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

% **Date of Decision: 07th March, 2019**

+ ARB.P. 837/2018

DAMONT DEVELOPERS PVT. LTD

THROUGH ITS AUTHORISED SIGNATORY Petitioner

Through: Mr.Anil K. Kher, Senior Advocate
with Mr.D.R. Bhatia, Ms.Vasundhara
Nayyar, Mr.Kunal Kher, Advocates.

versus

BRYs HOTELS PVT. LTD.

..... Respondent

Through: Mr.K. Datta, Mr.Rahul Malhotra,
Advocates.

J U D G E M E N T

1. The petitioner is seeking appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.
2. The arbitration agreement between the parties is contained in Clause 10 (e) of the MOU dated 17th September, 2016 which is reproduced hereunder:

“10. General Terms and Conditions

e. In case of any dispute, parties have agreed that, Transferee had the right to appoint a neutral third party as arbitrator and all arbitration proceedings shall be in accordance with the provisions of The Arbitration and Conciliation Act, 1996. Place of arbitration shall take place be New Delhi.”

3. The petitioner invoked the arbitration vide notice dated 27th September, 2018 and suggested the name of a retired Supreme Court Judge to act as a sole arbitrator.

4. The respondent replied to the said notice on 03rd November, 2018 in which the respondent did not agree to the appointment of an arbitrator.

5. According to the petitioner, there is a valid arbitration agreement between the parties contained in Clause 10 (e) of the MOU dated 17th September, 2016 and the petitioner has validly invoked the said arbitration vide notice dated 27th September, 2018.

6. According to the respondent, Clause 10 (e) of the MOU dated 17th September, 2016 does not constitute a valid arbitration agreement; MOU provides a remedy of specific performance and therefore, no arbitration can be carried out for resolution of disputes; the MOU dated 17th September, 2016 is a compulsorily registerable document but is neither registered nor requisite stamp duty has been paid thereon and therefore, the document is liable to be impounded by this Court and cannot be acted upon till the requisite stamp duty is paid thereon. Reliance is placed on *Jagdish Chander v. Ramesh Chander*, 2007 (6) SCALE 325, *SMS Tea Estates Private Ltd. v. Chandmari Tea Company Private Ltd.*, (2011) 14 SCC 66 and *Avinash Kumar Chauhan v. Vijay Krishna Mishra*, (2009) 2 SCC 532.

7. Learned senior counsel for the petitioner urged at the time of the hearing that Section 11(6A) of the Arbitration and Conciliation Act provides that the Court has to confine itself to the examination of existence of an arbitration agreement only and all objections of the respondent have to be considered by the arbitral tribunal. Reliance is placed on *SMS Tea Estates Private Ltd. v. Chandmari Tea Company Private Ltd.* (supra). Reliance is also placed on *Duro Felguera, S.A. v. Gangavaram Port Limited*, (2017) 9 SCC 729, *SBP and Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618, *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC

267 *Sandeep Soni v. Sanjay Roy*, 2018 SCC OnLine Del 11169 and *Coastal Marine Construction and Engineering Ltd. v. Garware Wall Ropes Ltd.*, 2018 SCC OnLine Bom 541 in support of the above proposition that the issue of arbitrability should be left to the decision of the arbitral tribunal. It is further submitted that the MOU dated 17th September, 2016 is sufficiently stamped. Without prejudice, it is submitted that respondent's objection to the stamping has to be considered by the arbitral tribunal. Reliance is placed on *Sandeep Soni v. Sanjay Roy* (supra) in which this Court held that the objection of inadequately stamping cannot impede the appointment of an arbitrator and it is for the arbitrator to exercise the power under the Indian Stamp Act, 1899 if the agreement is found insufficiently stamped. Reliance is also placed on *Coastal marine Construction and Engineering Ltd. v. Garware Wall Ropes Ltd.* (supra) and *Jumbo Bags Ltd. v. The New India Assurance Co. Ltd.*, (2016) 2 LW 769.

