Karnataka Stamp Act, 1957 ("Karnataka Stamp Act") because the HMA was first executed in Bengaluru, the place of performance is Bengaluru and the subject matter of the HMA is situated in Bengaluru.

4. The Schedule of the Karnataka Stamp Act enumerates different types of instruments that attract stamp duty and the corresponding duty that is payable. Article 5 of the Schedule provides the duty applicable to different types of agreements, The HMA is a services agreement which is not specifically provided for in Article 5, and therefore, it would be covered under the residuary provisions, Article 5(j), "Agreement or [its records or] Memorandum of an Agreement if not otherwise provided for". The corresponding stamp duty is INR 200. In order to establish its bona fide and to avert any argument regarding the adequacy of the stamp duty paid, Petitioner No. 1 has also paid the maximum penalty i.e., ten□times that duty amounting to INR 2,000 in accordance with the proviso to Section 34 of the Karnataka Stamp Act.

5. The Petitioners further submit that since they have paid the requisite stamp duty along with the maximum penalty prescribed under the Karnataka Stamp Act, this Hon'ble Court may proceed to appoint a sole Arbitrator who has the jurisdiction to deal with all disputes that arise between the parties."

16. The respondent, while objecting to the aforesaid application filed by the petitioners, stated as under:

"4. I state that at the time of hearing of the above cited Petition on the 02.03.2020, the learned Sr. Counsel appearing for the Petitioner had tendered a Letter dated 28.02.2020 annexing therewith a single e□Stamp paper bearing Unique Doc. Reference No. SUBINKAKABACSL08505575225085 99R dated 29.07.2020 for Rs.2,200/□classifying the HMA as "Bond" under Article 12 of the Schedule to the Karnataka Stamp Act, 1957 and the Consideration Prices as Zero....

5. That this Hon'ble Court, had by its Order dated 02.03.2020 directed the Petitioners to file the said single e□Stamp paper, dated 29.07.2019 along with a proper Application.

6. I state that, the Petitioners have not filed the said single e□Stamp Paper, dated 29.07.2019, classifying the HMA as "Bond". Instead, purportedly in furtherance of this Hon'ble Court's Order dated 02.03.2020, the Petitioners have filed a completely different set of 11 e□Stamp Papers of Rs.200/□each all dated 10.06.2020 this time classifying the agreement under Article 5(j) of the Schedule to the Karnataka Stamp Act, 1957 and annexing the HMA dated 07.08.2015 therewith, under the above cited Application seeking permission to file Additional Documents being I.A D. No. 60764 of 2020.

7. I state that it is not true that, vide this Hon'ble Court's Order, dated 02.03.2020, the Petitioners were granted permission to file the 11 e□Stamp Papers, for Rs.200/□ each, all dated 10.06.2020, that have been filed along with the above cited Application seeking permission to file Additional Documents being I.A D. No. 60764 of 2020.

8. I submit that the Petitioners have not paid the proper Stamp Duty and penalty under the Karnataka Stamp Act, 1957 nor has the procedure of adjudication of proper stamp duty and penalty payable been followed by the Petitioner as per law. The Petitioners have, in fact, arrogated to themselves the power of adjudication under the Karnataka Stamp Act, 1957.

9. I state that there is no procedure whereby a party self adjudicates and self certifies the proper stamp duty and the penalty payable on a Document as sought to be done twice by the Petitioners as under:

SELF ADJUDICATION BY THE PETITIONERS WITH THE MAXIMUM PENALTY OF 10 TIMES 29.07.2019 10.06.2020 Single e□Stamp paper 11 e□Stamp Papers for Rs.2,200/□for Rs.200/□each Description of Doc. Description of Doc.

Art 12 Bond	Art 5(j) Agreement (In any other cases)
Property Description Description Hotel Management Agreement	Property Agreement
Consideration Price (Rs.) 0 (Zero)	Consideration Price (Rs.) 0 (Zero)

17. We have heard learned counsel for the parties and perused the documents available on record.

18. 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 High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognized 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 Corporation, (2021) 2 SCC 1, 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 watch word for the Courts is 'when in doubt, do refer'.

This Court concluded as under:

"225. From a study of the above precedents, the following conclusion, with respect to adjudication of subject-matter arbitrability Under Section 8 or 11 of the Act, are pertinent:

225.1 In line with the categories laid down by the earlier judgment of Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267] the Courts were examining 'subject-matter arbitrability' at the pre-arbitral stage, prior to the 2015 amendment.

225.2 Post the 2015 amendment, judicial interference at the reference stage has been substantially curtailed.

225.3 Although subject matter arbitrability and public policy objections are provided separately Under Section 34 of the Act, the Courts herein have understood the same to be interchangeable under the Act. Further, subject matter arbitrability is inter-linked with in-rem rights.

225.4 There are special classes of rights and privileges, which enure to the benefit of a citizen, by virtue of constitutional or legislative instrument, which may affect the arbitrability of a subject-matter." Following is the opinion of one of us (N. V. Ramana, J., as His Lordship then was): "244. Before we part, the conclusions reached, with respect to question No. 1, are:

244.1 Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2 Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.

244.3 The Court, Under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4 The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt,

do refer'. 244.5 The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1 Whether the arbitration agreement was in writing? or 244.5.2 Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?

244.5.3 Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4 On rare occasions, whether the subject-matter of dispute is arbitrable?"

19. While holding as above, this Court by majority opinion speaking through Justice Sanjiv Khanna held as under:

"147.1. 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 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."

20. In any case, again in N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited, (2021) 4 SCC 379, this Court doubted the above proposition as held in Garware Wall Ropes (supra), and was of the opinion that the utility of the doctrine of separability overrides the concern under the respective Stamp Acts. Any concerns of non-stamping or under stamping would not affect the validity of the arbitration agreement. However, this Court considered it appropriate to refer the issue for authoritative settlement by a Constitution Bench in the light of Vidya Drolia (supra), citing the ratio in Garware Wall Ropes (supra). The relevant observations made in N.N. Global (supra) read as under:

"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] and Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg.

Ltd., (2019) 9 SCC 209] 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 un-enforceable, 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 by a co-ordinate Bench, which has affirmed the judgment in Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209], 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 Indian 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."

21. The reasoning for the above was provided in the captioned judgment as follows:

> "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, un-enforceable 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."

22. 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.

23. 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, licenses and permits (including but not limited construction, occupancy, liquor, bar, restaurant, sign and hotel accommodation licenses) 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."

24. 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.

25. 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.

26. Upon reading Vidya Drolia (supra), the issue of 'existence' and/or 'validity' of the arbitration clause, would not be needed to be looked into herein, as payment of stamp duty, sufficient or otherwise, has taken place herein. In order to ascertain whether adequate stamp duty has been paid in terms of the Karnataka Stamp Act, this Court needs to examine the nature of the substantive agreement, the nature of the arbitration agreement, and whether a separate stamp fee would be payable for the arbitration agreement at all. It may be noted that the petitioners, have themselves attempted to self□adjudicate the required stamp duty and have paid, on 29.07.19, a stamp duty of Rs 2,200/□, describing the HMA as a "bond". On 10.06.2020, 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 maybe 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 (supra), however, this case, is not one such scenario.

27. Therefore, we deem it appropriate for this matter to be referred to arbitration, in terms of Clause 18.2 of the arbitration agreement.

28. 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.

29. The arbitration petition is allowed in the above terms.

.....CJI.

(N.V. RAMANA) .....J. (SURYA KANT) .....J. (HIMA KOHLI) NEW DELHI;

JANUARY 25, 2022