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- * **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 26th August, 2022
- + ARB.P. 695/2021
M/S DROOSHBA FABRICATORS Petitioner
Through: Mr. Adarsh Kumar Tiwari, Advocate
with Mr. Vinit Pathak, Advocate and
Mr. Vivek K. Tripathi, Advocate.
- versus
M/S INDURE PRIVATE LIMITED Respondent
Through: Mr. Prashant Mehta, Advocate with
Ms. Divita Vyas, Advocate.
- + ARB.P. 754/2021
M/S DROOSHBA FABRICATORS Petitioner
Through: Mr. Adarsh Kumar Tiwari, Advocate
with Mr. Vinit Pathak, Advocate and
Mr. Vivek K. Tripathi, Advocate.
- versus
M/S INDURE PRIVATE LIMITED Respondent
Through: Mr. Prashant Mehta, Advocate with
Ms. Divita Vyas, Advocate.

J U D G M E N T

(Judgment released on 02.09.2022)

ANUP JAIRAM BHAMBHANI J. (ORAL)

ARB.P. 695/2021

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act' for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Work Order dated 04.12.2012 ('work order' for short).

2. Notice on this petition was issued on 02.08.2021, consequent to which the respondent filed its reply dated 16.12.2021.
3. Mr. Adarsh Kumar Tiwari, learned counsel for the petitioner has drawn the attention of this court to clause 15 of the work order, which comprises the arbitration agreement between the parties; and contemplates reference of disputes between them to arbitration in accordance with the A&C Act; with the ‘venue’ of arbitration being at a designated office address at New Delhi.
4. For completeness, it may be recorded that a separate territorial jurisdiction provision is also contained in clause 18 of the work order, which also subjects the disputes between the parties to the jurisdiction of courts of law at New Delhi.
5. As per the record, the petitioner invoked arbitration *vide* Notice dated 28.04.2021; to which however, the respondent sent no reply.
6. However, in reply dated 16.12.2021 filed to the present petition, the respondent has taken the following three principal objections:
 - i. **Objection I:** The respondent’s first objection is that the work order on which the petitioner has placed reliance has “*not been duly stamped*”. It is accordingly contended, that the work order requires to be impounded by the court; and that since an agreement only becomes a contract if it is enforceable by law, and being unstamped, the work order cannot be enforced, and therefore, the arbitration clause contained therein is also not enforceable. In this regard the respondent has drawn attention to the provisions of sections 11(6A) and 7 of the A&C Act and

to section 2(h) of the Indian Contract Act, 1872 to submit, that if an agreement is not enforceable in law, an arbitration clause contained therein is also not enforceable.

- ii. Furthermore, learned counsel for the respondent relies upon the decision of the Hon'ble Supreme Court in ***Garware Wall Ropes Limited vs. Coastal Marine Construction and Engineering Limited***¹ in support of this contention, in particular on paras 22 and 29, which held as follows:

“22. When an arbitration clause is contained “in a contract”, it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6-A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that SMS Tea Estates² has, in no manner, been touched by the amendment of Section 11(6-A).

“29. This judgment in Hyundai Engg. Case¹² is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist”, so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration

¹(2019) 9 SCC 209

clause that is contained in the sub-contract would not “exist” as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with “existence”, as opposed to Section 8, Section 16 and Section 45, which deal with “validity” of an arbitration agreement is answered by this Court's understanding of the expression “existence” in Hyundai Engg. Case¹², as followed by us.”

(emphasis supplied)

It is submitted that though the decision of the Hon'ble Supreme Court in paras 22 and 29 of *Garware* has been referred to a Constitution Bench of 05 judges in the case of *N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited And Other*², until such time as the Constitution Bench decides or takes a contrary view to that taken in *Garware*, the ratio of *Garware* must be treated as settled law; and that accordingly, the arbitration clause contained in the work order is not enforceable.

