

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

APPEAL (L) NO.96 OF 2016
IN
ARBITRATION PETITION NO.1279 OF 2015
WITH
NOTICE OF MOTION (L) NO.696 OF 2016
IN
APPEAL (L) NO.96 OF 2016
IN
ARBITRATION PETITION NO.1279 OF 2015

...

M/s.Universals Enterprises
A Partnership Firm and
having its office at Office No.2 & 3,
SukhSagar Building,
New Prbhadevi Road,
Mumbai- 400 025

...Appellant

v/s.

Deluxe Laboratories Pvt.Ltd.
a Company
having its registered office
at 401, Raheja Chambers,
213, Nariman Point, Mumbai-400 021

...Respondent

...

Mr.A.S.Khandeparkar with Mr.Mandar Tambe for the Appellant.
Mr.Chetan Kapadia with Ms.Kausar Banatwala i/b Mr.Tushar Garodia for the
Respondent.

...

**CORAM : ANOOP V. MOHTA &
A.A.SAYED, JJ.**

DATED : 2 APRIL 2016

ORAL JUDGMENT: (Per Anoop V. Mohta, J.)

Heard, entertained and decided finally by consent of the parties.

2. This Appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as `Arbitration Act') is filed by the Appellant, in whose Section 9 Petition the learned Single Judge by order 28.01.2016 has not granted any ad-interim relief, though specifically prayed. The impugned order reads as under:

“1.

2. *This petition is under Section 9 of the Arbitration & Conciliation Act, 1996 for an order of injunction restraining the respondent from selling, disposing of or creating third party right in respect of flats in the building constructed on the plot bearing C.S. No. 136(part), 2/136 (part) and 110 (part) of Lower Parel Division at Manjrekar Marg, Gandhi Nagar, Worli, Mumbai 400 018.*

3. *It is the case of the Petitioner that the Respondent executed the Agreement dated 29th December, 2008 on 100 Rupees stamp paper agreed to provide six flats. He further submits that it is specifically stated that on completion of the said project, the petitioner is entitled to 40% of the total proposed area aggregating to 73,200 sq. ft. super built up in the sale building to be constructed by the joint venture. He submits that as per the terms and conditions of the said agreement, if the built up area is less than 73,200 sq. ft. and or more, then the petitioner will be entitled to 40% of the same. He further submits that the respondent was called upon by the legal notice dated 15.03.2014 to comply the said agreement. As they failed and neglected to do so, the petitioner filed the present petition under Section 9 of Arbitration & Conciliation Act, 1996.*

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8. *In these circumstances, the following order is passed:*

a) The agreement which is on stamp paper dated 29.12.2008 being Exh.'A' to the petition is impounded for payment of stamp duty if it is applicable.

b) The authenticated copy of the said agreement shall be forwarded by the Prothonotary & Senior Master, High Court, Original Side to the Collector of Stamp, Mumbai for adjudication of the stamp duty and penalty, if any, on the documents under the provision of Maharashtra Stamp Act.

c) The Collector of Stamp, Mumbai shall expedite the determination in terms of clause (b) above and complete the exercise within the period of 8 weeks from the receipt of the duly authenticated copy together with the authenticated copy of this order from the Prothonotary and Senior Master, High Court, Original Side, Bombay.

d) Office is directed to place the matter on board after ten weeks.

9 At the request of learned Counsel for the petitioner, this order is stayed for four weeks.

3. The submission made by the learned Counsel appearing for the Appellant is that the impugned order resulted into refusal and/or non-grant of ad-interim relief though sought for in view of urgency so expressed in the Petition. Therefore present Appeal under Section 37 of the Arbitration Act.

