

In the High Court at Calcutta

Original Civil Jurisdiction

Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

A.P. No. 84 of 2023

**M/S. EAST END DEVELOPERS
-Versus-
PRIYANATH NEOGY**

For the petitioner : Mr. Satadeep Bhattacharyya, Adv.,
Mr. Saptarshi Dutta, Adv.,
Ms. Srijita Ghosh, Adv.,
Mr. Pourush Kanti Pal, Adv.

For the respondent : Mr. Ashim Kumar Roy, Adv.,
Mr. Sutanu Chakrabarti, Adv.,
Mr. Ashok Roy, Adv.

Hearing concluded on : 18.04.2023

Judgment on : 24.04.2023

The Court:-

1. The application under Section 11 of the Arbitration and Conciliation Act, 1996 Act (hereinafter referred to as, "the 1996 Act") has been opposed by the respondent primarily on two grounds.
2. First, it is argued that since a prior proceeding has been filed with regard to the same dispute before the concerned Consumer Forum, the subsequent reference to arbitration under the 1996 Act is barred.

3. Secondly, it is contended that the agreement containing the arbitration clause, out of which the dispute has arisen, is insufficiently stamped, for which the application under Section 11 ought not to be entertained.
4. Learned counsel appearing for the respondent cites *Ireo Grace Realtech Private Limited Vs. Abhishek Khanna and others*, reported at (2021) 3 SCC 241, where it was held that the existence of an arbitration clause was not a ground to restrain the consumer from proceeding with the consumer complaint.
5. The respondent next cites a judgment of the Orissa High Court dated February 5, 2021 in *M/s. Srikrishna Estates and Constructions Pvt. Ltd. Vs. Pradipt Ku. Ray*, wherein the Chief Justice of the said High Court observed that the contention that the arbitral proceedings would be simultaneous with the one under the Consumer Protection Act, 1986 (for short, “the C.P. Act”) and therefore, not maintainable, was without merit. It was recorded that Section 3 of the C.P. Act makes it abundantly clear that provisions of that Act “shall be in addition to and not in derogation of the provisions of any other law”. The matter was accordingly referred to arbitration. However, although the said judgment runs counter to the case of the present respondent, a special leave petition has been filed against the same, upon which, the Supreme Court, *vide* Order dated December 5, 2022, adjourned the SLP and directed that till the next date of hearing, let no further steps be taken in the arbitration proceedings. Hence, it is contended

that such proposition of the Orissa High Court is now sub judice before the Supreme Court and cannot be conclusively relied on.

6. Learned counsel for the respondent also places reliance on *N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others*, reported at (2021) 4 SCC 379, in paragraph 58 of which the three-Judge Bench of the Supreme Court referred the matter to a Constitution Bench of Five Judges on the question 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.
7. The Supreme Court, while so referring, relied on *Vidya Drolia Vs. Durga Trading Corporation*, reported at (2021) 2 SCC 1 and distinguished *SMS Tea Estates (P) Ltd. Vs. Chandmari Tea Co. (P) Ltd.*, reported at (2011) 14 SCC 66 as well as *Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions and Engineering Ltd.*, reported at (2019) 9 SCC 209.
8. The respondent further submits that the Five-Judge Bench of the Supreme Court has accordingly been constituted and on January 25, 2023, the matter was conclusively heard and judgment reserved by the Supreme Court.

9. Hence, it is submitted that it would be premature to refer the matter to arbitration under Section 11 of the 1996 Act in the present case.
10. Learned counsel next cites *Emaar MGF Land Limited Vs. Aftab Singh*, reported at (2019) 12 SCC 751, wherein it was observed that even if there exists an arbitration clause in an agreement and a complaint is made by the consumer in relation to a certain deficiency of service, the existence of an arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency constituted under the Consumer Protection Act, since the remedy provided under the said Act is in addition to the provisions of any other law for time being in force. It was further observed that it is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.
11. On the other hand, learned counsel appearing for the petitioner controverts the contentions of the respondents on maintainability and relies on *SMS Tea Estates (P) Ltd. (supra)* as well *Intercontinental Hotels Group (India) Private Limited and another Vs. Waterline Hotels Private Limited*, reported at (2022) 7 SCC 662.
12. Heard learned counsel for the parties. Section 3 of the Consumer Protection Act, 1986 has now been virtually reproduced in Section 100 of the said Act of 2019. Section 100 says that the provisions of the said Act shall be “in addition to and not in derogation of” the provisions of any other law for the time being in force.

13. Hence, it is not the law that the pendency of any proceeding under the C.P. Act would automatically debar the parties from proceeding in a different forum.
14. That apart, in the C.P. Act, the consumer dispute has been specified in Section 2(8) to be a dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint.
15. The definition of “consumer” under Section 2(7) clearly indicates the scope of operation of the said Act, which pertains to disputes regarding deficiency in service in respect of goods and services.
16. In *Ireo Grace Realtech Private Limited (supra)*, cited by the respondent, the subject-matter of consideration was just the opposite of the present matter. In the said matter, the jurisdiction of the consumer forum to deal with a dispute was contested on the ground of existence of an arbitration clause.
17. In paragraph 36.5 of the same, the Supreme Court observed that the existence of an arbitration clause was not a ground to restrain the consumer fora from proceeding with the consumer complaint.
18. The Orissa High Court, in *M/s. Srikrishna Estates and Constructions Pvt. Ltd. (supra)*, categorically decided that the mere fact that the opposite party had approached the consumer forum and succeeded before it will not preclude the arbitration clause from being invoked.
19. Against the said judgment, a Special Leave Petition has been filed which is now pending adjudication before the Supreme Court. As an interim order, the Supreme Court directed that no further steps be

taken in the arbitration proceedings. However, no ratio of law was laid down by the Supreme Court while so holding. Rather, the ratio applied by the Orissa High Court on the basis of Section 3 of the C.P. Act applies to the present case as well.

