

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

ARBITRATION APPEAL No. 10 of 2015

1. SAV Steels Private Limited, P-P/70 C.I.T. Road Scheme- VI- M, Kolkatta- 700054, District Kolkata, (W.B.) Through – Director, Anand Kumar Agrawal, S/o Shri Shyam Sunder Agrawal, Aged About 51 Years, R/o. 20 V. Motilal Basak Lane, Kolkata 700054 P.S. Phoolbagan

----Appellant

Versus

1. Ekta Ispat and Power Limited, 2/511, In front of Lav Kush Vihar, Choubey Colony, Raipur (C.G.).

---- Respondent

For Appellant	:	Mr. B.P. Sharma, Advocate with Mr. Raza Ali, Advocate.
For Respondent	:	Mr. Nalin Tripathi, Advocate with Mr. Ankit Singhal, Advocate.

Hon'ble Shri Justice Goutam Bhaduri

C A V Order

14/08/2015

1. Challenge in this appeal under Section 37 of the Arbitration & Conciliation Act, 1996 is to the order dated 23.02.2015, passed in M.J.C. No.121/2013, passed by the District Judge, Bilaspur, whereby an interim application (I.A. No.2/15), filed by the appellant to set-aside the arbitral award dated 15.07.2013 was dismissed.

2. Brief facts of the case are that an award was passed by the Arbitral Tribunal consisting of Hon'ble Shri Justice S.K. Tiwari (Retd.) and two others. After passing of the said award, an application was filed under Section 34 of the Arbitration & Conciliation Act, 1996 (*herein after referred to as 'the Act of 1996'*) to set-aside the said award raising various grounds. While the said application for setting-aside the award was pending, another preliminary objection to the maintainability of the award was made by I.A. No.2/15 on 16.01.2015. It was contended in the said application that share purchase agreement containing arbitration clause was not executed on the requisite non-judicial stamp as applicable in the State of Chhattisgarh and since the necessary stamp duty was not paid, the said agreement can not be acted upon. The objection was further to the effect that the appointment of arbitrator was not according to the mandatory provisions of Section 11 (3) of the Act of 1996 as the arbitrator was appointed by the counsel and not by the parties, therefore, the constitution of Arbitral Tribunal itself was bad and the proceedings drawn thereafter has no sanctity in the eyes of law.
3. The learned District Judge on such preliminary objections, while adjudicating the same by the impugned order dated 23.02.2015 held that the appointment of arbitrator was not objected during arbitral proceeding, therefore, it would amount to waiver of the right. It was further held that the case law relied on by the appellant/applicant ***reported in (2011) 14 SCC 66, SMS Tea***

Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd. that the question of stamp duty would be in between the State and the persons, who executed it and further held that it will not prejudice the parties. Further the Court held that under Section 19 of the Act of 1996, the Arbitral Tribunal has power to determine the admissibility of the documents. The Court further held that since no objection was raised during arbitral proceeding, therefore, the appointment of arbitrator can not be called in question subsequently. Eventually the I.A. No.2 was rejected. As against such dismissal, the instant appeal under Section 37 of the Arbitration & Conciliation Act, 1996 has been filed.

4. Mr. B.P. Sharma, learned counsel appearing on behalf of the appellant would submit that the learned District Judge has wrongly observed the fact that Hon'ble Justice Shri S.K. Tiwari (Retd) was appointed by the Hon'ble High Court as in this case, arbitrator was not by the court but was appointed by the counsel and not by any of the parties. Therefore a wrong finding of fact is recorded. It is contended that the error is apparent on the face of record, therefore, it can not be sustained. He would further submit that as per scheme for appointment of presiding arbitrator, consent of the other appointed arbitrator namely Mr. Prashant Jaiswal, Sr. Advocate was not taken, therefore, the very appointment of the arbitrator was bad. It is further contended that as per Article -5 of Schedule I-A of the Indian Stamp Act, as is applicable in the State of Chhattisgarh, the agreement of sale of

