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Arb.O.P. (Com.Div.) No.188 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.188 of 2023

1.Mr.K.M.Iqbal Ahmed
2.Dr.K.I.Syed Ahmed Kabeer

.. Petitioners

Vs.

1.Mr.S.Gurusamy
2.Ms.Haripriya Gurusamy
3.Mr.E.M.Akbar Basha
4.Mrs.Talath Tehseen

.. Respondents

Prayer: Original Petition is filed under Section 11(4) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to address the dispute based on the partnership deed dated 05.03.2020 entered between the petitioners and the first and second respondents.

For Petitioners : Mr.V.Srinivasa Babu

For Respondents : Mr.S.Senthilnathan
for R1 and R2
No appearance
for R3 and R4



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ORDER

The dispute between the petitioner and the first and second respondents is arbitrable under the Partnership Deed dated 05.03.2020 signed between them. Relevant Clause in the said Partnership Deed reads as under:-

“Clause 16.

That any consent or difference which may arise between the partners or their legal heirs, successors or representatives with regard to the construction, meaning and effect to this deed and/or any part thereof or in respect of the accounts, profits or losses of the business of the said firm or any other matter relating to the firm shall be referred to arbitration under the Indian Arbitration Act, 1940.”

2. The first and second respondents have earlier signed the Memorandum of Understanding cum Construction Agreement dated 06.11.2019 with the third and fourth respondents.

3. It is the specific case of the petitioners is that implement the above Memorandum of Understanding cum Construction Agreement signed with the third and fourth respondents on 06.11.2019, the petitioners herein entered into a Partnership Deed with the first and



second respondents on 05.03.2020. The petitioners have also issued notice under Section 21 of the Arbitration and Conciliation Act, 1996, a dispute has arisen between the petitioners and the first and second respondents herein. The first and second respondents have also responded to the same on 06.03.2023.

4. The learned counsel for the first and second respondents would submit that the dispute is not arbitrable. Earlier, the learned counsel for the first and second respondents had taken a plea of under stamping of the documents in the light of the recent decision of the Hon'ble Supreme Court in **N.N.Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others**, 2023 SCC Online SC 495.

5. It was therefore submitted that the dispute was not capable of being resolved through Arbitrator, as the Partnership Deed was under stamped. That apart, it was further submitted by the learned counsel for the first and second respondents, the third and fourth respondents are not a necessary party and not governed by the Arbitration Clause in the Partnership Deed.



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6. Finally, the learned counsel for the first and second respondents would also submit that the Partnership Deed itself was not a registered Partnership Deed dated 05.03.2020 and therefore in view of Section 69 of the Partnership Act, 1932 not binding. It is therefore submitted that the dispute was not arbitrable.

7. I have considered the arguments advanced by the learned counsel for the petitioners and the learned counsel for the first and second respondents and also perused the documents filed by the present Original Petition and the decision cited by the learned counsel for the first and second respondents. As far as petition relating to under stamped of the Partnership Deed dated 05.03.2020 is concerned, the said defence is no longer available in the light of the decision of the Hon'ble Supreme Court in the case of *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899* reported in *2023 SCC Online 1666*. In para 62, 173, 185, 187, 192, 195 and 197, the Court held as under:-

“62.A plain reading of Section 11(6A) makes it evident that it is referring to an arbitration agreement. Section 11(6A) provides that courts must confine



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themselves to an examination of the existence of the arbitration agreement. The word “confine” indicates the intention of the legislature to limit the jurisdiction of the courts at the stage of the appointment of an arbitrator.

173. In the present reference, the challenge before this Court is to harmonize the provisions of the Arbitration Act and the Stamp Act. The object of the Arbitration Act is to inter alia ensure an efficacious process of arbitration and minimize the supervisory role of courts in the arbitral process. On the other hand, the object of the Stamp Act is to secure revenue for state. It is a cardinal principle of interpretation of statutes that provisions contained in two statutes must be, if possible, interpreted in a harmonious manner to give full effect to both the statutes. In providing a harmonious interpretation, this Court has to be cognizant of the fact that it does not defeat the purpose of the statutes or render them ineffective. The Challenge, therefore, before this Court is to preserve the workability and efficacy of both the Arbitration and Conciliation Act and the Stamp Act.

185. Parliament was aware of the Stamp Act when it enacted the Arbitration Act. Yet, the latter does not specify stamping as a pre-condition to the existence of a valid arbitration agreement. Further, Section 11(6-A) of the Arbitration Act requires the Court to confine itself to the examination of the existence of the arbitration agreement. This provision stands in contrast to Section 33(2) of the Stamp Act which also uses the word “examine”. Section 33(2) requires the person before whom an instrument is produced, to examine whether it is stamped with a stamp of the value and description required by the law when such instrument was executed or first executed. Although Parliament was aware of the mandate of Section 33(2), it did not require the Court acting under Section 11 to also undertake the examination required by Section 33(2).

