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

ARBITRATION APPLICATION NO.225 OF 2016

Pigments & Allieds] .. Applicant

Vs.

1. Carboline (India) Pvt. Ltd.]
2. Official Liquidator and Liquidator of]
   Octamec Engineering Ltd.] .. Respondents

Mr. Gautam Ankhad, with Ms. Shruti Maniar and Mr. Mustafa Bohra, i/by Solomon & Co., for the Applicant.
Mr. Ashish Kamat, with Ms. Cheryl Fernandes and Ms. Praneeta Ragji, i/by AZB & Partners, for Respondent No.1.

CORAM : A. K. MENON, J.
DATE : 28TH FEBRUARY, 2022.

P.C. :

1. By this application, filed under Section 11 of the Arbitration and Conciliation Act, 1996, the applicant seeks appointment of a Sole Arbitrator to adjudicate upon disputes between the applicant and the respondents under a Tripartite Agreement dated 6th February 2013. The application is opposed by the 1st respondent-Carboline. The 2nd respondent-Octamec had not appeared at the initial stages. Later, it was learnt that the 2nd respondent is in liquidation and accordingly, the Official Liquidator of the 2nd respondent has been impleaded as respondent no.2.

2. At the outset, it is to be noted that the original Tripartite Agreement

dated 6th February 2013 is not presently available with any of the parties. When this matter was taken up for hearing, notice was issued to the Liquidator, calling upon the Liquidator to confirm whether he was in possession of the original agreement. The learned Company Prosecutor appearing on behalf of the Liquidator on 24th January 2022, on scrutiny of the record, has confirmed that the original agreement was not found in the records of the 2nd respondent-company.

3. As and way of background, the following facts are relevant.

3.1 The applicant is a partnership firm. The 1st and 2nd respondents were limited companies and it is seen from the record that pursuant to the tripartite agreement, the applicant was required to carry out certain work including construction and maintenance for Vodafone Shared Services Limited pursuant to a subcontractor agreement. The sub-contractor agreement is dated 18th September 2012 and that is between the respondents inter se. Essentially the work involved supply and application of intumescent paint fire protection system and anti-corrosive paint to steel columns, fire and rust protection systems for the Vodafore Data Centre. The respondent no.2 *("Octamec")* is believed to have placed a work order and a purchase order on respondent no.1 *("Carboline")* for

the aforesaid supply and application. A purchase order came to be issued under the Subcontractor Agreement on 8th October 2012.

3.2 The purchase order was placed by the 1st respondent on the applicant for supply of paint, as aforesaid. The total consideration was Rs.18,00,77,644=20. Payment was to be made by a Letter of Credit of 90 days. The applicant thereafter claims to have placed a purchase order with a company in Jordan for supply of the paint for an agreed consideration. The applicant is believed to have made payments to the said company in Jordan for supply of the paint. Several meetings were held between the parties to this application in the interregnum, but Carboline continued to default in making payments. Carboline apparently entered into negotiations with the applicant to revise payment terms and as a result of these negotiations, a New Purchase Order dated 26th December 2012 (NPO) came to be issued reflecting negotiated terms for supply of 3,32,597 ltrs. of paint for a consideration of Rs.19,19,13,125/-. The applicant has received a Letter of Credit only for Rs.3.14 crores from Octamec.

3.3 It is the applicant's case that pursuant to the earlier

purchase order, it had ordered 21 full container loads of the paint from Jordan. The consignments began arriving at Nhava Sheva Port on or around 6th January 2013 and the applicant was incurring demurrage charges and port charges. Meanwhile, Carboline apparently, facing a financial crisis, did not make payments under the NPO. Carboline then suggested that Octamec would open the requisite Letters of Credit in favour of the applicant and that Octamec should accept a combination of advances payable by post-dated cheques as guarantee against the Sight Letters of Credits being issued to the applicant by Octamec. Discussions ensued between the parties and as a result, the tripartite agreement forming subject matter of the present application came to be executed on 6th February 2013. The applicant thereafter awaited payments, which were not forthcoming. It is the contention of the applicant that the payments being irregular, the director of Carboline assured the applicant that the remaining payments would be made at the earliest. After much follow-up, some part payments were made on 15th February 2013, 23rd February 2013, 19th March 2013, 20th March 2013 and 23rd March 2013 by way of RTGS. Corresponding quantity of paint was

released after payment of a total sum of Rs.13,29,190=41 towards detention charges and demurrage and Rs.72,72,187/- towards customs duty. The first shipment was then delivered at Vodafone site on 26th February 2013. The applicant reminded Octamec of the fact that they were incurring huge costs by way of customs duty, demurrage charges since the paint had not been collected due to the default of Carboline.

3.4 Under clause 10(b) of the tripartite agreement, disputes between the parties were to be referred to arbitration. Clause 10 is reproduced below for ease of reference :-

"10. Dispute Resolution

(a) Negotiation

Any dispute, difference, controversy or claim between parties arising out of or relating to this Agreement or the construction, interpretation, breach, termination or validity thereof ("Dispute") shall, upon the written request ("Request") of either Disputing Party served be referred to the authorized representatives of the Disputing Parties for resolution. The authorized representatives shall promptly meet and attempt to negotiate in good faith a resolution of the Dispute. In the event that the Disputing Parties are unable to resolve the Dispute through negotiations within 30 (thirty) days

after service by a Disputing Party of a request, then the dispute shall be resolved in accordance with the provisions mentioned below.