share, it attracts a requisite stamp duty, which was not paid and therefore, the said agreement which has been acted upon by the arbitrator was not admissible in view of Section 33 of the Indian Stamp Act, 1899. It is further contended that as per Section 33 (2), when such issue was raised, the District Judge was under bounden duty to examine the instrument i.e. the agreement and was under statutory obligation to ascertain that whether document was stamped with a stamp of the value and description required by the law. The learned counsel placed his reliance in the case law reported in **(2011) 14 SCC 66, SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd.** and would submit that as per Section 35 of the Indian Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the Court can not act upon the instrument. It is further contended that since the appointment of arbitrator was contrary to the procedure agreed upon in the arbitration agreement, any award drawn by the arbitrator would be illegal and impermissible. He placed his reliance in the matter of **Walter Bau AG, Legal Successor, of the Original Contractor, DYCKERHOFF and Widmann A.G. Vs. Municipal Corporation of Greater Mumbai and Another, reported in (2015) 3 SCC 800** and states in similar circumstances when very appointment of arbitrator was not according to the scheme such appointment were set-aside. It is contended that both the question goes to the root of the matter, therefore, by way of preliminary objection, the arbitral award was liable to be set-aside at the threshold.

5. Per contra Mr. Nalin Tripathi alongwith Mr. Ankit Singhal, counsels appearing on behalf of the respondent would submit that the respondent in the year 2008, purchased 35% share in M/s. Shaisa Saila Power & Engineering (P) Ltd. for a sum of Rs.8.00 Crores, however, due to oppression and mis-management, Ekta Ispat and Power Limited filed a company petition. It is contended that thereafter, the appellant having conspired with the majority of the shareholder entered into a 1st share purchase agreement and approached to the respondent. In such circumstances, there being no option left, the respondent succumbed to the pressure tactics of the appellant and therefore, the appellant agreed to purchase the share held by the respondent and negotiated sum of Rs.6.00 Crores. It is further stated, since the respondent did not have any other option left, but agreed to sustain a loss of Rs.2.00 Crores. Therefore, second share purchase agreement was signed between the appellant and respondent on 20.08.2010, which contained the arbitration clause. It is further contended that even the promises agreed in between the parties did not materialized, therefore, it resulted in to filing of the claim petition on 03.05.2012.
6. The counsel would further submit that before the Arbitrator reply and the counter claim to the claim petition was also filed and the issues were framed before the Arbitrator on two different occasion on 13.10.2012 and 23.02.2013. It is contended that in such proceeding before Arbitrator the objection in such

proceeding about the insufficiency of stamp on agreement or that of constitution of Arbitration Tribunal was bad, was never raised. He would further submit that the appellant continuously participated in the arbitration proceeding and adduced the evidence, therefore, eventually an award was passed on 15.07.2013 by majority of three arbitrators directing the appellant to pay the balance consideration of Rs.4.10 crores with interest @ of 12% per annum. Against such award, the appellant filed a petition under Section 34 of the Act of 1996 on 09.11.2013 before the District Judge and subsequently the objection by way of I.A. No.2, was made in the year 2015 after two years raising preliminary objection of the maintainability of the award.

7. The counsel would further submit that the instant appeal filed by the appellant is not maintainable as Section 37 of the Act of 1996 do not contemplate the order of nature appealed to be appealable. It is further contended that for the first time in 2015, the appellant sought to raise issue that second share purchase agreement dated 28.10.2010 can not be acted upon as it is insufficiently stamped and it is submitted that the said objection can not be sustained as no such objection was raised during the arbitration proceeding.
8. The counsel would further submit that even reading the share purchase agreement would not attract the stamp duty as per Article – 5 as the sale has not actually been affected. It is

contended that when the sale of the share is being taken place according to Section 108 of the Companies Act, 1956 the instrument of transfer of share is duly stamped and before the transfer has actually taken place and the instant agreement would fall on to exception and it would not attract the payment of stamp duty. It is further contended that the stamp duty is payable at the time of transfer of share and not before. In this case, the transfer has not taken place due to non-payment of balance consideration by the appellant.

