

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO.194 OF 2022

Centre For Digestive and Kidney Diseases]
(India) Pvt. Ltd.] .. Applicant
vs.
Dr.Pravin P. Kulkarni] .. Respondent
WITH

COMMERCIAL ARBITRATION APPLICATION NO.197 OF 2022

Centre For Digestive and Kidney Diseases]
(India) Pvt. Ltd.] .. Applicant
vs.
Dr.Shailesh Kamkhedkar] .. Respondent

Mr.Rahul Jain a/w Ms.Mahafrin Mehta i/b HSA Advocates for the Applicant.
Mr.Meghnath Navlani for Respondent.

CORAM : BHARATI DANGRE, J

DATE : 08th DECEMBER, 2022.

P.C.

1] The two Applications seek appointment of a Sole Arbitrator to adjudicate the dispute, that has arisen between the parties, out of the "Doctor Contract" dated 03.05.2021, alongwith addendum agreemnt dated 01.05.2022 entered subsequent thereto.

The Agreement was entered between the Applicant, a Super

Speciality and transplant centre and the Respondents senior consultants, setting out the terms, under which the Hospital agreed to engage the services of the consultant on fulltime retainership basis and the consultants agreed to render their services to the Hospital, as an independent contractor. The Agreement determined the scope of their services and also set out the obligations to be discharged by either party with indemnity and liability clause, being incorporated by consent of parties.

It also comprise of a clause providing mechanism for resolving disputes if the disputes arise out of or in connection with the Agreement.

2] Clause 13.1 of the Agreement stipulated the arrangement for resolution of disputes between the parties, which contemplate a discussion between them on dispute being raised and an attempt to settle the dispute amicably and on failure to resolve the dispute amicably, it contemplate reference of dispute for the Arbitration to be conducted in accordance with the Arbitration and Conciliation Act, 1996, under the statutory directions thereof. The Award rendered by the Arbitrator is agreed to be final and binding and the clause contemplate appointment of a Sole Arbitrator.

3] The learned counsel for the Respondents though do not dispute the existence of the arbitration clause in the Agreement, he would submit that the said clause cannot be construed as a valid arbitration clause since the document in which it is comprised, is not stamped at all. His submission is that, though the dispute can be made over to the Arbitrator, this Court should impound the said document and sent it for adjudication to the Competent Authority i.e. the Collector of Stamps.

4] The question about part of the document, which are either insufficiently stamped or are unstamped, still continue to prevail and presently is made over to a larger bench of the Hon'ble Apex Court. In the case of N.N. Global Mercantile Private Ltd. vs. Indo Unique Flame Ltd. & Ors..(2021) 4 SCC 379, a reference has been made and para 58 of the Law Report read as under :-

“58. 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 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?”

5] Pursuant to the reference being made, three Judge Bench of the Hon'ble Apex Court in case of Inter Continental Hotels Group (India) Pvt. Ltd. & Anr. vs. Waterline Hotels Pvt. Ltd. , (2022) 7 SCC 662 has observed as under :

“25. Although we agree that there is a need to constitute a larger Bnch to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this court – until the larger Bench decides on the interplay between Sections 11(6) and 16 - should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.”

The three Judge Bench of the Hon'ble Apex Court in case of

Weatherford Oil Tool Middle East Limited vs. Baker Hughes Singapore PTE, in Arbitration Petition Nos.3/2022, 52/2021 and 2/2022, by gainful reference to the observations made by their Lordships in case of NN Global Mercantile Pvt Ltd. (supra) inter alia, has concluded as under

“16. In view of the above, since the arbitration agreements contained in all the three agreements namely, Onshore Service Agreement, Lease Agreement and Drilling Service Agreement were not disputed by the Respondent, and since the Respondent itself had proposed to consolidate the disputes under the said agreements and to refer them to a sole arbitrator in one single arbitration, the court is of the opinion that now it does not lie in the mouth of the Respondent to say that the petitions seekign appointment of a sole arbitrator should not be entertained, as the matter with regard to the determination of requisite stamp duty under the Maharashtra Stamp Duty Act on the two agreements is pending before the Collector. As held by this Court in N.N. Global Mercantile (supra) there is no legal impediment to the enforceability of the arbitration agreement pending payment of stamp duty on the substantive contract. Of course, the said issue is pending under consideration by the Constitution Bench, nonetheless as observed by this Court in Intercontinental Hotels Group (India Pvt. Ltd.) Supra), the matters hwihc are still pending at a pre-appointment stage, cannot be left hanging until the larger Bench settled the issue. Following the said proposition and considering the time sensitivity in the arbitration cases, we deem it appropriate to entertain the present petitions and allow the same.”

6] The position of law that emerges from the meaningful reading of the principles enunciated by the Lordships of the Hon’ble Apex Court in the aforesaid terms, make it amply clear that where the document in question which is sought to be construed as ‘arbitration agreement’ or comprise of Arbitration clause, is either insufficiently stamped or is not stamped at all, will not be a matter of consideration while considering appointment of an Arbitrator in exercise of power under Section 11 of

the Arbitration Act. It has been clarified in N N Global (*supra*) that, on the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, it would survive independent of the substantive contract and the arbitration agreement would not be rendered invalid, unenforceable 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. In any case, adjudication of the rights and obligations under the underlying substantive contract cannot be determined finally before deficit stamp duty is paid, in accordance with law.

The request of the learned counsel to confiscate document is not justified one, particularly when now it has been held through various authoritative pronouncements that the scope of the Court exercising power under sub-section(6) of Section 11 of the Arbitration Act is restricted to examining existence of an arbitration agreement only. In any case, if the document is insufficiently stamped, the party cannot be asked to wait till its adjudication and payment of stamp duty, for the purpose of appointment of arbitrator. On the similar lines the proceedings before the Arbitrator cannot be stalled in order to ensure payment of stamp duty. The document which is sought to be used in evidence before the Arbitrator cannot be permitted to be relied upon/read in evidence till the time, it is adequately stamped.

7] The learned counsel for the Applicant makes a categorical statement that before he produce the agreement before the learned Arbitrator and request it to be read in evidence, he shall ensure that it is adjudicated upon and appropriate stamp duty shall be paid as determined by the Competent Authority.

8] In the wake of above discussion, it will not be appropriate to stall appointment of the Arbitrator, since there is no dispute about existence of the arbitration clause in the subject Agreement.

Hence, following order :-

ORDER

TERMS OF APPOINTMENT

(a) Appointment of Arbitrator :

Advocate Ranjeev Carvalho, c/o Chambers of Dr.Birendra Saraf, Senior Advocate, 302, Oval Hosue, Off. N.M. Road, Fort, Mumbai – 400 001, is hereby appointed as a Sole Arbitrator to decide the disputes and differences between the parties under the documents referred to above.

(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/petitioner within one week from the date this order is uploaded.

(c) Disclosure : The learned Arbitrator, within a period of 15 days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application, with a copy to be forwarded to both the parties.

(d) Appearance before the Arbitrator : The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the learned Arbitrator shall fix up a first date of hearing in the week commencing from 19/12/2022. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

(e) Contact and communication information of the parties : Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. This information shall include a valid and functional E-mail address as well as mobile numbers of the parties, participating in the process as well as of the Advocates.

(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) Fees : Parties agree that the arbitral costs and fees of the Arbitrator shall be borne by them in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

(h) Venue and seat of Arbitration : Parties agree that the venue and seat of the arbitration will be in Mumbai.

(i) Procedure : These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

Both the Arbitration Applications are disposed off in the aforesaid terms.

[BHARATI DANGRE, J]