



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

COMMERCIAL ARBITRATION APPLICATION (L) NO.10282 OF 2023

John Cockerill India Limited ... Applicant
Vs.
Sanjay Kamalakar Navare ... Respondent

Mr. Rohan Kelkar a/w. Ms. Sarah Navodia and Ms. Pragma Chandak i/b. Cyril Amarchand Mangaldas for Applicant.

Mr. Piyush Raheja a/w. Mr. Dharmesh Pandya i/b. Kurdukar Associates for Respondent.

CORAM : MANISH PITALE, J.
DATE : SEPTEMBER 12, 2023

ORDER :

1. By this application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (Arbitration Act), the applicant is seeking appointment of an arbitrator on the basis of an arbitration clause contained in an agreement executed between the applicant (employer) and the respondent (erstwhile employee) titled as 'Employee Non-Disclosure and Non-Solicitation Agreement' dated 15.11.2021.

2. In the light of disputes having arisen between the parties, the applicant invoked the arbitration clause and since the agreed procedure for appointment of arbitrator failed, the present application was filed before this Court.

3. The respondent has appeared through counsel. No reply affidavit is on record. Yet, Mr. Kelkar, learned counsel appearing for the applicant fairly points out the recent judgement of the Constitution Bench of the Supreme Court in the case of *N. N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited*, (2023) 7 SCC 1. In the said judgment, the majority opinion has laid down that in the case of unstamped or

insufficiently stamped agreement, the same cannot be acted upon, unless the document is impounded and requisite stamp duty is paid, as also certificate to that effect is made available.

4. In that light, attention of this Court is invited to the subject agreement, the original of which was produced before this Court, to contend that it is simply a non-disclosure and non-solicitation agreement executed between the parties, having no monetary value assigned to it. It is submitted that the applicant would be able to demonstrate before this Court that under the provisions of the Maharashtra Stamp Act, 1958 (Maharashtra Stamp Act) and the Schedule appended thereto, the stamp duty payable on such an unstamped subject agreement can be determined by a simple exercise. Thereafter, this Court may grant an opportunity to the applicant to pay such stamp duty before an officer of this Court, who can then endorse the same and transfer the stamp duty, deposited by the applicant along with an authenticated copy of the subject agreement, to the Collector of Stamps, facilitating hearing and disposal of the present application filed under Section 11 of the Arbitration Act.

5. In this context, Mr. Kelkar, learned counsel for the applicant refers to and relies upon a recent judgement and order dated 22.08.2023, passed by the Delhi High Court, after the aforementioned judgement of the Constitution Bench of the Supreme Court was rendered in the case of **N. N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited** (*supra*).

6. Attention of this Court was invited to paragraphs 4, 14 to 17 and 22 of the judgement of the Delhi High Court in the case of **Splendor Landbase Limited Vs. Aparna Ashram Society and another** (Judgement and order dated 22.08.2023 passed in **Arbitration Petition No.366 of 2021** and connected petitions). It was submitted that the Delhi High

Court was considering *pari materia* provisions of the Indian Stamp Act, 1899. After considering such provisions, the Delhi High Court held that the Court considering an application under Section 11 of the Arbitration Act could undertake the exercise of determination of requisite stamp duty, enable deposit of the same, to be forwarded to the Collector of Stamps so that a defect, essentially curable in nature, could be cured and the application for appointment of arbitrator could proceed.

7. Thereupon, the learned counsel appearing for the applicant referred to Sections 33, 34, 37 and 41 of the Maharashtra Stamp Act, to contend that a similar course could be followed by this Court, in the facts and circumstances of the present case.

8. The learned counsel for the applicant then invited attention of this Court to the Schedule appended to the Maharashtra Stamp Act, particularly Article 5(h)(A) and (B) to contend that, considering the nature of the subject agreement, no duty is chargeable and hence the proper stamp duty would be Rs.100/-. It was submitted that applying the first proviso to Section 34 of the Maharashtra Stamp Act, particularly sub-clause (ii) thereof, a further penalty amount @ 2% per month would be payable. Upon referring to the date of the said agreement i.e. 15.11.2021, it was submitted that the penalty amount would have to be calculated on the basis that a period of about 22 months has already gone by. As 2% of Rs.100/- is an amount of Rs.2/-, the said amount multiplied by time period of 22 months comes to Rs.44/- and hence, the total amount of stamp duty and penalty would come to Rs.144/-. It was submitted that the applicant is ready to deposit the said amount today itself before the officer, who may be authorized by this Court. Such an officer could give an endorsement / certificate in respect of the subject agreement as regards the payment of stamp duty and penalty, to facilitate further consideration and hearing of the present application

filed under Section 11 of the Arbitration Act.