9. The counsel would further submit that as per Clause-6 of the agreement, even if the stamp duty was to be paid it was to be paid by the appellant and therefore, he can not take advantage of its own wrongs. With respect to the appointment of arbitrator, it is submitted that appointment of arbitrator was legal, however, even if, the appellant wanted to raise any objection about appointment of the arbitrator, it should have been raised at the initial stage and if the said right was not exercised, it can be presumed that the appellant has waived the right to challenge the jurisdiction and composition of arbitral tribunal. He finally contended that the instant appeal has no merit and is liable to be dismissed.
10. I have heard the learned counsel for the parties at length and perused the records.
11. Admittedly in this case, award dated 15.07.2013 is subject of challenge under Section 34 of the Act of 1996, which is pending

decision before District Judge. The record would show the challenge under Section 34 of Act was made sometime in the month of November-December, 2013. While pendency of the application under Section 34 of the Act of 1996, a separate application I.A. No.2/15 was moved raising preliminary objection to the maintainability of the award and or rejection of the award. It is contended in such I.A. that share purchase agreement dated 28.10.2010 was not inscribed with requisite stamp duty and therefore, the share purchase agreement could not have been acted upon as the necessary stamp duty is not paid. Further it was contended that the arbitrators, who passed the award were not appointed according to the agreement and since two of the arbitrator did not appoint presiding arbitrator as such it was violative of Section 11 (3) of the Act of 1996. The said I.A. No.2/15 was dismissed by the impugned order dated 23.02.2015. Therefore, the instant appeal is filed under Section 37 of the Act of 1996.

12. Reading of the impugned award would show that learned District Judge has observed that Hon'ble Justice Shri S.K. Tiwari (Retd.) was appointed as arbitrator by the High Court. It records that party do not dispute the fact that Hon'ble Justice Shri S.K. Tiwari (Retd) is appointed as arbitrator by the High Court and the other arbitrator namely Shri Prashant Jaiswal, Sr. Advocate and Shri H.K. Gupta co-arbitrator were appointed. Prima-facie it appears that the District Judge has misquoted and misplaced the fact that

Justice Shri S.K. Tiwari (Retd) was appointed as arbitrator by the High Court. Therefore, such observation was completely misconceived. The District Judge should have looked into the facts of this case before recording such fact of appointment of arbitrator. The said facts though have been observed wrongly by the District Judge but only on such ground the instant appeal can not be allowed. Such wrong observation however do not sideline as to what actually happened for appointment of arbitrators and do not vitiate the appointment. The proceeding of appointment of arbitrator is reflected in the award dated 15.07.2013 itself. It purports that on 21.03.2012, the proceeding of the arbitrator was carried out by the Shri H.K. Gupta, one of the co-arbitrator, which was attended by the accredited counsels of both the parties. The counsel of the respondent sought time to nominate their arbitrator and consented for the name of Justice Shri S.K. Tiwari (Retd.) to be the presiding arbitrator. The award further records on next sitting held on 05.05.2012, the nominee arbitrator of parties and presiding arbitrator were present, therefore, it formed full Arbitral Tribunal. It further records thereafter the claimants filed their petition and the copies of pleadings were exchanged. It also records successive proceedings of the Arbitral Tribunal were held on different dates and both the parties submitted their respective submission, written statement, rejoinder etc. The award would show that thereafter, the issues were framed and ultimately, the arbitration was decided. Therefore, it would be apparent that both the appellant and respondent participated in the arbitration

proceedings.

13. To decide the controversy it would be relevant to quote the scheme of the Act of 1996 with respect to raising of objection, waiver, appointment of arbitrator etc. The relevant section for this purpose would be Section – 4, Section 11, (1) (2) & (3) and Section 16 (1) & (2), which reads as under :-

“Section - 4. Waiver of right to object. – A party who knows that –

- (a) any provision of this Part from which the parties may derogate, or
- (b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

“Section – 11. Appointment of arbitrators. – (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third

arbitrator, who shall act as the presiding arbitrator.

