

2. However, upon a closer scrutiny of facts, the matter was directed to be listed for further arguments on 27th April, 2021 on the aspect of payment of insufficient/nil stamp duty and impounding of the MoU executed between the parties, which contains the arbitration clause. Prior to the said hearing, MSD filed its reply to the petition on 19th April, 2021. Thus, the objections raised by MSD's counsel during the hearings, as well those pleaded in the reply, have been taken into consideration herein.

BRIEF FACTS:

3. The factual background leading to the filing of the present petition is that the parties entered into a Memorandum of Understanding on 1st January, 2020 [hereinafter, '**MoU**'] with the objective of promoting their respective business interests and profitability. The MoU contains an arbitration clause which reads as under:

“3.7 Governing Law and Dispute Resolution:

- i. This Agreement shall be governed by and interpreted in accordance with laws of India.*
- ii. All disputes and differences, arising out of or in connection with this Agreement shall be attempted to be resolved mutually through negotiations between the Parties falling which the same shall be referred and decided by a sole Arbitrator to be appointed by the Parties. The decision of the Arbitrator shall be final and binding on the parties. The provisions of Arbitration and Reconciliation Act 1996 shall be applicable to such arbitration proceedings.*
- iii. That the venue of arbitration shall be at New Delhi.”*

CONTENTIONS OF THE PARTIES:

4. According to IMZ, Clause 2.4 of the MoU provided that both the parties agree that they shall not attempt to solicit, contact or attempt to contact employees of each other, as mentioned in the Annexure C and D of the MoU, for the purpose of offering employment. It was contended that

disputes have arisen as MSD has breached its obligations under the said clause. On 28th May, 2020, Mr. Siddharth Kasana, director of MSD, failed to acquire the shares of Mr. Ashmeet Singh, director of IMZ, under a Buyout Agreement. Thereafter, MSD indulged in various criminal activities which violate the terms of the MoU, such as tampering the servers of IMZ, forcibly gaining access to the computer database and electronic records of IMZ, sending emails to clients of IMZ including Bihar State Food Corporation (BSFC) and two others, and making false allegations against the directors and employees of IMZ.

5. Thus aggrieved, IMZ invoked arbitration *vide* notice dated 4th July, 2020 and also sent a request to the Delhi International Arbitration Centre (DIAC) for appointment of an arbitrator. Even the DIAC sent a notice to MSD regarding the same. However, on account of no response from MSD, IMZ has approached this Court by way of the present petition.

6. Mr. Devadutt Kamat, learned Senior Counsel for MSD, on the other hand, controverted the contentions of IMZ. He opposed the maintainability of the petition on several grounds. The contentions of Mr. Kamat and the objections raised in the reply are summarized as follows:

- i) IMZ has failed to plead or establish that the contingencies as enumerated in clauses (a), (b) or (c) of Section 11(6) of the Act, have arisen which call for this Court to entertain the present petition, thus the petition has been filed pre-maturely and ought to be dismissed.
- ii) The MoU in question is forged and fabricated and the existence thereof

is disputed. There are grave allegations of fraud, forgery and fabrication which permeate the entire MoU rendering the agreement to be void. Case in point: P.S Case No. 255/2020 has been registered against the officials of IMZ under Sections 419, 420, 406, 467, 468 and 471 of the Indian Penal Code, 1860 and the police is examining the wrongful gains made by IMZ. In this regard, reliance is placed on the order dated 26th March, 2021 passed by the Court of Additional District and Sessions Judge, Patna, in an anticipatory bail petition filed by the director of IMZ. In the said order, Mr. Kamat refers to the following observations:

“The third document is the MoU which took place on 01.01.2020 between MSD Telematics Ltd and IMZ Corporate Pvt Ltd but on this document Ashmit Singh has signed in capacity of director and Sidharth Kasana has signed in capacity of a witness. It is admitted that Sidharth Kasana became director of Respondent Company on 01.01.2020 and if he became director then why his signature is not in capacity of a director rather in capacity of a witness. There is no need to discuss here the difference between these two capacities but this document appears to be suspicious one.