(b) Arbitration

In the event that the Disputing Parties are unable to resolve a dispute as provided in clause above, the dispute shall be finally settled under the Arbitration and Conciliation Act, 1996 (the "Rules") by a panel of three arbitrators, one to be appointed by the claimant, the second to be appointed by the defendant and the third to be appointed by the two arbitrators so appointed. (Emphasis Supplied)

(c) Place, Enforcement and Proper Law of the Arbitration

(i) The place of arbitration shall be Mumbai and all the arbitration proceedings shall be conducted in the English language.

(ii) Judgment upon any arbitral award rendered hereunder may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

(iii) The proper law of the arbitration shall be Indian law and the award will be made under the laws of India.

(d) *Costs*

The costs of the arbitration shall be borne by the Disputing Parties in such manner as the arbitrators shall direct in their arbitral award."

4. It is the applicant's case that both Carboline and Octamec have avoided interacting with the applicant and that they have jointly and severally failed to make payments for a shipment. The 3rd and 4th consignments were awaiting clearance and this has caused enormous loss to the applicant. A claim for a sum of Rs.8,92,97,690=09 has been made along with Rs.1,24,04,618=30 towards demurrage, detention and other port charges. Interest has also been claimed @ 18% p.a. In these circumstances, the applicant has invoked arbitration vide its letter-cum-demand notice dated 2nd June 2016, and a Sole Arbitrator has been nominated.

5. Carboline has since appeared and filed an affidavit-in-reply of one Sandeep Sarda dated 3rd February 2017. Carboline has relied upon the affidavit-in-reply of one Sandeep Sarda dated 3rd February 2017 and has taken up various contentions on merits. It is the contention of Mr. Kamat that the tripartite agreement has not been followed and that the obligation to make payment is not of Carboline alone. The obligation was equally of Octamec, which has now been ordered to be wound-up. According to Mr. Kamat, there is no dispute that exists and the question of appointment of an Arbitrator does not arise. Inviting my attention to the Dispute Resolution clause, he submitted

that good faith negotiations contemplated under Section 10(a) of the tripartite agreement had not taken place. There has been no attempt to explore such negotiations and prior to arbitration being invoked, it was necessary that the parties engage in good faith negotiations. This not having been done, Mr. Kamat submits that it is not possible to now invoke arbitration under clause 10(b) of the tripartite agreement. Thus, it is Mr. Kamat's case that invocation of the arbitration clause is premature.

6. Furthermore, it is contended that Octamec was also required to nominate an Arbitrator and it is not only Carboline that is required to nominate an Arbitrator. Since Octamec is now under liquidation, it is Carboline's case that an arbitration cannot proceed only against Carboline. Arbitration, if any, can only proceed as amongst the three parties and if the applicant has a claim, it has to proceed against both the respondents – Carboline and Octamec. Mr. Kamat submits that the arbitration agreement is a non-starter and no reference may be made.

7. On perusal of the record, it revealed that on 9th November 2017, the court ordered impounding of the tripartite agreement since it was found to be inadequately stamped. On 21st November 2018, the court found that the original document was not available and the applicant submitted that although the document is not available, its existence was not disputed by the respondents. Hence, a copy of the tripartite agreement was directed to be deposited with the Prothonotary and Senior Master, who then forwarded the

same to the Superintendent of Stamp, Mumbai for determining the stamp-duty payable upon adjudication. This has remained pending for a long time and finally on 10th December 2019, the Superintendent of Stamps has issued a demand notice for payment of duty amounting to Rs.10,72,140/- and penalty of Rs.15,01,000/-. According to the Superintendent of Stamps, duty was payable under Article 5(h)(A)(iii)(b) @ 0.5% on a contract value of Rs.21,43,88,000/-. Further, a sum of Rs.200/- was payable towards indemnity and on this basis, an order was passed directing payment of the aforesaid amount. This has now been produced before the court and yet another issue has been raised on behalf of the respondents inasmuch as, in the absence of the original document-tripartite agreement, whether it was possible to impound a copy of the agreement and have the copy stamped with ad-valorem duty payable. The issues that have been canvassed before me are, firstly, whether a copy of an instrument can be impounded and stamped with stamp-duty. Secondly, whether in the arbitration agreement providing for three arbitrators, a Sole Arbitrator can be appointed and; thirdly, whether on account of insufficiency of stamps, there is a prohibition against appointing an Arbitrator in view of the decision in *InterContinental Hotels Group (India) Pvt. Ltd. & Anr. Vs. Waterline Hotels Pvt. Ltd.*[1] and lastly whether no reference should be made because this is a case of 'deadwood' and no purpose is served by appointing an Arbitrator.

