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C.M.A.No.1491 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2024

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN
THILAKAVADI

C.M.A.No.1491 of 2024

&

C.M.P.No.13031 of 2024
in C.M.A.No.1491 of 2024

1. M/s.Bindu Appalam Depot
Represented by its Proprietor Mr.Bharathan
Old No.19, New No.13, Hyder Garden
First Street, Opposite B & C Mills
Perambur Barracks Road,
Chennai - 600 012.
2. Mr.Bharathan
Old No.19, New No.13, Hyder Garden
First Street, Opposite B & C Mills
Perambur Barracks Road
Chennai-600 012.
3. Mr.Sinoj
Old No.19, New No.13, Hyder Garden
First Street, Opposite B & C Mills
Perambur Barracks Road,
Chennai-600 012.

... Appellants

Vs.

M/s.Emayam Industries P Ltd.,
Represented by its Managing Director



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Mr.Prakash Subramani
No.121A & 121B, Emayam Towers
Bhuvaneswari Nagar,
Velachery, Chennai-600 042.

... Respondent

Civil Miscellaneous Appeal filed under Section 37(2)(a) of the Arbitration and Conciliation Act 1996 read with Order XLIII Rule 1 and Section 104 of CPC to set aside the order dated 20.06.2024 made in the memo filed by the appellants in objecting the marking of insufficiently stamped documents presented by the respondent / claimant in pending arbitration proceeding in Arbitration O.P.(Comm. Div)No.353 of 2023 on the file of the sole Arbitrator.

For Appellants : Mr.S.Senthilnathan

JUDGMENT

[Order of the Court was made by M.SUNDAR, J.,]

Captioned statutory appeal has been filed in this 'Commercial Appellate Division' ['CAD' for the sake of brevity and convenience] on 24.06.2024 assailing an order dated 20.06.2024 (made on a memo filed by appellants before us) by an 'Arbitral Tribunal' [hereinafter 'said AT' for the sake of brevity]. To be noted, said AT is a former Hon'ble Judge of this Court [Sole Arbitrator], he having been appointed by way of an order dated 07.11.2023 made in Arb.O.P (Comm.Div.) No.353 of 2023 by a Section 11 Court.

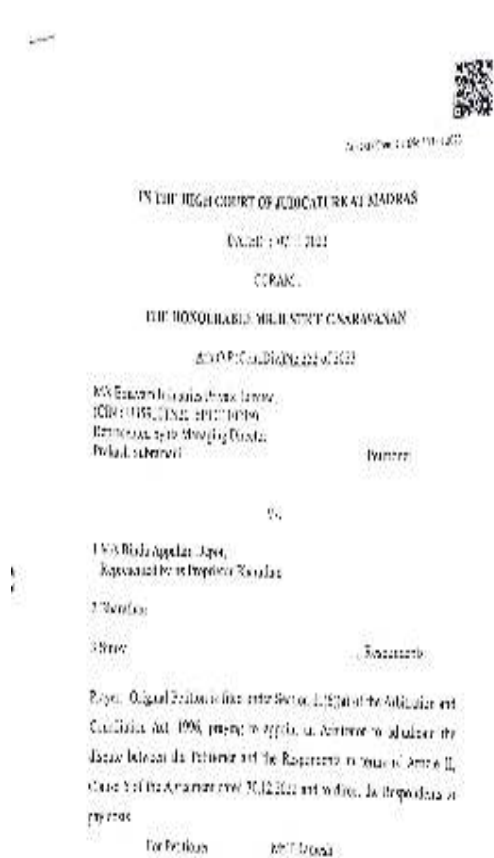


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2. This '07.11.2023 order' shall hereinafter be referred to as 'said

Section 11 Court order' for the sake of convenience and clarity. The '20.06.2024 order' made by said AT shall be referred to as 'impugned order' for the sake of convenience and clarity.

