

HIGH COURT OF ANDHRA PRADESH

ICOMAA No.01 of 2022

Between:

VR Commodities Private Limited

....Appellant

v.

Norvic Shipping Asia Pte. Ltd.

....
Respondent

JUDGMENT PRONOUNCED ON 05.05.2022

HON'BLE MR. JUSTICE PRASHANT KUMAR MISHRA, CHIEF JUSTICE

A N D

HON'BLE MR. JUSTICE M. SATYANARAYANA MURTHY

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? -No -
2. Whether the copies of judgment may be
marked to Law Reporters/Journals -Yes-
3. Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? -Yes-

*** HON'BLE MR. JUSTICE PRASHANT KUMAR MISHRA, CHIEF JUSTICE**

A N D

HON'BLE MR. JUSTICE M. SATYANARAYANA MURTHY

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VR Commodities Private Limited

....Appellant

v.

\$ Norvic Shipping Asia Pte. Ltd.

....
Respondent

! Counsel for the Appellant : Mr.Sanjay Suraneni representing
Avanija Inuganti

Counsel for Respondents : Mr. Amitava Majumdar

<Gist :

>Head Note:

? Cases referred:

- (1) (2019) 9 SCC 209
- (2) AIR 2019 Bom 149
- (3) (2021) 4 SCC 379
- (4) (2021) 2 SCC 1
- (5) JT 1995 (3) SC 186
- (6) 1942 AC 356
- (7) (2007) UKHL 40
- (8) (2012) WLR (D) 148
- (9) (1999) Q.B. 785
- (10) (2013) EWHC 470 (Comm) at [35]-[36]
- (11) (2016) SGHC 249
- (12) (2019) SCGA 84
- (13) (2014) 5 SCC 68
- (14) (2007) 5 SCC 692
- (15) (2011) 14 SCC 66
- (16) (2009) 2 SCC 134
- (17) 2019 SCC OnLine Bom 13047
- (18) AIR 2022 SC 797

IN THE HIGH COURT OF ANDHRA PRADESH : AMARAVATI

HON'BLE MR. JUSTICE PRASHANT KUMAR MISHRA, CHIEF JUSTICE

A N D

HON'BLE MR. JUSTICE M. SATYANARAYANA MURTHY

ICOMAA No.01 of 2022

VR Commodities Private Limited

.. Appellant/Respondent

Versus

Norvic Shipping Asia Pte. Ltd.

.. Respondent/Petitioner

Counsel for the Appellant : Mr.Sanjay Suraneni representing
Avanija Inuganti

Counsel for respondent : Mr. Amitava Majumdar

JUDGMENT

Dt.05.05.2022

(Per M.Satyanarayana Murthy, J)

1) Aggrieved by the order dated 28.01.2022 passed in ICOMAOA No.11 of 2021 by the learned single Judge, the present appeal is preferred under Section 37 of the Arbitration and Conciliation Act.

2) The parties to the appeal will hereinafter be referred as arrayed before the learned single Judge for the sake of convenience and to avoid confusion.

3) The petitioner (respondent herein) before the learned single Judge, filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 seeking the following reliefs:

- a) pass an order of interim injunction in favour of the petitioner and against the respondent, restraining the respondent, from directly or indirectly through its nominees, agents, associates, affiliates, representatives or employees, in any manner, acquiring, selling, encumbering, alienating, transferring, issuing delivery orders getting possession or otherwise dealing with the cargo of 7,600 MTs out of the 32,770 MTs of coal discharged by the Vessel MV Port Tokyo and currently lying at the V.O. Chidambaranar Port at Tuticorin in the month of August 2021, till the disposal of the present petition;
- b) pass an order appointing a Receiver/Court Commissioner to take custody of the cargo of 7,600 MTs of coal currently lying at the V.O Chidambaranar Port at Tuticorin discharged from the vessel MV Port Tokyo;
- c) pass an order directing the respondent to offer security in the form of cash security or other security as this Hon'ble Court deems fit for a sum of INR 4,86,97,180.40 ps. equivalent to USD 646,486.11 being the sum total of the principal claim of USD 566,486.11 in lieu of admitted pending dues of demurrage payable to the Petitioner and USD 80,000 towards legal costs
- d) Pass an order directing the Respondent to bear all costs, charges, expenses, levies, of any kind whatsoever which may be incurred by the petitioner in exercise of its lien over the cargo of 7,600 MTs of coal, including storage and maintenance costs
- e) pass an order permitting the Petitioner to sell the lien cargo of 7,600 MTs of coal in the event of non-payment of sums to the petitioner as set out in prayer clauses (c) above;
- f) for ad interim reliefs in terms of prayer (a) (b) (c) and (d) above.

