Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 3802-3803 of 2020

M/S N.N. GLOBAL MERCANTILE PRIVATE LIMITED

...Appellant

Versus

M/S INDO UNIQUE FLAME LTD. & ORS.

...Respondents

J U D G M E N T

C.T. RAVIKUMAR, J.

1. I have had the advantage of reading the erudite opinion of my learned brother Justice K. M. Joseph, for himself and learned brother Justice Aniruddha Bose, and the separate opinion of learned brother Justice Hrishikesh Roy, concurring with the opinion of learned brother Justice Ajay Rastogi, but disagreeing with the opinion of learned brother Justice K.M. Joseph. Regretfully, I record my inability to agree with the opinion of learned brother Justice Ajay Rastogi as also with the concurrent opinion of learned brother Justice

Hrishikesh Roy. While fully endorsing the opinion of learned brother Justice K. M. Joseph, to which my learned brother Justice Aniruddha Bose has concurred, I wish to add a concise addendum as under, in respect of some of the issues, of course, only in support of findings returned thereon.

2. The issue(s) under reference, the modification of the referred question and the allied questions cropped up for consideration have been elaborately dealt with and answered in the erudite draft judgment of my learned brother Justice K.M. Joseph and hence, it is absolutely unessential to refer them. While considering the power of the Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 it is to be noted that the position of Section 11(6) before and after the amendment and Section 11(6A), inserted by Act 2 of 2016 with effect from 23.10.2015 have been referred to in all the three opinions. Hence, I do not think it necessary to extract those provisions to avoid the risk of repetition. Certainly, the powers conferred under Section 16 of the Act often referred to as 'Kompetenz-Kompetenz' make it clear that the Arbitral Tribunal is empowered and thus got competence to rule on its own jurisdiction, including on all jurisdictional issues and existence or validity of the

arbitration agreement. This provision would have its full-play when appointment of the arbitrator takes place, on consensus, by the parties, in accordance with the terms of the arbitration agreement or by designated arbitration institution, without the intervention of the Court. But then, the provision under Section 11 (6) of the Act applies when the procedures envisaged under the arbitration agreement have not worked and an application is filed for invocation of the power thereunder before the Court for making appointment of the Arbitrator(s). The controversy in regard to the nature of the function to be performed under Section 11 (6) has been set at rest by the Seven-Judge Bench decision in ***SBP & Co. v. Patel Engg. Ltd.***[1] by holding that it is 'judicial'. It continues to be 'judicial' despite the amendment brought to the said section and even after the insertion of Section 11 (6A) in the Act. An application for 'Appointment of Arbitrators' is filed, by one party asserting the existence of an arbitration agreement or arbitration clause in an 'instrument' executed between the parties concerned. Therefore, invariably what is to be decided, in invocation of the said powers, is the

[1] (2005) 8 SCC 618

asserted factum of existence of arbitration agreement or arbitration clause in the said instrument and invariably, in this regard the party who invoked the said power under Section 11(6), has to produce that very relied on instrument for inspection. The question is whether while passing an order the Court exercising the power under Section 11 (6) receives any evidence, for the limited purpose of ascertaining the truth of the assertion that the document thus produced is an arbitration agreement or an instrument containing arbitration clause. In this regard it is only apposite to refer to the meaning ascribable to the term 'evidence'. As per ***Peter Murphy*** in *'**A Practical Approach to Evidence (Second Edition), 1985***, **'**evidence' may be defined as any 'material' which tends to persuade the Court of the truth or probity of same fact asserted before it. As noted hereinbefore, in such an application under Section 11 (6), invariably the fact to be asserted would be the existence of 'arbitration agreement' and in proof thereof the material viz., the document would be produced. I will refer to the relevant provision in the statutory scheme viz., the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, later. Now, when that is received, it is nothing but receiving evidence to that limited purpose for deciding

the question whether the 'instrument' produced is one executed between the parties is an arbitration agreement or whether the instrument contained an arbitration clause. Necessarily, if the answer is in the affirmative, an order appointing Arbitrator(s) would be passed and an answer in the negative would be the end of such proceedings. In that view of the matter, it can safely be said that what is to be decided while performing the function under Section 11 (6) is relating a 'jurisdictional aspect' as only on returning a finding that there exists an arbitration agreement or arbitration clause, in the material so produced, that arbitrator(s) would be appointed. The answering of that question, on receiving the 'instrument', is the performance of the function describable as ''acting upon'' the document thus produced. In other words, as discernible from the statement of law by M.C. Desai, J. in ***Mt. Bittan Bibi & Anr. v. Kuntu Lal & Anr.***[2], (the relevant paragraph 8 extracted in the opinion of learned brother Justice K.M. Joseph), 'acting upon' is not included in the act of admitting an instrument, though it can be acted upon, later, subject to permissibility in law therefor.