The witnesses recorded in case diary para-7, 10, 11 and 12 have supported the case of the informant. Para-25 speaks about the fixed deposit/recurring deposit of IMZ corporate and in between 23.01.2020 to 10.08.2020, IMZ Corporate had got fixed deposit/recurring deposit of 4 crore 43 lakh 50 thousand from the business of BFSC and OSAC. Para -34 shows that SIM of Vodafone which was given to MSD Telematics was later on transferred to IMZ Corporate. This it is quite clear that one document is silent on the point of separation or division of the company but other document deals with the same. On one document, parties have signed in capacity of a part while on another document the signature is made in capacity of a witness. There is material on the record that Ashmit Singh used the letter pad of MSD even after resignation and represented IMZ as subsidiary company of MSD which was completely wrong.”

iii) The afore-noted allegations in relation to the very existence of the MoU

disclose cognizable offences which are so grave that they permeate the entire document and have implications in public domain, and consequently the dispute is non-arbitrable.

- iv) The subject matter of dispute is unsuitable to be adjudicated through arbitration since it has an *erga omnes* effect. IMZ has made grave and unsubstantiated allegations of criminal activities by the director of MSD. Although the allegations are against the director, yet they form the subject matter of the dispute permeating the entire alleged MoU, rendering it void.
- v) IMZ has not complied with the pre-arbitration procedure as provided in the arbitration clause.
- vi) The MoU in question is an unstamped document. The same is therefore not a contract enforceable by law. Non-payment of stamp duty on a commercial contract would invalidate the arbitration agreement and render it non-existent and unenforceable in law. The Court cannot consider the same while exercising jurisdiction under Section 11 of the Act. Without prejudice to other contentions, the Court can impound the original MoU which does not bear stamp duty and once the issue of stamp duty and penalty is decided by the concerned authority, then IMZ must bring the MoU to the notice of the Court, whereupon the Petition can be adjudicated in accordance with law.
- vii) The subject matter of dispute is non-arbitrable. IMZ's director has alleged oppression and mismanagement on the same cause of action and initiated proceedings before the National Company Law Tribunal, Principal Bench, New Delhi [*hereinafter*, '**NCLT**']. Consequently, by virtue of Section 2(3) of the Act, the present dispute cannot be

submitted to arbitration.

ANALYSIS:

7. In the opinion of the Court, none of the objections raised by Mr. Kamat call for the rejection of the present petition, for reasons which are being stated hereinbelow.

8. In exercising jurisdiction under Section 11, the Court has to only examine if there is an existence of the arbitration agreement, and whether there exist arbitral disputes which are required to be adjudicated. The Court cannot, at this preliminary stage, venture into deciding the disputes arising between the parties. The observations sought to be relied upon by the Court while dealing with the anticipatory bail application are contextual, tentative and preliminary, and cannot be viewed as a final adjudication on merits regarding the allegations of fabrication of the document. MSD lays emphasis on the *prima facie* observations made by the criminal court in the bail petition to plead the non-existence of the agreement. This cannot be treated as a conclusive finding. However, investigation in the criminal case is pending, and besides, the allegations and counter-allegations are between the directors of the parties and not the parties themselves. In the reply filed by MSD, supported by the affidavit of Mr. Siddharth Kasana, the thrust is that “*there are extremely grave allegations of fraud, forgery and fabrication which permeate the entire MoU rendering the agreement void*”. However, there is no categorical denial of the signatures on the MoU by MSD. The law also on this subject is well settled. The Supreme Court, in the case of

Vidya Drolia & Ors. v. Durga Trading Corporation,¹ has observed that “the rule for the Court is ‘when in doubt, do refer’”. Therefore, it is only in cases when ex-facie, the document appears to be fabricated, that the Court would make a judicial enquiry. Mere allegation of fraud is not enough. The purported veracity of the document in the present case, though disputed by MSD, is not sufficient to hold that the document is fraudulent, or that the Court should not proceed to appoint an Arbitrator. MSD would be free to raise the objection of non-existence of the agreement before the arbitral tribunal, in accordance with law.

