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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 21.07.2023

\+ **Review Petition No. 161/2023 in ARB.P. 549/2022**

AMBIENCE DEVELOPERS AND INFRASTRUCTURE PVT. LTD.
..... Petitioner
Through: Ms. Kittu Bajaj, Advocate.

Versus

ZESTY FOODS ..... Respondent
Through: Mr. Amit Chaubey, Advocate.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

I.A. No. 11173/2023 (Delay)

1. For the reasons stated in the application, the delay in filing the review petition is condoned.

2. The application stands disposed of.

Review Petition No. 161/2023

3. The present review petition has been filed by the respondent seeking review of the order dated 20.03.2023 passed by this court, whereby the petition filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (the Act) was allowed.

4. The review petition is filed on the premise that the agreement dated 02.02.2019 executed between the parties, containing the arbitration clause, is

unstamped, and after the judgment in ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.,*** 2023 SCC OnLine SC 495, the same is invalid in law/cannot be acted upon, and liable to be impounded by this court. It is prayed as under:

> *"a. Allow the present application for review of the Order dated 20.03.2023 passed by this Hon'ble Court.*
> *b. Impound the agreement dated 02.02.2019 under the provisions of Stamp Act, 1899 and registration Act.*
> *c. Pass/make such other appropriate orders and /or directions as this Hon'ble court may deem fit and proper in the facts and circumstances of the present case."*

5. I have perused the record and heard learned counsel for the review petitioner/respondent**.**

6. At the outset, it is noticed that stamp duty amount of Rs. 100/- has been paid on the agreement dated 02.02.2019. As such, the contention of learned counsel for respondent that the said agreement is unstamped is factually incorrect. It is also noticed that the order dated 20.03.2023 was a consent order which specifically reserves the right of the respondent to raise preliminary objections with regard to the arbitrability/jurisdiction (which would include objections on account of insufficiency of stamp duty, and/or for non registration of the said agreement). The said order, *inter-alia*, directs as under:

> *"9. After some hearing, respective counsels for the parties are in agreement that a Sole Arbitrator be appointed to adjudicate the disputes between the parties.*
>
> *xxx* *xxx* *xxx*
>
> *11. It is agreed between the parties that preliminary objections sought to be raised by the respondent with regard to the arbitrability/jurisdiction shall be decided by the learned Arbitrator at the outset before adjudicating the claim/s on merits. It is directed accordingly."*

7. The order dated 20.03.2023 was consistent with the judgment of the Supreme Court in ***Intercontinental Hotels Group (India) (P) Ltd. v. Waterline Hotels (P) Ltd.,*** (2022) 7 SCC 662.

8. In ***Intercontinental Hotels*** (supra), the Supreme Court distinguished between the cases involving non-payment of stamp duty *vis-à-vis* insufficiency of stamp duty, and held as under:

> *"**25.** Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this 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.*
>
> *xxx xxx xxx*
>
> ***30**. It may be noted that the petitioners have themselves attempted to self-adjudicate the required stamp duty and have paid, on 29-7-2019, a stamp duty of Rs 2200, describing the HMA as a "bond". On 10-6-2020, the petitioners further purchased 11 e-stamps for Rs 200 each, describing the HMA as an "agreement" under Article 5(j). Therefore, it falls upon the Court, under the Stamp Act to review the nature of the agreement in order to ascertain the stamp duty payable. From the above it is clear, that stamp duty has been paid, whether it be insufficient or appropriate is a question that may be answered at a later stage as this Court cannot review or go into this aspect under Section 11(6). If it was a question of complete non-stamping, then this Court, might have had an occasion to examine the concern raised in N.N. Global case, however, this case, is not one such scenario."*

9. The review of the order dated 20.03.2023 is sought on the basis of a subsequent decision of the Constitution Bench of the Supreme Court in ***N.N. Global*** (supra).