9. The learned counsel appearing for the respondent did not raise any serious objection to the contentions raised on behalf of the applicant as regards the manner in which the stamp duty and penalty payable on the subject agreement could be made good, so that further hearing on the present application could be undertaken.

10. This Court has perused the subject agreement dated 15.11.2021. The original is produced for perusal of this Court. This Court finds that there is indeed no monetary value assignable to the subject agreement, as it is simply an employee non-disclosure and non-solicitation agreement.

11. There can be no quarrel with the proposition that in the case of **N. N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited** (*supra*), the majority opinion lays down that an unstamped or an insufficiently stamped agreement cannot be acted upon. Hence, if this Court is to consider the present application under Section 11 of the Arbitration Act, the deficiency of stamp duty and penalty, if any, would have to be made good. One of the ways in which this could be achieved, would be to impound the document and to refer the same to the Collector of Stamps for determination of the amount payable towards stamp duty and penalty, thereafter direct payment of the same before the Collector of Stamps by the applicant and upon an endorsement / certificate being issued by the Collector of Stamps, the subject agreement / document could be taken into consideration for hearing the present application under Section 11 of the Arbitration Act. The alternative would be to follow the course of action canvassed by the learned counsel for the applicant before this Court. Since reliance is placed on the judgement of the Delhi High Court in the case of **Splendor Landbase Limited Vs. Aparna Ashram Society and**

another (*supra*), it would be appropriate to refer to the relevant portions of the said judgement.

12. Paragraphs 4, 14 to 17 and 22 of the said judgement read as follows:-

“4. In the above conspectus, it is to be examined as to how the statutory mandate under Section 11(13) of the Arbitration and Conciliation Act, 1996 (the “Act”), which aims at expeditious disposal of petitions under Section 11 of the Act, is harmonized with the obligation imposed vide the judgement of N. N. Global i.e. to act in tune with the statutory dictate of the Indian Stamp Act, 1899 (the “Stamp Act”). Some possible issues that arise for consideration in the aftermath of the N.N. Global judgement were identified and set out in the order dated 30.05.2023 as under:-

(i) Whether it is incumbent on the petitioner, in a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, to file the original of the duly stamped arbitration agreement/contract or whether it would suffice for a 'true copy' thereof to be filed?

(ii) Whether in terms of proviso (b) to Section 33(2) read with proviso (a) to Section 35, Section 38 and Section 42 of the Indian Stamp Act, 1899, is it permissible for the petitioner to pay the deficient stamp duty together with penalty in these proceedings or whether it is incumbent/mandatory to send the concerned agreement / contract to the Collector for adjudication as to the proper stamp and penalty payable thereon?

(iii) Whether the adjudication by the Collector under Section 40 of the Indian Stamp Act can be made time bound?

(iv) Whether the stamping of the arbitration agreement/contract must conform to the local laws/stamping rate(s) prescribed at the place where the arbitration agreement/contract was executed and/or whether the same are required to conform to the relevant prescription at the place where the petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed?

14. The next issue that is required to be considered is the procedure post impounding of the unstamped instrument/ agreement as mandated under Section 33 of the Stamp Act.

15. It is evident from the scheme of the Stamp Act, as also noticed in N.N. Global, that it is open for this court to either:

(i) Send the impounded agreement/ instrument to the concerned Collector of Stamps, who shall then adopt the procedure under Section 40 of the Stamp Act and require the payment of proper stamp duty together with a penalty as contemplated therein. Once such duty or penalty has been paid, the Collector shall certify by endorsement thereon that the proper duty (together with penalty, if any) has been levied in respect thereof. Under Section 42 of the Stamp Act, every instrument/ agreement so endorsed shall be admissible in evidence, and it would be open for this Court to act on the basis thereof in proceedings under Section 11 of the Act.