3. To be noted, the said Section 11 Court order is a consent order and we deem it appropriate to extract and reproduce the order. We do so. The same reads as follows:





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Arz. (C) Com 216 (No.153 of 2024)

ORDER

With the consent of the learned counsel for the petitioner and the respondents, The Hon'ble Mr. Justice B. Rajendran (Retd.), Former Judge of Madras High Court residing at New No.E15, Old No.E65, 5th Main Road, Anna Nagar East, Chennai - 600 102, (Mobile No.9445024747) is appointed as an Arbitrator to enter upon reference and adjudicate/resolve the *inter se* disputes between the parties.

2. 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.

3. 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

Arz. (C) Com 216 (No.153 of 2024)
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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 petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondents.

4. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.

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

07.11.2023

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4. We shall be alluding to the said Section 11 Court order, elsewhere
infra in the latter part of this order.

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5. Reverting to the impugned order i.e., order dated 20.06.2024 made by said AT, as already mentioned supra, the impugned order was made on a memo filed by the respondents before said AT {Appellants before us in captioned CMA} and this memo is dated 13.06.2024. A scanned reproduction of this memo is as follows:

9

BEFORE THE HON'BLE JUSTICE B. RAJENDRAN (RETD)

Arb. Case 353/23

Emayam Industries (P) Ltd	... Claimant
VS	
V/s Bindu Anilam	... Respondent

MEMO FILED ON BEHALF OF THE RESPONDENT

It is respectfully stated that the marking of insufficiently stamped documents are objected and made on the above objections. Submitted following citations:-

(1) 2003 (7) SCC 41
(2) 1916 48 Bomaby LJR 353
(3) Oniprakash Vs Lakshminarayana

On the side of the Respondent and orders may be passed

Dated at Chennai on this 13th day of June, 2024.

COUNSEL FOR THE RESPONDENTS



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6. As would be evident from the memo as well as the impugned order, the respondents had objected to marking of insufficiently stamped documents. In the hearing today, Mr.S.Senthilnathan, learned counsel for the appellants submitted that the objection is to three documents and they are as follows:

(i) Document dated 9th March 2021/09.04.2021 termed as 'MOU CUM RECEIPT'.

(ii) Document dated 8th April 2022 termed as 'SERVICE PARTNERSHIP DEED EXTENSION' and

(iii) Document dated 30.12.2022 termed as 'SERVICE PARTNERSHIP DEED'.

7. Before we proceed further, it is necessary to examine the maintainability of the captioned appeal before this CAD. The memorandum of grounds of appeal makes it clear that the captioned appeal has been filed in this CAD under Section 37(2)(a) of 'The Arbitration and Conciliation Act (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] read with Order XLIII Rule 1 and Section 104 of 'The Code of Civil Procedure, 1908' ['CPC' for the sake of brevity]. As regards, Section



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37(2)(a) of A and C Act, the same provides for an appeal when an 'Arbitral Tribunal' ['AT' for the sake of brevity] accepts a plea referred to under sub-sections (2) or (3) of Section 16 of A and C Act. In the case on hand, learned counsel for appellants very fairly submitted that it is not a case of sub-section (2) at all as the appellants are not saying that the said AT does not have jurisdiction. This submission is recorded. In any event, it is nobody's case that said AT has 'accepted' a plea either under sub-section (2) or under sub-section (3) of Section 16.

8. However, learned counsel submitted that this is a case under sub-section (3) of Section 16, as according to learned counsel, said AT is exceeding the scope of its authority and the plea has been raised as soon as the matter beyond the scope of its authority qua the arbitral proceedings has arisen. In other words, it is the specific say of learned counsel for appellants that rejecting the appellants' aforementioned memo dated 13.06.2024 objecting to the marking of the aforesaid three documents vide the impugned order is a matter where said AT has exceeded the scope of its authority. This Court is unable to persuade itself to accept this plea as the impugned order i.e., order dated 20.06.2024 made by said AT cannot by any stretch of



