IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 141 OF 2017

Olympia Industries Ltd. ... Applicant
vs.
Sumilon Industries Ltd. ... Respondent

Mr. Virat M. Chavda for the Applicant.
Mr. Vijay Kantharia i/b. Ms. Shubhada Salvi for the Respondent.

CORAM : A. K. MENON, J.
DATED : 24th JANUARY, 2022
[THROUGH VIDEO CONFERENCE]

P.C.

1. This is an application for appointment of a Sole Arbitrator pursuant to an arbitration clause contained in an agreement described as an "Lease Agreement" dated 1st February, 2013. It is the applicants case that under the said writing dated 1st February, 2013 the applicant had granted to the respondent the right of conducting a factory premises situated at Surat wherein certain coning and dyeing facilities were being carried out. The agreement is stated to be an operating lease and not one of lease of land as understood in the customary sense.

2. It is alleged that the respondent was liable to pay a stipulated amount every month in advance with escalation over time. However on account of delays caused by the respondent in paying the licence fees the applicant has claims against the respondent. There is no dispute about the fact that the applicant has since recovered possession of the premises inasmuch as the operating lease no longer subsists because by a letter dated 29th October, 2016 the operating lease was revoked. Several breaches are alleged to have been committed by the respondent who has denied these allegations by a response dated 5th December, 2016.

3. On 8th February, 2017 the applicants Advocate invoked the arbitration clause. Allegations were traded between the parties and respondents has denied all of the applicants contentions vide its response dated 2nd March, 2017. Disputes and difference having arisen and having invoked the arbitration clause the applicant now seeks the appointment of a sole Arbitrator. Mr. Chavda for the applicant therefore submits that a Sole Arbitrator may be appointed to adjudicate disputes between the parties.

4. On behalf of the respondent the application is opposed by Mr. Kantharia who has submitted that the agreement is unstamped and by virtue of the decision of the Supreme Court in *SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Ltd*[1]. And *Garware Wall Ropes Limited vs. Coastal Marine Constructions and Engineering Limited*[2] the agreement is

1 (2011) 14 SCC 66

2 (2019) 9 SCC 209

liable to be impounded. Even otherwise, the arbitration agreement is alleged to be vague and invalid. My attention has been drawn to the arbitration clause which reads as follows :

> *"18. All disputes, difference, claims and questions whatsoever arising from this agreement between the parties and/or their respective representatives touching up on these present or any clause of thing herein contained or otherwise in any way relating to or arising from these presents shall be referred to the arbitration of two arbitrators, one to be appointed by each party to the dispute in case both the parties here to desire to do so as necessitated by circumstances and such arbitration shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or reenactment thereof for the time being in force. Such Arbitration proceedings will be held at Mumbai and all the matters shall be subject to Mumbai Jurisdiction."*

Inviting my attention to Clause no. 18 Mr. Kantharia submits that the clause proposes reference to arbitration of two arbitrators one to be appointed by each party and in the circumstances it is not in consonance with the Arbitration and Conciliation Act, 1996. He submits that under Section 10, the number of arbitrators should be an odd number and therefore the arbitration clause is invalid. He therefore submits that even assuming the agreement is admissible in evidence as being stamped appropriately, there is no valid arbitration agreement between the parties.

5. Mr. Chavda has however submitted that the agreement would attract stamp duty of Rs. 100/- only under clause of Article 5(h)(B)(ii) of the Schedule of the Maharashtra Stamp Act. He submits that the agreement which grants an operating lease is effectively only for conducting the factory premises. It did not transfer or assign any kind of right in the property per se which could have been valued under Article 5(a) to (g). He submits that the intention of the parties as can be seen from the agreement is one of permitting the respondent to occupy the factory and run the plant for a limited period of time. i.e. since when terminated and the operating lease no longer subsists. Thus the agreement clearly falls under 5(h)(B) and the duty payable is only Rs. 100/-. Thus Mr. Chavda submits that this is not a case of an agreement that is unstamped or insufficiently stamped.

6. Having heard the learned counsel for the parties I am of the view that two issues are required to be considered. Firstly whether the agreement is insufficiently stamp and if so, what steps are required to be taken. Secondly, whether on a fair reading of Clause 18, it constitutes a valid arbitration clause between the parties and under which a Sole Arbitrator can now be appointed as sought by the applicant. I will address the second issue first.