4) It is alleged that the petitioner (respondent herein) is a company incorporated under the Companies Act, carrying on shipping business known as "Norvic Shipping Asia Pte. Limited", whereas the respondent (appellant herein) is another company carrying on its business in the name and style of "VR Commodities Private Limited". The petitioner and respondent entered into fixture note dated 16.07.2021, Charterparty dated 29.05.2021 and settlement agreement dated 06.09.2021 for transportation of coal from "Muara Bunyuasi" to "Tuticorin" and "New Mangalore, India". But there is a breach of agreement of Charter party allegedly and the petitioner sustained loss due to default of certain terms under the

charterparty agreement, requiring the petitioner to have arbitral proceedings. To make good for the amount possibly to recover from the respondent, the petitioner sought various interim reliefs under Section 9 of the Arbitration and Conciliation Act.

5) Learned single Judge ordered ad-interim injunction on 22.10.2021 in favour of the petitioner against the respondent restraining the respondent, from directly or indirectly through its nominees, agents, associates, affiliates, representatives or employees, in any manner, acquiring, selling, encumbering, alienating, transferring, issuing delivery orders, getting possession or otherwise dealing with the cargo of 7,600 MTs out of the 32,770 MTs of coal discharged by the vessel MV Port Tokyo, which is currently lying at V.O.Chidambaranar Port at Tuticorin, in the event of the respondent failing to furnish security for US \$ 646,500/- within 48 hours of service of notice as well as this order on the respondent.

6) After passing order dated 22.10.2021, final order dated 28.01.2022 was passed in ICOMAOA No.11 of 2021 by the learned single Judge. Operative portion of the order dated 28.01.2022 is as follows.

“However, considering the scope of this application under Section 9 of the Arbitration and Conciliation Act, 1996, no further steps can as such be ordered pursuant to it. If the petitioner so desires, it can as well approach the Court for necessary relief.

Purpose of filing the present petition is over and therefore, this petition is directed to be closed, preserving liberty to the petitioner to file separate application if so advised in respect of subject matter in question for necessary reliefs. No costs.”

7) Aggrieved by the order passed by the learned single Judge, respondent in the ICOMAOA No.11 of 2021 preferred this appeal on various grounds.

8) Though several grounds were raised in the grounds of appeal, appellant/respondent, limited his contentions as to the admissibility of charterparty and arbitration clause contained in it in evidence before the Court or Arbitrator as it was not duly stamped, leaving the other contentions.

9) In view of the limited contentions urged before this Court, this Court is not required to adjudicate upon other issues except about the admissibility of document i.e. charterparty and arbitration clause imbedded in it in evidence before this Court or before the Arbitrator, without payment of stamp duty and penalty as it was not stamped.

10) During hearing, Sri Mr.Sanjay Suraneni representing Ms.Avanija Inuganti, learned counsel for the appellant would contend that since Charterparty is inadmissible in evidence and passing of order under Section 9 of the Arbitration and Conciliation Act based on arbitration clause in the substantive agreement, is a serious illegality. The charterparty between the petitioner and respondent is unstamped and when it is presented before the officer, who is authorised to receive the document in evidence, unless it is impounded collecting stamp duty and penalty under Section 35 of the Indian Stamp Act, 1899, the same is inadmissible, thereby the order dated 28.01.2022 passed by the learned single Judge is illegal. In support of his contentions, he has drawn the attention of this Court to the judgment of the Apex Court in “**Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited**”¹. On the strength of the principle laid down in the above judgment, learned counsel for the appellant requested to set aside the order dated 28.01.2022 passed in ICOMAOA No.11 of 2021 by the learned single Judge.