- (4) x x x x x
- (5) x x x x x
- (6) x x x x x
- (7) x x x x x
- (8) x x x x x
- (9) x x x x x
- (10) x x x x x
- (11) x x x x x
- (12) x x x x x”

“Section – 16. Competence of arbitral tribunal to rule on its jurisdiction. – (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, –

- (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
 - (b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
- (3) x x x x x

- (4) x x x x x
- (5) x x x x x
- (6) x x x x x”

14. Section 16 (2) of the Act of 1996 provides that arbitral tribunal may rule on its own jurisdiction. The section mandates that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Thereafter, Section 4 of the Act of 1996 speaks about waiver of right to object and requires that the party who knows that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within the period of time, shall be deemed to have waived his right to so object.
15. Therefore, if the facts are examined in this case, the appellant participated before the Arbitral Tribunal on different dates and filed it's pleading. Therefore, by application of Section 16 (2) alongwith Section 4 of the Act of 1996, would lead to suggest the objection, if any with respect to constitution of Arbitral Tribunal was not raised by appellant on the contrary the appellant participated in all the arbitral proceeding. Therefore, in these circumstances, it would be deemed that appellant has waived his right to object to the jurisdiction of Arbitral Tribunal on the principles of waiver.

16. The aforesaid proposition is laid down by the Hon'ble Supreme Court in case of ***Union of India Vs. Pam Development Pvt. Ltd., reported in (2014) 11 SCC 366***. The Hon'ble Supreme Court at Para-17 & 18 has held as under :-

“17. Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own jurisdiction. Section 16 clearly recognises the principle of kompetenz-kompetenz. Section 16 (2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in *BSNL v. Motorola India (P) Ltd.*. Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows. (SCC p. 349, para 39).

“39. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement

under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.”

17. The another proposition was raised by the appellant and the argument was advanced by placing reliance in case of ***Walter Bau AG, Legal Successor of the Original Contractor, DYCKERHOFF and Widmann A.G. Vs. Municipal Corporation of Greater Mumbai and Another***, reported in ***(2015) 3 SCC 800*** do not help the appellant. In such case, the parties did not submitted themselves to the jurisdiction of arbitrator but an option was given to one of the party to go beyond the panel submitted that of the arbitrator and to appoint a person of its choice. Therefore, it was held that such procedure of appointment was not agreed upon between the parties contemplated in the arbitration agreement. Consequently, the reliance placed by the

appellant in facts of this case is misconceived .

18. The another argument which is raised that the share purchase agreement was not adequately stamped as per Article 5 (a) of Schedule I-A of the Indian Stamp Act, 1899 as applicable in the State of Chhattisgarh, therefore, was inadmissible in evidence by application of Section 35 of the Indian Stamp Act.
19. Reading the award in the context of the subject matter would show that during the arbitral proceeding, no objection was raised about the maintainability and inadmissibility of the said share purchase agreement. The agreement was admitted by the parties for adjudication. The share purchase agreement, provides at Clause-6 that the purchaser shall be responsible for payment of stamp duty in connection with transfer of shares. Admittedly in this case, the purchaser is the appellant. The appellant during the course of proceeding before the arbitrator did not raise any voice of protest.
20. Section 19 of the Act of 1996 determines the rules of procedure, which the Arbitral Tribunal may follow. Section 19 of the Act of 1996 reads as under :-

“Section – 19. Determination of rules of procedure. – (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

21. Reading of sub-section (4) of Section 19 of the Act of 1996 would show that it gives power to the Arbitral Tribunal to determine the admissibility of any evidence. The appellant, herein who is the purchaser has acted upon the documents before the Arbitral Tribunal, therefore, the Tribunal has admitted the documents i.e. share purchase agreement as admissible.
22. If Section 4 of the Act of 1996 is further examined, which provides that if the parties knows, any requirement under arbitration agreement has not complied with and yet proceeds with the arbitration without stating the objection, it can be deemed to have waived the right to object. The procedure which was adopted before the arbitrator would go to show that the appellant who was purchaser on whom the liability was fastened by agreement to pay the stamp duty did not object to the fact that stamp duty is not adequately paid. On the contrary admitted the

documents in the proceeding and acted upon it. Therefore, necessarily, since the documents have been admitted in evidence, the admission of such instrument can not be questioned by the appellant by virtue of Section 36 of the Indian Stamp Act on the ground that document is not duly stamped. The relevant Section 36 of the Indian Stamp Act reads as under :-

“Section – 36. Admission of an instrument where not to be questioned. – Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.”