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imagination be said to be one exceeding the scope of its authority as said AT has only rejected objection to marking of three documents which according to appellants are insufficiently stamped. On a demurrer, even if it is a case of said AT exceeding the authority, the said AT has not accepted the plea as it has rejected the memo. Therefore, in our considered view, sub-section (3) also does not come into play. On a further demurrer, even if it is construed that sub-section (3) comes into play, sub-sections (5) and (6) of Section 16 make it clear that a AT shall decide on a plea referred to under sub-sections (2) and (3) and where the AT rejects the plea (as it is in the case on hand), continue with the arbitral proceedings and make the award. In the case on hand, even if the plea of the appellants are construed to be a plea that the AT is exceeding the scope of its authority, in and vide the impugned order said AT has taken a decision rejecting the plea (memo has been rejected) and therefore, vide sub-section (5), the AT should continue with the arbitral proceedings and make the arbitral award. Sub-section (6) makes it clear that a party aggrieved by such an award can make an application for setting aside said arbitral award in accordance with law under Section 34 of A and C Act. This means that when pleas under sub-sections (2) and (3) of



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Section 16 of A and C Act are rejected by the AT, the parties concerned should await for the completion of legal drill before the AT vide sub-section (5) and canvass it, if at all and if that be so, in a petition under Section 34 of A and C Act. To put it differently, an appeal under Section 37 (2)(a) of A and C Act would lie only when an AT accepts a plea under sub-sections (2) or (3) of Section 16 and axiomatically appeal would not lie when a AT does not accept such pleas. In other words, when a AT does not accept such pleas arbitration should proceed and award should be made owing to sub-sections (5) and (6) of Section 16. We are acutely conscious of the obtaining position that Hon'ble Supreme Court has made one exception to this proposition and that is vide ***Bhadra Products*** case law [***Indian Farmers Fertilizer Cooperative Limited Vs.. Bhadra Products*** reported in (2018) 2 SCC 534] but in ***Bhadra Products***, the question was whether a partial award qua limitation plea can be canvassed in a Section 34 petition. It is in that context that Hon'ble Supreme Court said that a Section 34 would lie without waiting for the legal drill vide sub-section (5). In the case on hand, captioned CMA is neither an application under Section 34 of A and C Act nor is it a case where said AT has ruled on its own jurisdiction i.e., kompetenz-kompetenz



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which has been statutorily imbibed in the A and C Act by borrowing copiously from the UNCITRAL model and the 1996 UK Act {The English Arbitration Act,1996}, all of which have been set out elaborately and elucidatively by Hon'ble Supreme Court in **Bhadra Products**. In **Bhadra Products** Hon'ble Supreme Court has also in a recommendatory tone said that Parliament can consider amending Section 34 of A and C Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Hon'ble Supreme Court also made it clear that *piecemeal* challenges lead to unnecessary delay and additional expenses which only defeats the 'ADR' ['Alternate Dispute Resolution'] mechanism and ecosystem of A and C Act which has been put in place by borrowing from UNCITRAL model and largely akin to the 1996 UK Arbitration Act. Relevant paragraph in **Bhadra Products** is Paragraph 30 and the same reads as follows:

'30. In our view, therefore, it is clear that the award dated 23-7-2015 is an interim award, which being an arbitral award, can be challenged separately and independently under Section 34 of the Act. We are of the view that such an award, which does not



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relate to the Arbitral Tribunal's own jurisdiction under Section 16, does not have to follow the drill of Sections 16(5) and (6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.'

It may not be necessary to dilate any further on this aspect of the matter as the matter at hand is not a Section 34 legal drill.

9. This takes us to Order XLIII Rule 1 of CPC. As regards XLIII Rule 1 of CPC, learned counsel has categorically submitted that he is not under any of the clauses under sub-section (1) of Order XLIII of CPC. We find that there are as many as 18 clauses under Rule 1 of Order XLIII [(a) to (w) but the clauses are 18 in number, considering certain deletions and insertions]. Learned counsel has categorically said he is not under any of the 18 clauses and he is only on Section 104 of CPC and it is the specific say of learned counsel that Section 104 provides for an appeal from orders set out thereunder vide clauses (a) to (i) save as otherwise expressly provided in



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the body of the code or by any law for the time being in force. Learned counsel submits that law for the time being in force is Section 37(2)(a) of A and C Act. We have already discussed Section 37(2)(a) and Sub-sections (2) and (3) of Section 16 of A and C Act and held that captioned appeal is not maintainable.