¹ (2019) 9 SCC 209

11) Sri Amitava Majumdar, learned senior counsel for the respondent, would submit that in proceedings under Section 8 and 11 of the Arbitration and Conciliation Act, the Courts concluded that such arbitration agreement or substantive agreement consisting of arbitration clause must be stamped. But in proceedings under Section 9 of the Arbitration and Conciliation Act, the Full Bench of the High Court already concluded that the agreement is admissible though not duly stamped and relied on “**Gautam Landscapes Pvt. Ltd. v. Shailesh S.Shah**²”. He further submitted that when similar issue came up for consideration before the Apex Court in various judgments, the Apex Court dealt with the issue with reference to object of enacting the Arbitration and Conciliation Act. In “**N.N.Global Mercantile Private Limited v. Indo Unique Flame Limited**³” the Full Bench of the Supreme Court referred the question to the Constitution Bench. Learned senior counsel placed reliance on another judgment of the Apex Court in “**Vidya Drolia v. Durga Trading Corporation**⁴”. Finally, learned senior counsel would submit that the issue can be decided by this Court though it is pending in reference before the Constitution Bench of the Apex Court.

12) Considering rival contentions, perusing the material available on record, the point need be answered by this Court is as follows:

Whether the charterparty dated 29.05.2021 consisting of arbitration clause is admissible in evidence before this Court or before the Arbitrator as the agreement is not stamped? If not, whether the order passed by the learned single Judge closing the arbitration proceedings as the purpose is served, be set aside?

² AIR 2019 Bom 149

³ (2021) 4 SCC 379

⁴ (2021) 2 SCC 1

P O I N T:

13) It is not in quarrel about the parties entering into agreement known as Charterparty dated 29.05.2021 for transportation of coal from Muara Bunyuasi to Tuticorin and New Mangalore, India subject to conditions contained in the agreement. Certain clauses are incorporated in the said charterparty. One of the terms of the charter party is with regard to arbitration. Clause No.5 deals with arbitration and the same is necessary for deciding the present issue and it is extracted hereunder:

“If any dispute or difference should arise under this Charter, same to be referred to three parties in the City of Singapore ~~New York~~, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or that any two of them, shall be final and binding and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are members of the Institute of Arbitrators in Singapore. English Law to apply and arbitrations and General Average in Singapore”

14) Annexure-B of Charterparty consists of arbitration clause and seat of arbitration is at “Singapore” governed by English law, but the Charterparty is not stamped as required under the Indian Stamp Act.

15) As seen from annexure-B of Charterparty, it was executed in India. When the Charterparty is executed in India, it must be duly stamped under the provisions of Indian Stamp Act. The Indian Stamp Act is a fiscal enactment intended to collect revenue from public, who entered into transactions. Therefore, it is the duty of every public officer, who is competent to receive the document, is under obligation to protect the revenue of the state. It is settled law that no document

can be admitted in evidence unless it is properly stamped. (Vide: ***Shankar Balwant Lokhande (Dead) by L.Rs. vs. Chandrakant Shankar Lokhande***⁵)

16) Undoubtedly, it is true that unless the document is impounded and collected stamp duty and penalty payable on such document, it cannot be received in evidence and no Court is competent to pass any decree or judgment based on such unstamped document. When the document is executed at a particular State, the law applicable to particular State for payment of stamp duty alone is applicable for collection of stamp duty and penalty and to admit the document in evidence.

17) Chapter – IV of the Indian Stamp Act deals with Instruments not duly stamped. Section 33 deals with ‘examination and impounding of instruments’, which is as follows:

“33. Examination and impounding of instruments. —

- (1) 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, 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.
- (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 in force in [India] when such instrument was executed or first executed:

Provided that—

- (a) nothing herein contained shall be deemed to require any Magistrate or Judge of a 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

⁵ JT 1995 (3) SC 186

under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

- (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 appoints 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.

18) Section 35 prohibits receiving instruments not duly stamped or unstamped in evidence. According to Section 35 of the Indian Stamps Act, 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.

19) Therefore, there is a clear prohibition against receipt of unstamped and not duly stamped document in evidence by public officer, who is entitled to receive such document in evidence and when it is produced before him, he shall examine the same and impound the same, collect stamp duty payable on the document.

20) According to Sl.20 of Schedule – I, Charter party, that is to say, any instrument (except an agreement for the hire of a tug-steamer) whereby a vessel or some specified principal part thereof is let for the specified purposes of the character, whether it includes a penalty clause or not, stamp duty payable is Rs.5/-.

21) Schedule I-A, which is applicable to the State of Andhra Pradesh deals with stamp duty payable several instruments or documents.

22) According to Sl.18 of Schedule-IA, Charter party, that is to say, any instrument (except an agreement for the hire of a tug-steamer), whereby a vessel or some specified principal part thereof is left for the specified purposes of the charter, whether it includes a penalty clause or not, stamp duty payable is “one rupee”.

