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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 123 OF 2024

Vijay Sharma

...Applicant

Versus

Vivek Makhija and Anr.

...Respondents

Mr. Karl Tamboly *a/w Mr. Dinesh Tiwari and Mr. Anish Sharma i/b Dinesh D. Tiwari and Associates for the Applicant.*

Dr. Abhinav Chandrachud *for the Respondents.*

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : MAY 9, 2025

Oral Judgment :

1. This Application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (“**the Act**”).

2. This matter was heard at length on a few occasions to consider the the resistance to proceeding to arbitration under the arbitration agreement whose existence is not in dispute.

3. The primary objection presented by the Respondents primarily is based on the premise that the issues involved in this Application under Section 11 have already been adjudicated in the past by an order dated January 31, 2022 (“**2022 Order**”) passed by the Learned Single Judge of this

Court, with a direction that the instrument in question ought to be stamped. It was submitted that the 2022 Order is a final adjudication on merits and this is the second round of litigation under Section 11 on the same issues, by seeking reference of the very same disputes to arbitration, but without complying with the adjudication on merits as made in the 2022 Order.

4. The second objection is on the premise that the Applicant had all along been aware about the stamp duty payable on the instrument in question having been adjudicated, and that the Applicant had suppressed the same from the Court. Consequently, the submission of the Respondents is that the Applicant should be non-suited on the premise of having come to Court with unclean hands, and that the Application must be rejected.

5. Having heard Mr. Karl Tamboly, Learned Counsel on behalf of the Applicant and Dr. Abhinav Chandrachud, Learned Counsel on behalf of the Respondents, and upon perusal of the record with their assistance, in my opinion, the Application deserves to be allowed since the objections of the Respondents are not worthy of necessitating dismissal of the Application.

6. It is seen that the 2022 Order, essentially leaned on the then prevailing legal position in connection with inadequacy of stamping of the instrument containing the arbitration agreement. The law has been differently declared now by a seven-judge bench of the Supreme Court. The Supreme Court has explicitly declared that it is not for the Section 11 Court

to get involved in the adequacy of stamp duty and has declared that issues relating to alleged inadequacy of stamp duty and its implications for the adjudication of the disputes involved, must be taken up before the Arbitral Tribunal. It is in this context that the Respondents submit that a different declaration of the law would not lead to closed and adjudicated matters being revisited by a fresh application. Therefore, the Respondents contend that the 2022 Order constitutes a final adjudication on merits.

7. Having heard the Learned Counsel for the parties at length and having examined the notes tendered by them, in my opinion, the 2022 Order cannot be regarded as an “adjudication on merits”. All that the 2022 Order does is to permit the Applicant to have the accurate quantum of stamp duty adjudicated with liberty to come back to Court. This is not an adjudication on merits but the grant of liberty to have the stamp duty adjudicated and paid in line with the then applicable law governing stamp duty. Pursuant to the 2022 Order, it is common ground that the Applicant filed an application with the stamp authorities.

8. On January 23, 2025 when the matter came up before me, the Respondents’ submission was that the Applicant had not had the instrument adjudicated at all (in the teeth of the 2022 Order) and that the Applicant had simply filed a fresh application under Section 11 of the Act. The Respondents had contended that the Respondents had sought information under the *Right to Information Act, 2005* (“**RTI Act**”) from the stamp authorities as to whether the Applicant had indeed filed an

application for adjudication of stamp duty. The result of that query had indicated that the Applicant had not filed any application at all.

9. In this context, the Applicant was directed to file an affidavit confirming that he had indeed moved the stamp authorities for adjudication of stamp duty. Although I was *prima facie* of the view that issue of stamp duty was no longer a matter of concern for the Section 11 Court and that it would be appropriate to refer the matter to the Arbitral Tribunal to deal with the issue of inadequacy of stamp duty, in view of the 2022 Order, the Applicant was directed to confirm the precise factual position of the activity carried out after the 2022 Order.

10. This led to an affidavit dated February 1, 2025 being filed by the Applicant. It transpires from such affidavit that the Applicant had indeed applied for adjudication of stamp duty after the 2022 Order granted liberty to the Applicant to do so. Since the direction by which the matter was disposed of by the 2022 Order was one granting liberty to apply to the stamp duty authorities and since that liberty has been availed of and a request for adjudication had indeed been made, it would not be proper to contend that there was no change in circumstances in the filing of the current Application.