ALTERNATIVELY:

(ii) It is also open for this Court to take recourse to Section 35 of the Stamp Act and enable deposit of the requisite stamp duty alongwith penalty as contemplated under proviso (a) to Section 35 of the Stamp Act and thereafter, take further steps [as amplified hereinbelow] as contemplated under other sections of the Stamp Act, eventually culminating in the concerned instrument being admitted in evidence/acted upon for the purpose of proceedings under Section 11 of the Act.

16. It would be open for this Court to exercise either of the above options, as may be deemed expedient depending upon the facts and circumstances of the case.

17. In appropriate cases, particularly where the quantum of stamp duty payable is not in dispute, it may be apposite for this Court to take recourse to the latter of the two options set out hereinabove, to enable deposit of the requisite stamp duty in Court and thereafter to act on the basis of the instrument containing the arbitration agreement. In this regard, it is notable that para 147 of N.N. Global, specifically holds that it would be open for the Court seized of a petition under Section 11 of the Act, to ensure adherence to Section 33 and 35 of the Stamp Act under its own “watchful gaze”. It would thus, be

consistent with N.N. Global, for this Court to itself collect the requisite stamp duty with which the agreement/ instrument is chargeable, together with ten times the amount of proper duty or deficient portion thereof, in terms of proviso (a) to Section 35.

22. However, while taking recourse to Section 35 of the Stamp Act for the purpose of enabling deposit of concerned stamp duty together with penalty in this Court, the law laid down by the Supreme Court in *Black Pearl Hotels Pvt. Ltd. v. Planet M. Retail Ltd.*, has to be adhered to. In terms thereof, although it is open for this Court to delegate [under proviso (b) of Section 33(2) of the Stamp Act] the duty of examining and impounding the concerned instrument to such officer as the Court appoints in that behalf, the duty of determining the nature of the instrument and the stamp duty payable thereon cannot be delegated and the same has to be performed by the Court itself. However, the Court can delegate the task of preparing a “report” on the said aspect to an officer of this Court, upon submission of which the necessary final determination can be made by the Court. The relevant observations in *Black Pearl Hotels Pvt. Ltd.(supra)*, are as under:-

“16. It is evincible from the impugned order that the learned Judge has left both the aspects, that is, determination of the nature and character of the document and impounding of the same to the Registrar. Therefore, the sentinel question that arises for consideration is whether the learned Single Judge for the purpose of determining the character of the instrument could have delegated the authority to the Registrar. A judicial functioning has to be done in a judicial manner. The duty of determination of an instrument or, to explicate, to determine when there is a contest, a particular document to be of specific nature, the adjudication has to be done by the Judge after hearing the counsel for the parties. It is a part of judicial function and hence, the same cannot be delegated. Be it noted, under the High Court Rules, in certain High Courts, the computation is done by the authorities in the Registry with regard to the court fees but that also is subject to challenge before the Court when the applicability of a particular provision of the Court Fees Act, 1870 is concerned. Thus analysed, we are inclined to think that the authority is not empowered to determine the nature

and character of the document. He may at the best send a report to the court expressing his views on a document which is subject to final determination by the court.”

13. This Court agrees with the contention raised on behalf of the applicant that since the Delhi High Court was considering *pari materia* provisions of the Indian Stamp Act, this Court could be persuaded to follow the view taken by the Delhi High Court in similar circumstances in the aforementioned judgement.

14. In that light, this Court has perused the relevant provisions of the Maharashtra Stamp Act, including Sections 33, 34, 37 and 41 thereof. The relevant portions of the said provisions read as follows:-

“33. Examination and impounding of instruments

(1) Subject to the provisions of section 32A, every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police or any other officer, empowered by law to investigate offences under any law for the time being in force, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall, if it appears to him that such instrument is not duly stamped, impound the same irrespective whether the instrument is or is not valid in law.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed :

Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973;

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section

may be delegated to such officer as the Court may appoint in this behalf.

- (3) For the purposes of this section, in cases of doubt,—
- (a) the State Government may determine what offices shall be deemed to be public offices; and
 - (b) the State Government may determine who shall be deemed to be persons in charge of public offices.”

34. Instruments not duly stamped inadmissible in evidence, etc.

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument.

Provided that,—

- (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of—
 - (i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and
 - (ii) a penalty at the rate of 2 per cent. of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument :

Provided that, in no case, the amount of the penalty shall exceed four times the deficient portion of the stamp duty;

...

37. Instruments impounded how dealt with

(1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 34 or of duty as provided by section 36, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

...