23) Thus, as per Schedule-I and Schedule-I A, stamp duty is to be paid on charterparty. Whereas, Schedule – I of the Indian Stamp Act and Schedule –IA (Andhra Pradesh) did not prescribe any stamp duty payable on arbitration agreement. When arbitration agreement though forms part of substantive agreement, it can be separable from the substantive agreement i.e. charter party. Time and again, this issue came up for consideration before the Court, but various countries dealt with this issue in different modes. The doctrine of separability treats an agreement to arbitrate contained within a contract as an independent agreement that is deemed to be separable from the main contract. To put it simply, as per the doctrine of separability, where a dispute arises concerning the initial validity or continued existence of a contract, the arbitration clause embedded in the main contract is seen to be autonomous, and separate. The doctrine preserves the validity and enforceability of the arbitration clause in a contract, even when the primary contract is found to be invalid and unenforceable, providing autonomy to the arbitration clause. The UNCITRAL Model law on International Commercial Arbitration, 1985, Article 16[1], integrates the doctrine of separability as an arbitration clause which forms part of a contract shall be

treated as an agreement independent of the other terms of the contract, it runs as follows:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. It provides that an arbitral tribunal's determination that a contract is void does not immediately render the arbitration provision unenforceable. The same principle is manifested in Section 7 of the Arbitration Act, 1996 of England, Singapore's approach to separability provisions and Section 16(1) of India's Arbitration and Conciliation Act, 1996.”

24) As seen from Charterparty, English law alone is applicable and the seat of the arbitration is at ‘Singapore’. As the law governing such arbitration is English law, it is necessary to advert to few decisions under English law relating to separability of arbitration clause from original agreement.

25) The United Kingdom views separability as reflecting the presumed intention of the parties that their preferred method of resolving dispute remain effective. Arbitration agreement is seen as distinct. Section 7 of the English Arbitration Act, 1996, deals with the Separability of Arbitration agreement.

26) The Doctrine was first recognised in England, through the landmark judgment in “**Heyman vs. Darwins Ltd.**”⁶, which laid down the principle of separability of arbitration agreement, and was later incorporated in the Arbitration Act of 1996, based on UNCITRAL Model Law through legislation.

⁶ 1942 AC 356

27) In “**Fiona Trust & Holding Corp v. Privalov**”⁷ the House of Lords held that unless otherwise agreed by the parties an arbitration agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

28) The House of Lords further stated that the arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the arbitration agreement; the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement.

29) The primary or substantive agreement and the arbitration agreement may both be declared as illegal for the same reason in rare situations. For example, if a signature on a contract including an arbitration clause is forged, the arbitration clause is null and void. This is because the signature to the arbitration agreement as a "separate agreement" was forged, not because the primary agreement is unlawful. However, in other circumstances, if an agent is accused of transgressing his power by entering into the primary or substantive agreement on conditions that were not authorised or for improper reasons, the arbitration agreement is not always under dispute.

30) In “**Sulamrica Cia Nacional de Seguros SA vs EnesaEngenharia SA**”⁸ it is observed that the only purpose of the doctrine of separability is to give legal effect to the parties' intention of

⁷ (2007) UKHL 40

⁸ (2012) WLR (D) 148

resolving disputes through arbitration and not to insulate the arbitration agreement from the substantive contract for all purposes. Accordingly, it was held that an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. The principle of separability of arbitration agreements from the contracts in which they sit which means that disputes arising out of the contract are submitted to arbitration even where the existence of the contract itself is challenged, was re-emphasised.

31) The House of Lords re-emphasised the doctrine of “separability” of arbitration agreements from the substantive contracts in which they sit, which means that disputes arising out of the contract are submitted to arbitration even where the existence of the contract itself is challenged.

32) In “**Soleimany v. Soleimany**”⁹ the Court of Appeal reversed the High Court's decision to enforce an arbitral award (rendered by the Beth Din in England under Jewish law) which enforced a contract to smuggle carpets out of Iran, held as follows:

“In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should enquire further to some extent.

The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate enquiry into the issue of illegality.”

33) The Court declined to enforce an award relating to a dispute arising out of an illegal contract to smuggle carpet out of Iran holding that 'where the making of the contract will itself be an illegal

⁹ (1999) Q.B. 785

act, the court would be driven *nolens volens* to hold that the arbitration was itself void'. It was also specified that the enforcement court must see whether there is prima facie evidence that the award is based on an illegal contract.