187. The decision of the majority in N N Global 2(supra) assumes that the inadmissibility of the document in evidence renders it unenforceable. However, the effect



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of the principle of competence-competence is that the arbitral Tribunal is vested with the power and authority to determine its enforceability. The question of enforceability survives, pending the curing of the defect which renders the instrument inadmissible. By appointing a tribunal or its members, this Court (or the High Courts, as the case may be) is merely giving effect to the principle enshrined in Section 16. The appointment of an arbitral tribunal does not necessarily mean that the agreement in which the arbitration clause is contained as well as the arbitration agreement itself are enforceable. The arbitral Tribunal will answer precisely these questions.

192. By enacting Section 16 of the Arbitration Act, Parliament has (in a manner of speaking) permitted an agreement to arbitrate to be preliminarily enforced even if it is only an agreement. After parties have been referred to arbitration under Section 8 of the Arbitration Act or after the appointment of arbitrators under Section 11 of the Arbitration Act the arbitral tribunal will have jurisdiction to determine all questions and issues in dispute between the parties. The legitimate concerns of the revenue in the realization of stamp duty are not defeated because the arbitral tribunal has the jurisdiction to act in pursuance of the provisions of the Stamp Act.

195. Issues which concern the payment of stamp-duty fall within the remit of the arbitral Tribunal. The discussion in the preceding segments also make it evident that Courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9.

197. Once the arbitral Tribunal has been appointed, it will act in accordance with law and proceed to impound the agreement under Section 33 of the Stamp Act, if it seems fit to do so. It has the authority to receive evidence by consent of the parties, in terms of Section 35. The procedure under Section 35 may be followed thereafter. In this manner, the *competence-competence* doctrine is given life and arbitration proceedings can continue to



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remain a faster alternative to suits before the trial Courts or other, similar actions.”

8. Therefore, it is for the parties to pay the deficit stamp duty before the Arbitral Award is passed in favour of the petitioner.

9. According to the learned counsel for the petitioners, the deficit stamp duty is also been paid. Therefore, the objection of the counsel is no longer maintainable. Even if there is a deficit Stamp Duty, it can be ordered to be reckoned. As far as objection of the respondents that the petition is not maintainable in the light of the Section 69 of the Indian Partnership Act, 1932 is concerned, I am of the view that the said objection is not available to the respondents.

10. In the light of the decision of the Hon'ble Supreme Court in (102) **Umesh Goel Vs. Himachal Pradesh Cooperative Group Housing Society Limited** reported in [(2016) 11 SCC 313]. The Hon'ble Supreme Court has observed as under:-

“37.Though the learned senior counsel for the appellant and the respondent referred to certain other decisions in support of their respective submissions, as we are fortified by our conclusion, based on the



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interpretation of Section 69 of the Partnership Act vis-a-vis the 1996 Act and the 1940 Act as well as supported by the decisions in *Jagdish chander and kamal pushp Enterprises*, we do not find any necessity to refer to those decisions in detail. **Having regard to our conclusion that arbitral proceedings will not come under the expression “other proceedings” of Section 69(3) of the Partnership Act, the ban imposed under the said Section 69 can have no application to arbitral proceedings as well as the arbitration Award.** Therefore, the appeal stands allowed, the impugned judgement of the Division Bench is set aside and the judgment of the learned Single Judge stands restored. No costs.”

11. In view of the above, the objection of the first and second respondents that the dispute is not arbitrable is overruled. Therefore, I see no impediment to appoint an Arbitrator to resolve the disputes between the parties. As far as impleading the third and fourth respondents in the arbitral proceedings is concerned, I am of the view they are not a party to the dispute between them. Therefore, they need not be impleaded in the arbitration proceedings. At best, they can be summoned to give evidence.

12. Considering the above, **Hon'ble DR.Justice S.Vimala, (Retired) Former Judge of this Court**, residing at **Plot No.3, River**



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View Avenue, 4th Main Road, Manapakkam, Chennai – 600 125,

(Mobile No.9444710101, is appointed as an Arbitrator to enter upon reference and adjudicate / resolve the *inter se* dispute between the parties.

13. The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.

14. The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remain *ex parte*, the petitioners shall pay the entire fee and



other incidental charges to the Arbitrator and later recover the same from the respondents.

15. The parties are at liberty to workout the venue for Arbitration at Chennai.

16. The Original Petition is allowed with the above observations, leaving the parties to bear their own costs.

17. Since the Court has appointed an Arbitrator, it is open to the petitioners as well as the respondents to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

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C.SARAVANAN, J.

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