

# M/S.Image Infotainment Limited vs M/S.Labour India Public School And ... on 18 August, 2023

2023:MHC:3802

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.07.2023

PRONOUNCED ON : 18.08.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

Arbitration O.P.No.11 of 2022

M/s.Image Infotainment Limited,  
Represented by its Managing Director,  
K.Kumar,  
Having its registered Office at  
Bo.61/32, TTK Road, Alwarpet,  
Chennai - 600 018.

...  
versus

M/s.Labour India Public School and Junior College,  
Represented by its Managing Director,  
Labour India Knowledge City,  
Labour India Hills,  
Mangattupuly P.O.,  
Kottayam District,  
Kerala - 686 635.

PRAYER: Arbitration Original Petition filed under Section 34(2) of Arbitration and Conciliation Act, 1996, prays to set aside the award by the sole arbitrator, Chennai dated 02.02.2022 in the Arbitration No.A.C.P (CNICA) No.2 of 2019.

For Petitioner : Mr.K.Subbu Ranga Bharan

For Respondent : Mr.Benoj C.Augustin

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<https://www.mhc.tn.gov.in/judis>

ORDER

This Arbitration Original Petition has been filed seeking to set aside the award passed by the learned Arbitrator, Chennai dated 02.02.2022 in the Arbitration Case No.A.C.P (CNICA) No.2 of 2019.

2. Heard the learned counsels for the petitioner and respondent and perused the materials available on record.

Petition in brief:-

3. The petitioner and the respondent have signed a Memorandum of Understanding on 01.06.2017 in connection with a project of the respondent's school; the agreement was for six years; as per the Memorandum of Understanding, 500 students would be admitted into the programme on a fee of Rs.5,000/- each; however a dispute arose between the petitioner and the respondent with regard to the payments; since the Memorandum of Understanding contained an arbitration clause, a sole Arbitrator was appointed; during the arbitration proceedings, the respondent had filed an Application in I.A.No.1 of 2019 and challenged that the Memorandum of Understanding that it is insufficiently stamped; the then learned Arbitrator dismissed the application and proceeded with the <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 arbitration; the said order was not challenged by the respondent; the Memorandum of Understanding has been marked as Ex.C.1; however the subsequent Arbitrator had concluded that the substantive agreement is inadmissible in law due to deficit stamping and held that the respondent is liable to pay a sum of Rs.8,16,666/- to the claimant with interest at the rate of 9% per annum from 15.02.2018.

3.1. The learned Arbitrator without considering the materials placed by the petitioner had chosen to reject the claim in view of the deficit fee; aggrieved by the said award, the petitioner had filed this Arbitration Original Petition to set aside the award dated 02.02.2022 made in Arbitration Case No.A.C.P (CNICA) No.2 of 2019 in entirety. Submissions of the petitioner:-

4. The learned counsel for the petitioner submitted that the award of the learned sole Arbitrator is erroneous, contrary to law and facts. The award was passed without application of mind and evaluating the evidence in right perspective. The arbitration clause is independent to that of Memorandum of Understanding; the Memorandum of Understanding ought <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 not to have been rejected on the allegation of deficit stamp duty; the very same question was raised by the respondent before the earlier Arbitrator by way of filing an Application in I.A.No.1 of 2019 and the same was dismissed and the order of dismissal was not challenged so far.

4.1. Even if the Memorandum of Understanding is insufficiently stamped, the learned Arbitrator ought to have directed the petitioner to produce the original Memorandum of Understanding and directed the petitioner to pay the necessary stamp duty by invoking Sections 34 and 35(b) of the Indian Stamps Act, 1899 and penalty could have been levied under Section 38 of the Indian Stamp Act. Without giving an opportunity to resolve the stamp duty issue, the Memorandum of Understanding should not have been rejected. Since the arbitral award passed by the learned

Arbitrator is erroneous on the face of it, it is liable to be set aside. Submissions of the respondent:-

5. The learned counsel for the respondent submitted that the award does not fall within any of the exceptions contemplated under Section 34 of the Arbitration Act for getting it set aside. An arbitral award cannot be set aside merely on the ground of erroneous application of law or <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 misappreciation of evidence. The petitioner had filed the claim application seeking compensation of an amount for the services provided to the respondent. Since a dispute had arisen, it was referred to mediation. Even though the Memorandum of Understanding dated 25.02.2017 was not properly stamped, in view of the independent nature of the arbitration clause, the learned Arbitrator has decided to proceed with the proceedings. The learned Arbitrator has correctly found that the Memorandum of Understanding was not properly stamped and that it cannot be treated as contract as per Section 2(g) of the Indian Contract Act.

