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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P. 230/2021

BHAGWATI DEVI GUPTA & ANR. Petitioners

Through: Mr. Shalabh Singhal, Adv.

versus

STAR INFRATECH PRIVATE LIMITED Respondent

Through: Mr. Rakesh Saini, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (O R A L)

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11.08.2021

(Video-Conferencing)

1. This is a petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 (“the 1996 Act”), for appointment of an arbitrator to arbitrate on the dispute between the parties.

2. The substance of the dispute is set out in para 7 sub-paras (a) to (q) of para 2 of the petition, which, for the sake of brevity are not being reproduced here. The notice invoking arbitration was issued by the petitioner to the respondent on 1st August, 2020. The parties having failed to arrive at any agreement regarding the arbitrator to arbitrate on the disputes, the petitioner has approached this Court under Section 11(5) of the 1996 Act.

3. The only objection raised by Mr. Rakesh Saini, learned Counsel for the respondent, regarding the reference of the disputes to arbitration is that the agreement between the parties is inadequately

stamped. He has relied on the judgment of the Supreme Court in *N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd.*¹ to contend that, till this defect is rectified, the Court cannot refer the dispute to arbitration. Mr. Singhal, learned Counsel for the petitioner, *per contra* submits that the arbitration agreement is not insufficiently stamped and that, even if it were, this aspect could be decided by the learned Arbitrator.

4. In fact, the decision in *N.N. Global Mercantile*¹ defeats the submission of Mr. Saini. Paras 6.1 to 6.10 of the decision may be reproduced thus:

“6.1 The issue which has arisen in the present case is whether the arbitration agreement incorporated in the unstamped Work Order dated 28.09.2015, would also be legally unenforceable, till such time that the Work Order is subjected to payment of Stamp Duty. Undisputedly, the Work Order is chargeable to payment of Stamp Duty under Item No. 63 of the First Schedule to the Maharashtra Stamp Act, 1958.

6.2 In our view, the non-payment or deficiency of Stamp Duty on the Work Order does not invalidate the main contract. Section 34 provides that an unstamped instrument would not be admissible in evidence, or be acted upon, till the requisite stamp duty is paid. This would amount only to a deficiency, which can be cured on the payment of the requisite stamp duty.

6.3 The point for consideration is whether the non-payment of Stamp Duty on the Work Order, would render the arbitration clause invalid, nonexistent, or unenforceable in law, till the stamp duty is paid on the substantive commercial contract.

6.4 The arbitration agreement contained in the Work Order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which

¹ (2021) 4 SCC 379

provides the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of Stamp Duty, unlike various other agreements enlisted in the Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, unenforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of Stamp Duty.

6.5 A three-Judge Bench of this Court in *Hindustan Steel Limited v. M/s. Dilip Construction Company*² held that :

“4. The award, which is an “instrument” within the meaning of the Stamp Act was required to be stamped. Being unstamped, the award could not be received in evidence by the Court, nor could it be acted upon. But the Court was competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. On the instrument so received the Collector may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. If the duty and penalty are paid, the Collector will certify by endorsement on the instrument that the proper duty and penalty have been paid.

5. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

² (1969) 1 SCC 597

6. Relying upon the difference in the phraseology between Sections 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and may be acted upon as if it has been duly stamped.

7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification.”

(emphasis supplied)

6.6 In our view, there is no legal impediment to the enforceability of the arbitration agreement, pending payment of Stamp Duty on the substantive contract. The adjudication of the rights and obligations under the Work Order or the substantive commercial contract would however not proceed before complying with the mandatory provisions of the Stamp Act.

6.7 The Stamp Act is a fiscal enactment for payment of stamp duty to the State on certain classes of instruments specified in the Stamp Act. Section 40 of the Indian Stamp Act, 1899 provides the procedure for instruments which have been impounded, and sub-section (1) of Section 42 requires the instrument to be endorsed after it is duly stamped by the concerned Collector. Section 42(2) provides that after the document is duly stamped, it shall be admissible in evidence, and may be acted upon.