4. Sub-clause (1) and sub-clause (b) of Section 37 is reproduced as under:

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)
 (b) *granting or refusing to grant any measure under section 9;*
 (c)

5. Learned Counsel for the Respondent, however, has raised a preliminary objection to the maintainability of such Appeal. He placed reliance upon judgment of the Supreme Court in **SMS Tea Estates Pvt.Ltd. v/s. Chandmari Tea Company Pvt.Ltd.**¹ and judgments of Division Bench of this Court in **Agility Logistics Pvt.Ltd. v/s. Jagannath Parmeshwar Mills Pvt.Ltd.**² and in **Lakdawal Developers Pvt.Ltd. v/s. Badal Mittal and ors.**³ and the learned single Judge of this Court in **Mr.Badal Mittal and ors. v/s. Lakadawala Developers Pvt.Ltd.**⁴. He has relied upon the judgment of the Division Bench of this Court in **Nimbus Communications Ltd. & Anr. v/s. Board of Control for Cricket in India & Anr.**⁵ We have noted the submissions made by the Counsel appearing for the parties.

6. Admittedly, the Supreme Court in **SMS Tea Estates Pvt.Ltd.** (supra) has dealt with the aspect of insufficient stamp duty and/or its payment in a

1 (2011) 14 SCC 66

2 Appeal No.479 of 2012 in Arbitration Application No.29 of 2012 dt.25-3-2013

3 Appeal (L) No.272 of 2013 in Arbitration Petition No.221 of 2013 dt.25-6-2013

4 Arbitration Petition No.221 of 2013 dt.29 April 2013

5 2012 (5) Bom.C.R. 14

Petition under section 11 of the Arbitration Act and not section 9. So also the Division Bench of this Court in **Agility Logistics Pvt.Ltd.** and **Lakdawal Developers Pvt.Ltd.** (supra) dealt with maintainability of Appeal against an order under section 11 Petition and the provisions of stamp duty so referred above.

7. The Supreme Court in **SMS Tea Estates Pvt. Ltd.** (supra) while dealing with sections 7, 11 and 16 of the Arbitration and Conciliation Act, 1996 read with sections 17, 48 and 49 of the Registration Act, 1908 alongwith sections 33 to 40 of the Stamp Act, 1899 and in the facts and circumstances observed thus:

“29. An arbitrator can no doubt be appointed in regard to any disputes relating to the lease deed. But as noticed above, as the lease deed was not registered, the arbitrator cannot rely upon the lease deed or any term thereof and the lease deed cannot affect the immovable property which is the subject matter of the lease nor be received as evidence of any transaction affecting such property. Therefore, the arbitrator will not be able to entertain any claim for enforcement of the lease.

30 Lastly, we may consider the claim for recovery of the amounts allegedly spent towards the tea estates, as a consequence of the respondents not selling the estates or not permitting the appellant to enjoy the lease for 30 years. If this claim is treated as a claim for damages for breach in not granting the lease for 30 years then it would be for enforcement of the terms of the lease deed which is impermissible under Section 49 of the Registration Act. If it is

treated as a claim dehors the lease deed then the arbitrator may not have the jurisdiction to decide the dispute as the arbitration agreement (Clause 35) is available only to settle any dispute or difference arising between the parties in relation to or in any manner touching upon the lease deed and not in regard to disputes in general.

31. In paras 29 and 30 above, we have considered and stated the general legal position for guidance in arbitrations, even though the same does not directly arise for consideration within the limited scope of the proceedings under Section 11 of the Act.”

8. The Division Bench in Agility Logistics Pvt.Ltd. (supra) was also dealing with an order under section 11 of the Arbitration Act against which Appeal under section 37 is not maintainable. In view of the specific provisions of Arbitration Act, it is not necessary to deal with the issue whether the impugned order so passed “is a judgment within the meaning of Clause 15 of the Letters Patent Act”. The Appeal against the order under section 9 is maintainable under section 37 of the Arbitration Act.