- iii. **Objection II:** The respondent's second objection is that the petitioner has not complied with the dispute resolution mechanism agreed to in clauses 14 and 15 of the work order, which lays-down the pre-conditions for invocation of arbitration; and the present petition is therefore, premature and not maintainable. To support this contention, the respondent cites the following clauses of the work order:

“14. Settlement of Disputes:

14.1 Any dispute(s) or differences arising out of or in

²(2021) 4 SCC 379

connection with the contract shall to the extent possible, be settled amicably between the parties.

14.2 All unsettled dispute(s) or difference(s) arising out of or in connection with the contract shall be decided by the Engineer whose decision shall be final and binding on the parties.

Prior to the initiation of any / or arbitration proceedings permitted by this contract to resolve disputes between them, in the event a dispute arises between you and us regarding the application or interpretation of this contract (a "Dispute"), Our Project Incharge and your representative shall use their best efforts in good faith to reach a reasonable and equitable resolution of the matter. If our Project Incharge and your representative are unable to resolve the matter within 30 days, either party by written notice may refer the matter for resolution by good faith negotiation between their respective senior officers with decision making power and who shall not have had substantive involvement in the matters involved in the dispute, unless the parties otherwise agree.

15. Arbitration

All disputes or differences whatsoever arising between the parties cut of (sic) or relating to the construction, meaning and operation or effect of this order or the breach thereof shall be settled by arbitration in accordance with the provisions of Indian Arbitration and reconciliation Act 1986(sic) or any statutory modification thereof and the awards made in pursuance thereof as subsisting shall be binding on the parties.

Except where otherwise provided in the Order, any dispute arising out of or in connection with the order or claim there under and as to the respective rights, obligations and liabilities of the parties hereto whether during the continuance of this order or thereafter shall be referred to at the written request of either party to the sole arbitration of Shri N P Gupta, President of Desein Private Limited,

New Delhi.

The Desein House, Greater Kailash-11, New Delhi, India shall be the venue of the arbitration.”

(emphasis supplied)

- iv. The respondent argues that the aforesaid dispute resolution mechanism comprises a four-step process, as summarised in their reply as follows:

“6. It is submitted that compliance of Clause 14 is a four-step process.

A tabular form of the said process is given as under:

<i>First Step (14.1)</i>	<i>Disputes to be resolved between the parties amicably</i>
<i>Second Step (14.2)</i>	<i>unsettled dispute(s) or difference(s) arising out of or in connection with the contract shall be decided by the Engineer</i>
<i>Third Step (14.2)</i>	<i>Thereafter, if the disputes still stands unsettled the Purchaser’s Project incharge and the contractor’s representative shall use their best efforts in good faith to reach a reasonable and equitable resolution of the matter.</i>
<i>Fourth Step (14.2)</i>	<i>In case the disputes are still not resolved respective senior officers will make efforts having decision making power and who shall not have had substantive involvement in the matters involved in the dispute</i>

The respondent’s submission is that the aforesaid steps have not been followed by the petitioner; and therefore, the present petition is not maintainable.

7. **Objection III:** The third objection taken by the respondent is that the claims sought to be referred to arbitration are barred by limitation, since the invoices against which

payments are sought relate to the years 2013, 2014, 2015 and 2016. In support of this contention, it is submitted that the parties did not maintain a ‘running account’, since there were no mutual debit/credit entries in their accounts; nor has the petitioner produced a ledger to evidence any such running account. The respondent contends that the payments were made invoice-wise; and it is therefore irrelevant that the invoices may have been labeled as ‘RA Bills’. Notably, in its reply filed to the petition, the respondent says that “*almost all the claims of the Petitioner are barred by limitation.*” However, in the course of submissions, the respondent does not press this objection, submitting that this issue may turn on mixed questions of fact and law.

8. In response to the objections raised by the respondent, the petitioner has given the following answers:

- i. **Response to Objection I:** As regards the allegation that the work order is unstamped and therefore does not comprise an enforceable contract in law, the petitioner submits that under Schedule 1A of the Indian Stamp (Delhi Amendment) Act, 2010, a ‘work order’ is not required to be compulsorily stamped; and that therefore, the decision in *Garware* (supra) is inapplicable to the facts of the present case. Furthermore, it is pointed-out that in a recent judgment in *Intercontinental Hotels Group (India) Pvt. Ltd. and Another vs. Waterline*

*Hotels Pvt. Ltd*³, in particular para 23, the Hon’ble Supreme Court has observed as under:

“23. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court - until the larger Bench decides on the interplay between Sections 11(6) and 16 - should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.”