8. It is the applicant's case that an instrument can be stamped even if it is

1 *Arbitration Petition (Civil) No.12 of 2019*

a copy and the original is unavailable. Secondly, Mr. Ankhad submits that by virtue of the decision in *InterContinental Hotels Group (Supra)*, when a court is faced with an issue of insufficient stamping, there is no bar against proceeding and appointing an Arbitrator and, thirdly, he states that the stamp-duty payable can be considered at a later stage after a statutory appeal against adjudication is filed. It is Mr. Ankhad's case that as on date, it is not possible to file statutory appeal since only a notice of demand has been issued, to which the applicant intends to respond. After such response, an order is expected to be passed, which can be challenged by way of a statutory appeal under Section 40 of the Maharashtra Stamp Act, 1958.

9. Per contra, Mr. Kamat has disputed the proposition that a photocopy can be stamped though the original is not available. He also submits that the court ought not to proceed and appoint an Arbitrator for the reason that the instrument is not sufficiently stamped and therefore is inadmissible in evidence. Mr. Kamat goes one step further. He submits that the document is, in fact, unstamped and would have to subject itself to the decision of the Supreme Court in *N.N. Global Mercantile Private Ltd. Vs. Indo Unique Flame Ltd. and Ors.*[2] According to Mr. Kamat, stamp-duty on the document has been paid in Tamil Nadu and in a sum of Rs.100/- only. According to him, no duty whatsoever is paid under the Maharashtra Stamp Act. This he submits on the basis of Carboline's belief that the stamp-paper purchased in Tamil Nadu would be of no relevance when the agreement is executed in Mumbai. He has

2 *(2021) 4 SCC 379*

invited my attention to Exhibit-A to the application, which reveals that the tripartite agreement was printed on India Non-Judicial stamp paper of Rs.100/- purchased in Tamil Nadu from a stamp vendor by the 1st respondent-Carboline, but the agreement is shown to have been executed in Mumbai on 6th February 2013. According to Mr. Kamat, ad-valorem stamp duty would have to be paid under the Maharashtra Stamp Act and no stamp-duty having been paid after it was brought into the State of Maharashtra, the tripartite agreement is not stamped at all.

10. Mr. Ankhad has however controverted this by contending that the stamp paper was purchased by Carboline and it is Carboline which has caused the tripartite agreement to be prepared, showing it to be executed in Mumbai. It was executed by Carboline in Chennai and then by the other parties in Mumbai. Thus, merely referring to the place of execution as Mumbai would not be of any consequence since Carboline was the author of the document and since both Octamec and the applicant were located in Maharashtra, the tripartite agreement refers to the place of execution as Mumbai. That alone, according to Mr. Ankhad, will not invalidate the agreement and would not render the agreement an unstamped document.

11. Relying upon the decision of *Pradeep Shyamrao Kakirwar Vs. Dr. Seema Arun Mankar and Ors.*[3], Mr. Ankhad has canvassed his case in support of stamping of a photocopy of the tripartite agreement. He seeks to urge that

3 *(2020) SCC OnLine Bom 799*

the court had considered all aspects of the matter and the finding that the photocopy is not an instrument does not come into way of stamp-duty being paid pursuant to an order impounding the same pursuant to an order of this court. Mr. Ankhad places much reliance on the decision in *Intercontinental Hotels Group (Supra)* in support of his plea that when a document bears some stamp-duty, it is a matter of paying the difference in stamp-duty. He submits that the dispute needs to be narrowed down and as contemplated in *Vidya Drolia Vs. Durga Trading Corporation*[4], to which reference is made by the Supreme Court in *Intercontinental Hotels Group (Supra)*, the courts could adjudicate upon the lis between the parties only to the extent to cut-out the deadwood, but when there is a doubt, one should refer the disputes to arbitration. In this behalf, he has placed reliance on the observations of the Supreme Court in *Intercontinental Hotels Group (Supra)* and in particular paragraph 18 thereof.

12. Mr. Ankhad has also invited me to consider observations in paragraphs 22 and 23 of the judgment in *Intercontinental Hotels Group (Supra)*, where the court has held that until the larger bench decides the issue of existence of the arbitration agreement by virtue of reference made to the larger bench in *N.N. Global Mercantile Pvt. Ltd. (Supra)*, the court should ensure that the arbitrations are carried on, unless the issue before the court patently indicates existence of deadwood. The issue of insufficient stamping also considered in that judgment and in this behalf, Mr. Ankhad has placed reliance on

4 *(2021) 2 SCC 1*

paragraphs 23, 24 and 25 of the judgment in *InterContinental Hotels Group (Supra)*. In conclusion, it is his case that an Arbitrator must be appointed.

13. Having heard the learned counsel for the parties, I find that the opposition to the appointment of the Arbitrator is mainly on three grounds :

(i) The agreement is not stamped in accordance with the Maharashtra Stamp Act, 1958, as amended, and no credit can be claimed for duty paid in Tamil Nadu.

(ii) The disputes are not arbitrable since it qualifies as 'deadwood'.

(iii) Disputes, if any, are between the applicant, Carboline and Octamec.

14. Firstly, on the issue of stamping, according to Mr. Kamat, the document is unstamped. He has invited my attention to the provisions of Sections 33 and 34 of the Maharashtra Stamp Act and contended that the copy of the agreement cannot be stamped and that no secondary evidence can be led in relation to the agreement. He has also taken up the plea that even assuming the issue of stamping is resolved, the Dispute Resolution clause between the parties provides for a pre-arbitral negotiation and in this behalf, the provisions of clause 10 of the agreement are required to be gone into. According to Mr. Kamat, unless the negotiations were held and had failed, arbitration could not have been invoked. Thirdly, he submits that the Octamec

having been ordered to be wound-up, the arbitral reference cannot proceed. According to Mr. Kamat, the reference is in respect of what he describes as "deadwood" and therefore no reference can be made at all.