34) United Kingdom views on doctrine of separability as reflecting the presumed intention of the parties that their preferred method of resolving dispute remain effective. Arbitration agreement seen as distinct. In cases of void *ab initio* contracts, it should be seen if the arbitration agreement by itself is *void ab initio*. However, in case of illegal contracts, court will find arbitration agreement within it invalid.

35) Singapore follows a limited “separability” in arbitration agreements. There are no distinct statutory provisions, but this doctrine is drawn from Article 16 UNCITRAL model law. The separability doctrine in the country is seen as a tool for execution of parties intention or expectation that the arbitration clause should survive an agreement that has been invalidated by Court. Here, the doctrine does not imply that arbitration agreement is independent of the main contract.

36) There are statutory provisions in the country in the Singapore Arbitration Act 2001, Part VI states Jurisdiction of Arbitral Tribunal. These are provisions for separability of arbitration clause and competence of arbitral tribunal to rule its own jurisdiction. When the jurisdiction is challenged before an arbitral tribunal one of the most common grounds raised is that the contract which incorporates the arbitration was never concluded. Before it was a common practice to determine both the validity of arbitration agreement and existence

of binding contract together. (Vide: **Hyundai Merchant Marine Company Ltd vs. Americas Bulk Transport Ltd.**)¹⁰

37) In the case of “**BCY and BCZ**”¹¹ the defendant's case was a binding ICC arbitration agreement which was concluded before the conclusion of SPA. In such cases where arbitration clause was negotiated in the context of a contract such an approach was found problematic from the perspective of both parties as well as arbitrators.

38) There are decisions of the High Court of the country where the law governing the arbitration agreement was implied from the main or substantive contract. The Court held that when the arbitration clause is a part of the main or substantive contract, then it is reasonable to presume that the entire relationship is governed by uniform law, if the intention differed, they must have specified or entered into different agreements. Further clarity is provided by Article 16 of the UNCITRAL Model Law on International Commercial Arbitration.

39) In the recent years there have been perspective judicial pronouncements which have provided clarity with respect to “doctrine of separability” of arbitration agreements. The court in the judgment of “**BNA v. BNB**”¹², stated that the root cause behind evolution of the doctrine of separability is the desire to give effect to the arbitration agreement even if the substantive contract is ineffective. Court refused to accept this as limitation of the doctrine following which it was held that it is legitimate to presume that the parties want the arbitration clause to survive. The only limitation the court stated was

¹⁰ (2013) EWHC 470 (Comm) at [35]-[36]

¹¹ (2016) SGHC 249

¹² (2019) SCGA 84

to only give 'reasonable effect' to this intention. The judgment further discusses the reason why “doctrine of separability” has a limited scope, being consistent with the *ut res magis* principle, it is there just to give effect to the intention of the parties which is presumed that the arbitration clause should survive.

40) The Court interpreted this doctrine and held that it has a limited scope it is broad enough to operate and uphold the arbitration clause, which is integrated in an agreement, but an operation of the substantive agreement could operate to nullify the parties manifest intention to arbitrate their disputes.

41) In India, the statutory provision is present in Chapter IV of Arbitration and Conciliation Act, 1996. There have been judicial pronouncements as cases upholding the “Doctrine of Separability” as well as on Illegal Contracts and Frauds. In the case of “***N.N.Global Mercantile Private Limited vs. Indo Unique Flame Limited***” (referred supra), the enforceability of Arbitration agreement embedded in Unstamped Contract was discussed. It was held that separability of arbitration agreement from substantive contract in which it is embedded is well settled law. Invalidity, ineffectiveness or termination of substantive commercial contract does not effect the validity of the arbitration agreement.

42) In the case of “***Today Homes & Infrastructure (P) Ltd. vs. Ludhiana Improvement Trust***¹³”, the two-judge bench held that arbitration clause is not invalidated even if the main or substantive agreement is declared void.

¹³ (2014) 5 SCC 68

43) In the case of “***National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd.***”¹⁴, it was stated Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

44) In view of the settled law laid down by the United Kingdom and in view of separate clause contained in Singapore Arbitration Act, the clause relating to settlement of disputes by arbitration shall be an independent and autonomous clause. Though Charterparty is not stamped, still, in view of separability of arbitration clause, which does not require any stamp duty payable thereon either under the Indian Stamp Act or law relating to the State of Andhra Pradesh, the arbitration clause is independent clause. When once the arbitration agreement is not liable for stamp duty, based on such arbitration clause, though the substantive agreement is not duly stamped, the Court can take into consideration of such clause independently and pass appropriate orders under Section 9 of the Arbitration and Conciliation Act, 1996.

