IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO.101 OF 2016

Vivek Mehta & Anr. .. Applicants

v/s.

KaRRs Designs & Developments & Ors. .. Respondents

Mr. Rohan Kadam a/w Ms. Ravina Rajpal, Ms. Sonia Redkar i/b. M/s. Singh & Singh Malhotra & Hegde for the applicants.

Mr. Dinyar Madon, Sr. Advocate, a/w Mr. Kevic Setalwad, Sr. Advocate, Mr. Cyrus Ardeshir, Mr. Rahul Dwarkadas, Mr. Neveille Mukerji & Mr. Asim Tirmizi i/b. Veritas Legal for the respondents.

Mr. Himanshu Takke, AGP, for the State on Notice.

CORAM : A. K. MENON, J.
DATED : 28th FEBRUARY, 2022.

P.C. :

1. This application filed under Section 11 of the Arbitration and Conciliation Act, 1996, seeks appointment of a Sole Arbitrator to adjudicate upon disputes that have arisen under a Memorandum of Understanding (MOU) dated 29th August, 2009. The application filed in 2016 remains pending for numerous reasons. Initially, the parties were referred to mediation since they were in negotiations and meetings have been held prior to 2017. These meetings did not yield results and on 18th April, 2019 the

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respondents raised objections to the maintainability of the petition since the MOU was not sufficiently stamped. This is found to be recorded in an order dated 18th April, 2019. Eventually mediation having failed, the matter was taken up for hearing on 26th November, 2019. After noting that clause 17 of the MOU contained an arbitration clause, the court noted that stamp duty in respect of the MOU was payable by the applicants.

2. In view of the objections to stamping, the court in its order dated 26th November, 2019 considered the nature of the MOU and observed that unless stamp duty is fully paid with penalty, the court could not proceed with appointing an arbitrator, in view of the decisions of the Supreme Court in *Garware Wall Ropes Limited v/s. Coastal Marine Constructions & Engineering Ltd.*[1] and *SMS Tea Estates Private Limited v/s. Chandmari Tea Company Private Limited(P).*[2] The court did not venture to consider the nature of the document and recorded a statement on behalf of the applicants Advocates that they would submit the document of the Collector of Stamps along with a copy of the order so as to enable the Collector to adjudicate the correct duty payable. The matter was thereafter adjourned with a request to the Collector to decide the matter at his earliest convenience preferably before 24th

1 (2019) 9 SCC 209

2 (2011) 14 SCC 66

January, 2019. The matter has remained pending since then. On 25th February, 2020 time was taken for parties to attempt a settlement.

3. On 3rd January, 2022 when the matter was listed before this court, a statement was made that no settlement had been arrived at. The matter therefore came to be listed for dismissal on 10th January, 2022, counsel informed the court that pursuant to the order of 26th November, 2019 the Collector had heard the applicants. The original instrument had been presented to the Collector and it was only now awaiting adjudication on the quantum of duty payable. The Collector was directed then to do so within one week.

4. On 17th January, 2022 the court was informed that the Collector had scheduled the matter on 20th January, 2022. Accordingly, the matter was listed on 20th January, 2022. No progress having been made, the matter was taken up for hearing and has been since heard. The learned Government Pleader who was present in court on the last occasion has appeared on notice and he informed the court that the Collector was expected to pass orders on 21st February, 2022.

5. Mr. Kadam submits that notwithstanding the fact that the Collector of Stamps is yet to pass an order on the adjudication application, the appointment of the arbitrator need not be delayed. He

relies upon the verdict of the Supreme Court in *Intercontinental Hotels Group (India) Pvt. Ltd. and Anr. v/s. Waterline Hotels Pvt. Ltd.*[3] holding that insufficiency of stamps is not a reason for refusing to appoint an arbitrator. Mr. Kadam submits that unlike an unstamped document which was the subject matter of numerous decisions of the Supreme Court including that of *Vidya Drolia and Ors. vs. Durga Trading Corporation*[4], on a fair reading of the decision of the Supreme Court in *N.N. Global Mercantile Private Limited v/s. Indo Unique Flame Limited and Ors.*[5] and Intercontinental Hotels (supra), it is now clear that an arbitrator can be appointed in these circumstances. In this respect he draws support from *S. N. Prasad, Hitek Industries (Bihar) Limited v/s. Monnet Finance Ltd. and Ors.*[6] and *Unissi (India) Private Limited v/s. Post Graduate Institute of Medical Education and Research*[7]. Mr. Kadam has invited my attention to paragraphs 10, 12 and 17 in *S.N. Prasad (supra),* paragraphs 18 and 23 of *Intercontinental Hotel Group (supra),* paragraphs 54 and 55 of *N.N. Global Mercantile (supra)* and paragraph 13 of *Unissi (supra*) and canvassed the applicants' case on the basis that the appointment of an arbitrator need not be now held up.