15. The original agreement is still unavailable. Thus, the instrument, which is required to be stamped, being unavailable, the authorities cannot proceed with stamping of the instrument and lastly that the original being unavailable, the copy cannot be tendered in evidence and hence clearly a non-starter and deadwood.

16. The document is inadmissible in evidence, because it is unstamped and hence hit by the decisions in *Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions and Engineering Ltd.*[5] and as set out in *Vidya Drolia Vs. Durga Trading Corporation*[6]. Even assuming the agreement could be stamped, he has relied upon the decision of the Supreme Court in *Hariom Agrawal Vs. Prakash Chand Malviya*[7], and in *N.N. Global Mercantile Private Ltd. Vs. Indo Unique Flame Ltd. and Ors.*[8] in support of his contention that unless the agreement is stamped with ad valorem stamp duty, the court cannot proceed to appoint an Arbitrator and in the instant case, ought not to proceed to appoint an Arbitrator since there is no substance in the claim. The claim is being made against an agent and is unsustainable.

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5 *(2019) 9 SCC 209*
6 *(2021) 2 SCC 1*
7 *(2007) 8 SCC 514*
8 *(2021) 4 SCC 379*

17. Chapter III of the Arbitration Act dealing with the composition of the arbitral tribunal requires the court to act on behalf of a party to a arbitration agreement when the party fails to act as required under Section 11(5) and 11(6). In the present case, failure to act is under sub-section 6 inasmuch as Carboline has failed to appoint an Arbitrator although the applicant has nominated an Arbitrator. Therefore, the court is called upon to act and make an appointment pursuant to Section 11(6)(a).

18. The relevant provision of the Arbitration Act in this application having been considered, I proceed to consider the effect of the provisions of the Maharashtra Stamp Act, 1958. In this behalf, the relevant provisions are the definitions in Section 2(d) in respect of the expression "chargeable"; Section 2(h) in relation to the expression "duly stamped"; Section 2(l) in relation to the expression "instrument". For ease of reference, these definitions are reproduced below :-

> *"2(d). "Chargeable" means, as applied to an instrument, executed or first executed after the commencement of this Act, chargeable under this Act, and as applied to any other instruments, chargeable under the law in force in the State when such instrument was executed or where several persons executed the instrument at different times, first executed. (Emphasis supplied)*
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> *2(h). "Duly Stamped" as applied to an instrument means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the State.*

2(l). "Instrument" includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt.

Explanation – The term "document" also includes any electronic record, as defined in clause (t) of sub-section (l) of Section 2 of the Information Technology Act, 2000."

19. The next provision that is relevant is Section 3, which provides for liability of Instruments to Duty. The relevant provisions of Section 3 are Sections 3(a), 3(b) and its proviso, which are reproduced below :-

"3. Instrument Chargeable with Duty :-

Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in Schedule I as the proper duty therefor respectively, that is to say -

(a) every instrument mentioned in Schedule I, which, not having been previously executed by any person, is executed in the State on or after the date of commencement of the Act;

(b) every instrument mentioned in Schedule I, which, not having been previously executed by any person, is executed out of the State on or after the said date, relates to any property situate, or to any matter or thing done or to be done in this State and is received in the State.

Provided that, a copy or extract, whether certified to be a true copy or not and whether a facsimile image or otherwise of the original instrument on which stamp duty is chargeable under the provisions of this Section, shall be chargeable with full stamp duty indicated in the Schedule I if the proper duty payable on such original instrument is not paid:

Provided further that, no duty shall be chargeable in respect of-

(1) any instrument executed by or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument or where the Government has undertaken to bear the expenses towards the payment of the duty.

(2) any instrument, for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Bombay Coasting Vessels Act, 1838 (XIX of 1838) or Merchant Shipping Act, 1958."

20. Section 7 is also relevant since it relates to the nature of the instrument to be stamped with applicable duty. Section 7 reads thus :

"7. Payment of higher duty in respect of certain instruments :-

(1) Notwithstanding anything contained in Section 4 or 6 or in any other enactment, unless it is proved that the duty chargeable under this Act has been paid,

(a) on the principal or original instrument, as the case may be, or

(b) in accordance with the provisions of this section,

the duty chargeable on an instrument of sale, mortgage or settlement other than a principal instrument or on a counterpart, duplicate or copy of any instrument shall, if the principal or original instrument would, when received in this State have been chargeable under this Act with a higher rate of duty, be the duty with which the principal or original instrument would have been chargeable under Section 19.

(2) Notwithstanding anything contained in any enactment for the time being in force, no instrument, counterpart, duplicate or copy chargeable with duty under this Section shall be received in evidence unless the duty chargeable under this section has been paid thereon :

Provided that, any Court before which any such instrument, duplicate or copy is produced may permit the duty chargeable under this Section to be paid thereon and may then receive it in evidence.