10. It is noticed that even in ***N.N. Global*** (supra), the Supreme Court, *inter-alia*, held as under:

> *"114. The question would arise as follows:*
>
> *i. xxx xxx xxx*
>
> *....*
>
> *v. The view that cases under Section 11 of the Act would consume more time and hinder the timely progress of arbitration and that the matter must be postponed so that the Arbitrator will more suitably deal with it, does not appeal to us. While the Stamp Act is primarily intended to collect revenue and it is not intended to arm a litigant to raise 'technical pleas', this would hardly furnish justification for the Court to ignore the voice of the Legislature couched in unambiguous terms. We find that the view expressed in SMS Tea Estates (supra), being reiterated, despite the insertion of Section 11(6A), would promote the object of the Stamp Act and yet be reconcilable with the mandate of Section 11(6A). We may, however, qualify what we have said with a caveat. There may be cases, where no stamp duty is seen paid. It paves the way for the unambiguous discharge of duty under Sections 33 and 35 of the Stamp Act. There may, however, be cases, where it may be stamped but the objection is taken by the party that it is not duly stamped. In such cases, no doubt, it is ordinarily the duty of the Court to examine the matter with reference to the duty under Section 33(2). If the claim that it is insufficiently stamped, appears to the Court to be on the face of it, wholly without foundation, it may make the Reference on the basis of the existence of an Arbitration Agreement otherwise and then leave it open to the Arbitrator to exercise the power under Section 33, should it become necessary. This approach does justice to the word 'examine' in Section 33(2) of the Stamp Act while not ignoring the command of Section 11(6A) of the Act. It is not to be confused with the duty to examine prima facie whether an 'Arbitration Agreement' exists under Section 11(6A) of the Act, but is related to the duty to examine the matter under Section 33(2) of the Stamp Act."*

11. Thus, ***N.N. Global*** (supra) itself contemplates that in certain situations, it may be expedient to leave it to the arbitrator to determine the issue as to whether stamping is insufficient, and if so, the arbitrator would take recourse to Section 33 of the Stamp Act. In the present case, the arbitrator having already been appointed, the applicant is not in any manner constrained from taking appropriate plea/s regarding alleged insufficiency of stamping, before the arbitrator.

12. Even otherwise, a review is precluded in terms of the explanation to Order XLVII Rule 1 CPC, which states as under:

> *"1. Application for review of judgment: -*
>
> *xxx xxx xxx*
>
> *Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."*

13. Thus, where any question of law on which the judgment of the Court is based, has been reversed or modified by a subsequent decision of a superior Court in any other case, the same shall not be a ground for the review of such judgment.

14. In ***Neelima Srivastava vs. State of Uttar Pradesh and Ors.,*** 2021 SCC OnLine SC 610, the Supreme Court, *inter-alia,* held as under:

> "*30. ....Mere over-ruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between over-rule a principle and reversal of the judgment. The judgment in question itself has to be assailed and got rid of in a manner known to or recognized by law. Mere over-ruling of the principles by a subsequent judgement will not dilute the binding effect of the decision on inter-parties."*

Further, relying upon the judgement of ***Naresh Shridhar Mirajkar vs. State of Maharashtra,*** AIR 1967 SC1 and ***Union of India vs. Major S.P. Sharma,*** (2014) 6 SCC 351, it was held by the Supreme Court in ***Neelima Srivastava*** (supra) as under:

> "*36. Thus, it is very well settled that it is not permissible for the parties to re-open the concluded judgments of the Court as the same may not only tantamount to an abuse of the process of the Court but would have far reaching adverse effect on the administration of justice.*"

15. In ***Beghar Foundation vs. Justice K.S. Puttaswamy (Retired) & Ors.,*** (2021) 3 SCC 1, it has been observed that change in law or subsequent decision/judgement of a Coordinate or larger Bench does not afford a ground for review.

16. In ***Subramanian Swamy v. State of T.N.,*** (2014) 5 SCC 75, it was held by the Supreme Court as under:

> ***"52.*** *The issue can be examined from another angle. The Explanation to Order 47 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") provides that if the decision on a question of law on which the judgment of the court is based, is reversed or modified by the subsequent decision of a superior court in any other case, it shall not be a ground for the review of such judgment. Thus, even an erroneous decision cannot be a ground for the court to undertake review, as the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and in absence of any such error, finality attached to the judgment/order cannot be disturbed. (Vide Rajender Kumar v. Rambhai [(2007) 15 SCC 513 : (2010) 3 SCC (Cri) 584 : AIR 2003 SC 2095] .)"*

17. Again, in ***BSNL vs. Union of India & Ors.,*** (2006) 3 SCC 1, it was *inter-alia* held by the Supreme Court as under:

> "*22. ....As we have said, overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate....."*

18. Thus, the applicant has failed to make out any case of review of the judgment/order dated 20.03.2023.

19. The review petition is accordingly dismissed.

JULY 21, 2023/hg **SACHIN DATTA, J**