23. The said proposition is laid down by the Hon'ble Supreme Court in case of ***Shyamal Kumar Roy v. Sushil Kumar Agarwal***, reported in ***2007 AIR SCW 234***. The Hon'ble Supreme Court at Para-14 has held as under :-

“14. Section 36, however, provides for a 'stand alone' clause. It categorically prohibits a court of law from reopening a matter in regard to the sufficiency or otherwise of the stamp duty paid on an instrument in the event the same has been admitted in evidence. Only one exception has been made in this behalf, viz., the provisions contained in Section 61 providing for reference and revision. In a case where Section 33 of the Act, as amended by West Bengal Act would be applicable, the proviso appended to sub-section (5) carves out an

exception that if no action would be taken after a period of four years from the date of execution of the instrument.”

24. Further the Hon'ble Supreme Court in case of **V. E .A. Annamalai Chettiar and Another Vs. S. V. V. S. Veerappa Chettiar and Others**, reported in **AIR 1956 SC 12** held in Para-10 as under :-

“10. There is also a further difficulty in the way of the appellants and it is that the document having been admitted in evidence such admission could not be called in question at any stage of the proceedings on the ground that it had not been duly stamped. The provisions of S.36, Stamp Act preclude the appellants from raising any objection against the admission of the document at this stage and the appellants are not entitled now to urge this objection before us.”

25. Therefore, even if the agreement, which was not duly stamped was admitted and acted upon by the appellant and the arbitrator then it can not be questioned to allow the appellant to use it as an arm-twisting method. The purpose of Section 36 of the Stamp Act in the similar nature was considered by Their Lordship long back in case of **Hindustan Steel Ltd. Vs. M/s. Dilip Construction Co.**, reported in **AIR 1969 SC 1238**. The Hon'ble Supreme Court at Para-4 & 5 has held as under :-

“4. 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. Relying upon the difference in the phraseology between Section 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 only 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 had been

duly stamped.

5. 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.”

26. The learned counsel for the appellant has also placed his reliance in the case law reported in **(2011) 14 SCC 66, SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited**. Reading of the case law, would show in that case at the initial stage the issue that the arbitration agreement is compulsory required to be stamped which is unregistered can not be enforced was in question in that case. The document was not admitted for evidence so as to come within the purview of Section 36 of the Indian Stamp Act. In the instant case, since the document, the share purchase agreement was admitted and acted upon by the parties, it was admitted by the arbitrator in evidence, therefore, the admissibility of such document can not be questioned. Consequently, the reliance placed by the appellant do not come to rescue.
27. Lastly it is observed that the appeal is under Section 37 of the Act of 1996. Section 37 of the Act of 1996 which gives limited

jurisdiction to entertain the appeal, which reads as under :-

“Section. – 37. Appealable orders. – (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely :-

- (a) granting or refusing to grant any measure under section 9;
- (b) setting aside or refusing to set aside an arbitral award under section 34.

(2) x x x x x

(3) x x x x x”

28. Therefore, the order, which is under challenge do not come within the purview, as the main application under Section 34 of the Act of 1996 is still to be adjudicated by the Court. Consequently, the appeal in the instant case also do not lie in facts of the case.

29. In a result, for the reasons stated in the forgoing paragraphs, in my opinion, the appeal is completely misconceived and as appears have been filed only to protract the hearing before the District Judge. Consequently, the appeal has no merit and is misconceived, accordingly the same is dismissed.

Sd/-
(Goutam Bhaduri)
Judge