11. That apart, apart from the grant of liberty to have the stamp duty assessed, the 2022 Order was not an “adjudication on merits” on any point of law or mixed question of fact and law. The 2022 Order permitted an application to be made for adjudication of stamp duty and that permission

was availed of. The 2022 Order also granted liberty to file a fresh application under Section 11 of the Act after the stamp duty was assessed. Meanwhile, the very law requiring the Section 11 Court to concern itself with the issue of stamp duty has undergone a change. The Applicant has complied with the 2022 Order by applying to the stamp authorities for assessment of stamp duty. Therefore, having acted in accordance with the 2022 Order, and now factoring in the newly declared law, in my opinion, this Application has been validly filed. In my opinion, there is no relevance left for the purported “adjudication” made in the 2022 Order.

12. Since the Applicant has indeed applied to the stamp authorities, it would follow that the responses under the RTI Act given to the Respondents by the stamp duty authorities was inaccurate. It is now the case of the Respondents, based on the additional affidavit filed by the Applicant, that the Applicant had all along been aware that they had applied and that their application had been adjudicated but this development of events had not been disclosed in this Section 11 Application. Therefore, the Respondents contend, the Applicant has suppressed material information while filing this Application and has therefore not come to court with clean hands. The Respondents refer to a voucher raised by the stamp authorities quantifying the amount of stamp duty as adjudicated and payable, which is now annexed to the Applicant’s additional affidavit. The objection is essentially that without paying the stamp duty as adjudicated, which is an outcome flowing from the 2022 Order, the Applicant has essentially sought

to not pay stamp duty and yet has filed this Application, which warrants dismissal of this Section 11 Application, invoking the principles laid down in *S.P. Chengalvaraya Naidu*¹ case.

13. The Applicant submits that he was of the *bona fide* view that such adjudication had not taken place. It was upon being forced to file an affidavit that he examined the records afresh and has annexed everything found in the matter. Learned Counsel has communicated the receipt of instructions to apologize for error in not being more diligent to disclose this development upfront when this Section 11 Application was filed. The Section 11 Application had in fact stated that adjudication of stamp duty is awaited, which is what is assailed by the Respondents as an untruthful statement in view of the information contained in the additional affidavit.

14. Mr. Tamboly is at pains to underline the fact that the Applicant had nothing to gain by not disclosing the fact of stamp duty having been adjudicated. The Section 11 Application contending that stamp duty assessment was awaited was a *bona fide* belief and can at worst be put to lack of diligence, he would submit. On examination of the record, all that has been available has been annexed to the additional affidavit.

15. The Applicant's conduct in filing this Application without examining the record is clearly not appreciated. However, in the facts and circumstances of the case, I am not of the opinion that this is a matter where the Applicant can be said to have approached the Court with unclean

¹ S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1

hands. The alleged suppression of stamp duty having been adjudicated would have been of no benefit to the Applicant since once referred to arbitration, the Arbitral Tribunal would have asked the Applicant to explain the factual position on applying for adjudication of stamp duty.

16. In these circumstances, one could say that the approach of the Applicant was not diligent or was even lackadaisical but I am not convinced that it can be pitched any higher as sought to be done by the Respondents, in alleging deliberate suppression necessitating rejection of the Section 11 Application. The objections of the Respondent represent a strong resistance to referral to arbitration but within the scope of jurisdiction of this Court, no useful purpose would be served by keeping this Application pending any further on the docket of this Court. Therefore, the Application is ***finally disposed of*** in the following terms :-

A] Ms. Gulnar Mistry, Learned Advocate, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties;

Address : 101, 1st Floor, 1 Infinity

(Formerly known as Ramnimi Fort),

Cawasji Patel Street, Mumbai – 400 001.

E mail : gm@mistrychambers.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from the date on which this order is uploaded on the website of this Court. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the Advocates for the Applicant so as to enable them to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Application and a copy of the same shall be furnished by the Advocates for the Applicant to the Respondents;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

17. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

18. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]