8. Learned counsel for the respondent urged at the time of the hearing that the MOU dated 17th September, 2016 is not duly stamped and therefore, liable to be impounded under Sections 35 and 38 of the Indian Stamp Act in the first instance. With respect to the judgment of *SMS Tea Estates Private Ltd. v. Chandmari Tea Company Private Ltd.* (supra), it was submitted that the insufficiently stamped document is not admissible in evidence and hence, parties cannot be relegated to arbitration. It was submitted that *Sandeep Soni v. Sanjay Roy* (supra) is not good law as the Court has disregarded the principles laid down by the Supreme Court in *SMS Tea Estates Private Ltd. v. Chandmari Tea Company Private Ltd.* (supra). With respect to *Duro Felguera, S.A. v. Gangavaram Port Limited* (supra), it was submitted that finding of the Supreme Court, while interpreting the

amended Section 11, that the Court should only examine whether there is an arbitration agreement - nothing less or nothing more, was in respect of the nature and class of disputes between the parties but the Supreme Court did not hold that the Court should not and /or cannot look into the fact as to whether the document comprising of arbitration clause can be admitted in evidence at all. It was urged that the MOU dated 17th September, 2016 is liable to be impounded in the first instance and the petition be adjudicated only after the payment of requisite stamp duty and penalty thereon.

Findings

9. Section 11(6A) of the Arbitration and Conciliation Act requires the Court to confine itself to the existence of an arbitration agreement. Section 11 (6A) is reproduced herein under:-

“Section 11(6-A) - The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.”

10. In *SMS Tea Estates Private Ltd. v. Chandmari Tea Company Private Ltd.* (*supra*), the Supreme Court held that an arbitration agreement does not require registration under the Registration Act and therefore, an arbitration agreement contained in an unregistered but compulsorily registerable document, can be acted upon and enforced. The relevant portion of the impugned judgment is reproduced as under:

“9. On the contentions urged the following questions arise for consideration:

(i) Whether an arbitration agreement contained in an unregistered (but compulsorily registerable) instrument is valid and enforceable?

16. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to Section 49 of the Registration Act read with Section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.”

(Emphasis Supplied)

11. With respect to inadequacy of the stamp duty, as per the ratio laid down in ***SMS Tea Estates Private Ltd. v. Chandmari Tea Company Private Ltd.*** (supra), the document is to be impounded and proceeded in accordance with Sections 35 and 38 of the Stamp Act before appointment of an arbitrator. The Arbitration and Conciliation Act was amended w.e.f. 23rd October, 2015 by which several provisions of 1996 Act were amended including Section 11(6A) which provides that the Court has to confine its examination to the existence of an arbitration agreement only.

12. Section 11(6A) was considered by the Supreme Court in ***Duro Felguera, S.A. v. Gangavaram Port Limited*** (supra) in which the Supreme Court considered the judgments prior to the 2015 amendment and held that the Courts need to see only whether an arbitration agreement exists – nothing more nothing less. Relevant portion of the Supreme Court judgment is as under:

“...19. The effect of the Arbitration and Conciliation (Amendment) Act, 2015 in Section 11 of the Act has been succinctly elucidated in the textbook “Law Relating to Arbitration and Conciliation” by Dr P.C. Markanda, which reads as under:

“The changes made by the amending Act are as follows:

1. The words 'Chief Justice or any person or institution designated by him' shall be substituted by the words, the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court'. Thus, now it is not only the Chief Justice who can hear applications under Section 11, the power can be delegated to any Judge as well.

2. As per sub-section (6-A), the power of the Court has now been restricted only to examination of the existence of an arbitration agreement. Earlier, the Chief Justice had been given the power to examine other aspects as well i.e. limitation, whether the claims were referable for arbitration, etc. in terms of the judgments of the Supreme Court in SBP and Co. v. Patel Engg. Ltd. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] Now all preliminary issues have been left for the Arbitral Tribunal to decide in terms of Section 16 of the Act.

3. The amending Act has categorically provided in subsection (6-B) that designation of any person or institution by the Supreme Court or High Court would not be construed as delegation of judicial power. The order passed by a designated person or institution would continue to be regarded as a judicial order.

4. It has been provided in sub-section (7) that the order passed under this section shall not be appealable. This change means that finality is attached to the order passed under this section and it would not be subject to further examination by an appellate court.

5. Sub-section (8) has been amended to bring it in conformity with amended Section 12 with regard to ensuring independence and impartiality of the arbitrator. Before appointing any arbitrator, a disclosure in writing has to be obtained in terms of Section 12(1) of the Act. This is to ensure that the appointed arbitrator shall be independent and impartial and also harmonizes the provisions of Sections 11 and 12 of the Act.

6. The amending Act has introduced sub-section (13) which provides that the disposal of the application under this section has to be expeditious and endeavour shall be made to dispose of the application within a period of 60 days from the date of service of notice on the opposite party. This sub-section would ensure speedy disposal of

applications under this section and all contentious issues have been left to be decided by the Arbitral Tribunal.