3 2022 SCC Online SC 83
4 (2021) 2 SCC 1
5 (2021) 4 SCC 379
6 (2011) 1 SCC 320
7 (2009) 1 SCC 107

6. Prima facie, it appeared that on the issue of admissibility of a document due to insufficient stamping, the decision in *Intercontinental Hotels Group(supra)* would be a way out of the impasse presented by the decisions in *SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Ltd*[8], *Garware Wall Ropes (supra)* and *Vidya Drolia (supra)* all of which hold that it would be necessary to await the actual stamping of document with adjudicated value. As against this, the decision in *N. N. Global (supra)* suggests that once the existence of an arbitration agreement is admitted, there would be no impediment in appointing an arbitrator.

7. However, Mr. Madon on behalf of the respondent has serious reservations on this aspect. He submits that the decision in *Intercontinental Hotels (supra)* would not come to the assistance of the applicant. He has sought to distinguish it on facts. Mr. Madon submitted that the factual aspects in *Intercontinental (supra)* will reveal that the court had come to the conclusion that issues as to whether the respondent is estopped from raising the contention of unenforceability of the agreement or the issue whether the agreement was insufficiently or incorrectly stamped, can be decided finally at a later stage. Mr. Madon has drawn my attention to the fact that the petitioners in

8 (2011) 14 SCC 66

Intercontinental (supra) had contended that they had paid the required stamp duty including the penalty and had sought appointment of an arbitrator pursuant to payment of such duty.

8. In other words, the petitioner had self assessed the duty payable and paid the duty and penalty on the document thereby presenting a case of insufficiency of stamps being cured by self-assessment. This was contested by the respondent in that case on the basis that the document had been wrongly classified for the purposes of stamp duty and stamp duty had been paid under Article 5(j) of the Schedule of the Karnataka Stamp Act, 1957 which was erroneous. Therefore, the respondent contended that the agreement was not properly stamped. It is in this factual background that *Intercontinental Hotels (supra)* had permitted the appointment of the arbitrator.

9. In the present case, Mr. Madon points out that the applicants are unwilling to pay duty as may be assessed. As on date, there is no commitment to pay the duty upon adjudication since Mr. Kadam has reserved his right to avail of a statutory appeal. Mr. Madon therefore submits that the applicants cannot take advantage of the decision in *Intercontinental Hotels (supra)* since there has been no self-assessment of duty and penalty. Mr. Kadam had also raised the contention that assuming the agreement is insufficiently stamped, the court could still

appoint an arbitrator since Section 7(4)(c) contemplates an arbitration agreement culled out of statements of claims and defence can be identified and acted upon. In the present case prior to the filing of the application the respondents did refer to the arbitration agreement between the parties and that is not being disputed by the respondents. He therefore sought to take advantage of the fact that the Act itself provides for an arbitration agreement to be culled out for correspondence and pleadings in the present case.

10. Having heard the learned counsel for the parties and having perused the pleadings and the contentions, one thing is clear that incorporation of an arbitration agreement within the MOU is admitted. I have observed that clause 15 of the MOU requires stamp duty and registration charges in respect of the agreement to be paid by the purchasers viz. the applicants whereas a sum of only Rs.100/- has been paid on the instrument as of now. If I come to the conclusion that insufficient stamping would render the application incompetent, we would have to await payment of duty as assessed and subject to all challenges that the parties may avail of. If I conclude that payment of Rs.100/- would be sufficient to avail of the decision in Intercontinental Hotels (supra), it may be possible to rule in favour of the applicants.