10. In the light of the discussion thus far, it is clear that the captioned appeal is not maintainable.

11. As we have held that the captioned appeal is not maintainable, that would be curtains on the captioned matter but as elaborate submissions were made by learned counsel and as the main OSA was heard out, we deem it appropriate to set out our views making it clear that the same shall not be construed as having entertained an appeal under Section 37 and/or as having heard out Section 37 appeal on merits. In other words, it is only for completion of facts and for better appreciation of this order as we are very clear that this first point itself is the end of the road for the appellants and it drops the curtains as regards Section 37 legal drill as we hold that captioned OSA is not maintainable and therefore the question of entertainability pales into insignificance.



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12. With the aforementioned clarification that what is to follow shall not be construed as discussion and/or dispositive reasoning in a Section 37 appeal and it is only for the limited purpose of capturing what unfurled in the hearing albeit with our views, we make it clear that in the event of this order being called in question in the hierarchy of Courts and in the event of Hon'ble Supreme Court holding that impugned order is assailable in a Section 37 appeal it would be desirable to set out our views on the other points that were urged elaborately. Therefore, the points are captured as a thumbnail sketch by way of bullet points:

- Learned counsel very fairly submitted that he is not challenging the jurisdiction of said AT;
- Though said Section 11 Court order is a consent order that does not preclude a party from assailing the jurisdiction of the arbitral award;
- As regards the three documents, the arbitration clause is Article II (5) in one of the three documents, namely a document captioned 'Service Partnership Deed dated 30.12.2022' and the same reads as follows:



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'5. Governing Law & Jurisdiction: *This Deed and all the rights and duties of the Parties arising from or relating in any to the subject matter of this Deed or the transaction(s) contemplated by it, shall be governed by and construed with solely in accordance with the laws of India in every particular manner; including formation and interpretation. Any proceedings arising out of or in connection with this Deed shall be settled by binding arbitration of a sole Arbitrator appointed by EIPL in Chennai City, Tamil Nadu State Courts in Chennai City will have exclusive jurisdiction in suits.*

In the event either party initiates legal proceedings in relation to unpaid payments and/or breach other terms of the Deed, this Deed shall be valid and binding during this period. These proceedings are limited only to those claims, and this Deed will continue to be valid till the time entire dues are paid by the Firm to EIPL, and their NOC is obtained. '

- Therefore, the question as to whether the arbitration agreement which is in the form of a clause in a primary contract is put in issue;
- The arbitration agreement is not compulsorily registrable. Learned counsel very fairly submitted that there is no quarrel on this proposition;
- This takes us to the question whether the arbitration agreement which is in the form of a clause in a primary contract is insufficiently stamped;
- As regards the primary contract i.e., the Service Partnership



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Deed dated 30.12.2022, it was submitted that the stamp duty payable vide Entry 46.A(b) of Schedule 1 of Indian Stamp Act, 1899 as applicable in Tamil Nadu is Rs.300/- but the contract has been executed in non-judicial stamp paper of value Rs.100/- leaving it insufficiently stamped to the extent Rs.200/-;

- As the point pertains to Arbitration Agreement, we deem it appropriate to capture the trajectory of the case laws in this regard. It all started with ***SMS Tea Estates*** case [***SMS Tea Estates Private Limited*** reported in (2011) 14 SCC 66] rendered on 20.07.2011. In ***SMS Tea Estates***, a two Hon'ble Judge Bench held that insufficiently stamped deed cannot be acted upon and therefore, arbitration agreement cannot be acted upon until insufficient stamping is cured. This was followed by ***Garware*** case law [***Garware Wall Ropes Limited*** case reported in (2019) 9 SCC 209 (rendered on 10.04.2019)] wherein ***SMS Tea Estates*** case law was reiterated. Thereafter in ***Vidya Drolia*** case [***Vidya Drolia &***



