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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION APPLICATION NO. 300 OF 2019**

Nirman Panchvati Developers Pvt Ltd & Anr	...Applicants
<i>Versus</i>	
Wellcity Real Estate Pvt Ltd & Ors	...Respondents

Mrs Punita Arora, *with Puneet Arora & Avadhi Jain, i/b Arora & Co., for the Applicants.*
Mr SM Algaus, *with Hafeez Ur Rehman, i/b Sanjay Sinha, for the Respondents.*

CORAM: G.S. PATEL, J.
DATED: 2nd March 2020

PC:-

1. The Application is under Section 11 of the Arbitration and Conciliation Act 1996.

2. There was a Memorandum of Understanding dated 9th June 2016 between the Applicants (the Poddar Group) and the Respondents (the Goyal Group). Clause XVII provides for governing law and arbitration, thus:

XVII GOVERNING LAW AND ARBITRATION

A. Governing Law

This Agreement shall be governed by and construed in accordance with Indian Law.

B. Submission to the Jurisdiction

The Parties agree that they shall attempt to resolve through good faith consultation, Deadlocks or Disputes (as hereinafter defined) arising in connection with this Agreement. Such consultation shall begin promptly after a Party has delivered to the other Party a written request for such consultation.

C. All matters questions, disputes, differences or claims arising between the Parties as to the effect, interpretation or application of this Agreement, or as to the their rights, duties or liabilities there under or as to any act, matter or thing arising out of, consequent to or in connection with this Agreement (hereinafter 'the Difference') shall be resolved amicably through negotiations. Such negotiations shall commence within a period of seven (7) Business Days of the receipt of notice by either Party calling for the same.

D. In the event that the negotiations fail to so resolve the Difference within a period of fourteen (14) Business Days from the date of receipt of the notice by the Other Party, either Party may invoke this arbitration clause under notice to the other. The Difference shall then be referred to and finally resolved by arbitration, which shall be governed by the 'Indian Arbitration and Conciliation Act, 1996.

E. The place of Arbitration shall be 'Mumbai' and the language of Arbitration proceedings shall be in 'English'.

F. The Arbitrator shall have the power to award interest on any sum awarded pursuant to the arbitration proceedings and such sum would carry interest, if awarded, until the actual payment of such amounts.

G. Any award made by the Arbitrator shall be final and binding on both Parties.”

3. The objection to the Application is that the agreement is insufficiently stamped. There is no doubt that it is on a Rs. 500/- stamp paper. The question is whether it is liable to any further stamp. Little is achieved by directing this to be sent to the adjudicatory authority. That will considerably delay matters. If absolutely necessary that can and should be done. But neither the law nor the decision of the Supreme Court in *Garware Wall Ropes v Coastal Marine Constructions & Engineering Ltd*¹ mean that a Court to which a Section 11 Application is presented cannot look into the agreement itself to see what it is that the agreement intends.

4. The Memorandum of Understanding (“MoU”) is between the two groups and their constituents as set out in Clause II. There are several recitals in this. The principal purpose of the MoU was for an amicable separation of the residential undertaking and commercial undertaking of an enterprise called Wellcity from the partnership of an entity called Geeta Constructions & Associates. This firm had two partners, both corporates: Geeta Constructions Pvt Ltd and Nashik Infrastructure Developers Pvt Ltd. Geeta Constructions Pvt Ltd is of the Goyal Group and Nashik Infrastructure Developers is of the Poddar Group. It was agreed that the Goyal Group was to retain the residential undertaking and the Poddar Group was to retain the commercial undertaking. As a result, and the MoU says so in terms, Wellcity was to be demerged and this procedure of demerger was to be followed in accordance

1 (2019) 9 SCC 209.

with the provisions of the Companies Act. Clause III dealt with a project called Safe Heights which, though not the subject matter of the demerger, was independently governed by the terms and conditions of the MoU. This required the Poddar Group to execute various documents. In fact this portion has been implemented from the Poddar Group's side. Clause IV then dealt with the demerger of Wellcity Real Estate Pvt Ltd and the separation of the two undertakings. The commercial and residential undertakings and their component plots were defined in the agreement. Sub-clause 5 of Clause IV specified the transfers of the properties that were to take place and Clause V then provided for a specific procedure to be followed. There are certain provisions in regard to the apportionment or sharing of various liabilities such as stamp duty and tax liabilities and then provisions are made for applications to be made to this Court for the necessary permissions for dispensing with meetings of shareholders etc for complete legal compliance.