45) The law is well settled regarding appointment of arbitrator despite the arbitration agreement/clause being contained in an insufficiently stamped document.

46) The Karnataka High Court in the case of “Malchira C. Nanaiah v. Messrs Pathak Developers Private Limited, [Civil Miscellaneous Petition No. 113 of 2019, decided on October 5, 2020]” faced with the issue of an application under Section 11 of the Act

¹⁴ (2007) 5 SCC 692

arising out of an insufficiently stamped arbitration agreement. In consideration of the peculiar facts and circumstances of the case, particularly having regard to the joint submission and consent given by both the parties to proceed with the appointment of the sole arbitrator upon imposition of necessary conditions with regard to payment of stamp duty and penalty on the sale agreement by the petitioners on or before the first date of hearing before the sole arbitrator, the Court went onto appoint an arbitrator to adjudicate upon the dispute between the parties despite the arbitration agreement being contained in an insufficiently stamped document. However, the Court also enumerated that the instant decision shall not be treated as a precedent.

47) The law relating to admissibility of a document and treating the arbitral agreement as separable was discussed in various judgments.

48) Learned counsel for the appellant placed reliance on the judgment of the Apex Court in “**Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited**” (referred supra). In the said judgment, the Apex Court held as follows:

“ In view of the above deliberation, we answer the questions as framed by us as follows:

(1) Whether a court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad-interim relief in an application Under Section 9 of the said Act when a document containing arbitration Clause is unstamped or insufficiently stamped?

In the Affirmative

(2) Whether, inter alia, in view of Section 11 (6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering and passing

final orders on an application Under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped?

In the Negative

Question (2), having been answered contrary to our judgment, is held to be incorrectly decided.

One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time frame provided by Section 29A of the 1996 Act.”

49) Earlier to the said judgment, when similar issue came up for consideration in “**SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited**”¹⁵. In the facts of the above case, a lease deed was executed with respect to two tea estates. Clause 35 of the deed provided for settlement of disputes between the parties by arbitration. However, the lease deed was unregistered and unstamped. With respect to the validity of the arbitration clause contained in an unregistered (but compulsorily registrable) instrument, the Supreme Court relied upon section 49 of Registration Act, 1908. The proviso to this section elucidates exceptions in which such an instrument can be received as evidence of any transaction affecting such property. The proviso states that it may be received as

¹⁵ (2011) 14 SCC 66

evidence of any collateral transaction not required to be effected by registered instrument. Applying the doctrine of separability, the Supreme Court held that an arbitration clause in a contract is a collateral term relating to the resolution of disputes and has nothing to do with the performance of the contract. Therefore, there are two independent documents:

- (a) the substantive contract which requires registration; and
- (b) the arbitration agreement which is not compulsorily registrable.

50) The Supreme Court concluded by stating that an arbitration agreement does not require registration under the Registration Act and, thus, can be enforced for the purpose of arbitration.

51) With respect to the validity of the arbitration clause in an unstamped instrument, the Supreme Court relied on sections 33 and 35 of the Indian Stamp Act, 1899. Section 33 of the legislation relates to the examination and impounding of instruments and section 35 provides that instruments not duly stamped are inadmissible in evidence and cannot be acted upon. The Supreme Court rejected the application of doctrine of separability to an unstamped instrument containing an arbitration clause, only for the reason that section 35 did not contain a proviso like the one in section 49 of the Registration Act, 1908. Therefore, the Supreme Court held that as the arbitration agreement is also a part of the instrument, it cannot be acted upon unless the stamp duty and penalty is paid.