(emphasis supplied)

In the backdrop of the aforesaid observation, it is argued that in the context of paras 22 and 29 of *Garware* (supra), which were affirmed in paras 146 and 147 of *Vidya Drolia and Ors. vs. Durga Trading Corporation*⁴, and the issues having been referred to a Constitution Bench in *NN Global* (supra), the mandate of the Hon’ble Supreme Court is clearly that reference to arbitration cannot be stalled till the Constitution Bench of the Hon’ble Supreme Court takes a final view in the matter. It is submitted that the aforesaid words *“In view of the same, this Court- until the larger Bench decides on the interplay between Sections 11(6) and 16- should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood”*

³ (2022) SCC OnLine SC 83

⁴ (2021) 2 SCC 1

refers not only to the Hon'ble Supreme Court *but also* to the High Court when exercising jurisdiction under Section 11 (6) of the A&C Act. Therefore, in line with the observations of the Hon'ble Supreme Court in para 23 aforesaid, the present petition should be allowed unless the court finds this to be a case of 'dead-wood.'

- ii. **Response to Objection II:** As regards the objection relating to the non-compliance of procedural requirements in clause 14 of the work order, the petitioner submits that it has complied with all such requirements; and that in fact, it is the respondent that has failed to respond to the petitioner's efforts to settle the matter amicably. Attention of this court is drawn to the correspondence exchanged between the parties as filed on record to show that the steps required towards resolving disputes, were taken by the petitioner; but to no avail.
- iii. **Response to Objection III:** Insofar as the objection that the claims are time barred, the petitioner responds to say that its claims are within time; and in any case, the issue of limitation involves complex questions of fact and law, which require determination by the arbitrator to be appointed by this court; emphasizing that the petitioner's claims do not fall in the category of 'dead claims'.

Discussions & Conclusions

9. First and foremost, it is necessary to address the issue as to whether, if the work order requires stamping but is unstamped, can the arbitration

agreement embedded in it be looked at by the court. It is clearly the position that the findings in paras 22 and 29 of *Garware* (supra) have been doubted and referred to a Constitution Bench of 05 Judges of the Hon'ble Supreme Court in *NN Global* (supra). At the same time, however, it bears repetition that in *Intercontinental Hotels*(supra), particularly in para 23 thereof, the Hon'ble Supreme Court has also emphatically observed that:

“23....All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court - until the larger Bench decides on the interplay between Sections 11(6) and 16 - should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.”

(emphasis supplied)

10. Furthermore, this court is also conscious that it is the bounden duty of this court to carry-out the directions of the Hon'ble Supreme Court contained in order dated 19.05.2022 in SLP (C) No. 5306/2022 tilted ***M/s Shree Vishnu Constructions vs. The Engineer in Chief Military Engineering Services and Ors.***, which are as under:

“In that view of the matter, we request all the Chief Justices of the respective High Courts to ensure that all pending applications under Sections 11(5) and 11(6) of the Arbitration Act and/or any other applications either for substitution of arbitrator and/or change of arbitrator, which are pending for more than one year from the date of filing, must be decided within six months from today. The Registrar General(s) of the respective High Courts are directed to submit the compliance report on completion of six months from today. All endeavour shall be made by the respective High Courts to decide and

dispose of the applications under Sections 11(5) and 11(6) of the Arbitration Act and/or any other like application at the earliest and preferably within a period of six months from the date of filing of the applications.”

(emphasis supplied)

11. In this backdrop, this court is persuaded to accept the petitioner’s submission that if the observation in para 23 of *Intercontinental Hotels* (supra) is interpreted to mean that only the Hon’ble Supreme Court may ensure that arbitrations are carried-on (by expeditious reference to arbitration), that would restrict matters only to international commercial arbitrations and would not apply to other references, which are dealt with in the first instance by the High Courts. This, in the respectful interpretation of this court, could not have been the intent or purport of the observation in para 23 above.
12. Furthermore, in *Garware* (supra), in order to harmonize the requirement for stamping as contained in the Maharashtra Stamp Act, 1958 with section 11(13) of the A&C Act, which latter provision requires the court to ensure expeditious disposal of arbitration petitions, the Hon’ble Supreme Court has said the following:

“37. One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and

preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time-frame provided by Section 29-A of the 1996 Act.”