(3) The provisions of this Act and the rules made thereunder, in so far as they relate to the recovery of duties chargeable on instruments under Section 3 shall, so far as may be, apply to the recovery of duties chargeable on a counterpart, duplicate or a copy of an instrument under sub-section (1)."

21. Considering Mr. Kamat's objection that the document is to be treated as an unstamped document since the stamp paper is issued in the State of Tamil Nadu, it becomes necessary to consider provisions of Chapter IV dealing with "Instruments Not Duly Stamped". Section 33 deals with Examination and

Impounding of Instruments; whereas Section 34 deals with Instruments which are inadmissible in evidence.

22. Applying the above provisions to the case at hand, we find that when the document was first executed, it should have been stamped with duty chargeable. This is evident from Section 2(d), which sets out that when the instrument was executed or where several persons executed the instrument at different times, duty would be chargeable when it was first executed. In the instant case therefore it appears that the document was first executed in Chennai. Since Carboline has purchased the stamp paper from a vendor in Chennai in its own name, it appears to have been executed by Carboline in Chennai and thereafter sent to the two other parties being the applicant and Octamec in Mumbai. No doubt, the agreement mentions that the agreement is executed in Mumbai, but that does not take away the possibility that first execution appears to be in Chennai. It is not the case of the respondent that Carboline also executed the agreement in Mumbai. Thus, it would be upto the arbitral tribunal and not for this court to consider this aspect of the case. Suffice it to say that when the agreement was first executed, it appears to have been executed by Carboline – a Chennai based company, on a stamp paper purchased in its name from a vendor in Chennai. All indications therefore are that the agreement was first executed in Chennai and duty chargeable in Chennai would be applicable.

23. Section 2(h) deals with "duly stamped" and contemplates affixation of

adhesive stamps or impressed stamps of an amount in law required to be paid for the "time being" in force in the State. Obviously, the reference to "the State" in that context read with Section 2(d) would mean the State of Tamil Nadu.

24. Section 2(l) defines "instrument". When we take into consideration the current agreement, the fact that the photocopy could not have been treated to be an instrument for the purposes of impounding is the view taken by our court in the case of *Pradeep Shyamrao Kakirwar Vs. Dr. Seema Arun Mankar and Ors.*[9]. As far as liability of duty on the instrument is concerned, one finds from Section 3 that every instrument mentioned in Schedule-I of the Act, which is not previously executed by any person and is executed in the State on and after the commencement of the Act, shall be chargeable with duty, as set out in Schedule-I.

25. Section 3(b) deals with the situation where an instrument is executed out of the State relating to any matter or thing to be done in the State and is received in Maharashtra. The proviso clarifies that a copy, whether true copy or not, including a facsimile image of the original instrument, on which duty is chargeable under the provisions of this section, shall also be chargeable with full stamp duty, as set out in Schedule-I, if proper duty is not paid on such original instrument.

26. In the instant case, we are faced with a situation where the original agreement is not to be found. None of the parties are in possession of the

9 *2020 SCC OnLine Bom 799*

original, but none of them dispute the existence of the agreement and a copy as annexed to this application. Chargeablity of a copy to duty is obvious from Section 7 of the Stamp Act and this has been considered in the case of *Hariom Agrawal Vs. Prakash Chand Malviya*[10], in which the challenge to the constitutional validity of the provision, which required a copy to be stamped when brought into the State of Maharashtra, has been repelled. In the case of *Hariom Agrawal (Supra)*, documents evidencing security created in favour of banks and financial institutions outside the State of Maharashtra and in Gujarat were sought to be made chargeable to duty in Mumbai since the borrower companies had their registered office in Mumbai and were required to register a charge with the Registrar of Companies in relation to such property based on a copy of the agreement. The original, no doubt, had been stamped, as required under the Stamp Act as applicable in the State of Gujarat, where the duty was lower, but when the document was brought into the State of Maharashtra, the copy was found to be chargeable with additional stamp duty. That challenge has been repelled, as seen from paragraphs 4 and 5, read with paragraphs 14, 17 and 19, of the decision in *Hariom Agrawal*. Thus, it is evident that under Section 7 of the Maharashtra Stamp Act, unless it is proved that stamp duty paid on the principal agreement, being the original instrument in the instant case, has been paid is established, duty chargeable under the Act would have to be paid on a copy of the instrument. It is evident that if the duty payable in Maharashtra was higher, then the

10 *(2007) 8 SCC 514*

higher duty would have to be paid. While it is the applicant's case that it would be entitled to credit to the extent of the amount paid on the instrument in the first place or that would seem to have been paid on the instrument from the copy thereof, this aspect is sought to be contested by Mr. Kamat, who states that the duty should have been paid under the Maharashtra Stamp Act since the document is executed in Mumbai and could not have been executed on a stamp paper issued in Tamil Nadu. According to Mr. Kamat therefore no credit can be claimed.