52) The judgment of the Apex Court in “**N.N.Global Mercantile Private Limited v. Indo Unique Flame Limited**”

(referred supra) signifies a complete overhaul in the approach of the Court regarding the validity of an arbitration clause in an unstamped instrument. The Supreme Court held that an arbitration agreement is separate and distinct from the substantive commercial contract on the basis of two principles: the doctrine of separability and *kompetenz – kompetenz*. While the doctrine of separability has been discussed earlier, principle of *kompetenz – kompetenz* is relatively unexplored. This principle states that the arbitral tribunal is competent to determine and rule on its own jurisdiction, including issues of existence, validity and scope of arbitration agreement. The ruling of the arbitral tribunal is subject to judicial scrutiny by courts at a later stage. This legislative policy of minimal interference has been statutorily recognized by the Arbitration and Conciliation Act, 1996 by the following provisions:

(a) Section 5 prohibits judicial intervention except as specified in Part I of the Arbitration and Conciliation Act, 1996; and

(b) Section 16 explicitly empowers the arbitral tribunal to rule on its jurisdiction and also recognizes the independent existence of an arbitration clause.

53) With respect to the specific issue of validity of arbitration clause contained in an unstamped instrument, the Supreme Court held that according to Maharashtra Stamp Act, 1958 (which was the legislation applicable in “**Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited**” (referred supra), the arbitration agreement is not included as an instrument chargeable to Stamp duty. Therefore, due to the doctrine of separability, the arbitration clause will exist independently and would

not be rendered invalid on account of non-payment of stamp duty as the same is not chargeable to it.

54) On this basis, the Supreme Court overruled the judgment in “**SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited**” (referred supra). Further, the Supreme Court stated that the judgment in “**Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited**” (referred supra), was affirmed by a coordinate bench in “**Vidya Drolia v. Durga Trading Corporation**” (referred supra). Therefore, the Supreme Court referred the issue to a constitution bench of five judges of the Supreme Court.

55) Sri Amitava Majumdar, learned senior counsel for the respondent, relied on “**Gautam Landscapes Pvt. Ltd. v. Shailesh S.Shah**” (referred supra), the Full Bench judgment of Bombay High Court on detailed consideration of various provisions concluded as follows:

“Taking an overall view of the scheme of the ACA, judgments delivered by the Supreme Court, we are of the view that the party need not be put to a disadvantage merely because an objection has been raised in respect of insufficiency of the stamp on the agreement presented before the court. Neither a contesting party could deprive legitimate rights of a litigant in praying for timely intervention of the court by praying for appointment of an arbitral tribunal nor for interim reliefs in the fact situation of a case. That would be rendering a party without any forum and in a given situation the outcome would be, at times, catastrophic and disastrous and the damage could be irreparable one. A balanced approach, keeping in view the legislative intent and the view adopted by the Supreme Court, needs to be adopted, so that the purpose of enacting the provisions of Sections 11 and 9 of the ACA as amended by the Amendment Act is not defeated.

If an application under Section 11 or under Section 9 is required to be postponed till the order of adjudication is passed by the learned Collector of Stamps with such uncertainty of the time it would take to decide and the hierarchy of remedies after such order, as it would be subject to an appeal or

a revision, as the case may be and till such time no order either under Section 11 of under Section 9 should be passed, then the Legislature would not have provided for speedy disposal of the applications under Section 11 or under Section 9 of the Act by inserting sub-Section (13) in Section 11 and sub-Section (2) in Section 9 of the Act.”

56) Learned Senior counsel for the respondent relied on “**Shakti Bhog Foods Limited v. Kola Shipping Limited**¹⁶”, wherein the Apex Court held as follows:

“Fixtures are frequently recorded in a telex or fax recapitulating the terms finally agreed (a "recap"). Thus a recap telex or fax may constitute the "charter Party referred to in another contract. In the case of “Welex A.G. v. Rosa Maritime Ltd. (The "Elipson Rosa Case") [2002] EWHC 762 (Comm)”, it was decided by the Queen's Bench Division (Commercial Court) that a voyage charter party of the Elipson Rosa was concluded on the basis of a recap telex which incorporated by reference a standard form charter. Before any formal charter was signed, bills of lading were issued referring to the "Charter Party", without identifying it by date. It was held that the charter party referred to was the contract contained in or evidenced by the recap telex.

In the present case therefore, we conclude that there existed a charter party between the parties to the suit which can be identified from the correspondence between the parties to that effect as also from the fixture note and the bill of lading signed by the parties.”