6.8 In our view, the decision in *SMS Tea Estates*³ does not lay down the correct position in law on two issues i.e. (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as u/S. 19 of the Indian Contract Act, 1872. We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it un-enforceable, since it has an independent existence of its own. The view taken by the Court on the issue of separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the Stamp Act. The non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite Stamp Duty.

6.9 The second issue in *SMS Tea Estates*³ that a voidable contract would not be arbitrable as it affects the validity of the arbitration agreement, is in our view not the correct position in law. The allegations made by a party that the substantive

³ S.M.S. Tea Estates v Chandmari Tea Co. (P) Ltd, (2011) 14 SCC 66

contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue. These issues can certainly be adjudicated through arbitration.

We overrule the judgment in *SMS Tea Estates* with respect to the aforesaid two issues as not laying down the correct position in law.

6.10 The *Garware* judgment⁴ has followed the judgment in *SMS Tea Estates*³. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration clause would be nonexistent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract.

We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying substantive commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.”

5. On this position being brought to his notice, Mr. Saini sought to rely on the earlier decision of a Bench of three Hon’ble Judges of the Supreme Court in *Vidya Drolia v. Durga Trading Corpn*⁵. In this respect, paras 6.11 and 6.12 of the decision in *N.N. Global Mercantile*¹ observe thus:

“6.11 We notice that the judgment in *Garware Wall Ropes Limited*⁴ has been cited with approval by a co-ordinate bench of this Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*⁵. Paragraph 92 of the judgment reads thus :

“92. We now proceed to examine the question, whether the word ‘existence’ in Section 11 merely refers to contract formation (whether there is an

⁴ *Garware Wall Ropes v. Coastal Marine Engg. & Constructions Ltd*, (2019) 9 SCC 209
⁵ (2021) 2 SCC 1

arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word ‘existence’. However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of ‘existence’ requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law. We would proceed to elaborate and give further reasons :

(i) In *Garware Wall Ropes Ltd.*⁴, this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to ‘existence’ and ‘validity’ of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing paragraph 29 thereof :

“29. This judgment in *Hyundai Engg.* case⁶ is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist”, so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the subcontract 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(6A) deals with “existence”, as opposed to Section 8, Section 16 and Section 45, which deal with “validity” of an arbitration agreement is answered by this Court's understanding of the expression “existence” in *Hyundai Engg.* case, as followed by us.”

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.”

6.12 We doubt the correctness of the view taken in paragraph 92 of the three-judge bench in *Vidya Drolia*⁵. We consider it appropriate to refer the findings in paras 22 and 29 of *Garware Wall Ropes Limited*⁴, which has been affirmed in paragraph 92 of *Vidya Drolia*⁵, to a Constitution Bench of five judges.”

The question of whether, once a bench of the Supreme Court has *doubted* the correctness of an earlier bench of co-equal strength, and referred the issue to a larger bench, Courts lower in hierarchy should continue to follow the earlier decision, appears to be debatable.

⁶ *United India Insurance Co. V. Hyundai Engg. & Construction Co. Ltd.*, (2018) 17 SCC 607

6. In this view of the matter, Mr. Saini agrees to reference of the dispute to arbitration.

7. In view of the above, the parties are referred to the Delhi International Arbitration Centre (DIAC), which would appoint a suitable arbitrator to arbitrate thereon. The arbitration would take place under the aegis of the DIAC and would abide by its rules and regulations. The arbitrator would be entitled to fees in accordance with the schedule of fees maintained by the DIAC or as otherwise agreed between the parties and the learned arbitrator.

8. The arbitrator would furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

9. All issues of fact and law, including the aspect of non-stamping of the agreement between the parties and, if so, the consequences thereof on arbitrability of the dispute, are left open for agitation before the learned Arbitrator. This Court does not return any definitive opinion thereon.

10. This petition stands disposed of in the aforesaid terms.

C. HARI SHANKAR, J

AUGUST 11, 2021/kr