5.1. In support of his submissions, the learned counsel for the respondent relied on the decision of the Constitutional Bench of the Hon'ble Supreme Court held in N.N.Global Mercantile Private Ltd. vs. Indo Unique Flame Ltd. and others reported in 2023 SCC Online SC 495. In the said judgment, it is held that if the agreement is not duly stamped, its terms and conditions cannot be enforced and it is not admissible in law. The said position of law has been followed in various judgments of the Hon'ble Supreme Court and various High Courts.

<https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 5.2. As per Section 35 of the Indian Stamp Act, if the instrument is insufficiently stamped it is inadmissible in evidence. Further the Tamil Nadu Stamp Rules 3(iii) states that the "stamps purchased in Tamil Nadu State shall alone be used for instruments chargeable with duty under the Act as in force in that State". The agreement was executed in Chennai in on insufficiently stamped instrument, bearing the stamp of State of Kerala and it is invalid as per Tamil Nadu Stamp Rules.

5.3. The petitioner had approached the Court under Section 34 of the Arbitration and Conciliation Act 1996 to set aside the arbitral award and that itself is not maintainable. The arbitral award cannot be set aside except if there is any patent illegality or perversity. The learned Arbitrator has considered and passed the award by giving proper reasons and hence this petition should be dismissed.

Discussion:-

6. The sole ground to challenge the award is the rejection of the Memorandum of Understanding by stating the reason of insufficient stamping. Irrespective of the issue of stamp duty, the learned Arbitrator had <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 continued the proceedings by considering that the arbitral clause itself in a separate agreement in itself.

7. The Memorandum of Understanding entered into between the petitioner and the respondent dated 25.02.2017 has been marked as Ex.C.1. Even though the learned Arbitrator had chosen to rely on the decision of the Hon'ble Supreme Court held in Jupudi Kesava Rao vs. Pulavarthi Venkata

Subbarao reported in AIR 1970 SC 1070 on the point of inadmissibility of the insufficiently stamped document, the document has been admitted and marked as an exhibit during the course of the Arbitration Proceedings.

8. As per Section 33 of the Indian Stamp Act, 1899, if any instrument is found to have been not duly stamped, the authorities specified in the above provision, shall impound the same and collect duty. Section 33 of the Indian Stamp Act reads as under:-

“Sec.33.Examination and impounding of instruments.-

(1)[(a)] Every person having by law or consent of parties, authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 produced or comes in the performance of his functions, shall if it appears to him that such instrument is not duly stamped, impound the same.

[(b) Notwithstanding anything contained in section 31, but without prejudice to the provisions of clause (a), the Collector before whom any instrument is brought under section 31 for determining the duty with which the instrument is chargeable, shall, if it appears to him that such instrument is not duly stamped, impound the same :

Provided that nothing contained in this clause shall be deemed to authorise the Collector to impound any instrument which has not been executed but is brought to him under section 31 for determining the duty with which the instrument is chargeable or any instrument which he is authorised to endorse under section 32] (2) For the purpose, every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed:

Provided that-

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (Act V of 1898);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,-

(a) the State Government may determine what offices shall be deemed to be public offices; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices.”

9. As per Section 35 of the Indian Stamp Act, no instrument chargeable with duty shall be admissible in evidence, unless it is impounded in accordance with Section 33 and an endorsement to that effect has been made under Section 42(2) of the Act. However, as per Section 36, if an instrument has been admitted in evidence, such admission shall not be called in question at any stage of the proceedings on the ground that the instrument has not been duly stamped, except as per the procedure contemplated under Section 61 of the Indian Stamp Act. And Section 36 reads as under:-

<https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 “Sec. 36 Admission of instrument where not to be questioned

-Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly stamped.”