- 20.** The respondent also cited *Emaar MGF Land Limited (supra)*. In paragraph 63 of the same the Supreme Court held that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in the disputes being proceeded in arbitration. It is only a case where specific/special remedies are provided for and are opted by an aggrieved person that a judicial authority can refuse to relegate the parties to the arbitration.
- 21.** The expression “judicial authority can refuse” leaves discretion on the judicial authority to relegate or refuse to relegate the parties to arbitration.
- 22.** That apart, in the said judgment, the scope and effect of Section 3 of the C.P. Act, 1986 was not argued and/or considered specifically.
- 23.** In *N.N. Global Mercantile Private Limited (supra)*, the Supreme Court referred to a Constitution Bench of five Judges the issue as to 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.

24. However, the Supreme Court, in *N.N. Global Mercantile Private Limited (supra)*, had overturned the findings in *SMS Tea Estates (supra)* and *Garware Wall Ropes Ltd. (supra)* 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 unenforceable, on the ground that the same was not the correct position in law.
25. As such, despite the matter being referred, the three-Judge Bench of the Supreme Court in *N.N. Global Mercantile Private Limited (supra)* clearly held in favour of reference to arbitration under Sections 8 and 11 of the 1996 Act even where the parent agreement was required to be stamped.
26. It has been argued by the respondent that the reference before the Five-Judge Bench from *N.N. Global Mercantile Private Limited (supra)* has already been heard at length and judgment has been reserved. However, until and unless such reference is answered either way, the mere pendency of the said reference cannot entail that all pending matters on the said issue are to come to a standstill. It cannot be the law that mere pendency of a larger Bench reference will prevent High Courts in all connected matters from deciding the issue-in-question in the interregnum, in terms of the last 3-Judge Bench decision of the Supreme Court in *N.N. Global (supra)*, which considers all relevant previous judgments, until and unless the reference is finally answered.

- 27.** Since *N.N. Global Mercantile Private Limited (supra)* is subsequent to *SMS Tea Estates (supra)* and considers *SMS Tea*, it would only be apt to follow the proposition laid down in *N.N. Global Mercantile Private Limited (supra)* till the reference is answered.
- 28.** Such conundrum of awaiting the decision of a larger Bench reference was dealt with by the Supreme Court in *Intercontinental Hotels Group (supra)*. In paragraph 25 of the same, a three-Judge Bench observed that although it agreed that there is a need to constitute a larger Bench to settle the jurisprudence, the Bench was also cognizant to time-sensitivity when dealing with arbitration issues. The matters therein were still at a pre-appointment stage, and the Supreme Court held that it cannot leave them hanging until the larger Bench settles the issue. In view of the same, the Supreme 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.
- 29.** Adopting such principle, there cannot be any reason to stall the arbitral process at the nascent stage of reference under Section 11 of the 1996 Act merely because the consumer forum has been moved.
- 30.** Hence, on a comprehensive consideration of all the judgments cited by the parties, it transpires that as per *N.N. Global Mercantile Private Limited (supra)* and *Intercontinental Hotels Group (supra)*, which are the latest judgments holding the field, there cannot be any bar to refer the matter to arbitration under Section 11 of the 1996 Act despite the

allegation that the parent agreement-in-question is not properly stamped.

- 31.** That apart, it is now well-settled that the scope of decision under Section 11(6A) of the 1996 Act is restricted to a consideration of the existence of an arbitration clause.
- 32.** There being such a clause in the present case, it is beyond the scope of this Court under Section 11 to enter into the mixed question of fact and law as to whether the agreement suffers from deficiency in stamp duty.
- 33.** Even such issue is potentially a subject-matter of consideration before the Arbitrator, if appointed, within the purview of Section 16 of the 1996 Act. The scope of decision to be rendered under Section 11, keeping in view sub-section (6A) thereof, is not of a judicial adjudication but is restricted to the exercise as stipulated in the said sub-section and endorsed in *Vidya Drolia (supra)*.
- 34.** Since the arbitration clause in the present case admittedly exists and the dispute has only been raised with regard to insufficiency of stamp duty of the parent agreement, there cannot be any bar to appoint an Arbitrator leaving all issues, including the issue of deficiency of stamp duty, open to be decided by the Arbitrator. The dispute between the parties falls within the scope of the arbitration clause and the issues involved are inherently arbitrable.
- 35.** Hence, AP 84 of 2023 is allowed, thereby appointing Mr. Partha Pratim Roy (Mobile No. – 9874135485), an Advocate practising in this Court and a member of the Bar Association, as the sole arbitrator to

resolve the dispute between the parties, subject to obtaining declaration/consent under Section 12 of the Arbitration and Conciliation Act, 1996.

(Sabyasachi Bhattacharyya, J.)