9. Turning now to the objection regarding non-compliance of the pre-arbitration procedure. The arbitration clause inter-alia stipulates that the parties shall attempt to resolve the disputes mutually through negotiations, failing which the same shall be referred to and decided by a sole Arbitrator. IMZ contended that failure to attempt mutual negotiations is mandatory. On this aspect, firstly the Court finds this objection to be completely inconsistent with the plea regarding the existence of the Arbitration Agreement. MSD has disputed the document, however, at the same time, it insists that IMZ should have attempted to resolve the disputes and differences between the parties through negotiation. It is surprising and irreconcilable that, on the one hand, MSD has initiated criminal proceedings by filing an FIR against IMZ and on the other hand, it looks forward to mutually resolve the disputes through negotiation. Moreover, in the opinion of the court, having regard to ongoing litigation between the directors of the parties before NCLT, the criminal proceedings, and the conduct of the

¹ (2021) 2 SCC 1.

parties, relegating them to mutual negotiation to resolve the disputes would be an empty formality. The directors of both the parties having initiated criminal action against each other which clearly indicates that parties do not intend to come to any kind of resolution. In such a situation, insistence on negotiation as a pre-condition to arbitration should not get in the way of the dispute resolution process agreed upon between the parties. Therefore, this objection is completely devoid of merit and would not come in the way for the Court to allow the present petition.

10. Next, the objection of insufficiency of stamp duty is taken up. The documents in question, is titled 'Memorandum of Understanding'. The court had initially, without going into the merits of the objection, contemplated impounding the document and directing IMZ to deposit the leviable penalty, having regard to the fact that the agreement would be amenable to stamp duty in terms of Article 5 clause (c) of Schedule 1A of the Indian Stamp Act, 1899, attracting stamp duty of only Rs. 50/- and consequently under Section 35 of the of the Indian Stamp Act, 1899, the maximum penalty leviable on such a document would be ten times the stamp duty payable, which amounts to no more than Rs. 500/-. However subsequent to hearing the parties, in the opinion of the Court, such a recourse is not necessary in view of the judgment of the Supreme Court in the case of *N.N. Global Mercantile Pvt. Ltd v. Indo Unique Flame Ltd.*²

11. Mr. Kamat strenuously argued that the non-payment of stamp duty on a commercial contract would invalidate the arbitration agreement, thereby

² 2021 SCC OnLine SC 13.

rendering it non-existent and unenforceable in law. He further argued that notwithstanding the judgment of the Supreme Court in *N.N. Global* (*supra*), the position in law remains unchanged in light of the judgment of the Supreme Court in *Vidya Drolia* (*supra*). In *N.N. Global* (*supra*), a three-judge bench of the Supreme Court has referred the question of enforceability of insufficiently stamped instruments containing arbitration agreement to be settled by a bench of five judges. Mr. Kamat contended that till the time the law is settled by a larger bench, the ruling of a two-judge bench of the Supreme Court in *Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engg. Ltd.*,³ as affirmed by a three-judge bench in *Vidya Drolia* (*supra*), would continue to hold the field. In support of this contention, Mr. Kamat relied upon the decision in *M. S. Bhati v. National Insurance Company Ltd.*⁴

12. In the considered opinion of the Court, the issue of stamping also stands covered by *N.N. Global* (*supra*), wherein, the Supreme Court in clear and unequivocal terms overruled the decisions in *SMS Tea Estates* (*supra*) and *Garware Wall Ropes* (*supra*). However, since the judgment in *Garware Wall Ropes* (*supra*) had been affirmed in *Vidya Drolia* (*supra*), the Supreme Court considered it appropriate to refer the issue for authoritative settlement by a Constitution Bench. The relevant observations from *N.N. Global* (*supra*) read as under:

“12. We are of the considered view that the finding in *SMS Tea Estates* and *Garware* that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and un-enforceable, is not the correct position in law.