10. Section 61 says about the revisional powers of the Appellate Courts in the matters of imposition of duty on the insufficiently stamped instruments either on its own motion or on the application made by the collector. If an insufficiently stamped document is admitted in evidence its admissibility shall not be questioned except by the Appellate Court as stated under Section 61. For the sake of clarity Section 61 is extracted as under:-

“ Sec.61 Revision of certain decisions of Courts regarding the sufficiency of stamps-

(1) When any Court in the exercise of its civil or revenue jurisdiction of any Criminal Court in any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898), makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under section 35, the Court to which appeals lie from, or references are made by, such first-mentioned Court may, of its own motion or <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 on the application of the Collector, take such order into consideration.

(2) If such Court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same

when produced.

(3) When any declaration has been recorded under sub-

section (2), the Court recording the same shall send a copy thereof to the Collector, and, where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under section 42, or in section 43, prosecute any person for any offence against the Stamp-law which the Collector considers him to have committed in respect of such instrument:

Provided that-

(a) no such prosecution shall be instituted where the amount (including duty and penalty) which, according to the <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 determination of such Court, was payable in respect of the instrument under section 35, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty;

(b) except for the purposes of such prosecution, no declaration made under this section shall effect the validity of any order admitting any instrument in evidence, or of any certificate granted under section 42.”

11. Before proceeding to the special facts behind the admission of the document in question in this case, it is relevant to extract the special paragraphs of the judgment in *Jupudi Kesava Rao vs. Pulavarthi Venkata Subbarao* reported in AIR 1970 SC 1070 on the impact of insufficient stamping.

“The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable when the original instrument is actually before the Court of <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfil the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself.”

12. The learned Arbitrator has relied the above judgement, despite allowing the copy of the Memorandum of Understanding marked. The copy of the Memorandum is only a secondary evidence. The import of the above content is that if the instrument is not duly stamped it has to be

impounded and that can be done only on the original instrument; hence there is no question of receiving secondary evidence during the proceedings. In other words, if secondary evidence of insufficiently stamped instrument is received, it would amount to approving the insufficiently stamped instrument itself by waiving the obligation to pay the deficit stamp duty along with penalty.

13. During the arbitration proceedings, the learned Arbitrator had chosen to receive and mark the copy of the Memorandum of Understanding <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 as a document. Having known that it is not the original document and received it in evidence, later the learned Arbitrator has chosen not to consider the same for want of sufficient stamp duty. Further, the learned Arbitrator has made a cautious observation in his order about the petitioner's disentitlement to get the benefit under Section 36 of the Indian Stamp Act, by stating that what was in evidence is only a copy of the Memorandum of Understanding and not the original Memorandum of Understanding. It is reiterated that as per Section 36 of the Stamp Act once an instrument is admitted in evidence, it shall not be questioned later that it is insufficiently stamped.

14. As per Section 35 only an original document can be impounded and not a copy. It is obviously because Xerox copy of the document would only contain an image of the stamp and for the image of a stamp no value can be attached. It is similar to the difference between an original currency note and a Xerox copy of the currency. While the original currency note has an exchangeable value, the Xerox copy of the currency can be considered as nothing but a piece of paper.

<https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022

15. Only in view of the above reason, the Hon'ble Supreme Court has held in Jupudi Kesava Rao that unless the original document is impounded its copy can not be received as a secondary evidence. In fact the Court went to an extent further and observed that receiving the secondary evidence of an insufficiently stamped document would tantamount to acting up on the improperly stamped original document itself, without the payment of duty or penalty.

16. Hence, the learned Arbitrator ought not to have allowed the petitioner to mark the copy of the Memorandum of the insufficiently stamped Agreement. As per the legal position held in Jupudi Kesava Rao, allowing a Xerox copy of the insufficiently stamped Memorandum of Understanding to be admitted in evidence would indirectly amount to ratifying the insufficiently stamped document, without payment of duty or penalty.