7. For determining the fee structure of the Arbitral Tribunal, it has been recommended that the High Courts may frame the necessary rules and for that purpose, a model fee structure has been provided in the Fourth Schedule of the amending Act. However, this sub-section would not be applicable for the fee structure in case of international commercial arbitrations and domestic arbitrations where the parties have agreed for determination of fee as per rules of an arbitral institution. This sub-section has been inserted to ensure a reasonable fee structure since the cost of arbitration has increased manifold due to high charges being levied on the parties by the Arbitral Tribunal and other incidental expenses.”

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56. Having said that, this being one of the first cases on Section 11(6-A) of the 1996 Act before this Court, I feel it appropriate to briefly outline the scope and extent of the power of the High Court and the Supreme Court under Sections 11(6) and 11(6-A).

57. This Court in *SBP & Co. v. Patel Engg. Ltd.* [*SBP and Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] overruled *Konkan Railway Corpn. Ltd. v. Mehul Construction Co.* [*Konkan Railway Corpn. Ltd. v. Mehul Construction Co.*, (2000) 7 SCC 201] and *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.* [*Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388] to hold that the power to appoint an arbitrator under Section 11 is a judicial power and not a mere administrative function. The conclusion in the decision as inimized by Balasubramanyan, J. speaking for the majority reads as follows: (*SBP & Co. case*[*SBP and Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] , SCC pp. 663-64, para 47)

“47. We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) *In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the Designated Judge would be that of the Chief Justice as conferred by the statute.*

(iv) *The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the Designated Judge.*

(v) *Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.*

(vi) *Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.*

(vii) *Since an order passed by the Chief Justice of the High Court or by the Designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.*

(viii) *There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.*

(ix) *In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.*

(x) Since all were guided by the decision of this Court in *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.* [*Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

58. This position was further clarified in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] To quote: (SCC p. 283, para 22)

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are: (a) Whether the party making the application has approached the appropriate High Court. (b) Whether there is an arbitration agreement and whether the

party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267; (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists— nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court’s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

(Emphasis supplied)

13. In *Sandeep Soni v. Sanjay Roy* (supra), this Court after considering *SMS Tea Estates Private Ltd. v. Chandmari Tea Company Private Ltd.* (supra) and *Duro Felguera, S.A. v. Gangavaram Port Limited* (supra), held that the objections of insufficiently stamped document cannot impede the appointment of an arbitrator and it is for the arbitrator to consider the

objections and exercise the powers under Section 33 and other attendant provisions of the Stamp Act. The findings of this Court are as under:

“19. A plain reading of the arbitration clause would show that every aspect including the aspect of liability has to be considered by the arbitral tribunal. Thus, to my mind, the ratio laid down in M/s. Duro Felguera case would apply in the matter.

20. It may be relevant to note in this behalf that Section 33 of the Stamp Act, which empowers impounding of an instrument which is not duly stamped confers such power on every person, who by law or consent of parties has authority to receive evidence, as also, every person in charge of a public office, except an officer of police. In my opinion, the arbitrator is an authority who by consent of the parties has the right to receive evidence.

21. Therefore, as contended on behalf of the petitioner, the Collaboration Agreement even if found to be inadequately stamped cannot impede the appointment of an Arbitrator. The Arbitrator can exercise the power available under Section 33 and other attendant provisions of the Stamp Act if he comes to the conclusion that the Collaboration Agreement is deficient in stamp duty.”

(Emphasis supplied)

14. In the present case, there is a valid arbitration agreement between the parties contained in Clause 10(e) of the MOU dated 17th September, 2016. The petitioner has validly invoked the arbitration vide notice dated 27th September, 2018. Under Section 11(6A) of the Arbitration and Conciliation Act, this Court has to confine only to the existence of an arbitration agreement and all other objections including the objection as to insufficient stamping have to be considered by the arbitrator. This Court agrees with the view taken in *Sandeep Soni* (supra). As such, there is no impediment to the appointment of an arbitrator in the present case. There is no merit in the objections of the respondent.

15. The petition is allowed and Justice A.K. Sikri (Retd.) is appointed as a sole arbitrator to adjudicate the claims and counter claims between the parties. The objections of the respondent with respect to the insufficient stamping shall be considered by the arbitrator in accordance with law.

16. The learned arbitrator shall ensure the compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

17. The fees of the arbitrator shall be according to Fourth Schedule of the Arbitration and Conciliation Act, 1996.

18. Copy of this judgment be sent to the learned Arbitrator.

19. Copy of this judgment be given *dasti* to counsels for the parties under signatures of the Court Master.

MARCH 07, 2019

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J.R. MIDHA, J.

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