5. None of this address the merits of the dispute. What remains is really a question of valuation of the residential and commercial undertakings respectively and then the question of how the applicable stamp duty and registration charges are to be apportioned.

6. According to the Respondents, the instrument is chargeable under Article 5(h)(a)(iv) and (b). Article 5 relates to an agreement or its records or a memorandum of an Agreement. This would cover the MoU. Sub-article (h)(a)(iv) speaks of such a document if relating to the 'creation of any obligation, right or interest and having

monetary value but not covered by any other Article'. If the 'amount agreed' does not exceed Rs. 10 lakhs then 0.1% of 'the amount agreed in the contract' is to be paid, subject to a minimum of Rs. 100/- and in any other case the percentage is 0.2%. The Respondents urge that a stamp duty of 0.2% would have to be paid.

7. Clearly this is incorrect. 0.2% of what? The properties themselves have no stated value and the demerger is a process to be achieved hereafter. Every instrument of transfer of property will have to be by way of a registered conveyance and will carry its own liability to stamp duty. Every instrument of transfer of shares in this or that company will similarly be subject to an imposition of stamp duty. Now sub-Article (iv) speaks of an 'obligation, right or interest' but also speaks of such an obligation, right or interest 'having a monetary value'. Both conditions must be fulfilled. Even assuming that there is any obligation, right or interest (and I am not at all certain that there can be said to be 'right or interest' strictly speaking), a monetary value has to be known. Not only does the Article say so but the charging portion also speaks of 'the amount agreed in the contract'. There is no rupee value and no amount agreed in the contract. Stamp duty cannot be assessed on an amount that is not reckoned. Stamp duty, it is well settled, is payable on the instrument and it is the instrument that attracts stamp duty not the underlying transaction. This is very old and very well settled law and requires no greater reiteration.

8. In view of this, the only alternative is, as Ms Arora correctly points out, the residuary Article (B) which says that if the

agreement is one not otherwise provided for, then the stamp duty payable is Rs. 100/-. In fact, it is her submission that the instrument is over-stamped by 400% since it is on a Rs.500/- stamp paper.

9. I am unable to appreciate this argument of the agreement being insufficiently stamped.

10. As I have said previously even following *Garware Wall Ropes*, it is not enough for a Respondent merely to raise this argument in every single case thus delaying the arbitration. Speed of arbitral decision making is equally critical. When an objection is raised like this, the objecting party must be able to sustain the objection by pointing clearly to the Article in question and also how the ingredients of that Article are in fact satisfied on a fair reading of the contract in question. As we have seen, this document cannot possibly be said to fall within Article 5(h)(iv)(a) or (b) but will only fall under Article 5(h)(B). The objection is, therefore, without substance.

11. In this view of the matter, I will exercise my authority under Section 11 of the Arbitration and Conciliation Act 1996 and nominate Hon'ble Mr Justice Mohit S Shah, former Chief Justice of this Court as a sole Arbitrator to decide the disputes and differences between the parties arising out of MoU dated 9th June 2016.

(a) **Appointment of Arbitrator:** Mr Justice Mohit S Shah, former Chief Justice of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and

differences between the parties under the MoU dated 9th June 2016.

(b) Communication to Arbitrator of this order:

- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.
- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator **Mr Justice Mohit S Shah,
former Chief Justice of this
Court**

Address Office 218-219, Commerce House,
140, Nagindas Master Road,
Behind Rhythm House, Fort,
Mumbai 400 001

Contact 022-2269 3954

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will

be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.

- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Section 16 application:** The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.
- (g) **Interim Application/s:**
 - (i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be

decided in such manner and within such time as the learned Sole Arbitrator deems fit.

- (ii) The present Petition under Section 9 of the Arbitration Act will be treated, heard, and disposed of as an application under Section 17 of the Act. All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application. Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits.
- (iii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.
- (h) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.
- (j) **Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (k) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.

12. The application is disposed of in these terms. No costs.

(G. S. PATEL, J)