9. The scheme and purpose of Stamp Duty Act including of section 33 and the relevant clauses of the Schedule and law are well settled. Therefore in the present case direction is given by the learned Single Judge to forward the document for adjudication to the authority to determine whether or not

the stamp duty on the subject agreement was properly charged or was paid. We are not inclined to disturb the said part of the order, as nothing is decided finally by the learned Judge. It is subject to orders passed by the authority/Collector. It is further subject to Appeal provided under the Bombay Stamp Act. The point which remains to be considered in the present case is power of Court under section 9 of the Arbitration Act to pass ad-interim protective injunction so sought. In both the judgments referred to above, there was no such issue involved and/or raised and/or discussed. Therefore those judgments, in our view, are of no assistance to the learned Counsel appearing for the Respondent in support of his case that the ad-interim order passed by the learned Judge is not appealable under section 37 of the Arbitration Act. There is no question of granting any ad-interim order under section 11 of the Act or any urgent relief, as available under section 9. This distinguishing feature, in our opinion, is relevant for deciding the issue raised in the present matter, as the learned Judge though ordered/directed the document to be forwarded for adjudication, but has not granted any ad-interim protection and/or relief so sought. There is no specific order passed either granting and/or rejecting the interim protection/injunction so sought by the Appellant. The Appeal under section 37, therefore filed by the Appellant mainly contending that the learned

Judge has not granted any ad-interim protection, though sought for based upon the averments and materials so placed on record to justify the urgency and for ad-interim protection/injunction.

10. Considering the scheme of the Arbitration & Conciliation Act and specifically Section 9, it is clear that if a case is made out “the Court” is empowered to pass appropriate ad-interim/interim order even before invocation of Arbitration, in view of the agreement between the parties. There is no issue that existence of arbitration agreement is required to be noted even at prima facie stage by the learned Judge before passing any ad-interim relief under section 9 of the Act. The issue, if any, even of jurisdiction can be adjudicated subsequently before deciding section 9 Application finally. But if a case is made out for ad-interim relief, the Court cannot reject to consider the same merely on the ground that the agreement in question needs to be adjudicated on the issue of payment of stamp duty, as is done in the present case. This is for the simple reason that the issue of less stamp duty and/or agreement can be adjudicated considering the scope and purpose of stamp duty at later stage. There is no issue that the parties are under obligation to make the full payment so far as the stamp duty is concerned, if the document falls within the ambit of the Act. The deficiency of stamp duty as per law itself can be considered by the concerned authority

at appropriate stage and appropriate order and/or direction can be issued including impounding of such document. The concerned authority will adjudicate upon the same in accordance with law. This itself, in our view, at this prima facie stage contemplates the existence of agreement between the parties, which includes the arbitration clause. The existence of agreement and the arbitration clause, in our view, is prima facie sufficient to consider the case for ad-interim reliefs as sought for. The parties, in our view, cannot be rendered remediless at this stage merely because the stamp duty on the document in question is not paid fully. Merely because one party has raised the objection of insufficient stamp duty being paid on the Agreement would not preclude the learned Judge from considering the grant of ad-interim relief. If the argument of learned Counsel for the Respondent No. 1 is accepted, then in many cases, the Respondents would merely to avoid any urgent relief being granted to the Petitioner, raised the issue of inadequate stamp duty and avoid urgent ad-interim order being passed. In the present case, there is even a controversy whether the stamp duty is payable or not. Learned Single Judge himself has observed in the operative part of the order, which is reproduced above, that the concerned authority will adjudicate and pass appropriate order on that, and admittedly has not granted any ad-interim relief. Section 9 Petition so filed is still pending. The

learned Judge, therefore, considering the scheme and purpose of the stamp duty and in view of urgency so expressed was required to consider the case of the Petitioner and pass appropriate ad-interim order.