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Ors. Vs. Durga Trading Corporation reported in (2021) 2 **SCC 1**], a three Judges Bench vide order dated 14.12.2020 approved **SMS Tea Estates** and **Garware Wall Ropes** though **Vidya Drolia** arose out of a reference qua **Himangni Enterprises v. Kamaljeet Singh Ahluwalia** reported in (2017) 10 **SCC 706** doubting the correctness of **Himangni** as regards lessor and lessee agreements. Nonetheless, for the purpose of this order it will suffice to say that in **Vidya Drolia**, **SMS Tea Estates** and **Garware Wall Ropes** case laws were approved. Thereafter, **N.N.Global (1)** case reported in (2021) 4 **SCC 379** was rendered by another Bench of three Judges on 11.01.2021. In **N N Global (1)**, the 3 Judges disagreed with **SMS Tea Estates** and **Garware** as approved in **Vidya Drolia** and being a Coordinate three Judge Bench made a reference. This led to **N.N.Global (2)** which was rendered by a five Judges Bench. **N.N.Global (2)** was rendered on 25.04.2023 and it is reported in (2023) 7 **SCC 1**. To be noted, **N.N.Global (2)** was rendered by a 3:2



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majority wherein it resurrected ***SMS Tea Estates*** and ***Garware*** principles. However, this ***N.N.Global (2)*** in turn was reversed by a 7 member Hon'ble Bench of the Hon'ble Supreme Court in a Curative Petition [Curative Petition (c) No.44 of 2023 in Review Petition(c) No.704 of 2021 in Civil Appeal No.1599 of 2020] and this order was rendered on 13.12.2023 and this has been reported in ***2023 SCC OnLine SC 136***. In the Curative petition, which is titled '*In Re Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*', a 7 Member Bench of the Hon'ble Supreme Court clearly held that ***SMS Tea Estates*** and ***Garware*** as upheld by ***N.N.Global (1)*** is no more good law and it also held that in the light of Sections 33 and 35 of Indian Stamp Act, 1899 insufficiently stamped document is only a curable irregularity and not an illegality. As regards ***N.N.Global (2)*** adverted to supra, it was clarified that a insufficiently stamped document is not void and it is only



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inadmissible. To be noted, in the impugned order said AT has categorically observed that *N.N.Global* (2) has now been reversed vide the curative petition and Hon'ble Arbitrator (said AT) has copiously referred to various paragraphs from the Curative Petition order i.e., paragraphs 162, 166, 167, 177 and 178 in paragraph 13 of the impugned order.

13. Before writing that it is the end of the road for the appellants in this appeal and before dropping the curtains on the captioned matter, though obvious, we make it clear that if the appellants are aggrieved by the proceedings i.e., more particularly the impugned order, it will always be open to the appellants to wait for the completion of legal drill qua sub-sections (5) and (6) of Section 16 and thereafter, propel a Section 34 petition. If such a course is adopted, we make it clear that in this order we have only traced the trajectory *SMS Tea Estates* has taken in culminating in Curative Petition from 2011 (20.07.2011 to be precise) to 2023 (13.12.2023 to be precise) i.e., setting out obtaining legal position / declaration of law by Hon'ble Supreme Court and therefore Hon'ble single Judge would consider



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the matter on its own merits and in accordance with law with this order neither impeding nor serving as a impetus. Captioned appeal fails to pass muster qua maintainability.

Ergo, the sequitur is, captioned appeal is dismissed as not maintainable. Captioned CMP perishes with the appeal. In other words, CMP is also dismissed. This Court imposes restraint on itself and we refrain from imposing costs.

(M.S.,J.) (K.G.T.,J.)

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Neutral Citation : Yes / No
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