57) In “**Saifee Developers Pvt. Ltd. vs. Shanklesha Constructions**¹⁷”, the High Court of Bombay held that “the decision of the Supreme Court in **Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited**” (referred supra) is rendered in the context of Section 11 of the Act and not in a proceeding under Section 9 of the Act. The decision of the Full Bench in the context of Section 9 of the Act is subject matter of challenge before the Supreme Court in "Shailesh S. Shah vs. Gautam Landscapes Pvt. Ltd.” in a Petition for Special leave to Appeal (c) No. 10232 - 10233 of 2019. By an order dated 29th April, 2019, passed by

¹⁶ (2009) 2 SCC 134

¹⁷ 2019 SCC OnLine Bom 13047

the Supreme Court, on the said petition, while issuing notice to the respondents, the Supreme Court has not stayed the decision of the Full Bench. The Supreme Court, however, observed that section 9 petition may continue, in the meanwhile judgment delivered thereon shall not be implemented without leave of the Court. Thus, as the judgment of the full bench is binding on this Court, and the same being not stayed by the Supreme Court, it is not possible to accept the contention as urged on behalf of respondent that this Court cannot grant any ad-interim relief.”

58) The judgment of learned single Judge is not binding and similarly the judgments of other High Courts are also not binding, however they got persuasive value. Therefore, persuaded by the law laid down in “**N.N.Global Mercantile Private Limited vs. Indo Unique Flame Limited**” (referred supra)” and by applying the doctrine of separability, in the absence of inclusion of arbitration agreement in Schedule – I of Indian Stamp Act or Schedule-IA (Andhra Pradesh) and not chargeable with stamp duty, the arbitration clause is admissible since it is a separate contract.

59) Recently, the Apex Court in “**Intercontinental Hotels Group (India) Pvt. Ltd. vs. Waterline Hotels Pvt. Ltd.**”¹⁸ the Full Bench after consideration of judgments (referred above) expressed its opinion as to the admissibility of unstamped or insufficiently stamped arbitration clause in unstamped substantive agreement, held as follows:

“Upon reading “**Vidya Drolia v. Durga Trading Corporation**” (referred supra), the issue of 'existence' and/or 'validity' of the arbitration clause, would not be needed to be looked into herein, as payment of stamp duty, sufficient

¹⁸ AIR 2022 SC 797

or otherwise, has taken place herein. In order to ascertain whether adequate stamp duty has been paid in terms of the Karnataka Stamp Act, this Court needs to examine the nature of the substantive agreement, the nature of the arbitration agreement, and whether a separate stamp fee would be payable for the arbitration agreement at all. It may be noted that the Petitioners, have themselves attempted to self-adjudicate the required stamp duty and have paid, on 29.07.19, a stamp duty of Rs. 2,200/-, describing the HMA as a "bond". On 10.06.2020, 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 maybe 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 Mercantile Private Limited vs. Indo Unique Flame Limited**" (referred supra)", however, this case, is not one such scenario."

60) In view of the law laid down by the Apex Court in various judgments and by applying the principle of separability, the clause pertaining to settlement of disputes by Arbitration contained in substantive agreement can be taken into consideration even to decide an application under Section 9 of the Arbitration and Conciliation Act leaving it open to the Arbitration Tribunal to record a finding, if any, on the clause, its admissibility due to failure to pay stamp duty on the substantive document.

61) In any view of the matter, the issue is pending before the Constitution Bench of the Apex Court and this finding is only subject to decision of Constitution Bench in the reference made in "**N.N.Global Mercantile Private Limited vs. Indo Unique Flame Limited**" (referred supra)".

62) The main contention raised before this Court by the appellant is that since the document is unstamped, basing on the principle laid down in "**Garware Wall Ropes Limited v. Coastal**

Marine Constructions and Engineering Limited and ***“SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited”*** (referred supra), the order of the learned single Judge is liable to be set aside. The same was considered in the later judgment by the Full Bench in ***“N.N.Global Mercantile Private Limited vs. Indo Unique Flame Limited”*** (referred supra)” and referred the issue to the Constitution Bench. Therefore, basing on the principle laid down in ***“Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited”*** and ***“SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited”*** (referred supra), it is difficult to uphold the contention of the learned counsel for the appellant since the same was turned down by the Full Bench indirectly while referring the matter to the Constitution Bench.

63) In view of our foregoing discussion, we find no merits in the contention of the learned counsel for the appellant-respondent, hence the order under challenge cannot be interfered on the ground that the substantive agreement is not stamped. Consequently, the appeal is liable to be dismissed.

64) In the result, the appeal is dismissed. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

PRASHANT KUMAR MISHRA, CJ

M. SATYANARAYANA MURTHY, J
Ksp

Note:
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