(emphasis supplied)

13. However, the finding in paras 22 and 29 of *Garware* (supra), to the effect that the arbitration clause would be non-existent in law and unenforceable till stamp duty is adjudicated and paid on the substantive contract, has been doubted by a Larger Bench of the Hon’ble Supreme Court in *N.N. Global* (supra), stating another way forward in para 36.2, which reads as under:

“36.2. The second mode of appointment is where the parties fail to make the appointment in accordance with the arbitration agreement, and an application is filed under Section 11 before the Court to invoke the default power for making the appointment. In such a case, the High Court, or the Supreme Court, as the case may be, while exercising jurisdiction under Section 11, would impound the substantive contract which is either unstamped or inadequately stamped, and direct the parties to cure the defect before the arbitrator/tribunal can adjudicate upon the contract.”

(emphasis supplied)

14. In the context of the procedure referred to by the Hon’ble Supreme Court in para 36.2 above, it is noticed that section 29(m) of the Indian Stamp Act, 1899 casts the obligation to pay stamp duty on an

instrument not otherwise provided for in the said Act, in the following manner:

29. Duties by whom payable.—In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne—

(m) in the case of any other instrument not specified herein, by the person making, drawing or executing such instrument.

(emphasis supplied)

In the present case, since there is no dispute that the work order was issued by the respondent, it is the respondent who would be liable to pay the applicable stamp duty.

15. In the above view of the matter, and in keeping with para 36.2 of *NN Global (supra)*, the course that commends itself for acceptance to the court is to first address and obviate the respondent's objection as to the stamping of work order dated 14.12.2012; and to thereafter refer the matter to arbitration by appointing a sole arbitrator in the matter, while especially noting that the liability for appropriately stamping the work order in the present case, was upon the respondent.
16. Insofar as the question of non-compliance with the pre-conditions of reference to arbitration is concerned, the record reveals that on multiple occasions the petitioner did communicate its grievances to the respondent in writing, seeking an amicable resolution thereof. However, evidently such communications have been to no avail. Apart from the bare averment that the pre-conditions for reference to arbitration, set-out as a four step process in the reply, have not been complied with by the petitioner, there is nothing specific on record to show that the respondent participated in the dispute resolution process

initiated by the petitioner; which the respondent is now canvassing as an impediment to allowing the present petition.

17. In the opinion of this court, the four-step process set-out in the reply is, in essence and substance, nothing but a provision for a best-effort, good faith negotiation, for a possible, reasonable and equitable resolution of disputes, escalated to various levels within the respondent organisation. Accordingly, at this stage, it is futile to deny to the petitioner a reference to arbitration, since there is sufficient material on record to show that the petitioner made attempts at amicable resolution of its disputes with the respondent. In the opinion of this court, there is thus no merit in this objection raised by the respondent.
18. As for the question of claims being time-barred, although this objection has not been pressed in arguments by the respondent, since it has been raised in its reply to the present petition, it is considered appropriate to deal with it. Now, in its reply the respondent contends that the mere description of the bills raised by the petitioner as ‘running account bills’ is not dispositive of whether the account was a running account or not, but it is noticed that the terms of payment in Annexure III to the work order themselves read as follows:

“TERMS OF PAYMENT:

- i. *90% payment shall be done on pro-rata basis.*
- ii. *5% retention money to be retained which shall be paid on completion of work.*
- iii. *5% payment shall be released after reconciliation of structural steel.*
- iv. *All running bills shall be paid only after submission of due certification protocol by NTPC FQA and NTPC construction engineer.*

Fabrication:

a.	<i>Fit-up</i>	:	50%
b.	<i>Complete welding</i>	:	40%
c.	<i>Reconciliation</i>	:	5%
d.	<i>Retention</i>	:	5%