17. Having admitted a copy and marked the same as an exhibit and thereby waiving the process of impounding and collection of duty, the learned Arbitrator had denied the petitioners to get the benefits of Section 36 of the Stamp Act. In this regard it is relevant to refer the judgement of <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 the Hon'ble Supreme Court held in N.N.Global Mercantile Private Ltd. vs. Indo Unique Flame Ltd. and others reported in 2023 SCC Online SC 495. In the said judgement it is held as under;

67. We may also profitably refer to paragraph-8 as well : (Hindustan Steel Ltd. Vs. Dilip Construction Co., reported in (1969)1 SCC 59, SCC p.601)

8. Our attention was invited to the statement of law by M.C. Desai, J., in *Mst Bittan Bibi v. Kuntu Lal* [ILR (1952) 2 All 984] : (ILR p.1000) “...A court is prohibited from admitting an instrument in evidence and a court and a public officer both are prohibited from acting upon it. Thus a court is prohibited from both admitting it in evidence and acting upon it. It follows that the acting upon is not included in the admission and that a document can be admitted in evidence but not be acted upon. Of course it cannot be acted upon without its being admitted, but it can be admitted and yet be not acted upon. If every document, upon admission, became automatically liable to be acted upon, the provision in Section 35 that an instrument chargeable with duty but not duly stamped, shall not be acted upon by the Court, would be rendered redundant by the provision that it shall <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 not be admitted in evidence for any purpose. To act upon an instrument is to give effect to it or to enforce it.” In our judgment, the learned Judge attributed to Section 36 a meaning which the legislature did not intend. Attention of the learned Judge was apparently not invited to Section 42(2) of the Act which expressly renders an instrument, when certified by endorsement that proper duty and penalty have been levied in respect thereof, capable of being acted upon as if it had been duly stamped.

68. We draw the following conclusions, as to what has been laid down by a Bench of three learned Judges in *Hindustan Steel Ltd. Vs. Dilip Construction Co.*, reported in (1969)1 SCC 597:

68.1. The Stamp Act is a fiscal measure intended to raise revenue;

68.2. The stringent provisions of the Act are meant to protect the interest of the Revenue;

68.3. It is not intended to be used as a weapon by a litigant to defeat the cause of the opponent;

68.4. Upon the endorsement being made under Section 42(2) of the Stamp Act, the 63 document would be admissible in evidence and can be acted upon.

69. We may only observe that the Court did not take into consideration Section 17 of the Stamp Act, which provides for <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 the precise time, at which, the instrument is to be stamped.

Equally, the Court did not bear in mind that Section 62 of the Stamp Act, penalises transgression of Section 17, inter alia. Still further, the Court was dealing with an instrument after it was impounded, and the payments made which were certified under Section 42(2).

70. It is true that an unstamped instrument is compulsorily impoundable under Section 33 of the Stamp Act. The procedure to be followed thereafter is also provided in the Act. After the procedure is followed and the duty and the penalty is paid, the instrument would come to be visited with the endorsement under Section 42(2). Thereafter, it becomes enforceable and it can be acted upon, as held in *Hindustan Steel* (supra).



18. In the above judgment the Hon'ble Supreme Court has expressed its disapproval to the view of the Allahabad High Court in Mst Bittan Bib. The Allahabad High Court has observed in the above judgment that even if a document is admitted, there is no compulsion to act upon it. It is asserted by the Hon'ble Supreme Court that the above view of the Allahabad High Court in Mst Bittan Bibi v. Kuntu Lal, is not the object of Section 36 of the Indian Stamp Act.

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19. So, the natural corollary would be once a document is admitted in evidence by accepting the stamp on it, its evidentiary value cannot be overlooked without appreciation. To make it more specific, Section 36 can not be understood in a manner that if a stamped document is admitted, the courts can refrain from acting upon it. Though Section 36 only implies the acceptance of a document after paying the impounded duty and getting the seal of approval under Section 42(2) of the Stamp Act, it doesn't state anything explicitly about the impact of passing the document without impounding and marking it in evidence. In other words, Section 36 does not state in any explicit terms that those documents admitted and marked in contravention to Section 35 shall not be considered during the course of appreciation of evidence.