12. I am of the view that it is not necessary to delve deep into the nature of the agreement between the parties. Suffice it to say that it relates to construction and purchase of a high end luxury villa from the respondents. What is of relevance is the nature of the document, the stamp duty if any, already paid and duty if any, that is yet to be paid. There is no doubt that the MOU in clause 10 contemplates execution and registration of a formal agreement for sale and an indenture of conveyance and that is a matter that has engaged the attention of this court in a series of matters. In the instant case, the order dated 26th November, 2019 has already observed that the court does not intend to examine those aspects.

13. Mr. Kadam had placed reliance on the existence of a arbitration agreement dehors the clause in MOU viz. by the assertion in the pleading and the non-denial by the respondent. In *S.N. Prasad (supra)* a non-signatory guarantor was sought to be proceeded against pursuant to an arbitration clause. In paragraph 11, the Supreme Court observed that an arbitration agreement in writing can be said to exist if it is contained in exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and is not denied by the other. In that case, the statement of claim filed before the arbitrator did not contain any assertion that an arbitration agreement

existed between the non-signatory to the agreement and the appellant who had not denied the fact that there was no arbitration agreement between him and the non-signatory. In that view of the matter, the court found that there was no arbitration agreement between them and therefore the arbitrator did not have jurisdiction. The Supreme Court also observed that the expression "statements of claim and defence" referred to in Section 7(4)(c) is not restricted to the statements of claim and defence filed before an arbitral tribunal. On the other hand, if there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court and if there is no denial of the same in a defence or counter statements filed by the other party, the exchange of statements of claim and denial for the purposes of 7(4)(c) would be complied with. Therefore in an application under Section 11 of the Act, if an applicant has asserted the existence of an arbitration agreement which the respondent does not deny in the defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties.

14. In my view, the clause itself is the genesis of the application and an instrument containing the said clause has now been found to be inadmissible in evidence for want of sufficient stamp duty. The question is whether at this stage one should prevent a party from seeking an

appointment of a arbitrator under Section 11 and hold up the entire pre-reference proceeding or whether the party should be pushed beyond that hurdle and leave it to the arbitral tribunal to consider the admissibility of the documents subject to paying payment of stamp duty. If this court finds that the document is admissible for the purposes of Section 11 and that the court cannot look into the existence of such an agreement to refer disputes to arbitration, we have a road block which can be cleared only after duty is paid. If not, it may be possible for this court to appoint the tribunal and the arbitrator would entered the reference and thereafter be faced with a situation where the document remains unstamped. In that set of facts, there is the possibility of time for the arbitral tribunal to complete the reference and make an award running out and extension(s) of time would have to be sought.

15. In my view, that would be one of the ways that the court approaches the issues involved, viz is to consider the practicality of appointing an arbitrator and have the reference proceed adjudication while the applicants decide whether or not to pay duty as assessed. The other option is to await a final decision on the issue of stamping and once that is concluded, the parties can be relegated to arbitration by appointing an arbitrator. In this background, it is appropriate to consider the decision in *N.N. Global (supra)* which in paragraph 54 in

no uncertain terms are holds thus,

> *"In the present case, since both parties have admitted the existence of the arbitration agreement between the parties, as recorded in the judgment of the High Court, and even before this Court during oral submissions, parties may either appoint a sole arbitrator consensually; failing which, an application under Section 11 for appointment of the arbitrator may be made before the High Court. "*

16. The Supreme Court then proceeded to set aside the judgment of the Bombay High Court and directed the Secretary General of the Supreme Court to impound the instrument and forward it to the Collector of Stamps for assessment of stamp duty. On determination of stamp duty, the appellant-plaintiff was directed to make payment of the duty assessed within four weeks subject to the right of statutory appeal available to the appellant. *N. N. Global (supra)* also held that the view taken by the Supreme Court in *SMS Tea Estates (supra)* and *Garware Wall Ropes(supra)* that non-payment of stamp duty would render the arbitration agreement non-existent, is not the correct position in law but also finds that *Vidya Drolia (supra)* had affirmed the judgment in *Garware Wall Ropes (supra)* and the court hence made a reference to a larger bench.