11. We have already noted that there is no such order passed by the learned Judge of granting and/or refusing to grant such injunction. Therefore, considering the scheme and purpose of section 9 read with the provisions of Arbitration Act, the party based upon the arbitration agreement is entitled to invoke the Court's jurisdiction for interim protection and/or injunction even before invoking arbitration clause till the stage the Award is enforced and/or executed. Even if the issue is raised about the insufficiency of stamp and/or related aspects and if documents are sent/directed for adjudication for stamp duty still the fact of existence of agreement between the parties including the arbitration clause will remain. The existence of arbitration clause in such circumstances is itself sufficient to consider the case, though prima facie, to grant and/or not to grant the ad-interim protection so sought by one of the parties. Whether the document is valid or invalid and/or agreement is void or voidable, that issue can be adjudicated by the Court under section 9 before passing final order. But at ad-interim stage, if the document is in existence, which otherwise cannot be denied at this stage and in fact takes objection about insufficient stamp, "the Court", if

the case is made out is required to consider the case of grant ad-interim protection. The parties cannot be rendered remediless pending the issue of sufficiency of stamp, which is subject to Appeal also. Another factor is, even if insufficient stamp issue is raised, after adjudication, a party can deposit the deficient stamp duty and once the documents are stamped fully as required, the agreement and the related clauses may require to be treated as arbitration agreement for the purpose of passing order by “the Court” under section 9. This is also for the reason that pending the decision if “the Court” refuses to grant and/or entertain section 9 Application, for ad-interim relief, though case is made out for ad-interim protection and/or injunction, the party will not be in a position to seek any protective relief pending adjudication of insufficient stamp issue. Section 11 Application is to be decided only finally before appointing an Arbitrator based upon the agreement between the parties. These distinguishing factors, in our view, changes the situation and considering the scheme and purpose of the Arbitration Act and specifically section 9, “the Court”, if the case is made out, pending direction for adjudication of stamp duty, is required to consider the case of passing ad-interim order. Non-passing of any ad-interim order, either refusal and/or grant thereof pending the adjudication by the Collector as directed, in our view, is contrary to the scheme and it will frustrate the

whole purpose and object of section 9. This itself, in our view, distinguishes all the judgments cited by the learned Counsel appearing for the Respondent, so referred above.

12. The interim order dated 25 June 2013 so relied upon in Lakadawala Developers (supra) of the Division Bench was a prima facie view pending the Appeal. The Appeal itself was disposed of on 21 October 2013 as parties settled the matter in Supreme Court, thereby revoked & recalled even order of sending the authenticated copy of the MoU from the Collector of Stamp-Mumbai. Therefore also the order dated 25 June 2013 in Lakadawala Developers (supra) may not be of any assistance to the Respondent to treat as precedent for the issues so raised. We are concerned in this matter with the issue of grant of an ad-interim relief pending Section 9 Petition and in the background of the order of reference for adjudication of stamp deficiency, if any and not the final decision of Section 9 Petition.

13. Considering Section 37 so referred above read with Section 9 of the Act, the same is required to be tested on the foundation of facts and circumstances of the present case and non-consideration of grant of ad-interim relief, though asked for, in our view amounts to rejection of ad-interim relief under Section 9 Petition. Appeal under Section 37 against such order as recorded above is maintainable. We are not specifically dealing

with the contentions and/or merits of the order so passed by the learned Judge with regard to payment of stamp duty, as the learned Judge himself has not gone into the merits of the issue and passed the order as recorded above with observation that the Petitioner is liable to make payment of stamp duty, if any.

14. In the present case, the Appeal in the circumstances so referred above is definitely against non-grant of ad-interim relief so asked for. Therefore, we are inclined to hold that the present Appeal in the facts and circumstances is maintainable and is entertained accordingly.

15. We request the learned Single Judge to hear both parties on section 9 Petition for grant of ad-interim relief pending the reference to the concerned authority for adjudication of stamp duty.

16. Appeal is allowed in the aforesaid terms. No costs.

17. In view of disposal of Appeal, Notice of Motion does not survive for consideration and is disposed of as such.

(A.A. SAYED, J.)

(ANOOP V. MOHTA J.)