³ 2019 9 SCC 209.

⁴ (2019) 12 SCC 248.

*In view of the finding in paragraph 92 of the judgment in **Vidya Drolia** by a co-ordinate bench, which has affirmed the judgment in **Garware**, the aforesaid issue is required to be authoritatively settled by a Constitution bench of this Court.*

We consider it appropriate to refer the following issue, to be authoritatively settled by a Constitution bench of five judges of this Court:

“Whether the statutory bar contained in Section 35 of the Indian Stamp Act, 1899 applicable to instruments chargeable to Stamp Duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract / instrument?”

In light of the same, the Registry may place this matter before the Hon’ble Chief Justice of India for appropriate orders / directions.”

13. The reasoning for the above was provided in the above judgment as follows:

“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 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 33 agreement would not be rendered invalid, un-enforceable 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.”

14. Thus, in the opinion of this court, the plea of the agreement being unstamped also does not prevent this court in appointing an arbitrator while exercising jurisdiction under section 11 of the Act.

15. Lastly, we shall deal with the objections raised by MSD regarding the issue being covered in the proceedings before the NCLT and the disputes being non-arbitrable. This Court finds no merit in the above objection. The petition before the NCLT has been instituted by Mr. Ashmeet Singh, director of IMZ, against MSD for oppression and mismanagement, alleging to be the co-promoter and 50% shareholder of the said Company. The cause of action of the present petition is the failure on the part of MSD to agree for arbitration under clause 3.7 of the MoU, constraining IMZ to invoke the jurisdiction of this court under Section 11 of the Act. IMZ has alleged that in terms of clause 2.4 of the MoU, parties had agreed not to solicit each other's employees as listed out in Annexures C & D to the MoU. MSD, allegedly, has breached *inter alia* clauses 2.1 and 2.4 of the MoU by tampering the computer servers, gaining unauthorised access to computer database, etc. and has also harmed the reputation of IMZ. In the opinion of the Court, the subject matter of the disputes cannot be held to be non-arbitrable. The filing of petition before the NCLT by the director of IMZ alleging oppression and mismanagement, does not mean that contractual disputes cannot be submitted to arbitration. Equally misconceived is the contention that allegations against the director of MSD permeates the MoU and renders it void. The court is not evaluating the contentions relating to the merits of the dispute at this stage. MSD shall be free to urge all pleas/objections relating to such claims before the learned Arbitrator in accordance with law.

16. IMZ has thus established that the contingencies provided under Section 11(6) of the Act have been satisfactorily made out. In view of the above, the

present petition is allowed and accordingly, Mr. Shashank Garg, Advocate (Ph: 9811526671) is appointed as the Sole Arbitrator to adjudicate the disputes that are stated to have arisen between the parties under the MoU dated 01st January, 2020.

17. The parties are directed to appear before the learned Sole Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

18. The learned Arbitrator will be paid their fee in terms of the provisions of the Fourth Schedule appended to the Act.

19. It is clarified that MSD would be free to take up all such objections as are available in law under Section 16 of the Act, including the dispute regarding the existence or validity of the agreement, before the learned Arbitrator. The parties shall also be entitled to raise their claims and counter-claims before the Learned Arbitrator in accordance with law. It is further clarified that the learned Arbitrator shall decide all the issues without being influenced by the observations made by this Court which are only *prima facie* in nature. All rights and contentions of the parties are left open.

20. The appeal is allowed in the aforesaid terms.

SANJEEV NARULA, J

JUNE 4, 2021

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