27. I am unable to accept the proposition that no credit can be claimed in respect of duty paid in Tamil Nadu. In *New Central Jute Mills Co. Ltd. and Ors. Vs. State of West Bengal and Ors.*[11], the Supreme Court was considering an instrument executed in Uttar Pradesh and consequently liable to stamp-duty under the Indian Stamp Act, as amended in Uttar Pradesh, but relating to property in West Bengal. It was bearing stamps overprinted with the name West Bengal and came before a public officer in U.P. The officer held that the instrument is not duly stamped since it does not bear stamps overprinted with the name of Uttar Pradesh. The question was considered under Article 32 of the Constitution of India and the court concluded in paragraph 20 as follows :-

> *"20. The result of this will be that if an instrument after becoming liable to duty in one State on execution there becomes liable to duty also in another State on receipt there, it must first be stamped in accordance with the law*

11 *(1964) 1 SCR 535*

of the first State and it will not require to be further stamped in accordance with the law of the second State when the rate of that second State is the same or lower; and where the rate of the second State is higher, it will require to be stamped only with the excess amount and that in accordance with the law and the rules in force in the second State."

The Stamp Authorities will therefore be required to take this aspect into consideration.

28. Mr. Ankhad canvassed the point that the document was executed first in the State of Tamil Nadu and hence the duty was certainly payable as provided in that State. Even it is contemplated under the Act. I am of the view that by virtue of Section 3 of the Act, the agreement is seen to be executed on stamp paper by Carboline prior to its execution. It is not Carboline's case that when it executed the agreement, insufficient duty was paid in the State of Tamil Nadu. Its only submission and objection is that the duty should have been paid in Maharashtra and till such duty is paid, the application cannot proceed. Furthermore, such duty ought to have been paid on the instrument, original of which is missing, and hence no reference can be made to arbitration, no stamp-duty can be paid on the copy. The logical consequence would be that no duty would have to be paid on the copy and hence no valid reference can be made to arbitration and hence the application be dismissed.

29. In ***N.N. Global (Supra)***, in paragraph 4, the court considered the validity of the arbitration agreement in an unstamped document holding that

on the basis of the doctrine of separability, the arbitration agreement need not be stamped. Mr. Kamat had contended that the decision in *N.N. Global* considers in detail the statutory scheme of the Maharashtra Stamp Act and in particular, Sections 3, 30, 32A, 33, 34 and 35, he invites me to hold that in the present case, the document is clearly an unstamped document, but what that submission overlooks is the fact that *N.N. Global* also dealt with the Supreme Court's decision in *Hindustan Steel Ltd. Vs. Dilip Construction Co.*[12], which observed in paragraph 7 that the Stamp Act is a fiscal measure enacted to secure revenue of the State on certain classes of instrument. It was not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The judgment reiterates that the stringent provisions of the Act are in the interest of the revenue and once that object is secured in accordance with law, the party's taking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Thus, I am unable to accept Mr. Kamat's contention that the tripartite agreement is unstamped and that we have a case of deadwood at hand.

30. I now proceed to consider the issue pertaining to the non-availability of the original and the fact that Octamec is now in liquidation and whether either of these can affect the reference being made. In this behalf, I am of the view that there is no impediment caused by these two objections in proceeding with the application and appointing an Arbitrator. Perusal of the Dispute Resolution clause, clause 10(b) of the agreement, reveals that the

12 *(1969) 1 SCC 597*

disputes are to be resolved by a panel of three arbitrators; one to be appointed by the claimant and the second to be appointed by the defendant and the third to be appointed by the two arbitrators so appointed. In the present case, Octamec is not a claimant, nor is it a defendant. Assuming it to be a defendant, it is not a contesting defendant. At best, the applicant would have had to seek leave under the Companies Act before proceeding against the company in liquidation and that has been done.

31. In view of the appointment of the Liquidator of Octamec vide an order dated 24th February 2016, the applicant is seen to have approached the Company Court in Company Application No.501 of 2016 in Company Petition No.229 of 2015, whereby leave under Section 446(1) of the Companies Act was sought to proceed with the arbitration application and in that matter, pursuant to an affidavit dated 24th October 2016 filed by the partner of the applicant, the court has passed the following order :-

> *"Company Application is allowed to the extent that the applicant is granted leave under Section 446(1) to proceed only against Carboline (India) Pvt. Ltd. on the basis of a statement made by the applicant its affidavit and that no relief is being sought against the company in liquidation. The learned counsel for the applicant also states that the liquidator is not expected to appear in the arbitration application or any arbitration proceedings that may ensue. Accordingly, the presence of liquidator is executed from such proceedings. Application is disposed of."*

32. The enquiry that this court is required to make is to ascertain whether

an agreement exists between the parties and in that behalf, the dispute in the present case clearly appears to be between the Applicant and Carboline. Thus, the Applicant is the claimant and the defendant is Carboline. I find no substance in the objection that under clause 10(a) of the agreement, negotiations had not been held. Clause 10(a), as we have seen, provides for authorized representatives to promptly make an attempt in negotiation in good faith. The question is, if negotiations are not initiated by either party, whether reference to arbitration can be bad. In my view, the answer must be in the negative. It was open to both sides to seek a meeting for holding negotiations, as contemplated, and this could have been done prior to filing of the application. In any event, upon receipt of the notice invoking arbitration dated 2nd June 2016 (Exhibit-FF to the application), it was open to the respondent to state that the parties should engage in negotiations prior to acting on the invocation. However, I find from the averment in paragraph 5.30 in the application that after the notice dated 7th June 2016 was served, neither Carboline nor Octamec had replied. Carboline and Octamec have not contended that the invocation was invalid by virtue of not having held negotiations. In the event that they did, they have failed to establish that negotiations were proposed and they were denied by the applicant.