7. As far as appointment of the tribunal is concerned, considering the language of Clause 18 it is clear that the parties have agreed on a two member tribunal but subject to the provision of Arbitration and Conciliation Act. The Supreme Court has in the case of *Narayan Prasad Lohia vs Nikunj*

Kumar Lohia and Ors.[3] held that although section 10 provides for even number of arbitrators, the appointment of two arbitrators under the agreement would render the agreement invalid. The two arbitrators appointed in terms of the arbitration clause should proceed to appoint a third arbitrator under section 3. In this view of the matter I find no difficulty in the applicant proceeding with the arbitrator nominated provided the respondent also nominates an arbitrator or the court appoints one for the respondent. The two arbitrators so appointed can then appoint the presiding arbitrator as contemplated in *Narayan Prasad Lohia (supra).* However, that will have to await the stamping of the document. Alternatively an arbitrator can be appointed subject to the document being stamped and the arbitrator will not enter the reference till the agreement is so stamped. That is an aspect which will need further consideration.

8. Prima facie it did appear that Mr. Chavda's contention that the agreement being an operating lease agreement would fall within the residual clause of Article 5(h)(B) but on closer scrutiny, the agreement in my view is clearly in the nature of a licence to occupy the premises, to get the factory licence transferred to the name of the respondent and to continue in uninterrupted occupation of portion of the premises, save and accept one room on the first floor and two rooms on the second floor of the factory building which will remain in the custody of the applicant for their use and to store their records.

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3 (2002) 3 SCC 572

9. The agreement in fact assumes the character of a leave and licence agreement, considering the initial period of 33 months which was renewable for upto a period of 66 further months, thus in all amounting to 99 months. This is evident from Clause no. 12. Apart from the security deposit that is in contemplation, Annexures I and II to the agreement are two letters, the first of which is dated 1st January, 2013 viz. is one month prior to the execution date of the agreement and which records that the applicant and the respondent will renew the lease agreement for further 33 months after the first three operative periods described in clause 3. After this letter was executed a second letter of the same date, once again signed by both parties, records that the lease agreement of 1st February, 2013 shall not be terminated for a period of 66 months provided the respondent complies with the commercial understanding.

10. The parties were therefore ad-idem on the fact that the arrangement would continue for a period of 66 months and in my view this agreement would clearly not fall under the residuary clause but under Article 36A of the Maharashtra Stamps Act. The agreement also could fall under Article 36A(b) which provides for leave and licence agreement for a period exceeding 60 months without a renewal clause. The period of 66 months would relate back to Article 36 which contemplates the stamp duty for a lease unless provided in sub clauses (2), (3) or (4) of Article 36.

11. Considering the fact that a 66 months lock in period was contemplated, the agreement is clearly insufficiently stamped. Deficit stamp duty will have to be paid. In these circumstances I am of the view that it is only after stamp duty is paid that the agreement will be admissible in evidence. The agreement will therefore required to be impounded and sent for adjudication.

12. In view of the agreement being insufficiently stamped and the obvious question of enforceability of an arbitration agreement within the main agreement which is insufficiently stamped *SMS Tea Estates (supra)* and *Garware Wall Ropes (supra)* would have to be taken into consideration. As already noted in *M/s. N. N. Global Mercantile Pvt. Ltd. vs. M/s. Indo Unique Flame Ltd. & Ors.*[4], a three judge bench of the Supreme Court in has come to the conclusion that *SMS Tea Estates (supra)* does not propound the correct position in law but in view of the decision of a co-ordinate bench of three judges in *Vidya Drolia and Ors. vs. Durga Trading Corporation*[5] which has affirmed the judgment in *Garware Wall Ropes (supra)* the issue whether non payment of stamp duty in a commercial contract will invalidate an arbitration agreement, rendering it non-existent in law and unenforceable is required to be settled by a Constitution bench. The issue has therefore been referred to a constitution bench.

4 CA Nos. 3802-3803 of 2020

5 (2021) 2 SCC 1

13. In this background the question is whether this petition is required to be kept pending till a party decides to pay stamp duty. In many cases it has come to the notice of the court that upon an order of adjudication being passed, the parties proceed to challenge orders of assessment of duty by the Collector since there is a statutory Appeal available under the Maharashtra Stamp Act,1958. Appeals also remain pending for a long time and further challenges are not ruled out. Numerous applications under Section 11 thus remain pending for years.

14. In the circumstances I am of the view that this application need not be kept pending and if the applicant pays stamp duty as adjudicated or as may be finally found payable after the applicant exhausts his remedy against an order of adjudication he can be given liberty to revive this application. I accordingly pass the following order :

(i) The Applicant shall deliver the agreement dated 1st February, 2013 within two weeks from today to the Prothonotary and Senior Master as it now stands impounded. The Prothonotary and Senior Master shall send the document to the Collector of Stamps, Mumbai for adjudication.

(ii) Application disposed with liberty to revive the same after payment of stamp duty.

(iii) No costs.

(A.K.MENON, J.)