17. In the present case, the MOU is executed on stamp paper of Rs.100/-. Thus, there is no question of the document being

"unstamped". It is at best insufficiently stamped and if a document is insufficiently stamped, then we have to consider the effect of the Supreme Court's decision in *Intercontinental Hotels (supra)* which takes into consideration the decision in *Garware Wall Ropes, N.N. Global, Vidya Drolia, SMS Tea Estate* (supra) and then concludes that while there is a need to constitute a larger bench to settle the jurisprudence taking cognizance of the time sensitivity of the matter, when dealing with arbitration issues, all matters which are still at pre-appointment stage, cannot be left hanging till the larger bench settles the issue and accordingly the court should ensure that until the larger bench decides on the interplay between Sections 11(6) and 16, that arbitrations are carried on, unless the issue before the court "patently indicates existence of deadwood".

18. The deadwood concept has been dealt with extensively in *Vidya Drolia (supra).* Applying that test in *Intercontinental Hotel Group (supra)* the Supreme Court has made reference to the same in paragraph 18 as under;

> *"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'.

20. In paragraph 23, the court observed that;

> *"while there is need to constitute a larger bench to settle the jurisprudence, although the court was cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and court 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 Section 11(6) and 16 – should ensure that arbitrations are carried on, unless the issue before the court patently indicates existence of deadwood."*

21. Thus, unless the court comes to the conclusion that there is existence of deadwood, that the appointment procedure should be completed. In paragraph 24, the court observed thus;

> *"24. 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."*

22. In the instant case, the agreement in the form of MOU which contemplates execution of a formal agreement for sale and/or conveyance and registered the same. This agreement proposed to be executed would certainly attract stamp duty but such an instrument is yet to be executed. Thus, the question is whether duty can be paid on a

later stage and that is something that will have to be gone into at the appropriate stage and not in this application which restricted to appointment of an Arbitrator.

23. In the present case, I am not able to find any element of deadwood and hence, I have considered Mr. Madon's objection to acceptance of the decision in *Intercontinental Hotels (supra)* and his attempt to distinguish the same on facts from this case such that the tribunal is not appointed merely on the basis of insufficient stamping for an issue to be decided later. There is merit in Mr. Madon's contention that on facts the Supreme Court was considering a situation where the appellant before it had self assessed duty payable, penalty payable and had paid the same. The challenge then remaining was the respondents contention of wrong classification and hence improper duty being paid, thus, leading to insufficient duty being paid but I am of the view that the larger issue before the court is whether the arbitration should be held up at the pre-appointment stage and pre-reference stage or whether party should be left to follow the procedures post reference and be left to agitate their respective challenges. The aspect of self-assessment of duty and penalty and payment thereof was not the issued that fueled the ratio. The ratio is clear viz. least interference at the pre-appointment stage.

24. I am of the view that the ratio in *Intercontinental Hotel Group (supra)* would apply squarely to the facts of this case as well. Although it is the case of Mr. Madon that the fact in *Intercontinental Hotel Group (supra)* being different inasmuch as stamp duty had already been paid whereas in the instant case it has not been paid, that is not the ratio of the case but an aspect that the court need not consider in the facts of this case especially in view of the provisions under Section 11(6A) of the Arbitration and Conciliation Act which requires the court to confine itself to the existence of the agreement. The deletion of this Section 11(6A) by the 2019 amendment I am told is yet to be notified.

24. The existence of the agreement not being in dispute, I do not think it necessary to consider Mr. Kadam's alternative argument as to ascertaining of existence of the arbitration agreement culled out of correspondence. In my view, it would not be appropriate to consider the arbitration agreement as having been incorporated in correspondence between the parties since the correspondence in turn refers to clause 17. In the present case I have observed that pursuant to invocation of arbitration agreement the applicants have also nominated a Sole Arbitrator on 8th January, 2016. In conclusion, I am of the view that the application is liable to be allowed.

24. For all the aforesaid reasons, I pass the following order;

(i) Mr. Karl Tamboly, Advocate, is appointed as Sole Arbitrator to adjudicate upon claims and counter claims, if any,

(ii) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) and Section 12(1) within two weeks with the Prothonotary and Senior Maser and provide copies to the parties.

(iii) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.

(iv) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(v) Arbitration Application is disposed in the above terms.

(vi) No costs.

(A. K. MENON, J.)