41. Endorsement of instruments on which duty has been paid under section 34, 39 or 40

(1) When the duty and penalty (if any) leviable in respect of any instrument not being any instrument referred to in sub-section (1) of section 32A, have been paid under section 34, section 39 or section 40, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) Subject to the provisions of section 53A, every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on the application in this behalf, to the person who produced it, or to the person from whose possession it came into the hands of the Officer impounding it, or to any other person according to the directions of such person :

Provided that,—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 34, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate ;

(b) nothing in this section shall affect the provisions of rule 9 of Order XIII in Schedule I of the Code of Civil Procedure, 1908.”

15. This Court is convinced that in a given case, where there is no dispute raised about the amount payable towards stamp duty and penalty, by applying the provisions of the Maharashtra Stamp Act read with the Schedule appended thereto, this Court could conduct the exercise of determining the stamp duty payable and authorizing an officer of this Court to collect the same, to be forwarded to the Collector of Stamps. The Officer, so authorized by this Court, would then be entitled to give

an endorsement on the subject agreement / document, to certify that the stamp duty along with penalty, as determined by the Court, has been deposited. As a consequence, the defect of non-payment of stamp duty and penalty, if any, would stand cured and the arbitration agreement could, therefore, be acted upon, facilitating hearing of the application under Section 11 of the Arbitration Act.

16. In that light, this Court is inclined to conduct the exercise of determining stamp duty payable on the subject agreement. Perusal of the Schedule appended to the Maharashtra Stamp Act shows that the subject agreement would fall under Article 5(h)(B). This Court has perused the categories of agreements specified in Article 5(h)(A) of the Schedule and it is found that the subject agreement does not fall in any of the categories identified in Article 5(h)(A)(i) to (vi). Hence, Article 5(h)(B) of the Schedule applies under which no duty is chargeable on the subject agreement. Consequently, the proper stamp duty payable comes only to Rs.100/-.

17. Applying proviso (a)(ii) to Section 34 of the Maharashtra Stamp Act, the penalty payable would indeed come to Rs.44/-, considering the fact that the penalty is payable @ 2% on the deficit stamp duty. In this case, since no stamp duty was at all paid, the entire amount of Rs.100/-, towards proper stamp duty is payable and 2% penalty comes to Rs.2/-. There can be no dispute about the fact that the period of 22 months has elapsed from the date of the subject agreement i.e. 15.11.2021. Therefore, the stamp duty along with penalty payable on the subject agreement, by applying the relevant article from the Schedule appended to the Stamp Act, comes to Rs.144/-.

18. The learned counsel for the applicant, on instructions, makes a statement that the applicant is ready to deposit the said amount today itself. The learned counsel for the respondent has also not disputed the

manner in which the aforesaid amount towards stamp duty and penalty has been determined by this Court.

19. In view of the above, this Court directs as follows:-

- (a) The Prothonotary and Senior Master of this Court is authorized under *proviso* (b) to Section 33(2) read with Sections 37 and 41 of the Stamp Act to impound the original agreement and to collect the aforesaid amount of Rs.144/-, payable towards stamp duty and penalty, from the applicant and to forward the same to the Collector of Stamps.
- (b) In order to further facilitate the aforesaid exercise, the applicant shall deposit original of the subject agreement with the Prothonotary and Senior Master of this Court, within 10 days from today.
- (c) Upon the applicant depositing the aforementioned amount of Rs.144/- towards the stamp duty and penalty, the Prothonotary and Senior Master of this Court shall endorse the said original subject agreement, as having been duly stamped on proper stamp duty along with penalty being deposited.
- (d) The Prothonotary and Senior Master of this Court shall then issue a certificate in writing, stating that the amount of stamp duty and penalty has been duly paid and shall forward such amount to the Collector of Stamps. Along with the stamp duty and penalty, the Prothonotary and Senior Master shall also forward authenticated copy of the subject agreement to the Collector of Stamps.
- (e) The applicant shall thereupon be entitled to place the proof of such exercise, having been completed, before this Court

for further consideration and hearing of the present application filed under Section 11 of the Arbitration Act.

- (f) The Prothonotary and Senior Master of this Court shall complete the aforementioned exercise within 10 days of the applicant depositing the amount towards the stamp duty and penalty, as determined hereinabove.

20. Liberty to the parties to mention.

(MANISH PITALE, J.)

Minal Parab