33. In my view, upon receipt of the notice invoking arbitration, it was appropriate that the respondents raise this objection however from the affidavit-in-reply dated 3rd February 2017 filed on behalf of Carboline, in

paragraph 22 thereof, I find the only averment is that the parties were under an obligation to attempt to resolve disputes by negotiations and only if such negotiation was unsuccessful, the parties can refer disputes to arbitration. Paragraph 23 admits that negotiations, as contemplated under the tripartite agreement, did not take place. There is nothing to show that Carboline has attempted negotiations or have suggested that negotiations be initiated first. In the absence of such an attempt, there is no substance in this objection. Furthermore, in paragraph 24, the contention of Carboline is that Octamec and Carboline are required to appoint an Arbitrator and it was a joint nomination and not solely of Carboline. That I am unable to accept, since the provisions of the agreement clearly state that where there is *a claimant* and *a defendant*, *the claimant* would appoint one arbitrator and *the defendant* the other. Merely because Octamec is in liquidation does not mean that the application is rendered ineffective or deadwood. Octamec is not *the defendant*. Pursuant to the order passed in Company Application No.501 of 2016, the contesting party, as I see, is only Carboline. It was upto the applicant to decide whether it has a claim against the Liquidator or not and proceed in accordance with law. The applicant has chosen not to proceed against the company in liquidation.

34. I am therefore not satisfied that the objection on account of failure to refer to negotiations reduct the course under clause 10(a) is fatal to this application. I also find that a limited additional affidavit has been filed on

behalf of respondent no.1, in which the objections under Sections 33 and 34 of the Maharashtra Stamp Act have been reiterated. That affidavit also seeks to lay emphasis on the fact that the claims of the applicant are mainly against Octamec, which is in liquidation, and that the application cannot be decided without the presence of the Liquidator. In the instant case the Liquidator has appeared and clearly stated that it does not have a copy of the agreement. The Liquidator has not contended that it seeks to defend the claim and if that is to proceed against the company in liquidation, necessary leave would have to be sought by the applicant, that as I have observed earlier is not within the scope of this application especially since the application is amended records that the applicant has no claim against the company in liquidation. While the applicant has relied upon compilation of documents, including copy of ledger account of Octamec and that of Carboline, I am of the view that these are not relevant for the purposes of considering the present application since I am not concerned with the merits of the case. I must be mindful of the fact that we are not dragged into the merits of the case or material aspects which may relate to the merits of the claim and the defence or the counter-claim, if any. Thus, in my view, the court should restrict itself to the objections that do not allude to the merits of the case. Suffice it to say that a demand notice dated 10th December 2019 has now been received and the applicant has contended that it now seeks to proceed to show cause against the demand and challenge the adjudication, if any.

35. That brings me to the question of impounding of the document in the

first place and this court has vide its order of 21st November 2018 found that the court had impounded the document. A copy of the agreement was deposited with the Prothonotary and Senior Master. Superintendent of Stamps has been directed to adjudicate stamp duty on the document. This I believe was done in anticipation of the original instrument being lodged. That has not been done. It is fairly clear from the decision of this court in the case of *Pradeep Shyamrao Kakirwar (Supra)*, which holds that the copy of a document cannot be impounded and only the instrument can be impounded. Notwithstanding that, the Stamp Authorities have now acted on the direction of this court to ascertain duty payable on the instrument. It is not known as to where the original agreement is and in that view of the matter, the law on the subject appears to be that a copy cannot be impounded but then a copy is liable to be stamped in view of Section 7 and *Hariom Agrawal (Supra).* In this behalf, I find that Section 7(2) is relevant and that is extracted below for ease of reference.

> *"7. Payment of higher duty in respect of certain instruments :–*
>
> *(1) Notwithstanding anything contained in Section 4 or 6 or in any other enactment, unless it is proved that the duty chargeable under this Act has been paid,*
>
> *(a) on the principal or original instrument, as the case may be, or*
>
> *(b) in accordance with the provisions of this section,*
>
> *the duty chargeable on an instrument of sale, mortgage or settlement other than a principal instrument or on a counterpart, duplicate or copy of any instrument shall,*

if the principal or original instrument would, when received in this State have been chargeable under this Act with a higher rate of duty, be the duty with which the principal or original instrument would have been chargeable under Section 19.

(2) Notwithstanding anything contained in any enactment for the time being in force, no instrument, couterpart, duplicate or copy chargeable with duty under this Section shall be received in evidence unless the duty chargeable under this section has been paid thereon :

Provided that, any Court before which any such instrument, duplicate or copy is produced may permit the duty chargeable under this Section to be paid thereon and may then receive it in evidence."

The proviso to Section 7(2) would therefore be the basis of the order dated 21st November 2018.