Erection:

a.	<i>Placement</i>	:	50%
b.	<i>Alignment & welding</i>	:	40%
c.	<i>Against Hydrotest</i> <i>(whenever applicable)</i>		
	<i>Inspection & completion</i>	:	40%
d.	<i>Security</i>	:	5%”

(emphasis supplied)

19. The foregoing terms of payment, at least *prima-facie* disclose the existence of a system of payment of the petitioner’s bills on a percentage/*pro-rata* basis, related to the stage of completion of the work. To add to this, the details of amounts withheld by the respondent was last updated on 29.12.2017, and a copy of the communication conveying the same to the respondent, has also been filed by the petitioner, which shows that same amounts due were withheld upto as late as 06.05.2017. It is only thereafter that the petitioner has issued to the respondent notice dated 28.04.2021, setting-out its claims and invoking the arbitral mechanism. Retention of amounts against running account bills is also contemplated in the terms of payment as extracted above.
20. Now, the limitation for making a claim for amounts withheld upto 06.05.2017 would have expired on 05.05.2020; but the delay thereafter, till the issuance of demand-cum-invocation notice dated

28.04.2021, is condonable in view of Order dated 10.01.2022 made by the Hon'ble Supreme Court in *Suo Motu Writ Petition (C) No. 3 of 2020*, whereby limitation was held in abeyance for the period from 15.03.2020 to 28.02.2022 by reason of the then prevailing pandemic; and thereafter, by orders of the Hon'ble Supreme Court, additional time of 90 days was given to parties to file petitions, regardless of the period of limitation provided in the various acts including the A&C Act. It cannot be said therefore, *at least at this stage*, that the claims are *ex-facie* time-barred. At best, the question of whether the claims are barred by limitation would be a mixed question of fact and law, to be decided by the arbitrator.

21. Without expressing any opinion on whether the work order requires stamping, and if so, the proper stamp duty/penalty payable thereon, in order to address the objections, the following directions are issued:
 - a) The respondent, or as the case may be the petitioner, whoever is in possession of the original work order dated 14.12.2012 is directed to produce the same before the learned Registrar General of this court within 07 days; thereupon the Registrar General is directed to impound the said document and to forward it to the Collector of Stamps, Delhi for the latter to assess the appropriate stamp duty along with requisite penalty/fines, if any and the respondent is directed to pay the requisite stamp duty/penalty/fines/other charges so assessed and take all necessary steps to cure the stamping defect in relation to the document;

- b) Once the stamping defect is cured the original of the work order shall be handed-up by the Registrar General to the party who produced it, against acknowledgement in writing;
22. Subject to the directions contained above, the present petition is allowed and Mr. Rahul Prasanna Dave, Advocate (Cellphone No.: +91 9811031284) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
23. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
24. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.
25. Parties shall share the arbitrator's fee and arbitral costs, equally.
26. All rights and contentions of the parties in relation to the claims/counter-claims are left open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.
27. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days of completing the process of stamping of the work order.
28. The petition stands disposed of in the above terms.
29. Other pending applications, if any, also stand disposed of.

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30. This is also a petition under section 11 (6) of the A&C Act and seeks appointment of a sole arbitrator to adjudicate upon the disputes that have arisen between the same parties as in ARB. P. No. 695/2021. Learned counsel for the petitioner submits that the disputes in the present matter arise from a Work Order dated 03.02.2010 which contains the same terms as in the other matter; and requests that the disputes and claims arising from this work order be also referred to arbitration before the same arbitrator as has been appointed in the connected petition.
31. In view of the conclusions arrived at in ARB. P. No. 695/2021, the present petition is also allowed; and Mr. Rahul Prasanna Dave, Advocate (Cellphone No.: +91 9811031284) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
32. Since the disputes in the present case arise from a separate work order, the references in ARB. P. No. 695/2021 and in the present petition shall be treated as separate references and the learned sole arbitrator shall be entitled to separate set of fee in the present matter.
33. The petition stands disposed of in the above terms.
34. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J

AUGUST 26, 2022/uj