20. The above aspect needs a little more elaboration by visualizing a situation where an improper impounding has been taken place as an insufficiently stamped document resulting in collecting of less duty than the actual due. Even in that case, it has be presumed that the impoundment and collection of duty within the meaning of Sections 33 and 35 of the Act has been completed. In view of Section 36, even an improper impounding can <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 not be questioned except following the procedure contemplated under Section 61. So the possibilities of insufficiency still might continue in a few cases but safeguarded due to the special procedure contemplated under Section 61 of the Stamp Act.

21. Similar is a case where the insufficiently stamped instrument is admitted by the authority concerned without following the due procedure and then marking it as evidence. Once such a document is marked as an evidence, it passes from the stage of admission to relevance. Once an evidence is allowed as relevant during the arbitration proceedings, the learned Arbitrator can not refrain from analyzing and appreciating its evidentiary value for a given dispute.

22. In the case on hand, the learned Arbitrator has admitted the copy of the Memorandum of Understanding. Admitting such kind of secondary evidence tantamounts to acting on the insufficiently stamped document itself. Once an act starts, its sequence can not be averted. But the learned Arbitrator has not relied the terms of the contract even though the copy of the Memorandum of Understanding is marked as a document. <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022

23. Deciding a dispute between the parties without considering the terms of contract between them is like constructing a building without foundation. Since the said process is in conflict with the basic notion of rendering justice, I feel the petitioner has made out a ground under Section 34 of the Arbitration and Conciliation Act and consequently the award is liable to be set aside.

24. However, the omission to impound the insufficiently stamped but admitted document has to be necessarily taken cognizance by this Court, which has the revisional power under Section 61 of the Stamp Act. Though there is no order of impoundment made by the learned Arbitrator under Section 33 of the Stamp Act, this Court is empowered to revise the act of the omission to impounding, on the part of the learned Arbitrator, by causing the production of the original. Since the stamps on instruments represent the fiscal value of the public revenue, failure to collect duty by impounding an insufficiently stamped document can not be condoned. The petitioner himself has submitted that the learned Arbitrator ought to have called for the original Memorandum of Understanding and impounded it <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 instead of not appreciating the evidentiary value of the marked copy of the same. (Ex.C1).

25. Hence the petitioner is directed to produce the original of the Memorandum of Understanding for impoundment to this Registry within 2 weeks. On such production of the original Memorandum of Understanding the Registry shall impound and collect the stamp duty before issuing a certified copy of this order to the petitioner. Since the stamp on the instrument is said to be the Stamp of Kerala, the rest of the stamp duty cannot be collected in terms of stamp of TamilNadu. Hence the registry is directed to proceed with the process of impoundment as though the instrument is wholly unstamped and collect the whole duty in terms of stamp of Tamil Nadu and then make due endorsement. After such impoundment, the Registry shall attach the original Memorandum of Understanding along with a copy which has been already marked as Ex.C1.

In the result, the petition in Arbitration O.P.No.11 of 2022 is allowed and the award dated 02.02.2022 passed by the learned sole Arbitrator, Chennai in Arbitration Case No.A.C.P (CNICA) No.2 of 2019 is set aside <https://www.mhc.tn.gov.in/judis> Arbitration O.P.No.11 of 2022 and the matter is remitted back to the same Arbitrator to reappraise the materials including the terms of Memorandum of Understanding and dispose it afresh, on the condition that the petitioner shall produce the original Memorandum of Understanding for the purpose of impounding as directed supra. Failure to produce the original as directed and get it impounded for paying the duty, will deprive the petitioner from getting the benefit of this order and in such case the Petition will be dismissed. Hence the matter has to be listed for compliance after 4 weeks.

Speaking order  
Index : Yes  
Neutral Citation : Yes

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Arbitration O.P.No.11 of 2022

R.N.MANJULA, J.

sri

Pre-Delivery Order made in  
Arbitration O.P.No.11 of 2022

18.08.2023

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