36. This once again is an aspect that need not detain this court in view of the observations of the Supreme Court in *InterContinental Hotels Group (Supra)*. Paragraphs 18, 20, 22 and 23 to 26 of *InterContinental Hotels Group* is relevant for our purposes and the Supreme Court has considered the jurisdiction of this court to adjudicate on existence of the agreement at the pre-appointment stage and the fact that case by case, courts have restricted themselves in occupying the space provided for the arbitrators in line with party autonomy. Furthermore, the court observed that notwithstanding the decision in *Vidya Drolia (Supra)*, which clearly expounds that courts had limited jurisdiction under Section 11(6) and are required to take a prima facie view. The narrow exception carved was that court could adjudicate to cut out

the deadwood. Ultimately, as *InterContinental Hotels Group* reiterates the watchword for the courts viz. "when in doubt, do refer". The conclusions in *Vidya Drolia* in paragraphs 225.1 to 225.4 and the observations of the Supreme Court in paragraph 244 have also been reiterated. The judgment in *InterContinental Hotels Group* also makes reference to the decision in *N.N. Global (Supra)*, which deals with the issue of non-stamping and under-stamping. In the present case, the document is, at best, insufficiently stamped, since I am unable to accept the contention of Mr. Kamat that the document is "unstamped". Clearly, Carboline had purchased the stamp paper and Carboline did proceed to execute the agreement on the basis that the stamp paper was of sufficient value when it executed the agreement. In paragraph 23 of *InterContinental Hotels Group*, the Supreme Court contemplates ascertaining whether the case presented an unworkable arbitration agreement or whether there were deeper issues to be resolved at a later stage and in this behalf, I am of the view that in the facts at hand, the reference cannot clearly be stated in respect of deadwood. While the fact situation in *InterContinental Hotels Group* was that the petitioners had paid requisite stamp duty and penalty upon realizing insufficiency of stamps, the objection on behalf of the respondent was that the duty was paid under a wrong classification, that aspect the Supreme Court found, need not await any further deliberation in court and in paragraph 26, the Supreme Court observed that if it is a case of a complete non-stamping, the court might have occasion to examine the concerns raised in *N.N. Global*.

37. In the present case, on a fair reading of provisions of the Maharashtra Stamp Act, as applicable in Maharashtra, it is evident under definition 2(d) that the agreement in question was required to be stamped when it was first executed. The agreement was first executed, it was executed by Carboline presumably with appropriate stamp duty since it is not the case of Carboline that it was under-stamped in Chennai. The only contention is that the agreement is executed in Mumbai, as seen from the face of the document. Thus, clearly, when the document was first executed, stamp duty was payable, that has been paid. The only issue now remains whether it was insufficiently stamped and whether a copy could be stamped with the duty payable. That aspect Mr. Ankhad has submitted is not for this court to go into now since the decision in *InterContinental Hotels Group (Supra)* clearly states that, when in doubt, one must refer the matter to arbitration. I have already dealt with the effect of Section 3(7) and the provisions of Sections 33 and 34 of the Act and taking an overall view, I have no doubt that an Arbitrator would have to be appointed. The notice invoking arbitration has nominated an Arbitrator. It now seeks appointment of an Arbitrator on behalf of the respondent and accordingly, the application must succeed, reserving all rights and contentions of the parties on merits.

38. Arbitration is seen as a speedy remedy but if applicants and respondents who may have counter-claims, have to await the fate of adjudication of documents for stamping and conclusion of the statutory

challenge, the purpose of arbitration may be defeated. In my view, once parties are ad-idem on the fact that they have signed the writing containing an arbitration clause, the parties having acknowledged that an arbitration clause was embodied in the substantive contract, cannot prevent the court from disposing an application under Section 11 and the High Court, in my view, need not await the decision of the claimant in the case at hand as to whether or not to pay stamp-duty, as adjudicated. If this is not to be so, a large number of arbitration proceedings will be held up right at the inception, which is not desirable.

39. Pending the decision of the Collector of Stamps, I am of the view that the non-availability of the original agreement at this stage will not prevent this court from appointing an Arbitrator. It is possible that the document is still lying undiscovered with either of one of the parties. If it is with any of the parties, it could surface tomorrow and the agreement and its contents having been accepted and relied upon by both sides, there is no merit in contending that absent the original agreement, no reference can be made. As to whether secondary evidence can be led or not, Mr. Kamat has canvassed the respondents' view that no secondary evidence can be led in respect of this agreement. That is once again an aspect that this court need not go into under Section 11 and is left to the arbitral tribunal to decide since it pertains to admissibility of the document.

40. In view thereof, I pass the following order :-

(i) Mr. Rajendra M. Savant, Former Judge of this court, is appointed as Sole Arbitrator for and on behalf of the respondent no.1-Carboline (India) Pvt. Ltd.

(ii) It is clarified that in view of the order dated 26th October 2016 passed by Company Court in Company Application No.501 of 2016 in Company Petition No.229 of 2015, the disputes and differences to be adjudicated are those as between the applicant and the 1st respondent.

(iii) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) and Section 12(1) of the Arbitration and Conciliation Act, 1996, within a period of four weeks from today with the Prothonotary and Senior Master, High Court, Bombay and provide copies thereof to the parties.

(iv) Parties to appear before the Sole Arbitrator on a date to be fixed by him at the earliest possible.

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

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

(vii) No costs.

(A.K. MENON, J.)