[2] ILR [1952] 2 All 984

3. The cleavage in opinion occurs on the issue as to whether the Court called upon to invoke the power under Section 11 (6) should or could exercise the power coupled with duty under Section 33 of the Indian Stamp Act, 1899, when the document carrying the arbitration agreement or arbitration clause is found unstamped or insufficiently stamped or without going into such matter, should it confine its exercise of power in the matter of appointment of Arbitrator(s) only and refrain itself from proceeding further in view of the mandate under Section 33 of the Indian Stamp Act, 1899. I have already recorded my agreement with the opinion of my learned brother K.M. Joseph that exercise of power coupled with duty under Section 33 of the Stamp Act cannot be accused of judicial interference in contravention to Section 5 of the Act and further that it shall not be confused with examination whether an arbitration agreement or arbitration clause in the said instrument, exists so as to appoint arbitrator in invocation of the power under Section 11(6) of the Act. In that view of the matter, the provisions under Section 11(6A) or 16 of the Act cannot act as a rider for the exercise of the said power under Section 33 of the Stamp Act.

4. In the aforesaid context, it is relevant to refer to Sub-sections (1), (2) and clause (b) of Sub-section 2, of Section 33 of the Indian Stamp Act, 1899. They read thus:-

> ***"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 2 [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 under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (V of 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.

5. I have already found that receiving the very 'instrument' which is carrying the arbitration agreement or containing an arbitration clause from the party who asserts its existence is essentially an act of receiving the evidence, in that limited sense. Therefore, how can the Court, which is having authority and competence to receive evidence, for the purpose of invoking the power under Section 11 (6), abstain from proceeding further in terms of Section 33 if it appears to it that such instrument produced before it, though required to be stamped, is unstamped or is not duly stamped. According to me, in terms of the mandate under Sub-section (2) of Section 33, for that purpose, the Section 11 Judge who received evidence shall 'examine' the instrument so chargeable and so produced 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. Proviso (b) which is extracted hereinbefore, would only permit a Judge of the High Court for delegation of the duty of examining and impounding any such instrument to such officer as the Court may appoint in that behalf. Thus, it only gives discretion to a Judge of the High Court to delegate the duty of examining and impounding any such instrument in the manner mentioned under the said proviso if he chooses not to proceed in the manner provided for impounding the instrument in accordance with the relevant provision, by himself. When that be the provision under Section 33 (1) and (2), a conjoint reading of which obviously makes it mandatory for the Court exercising the power under Section 11 (6) to proceed in terms of the mandate under Section 33 when the circumstances legally invites its invocation. A contra view, according to me, would render Sub-section (2) of Section 33 and proviso (b) redundant and would defeat the very soul of the provisions as relates their application in respect of application filed under Section 11(6) of the Act.

6. The Bar under Section 35 of the Stamp Act on admission of instruments not duly stamped in evidence,

as is evident from proviso (a) to it, is not permanent and is curable by following procedures provided thereunder and making an endorsement as provided under Section 42(1) of the Stamp Act. Sub-section (2) of Section 42 makes it clear that every such instrument so endorsed shall thereupon be admissible in evidence and be acted upon and authenticated as it had been duly stamped. The upshot of the discussion is that being unstamped or insufficiently stamped, the agreement would not be available to be 'admitted in evidence' and 'to be acted upon', till it is validated following the procedures prescribed under the provisions of the Stamp Act and till then, it would not exist 'in law'.

7. Another point which I intend to make in addition to the opinion of my learned brother Justice K. M. Joseph, is with respect to the meaning ascribable to the expression 'certified copy' which is permissible to be produced along with the application for appointment of Arbitrator(s) in terms of paragraph 2 (a) of the scheme framed by the Hon'ble the Chief Justice of India, in exercise of power under Section 11(10) of the Act, namely, the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996. Paragraph 2 and sub-paragraph (a) thereof read thus:-

2. <u>Submission of Request</u>:- The request to the Chief Justice under Sub-section (4) or Sub-section (5) or Sub-section (6) of Section 11 shall be made in writing and shall be accompanied by –

(a) the original arbitration agreement or a duly certified copy thereof.

8. In the opinion of my learned brother Justice K. M. Joseph this issue has been elaborately considered from paragraphs 77 to 89. While concurring with the conclusions and findings thereof, I would like to give my own reasons as to why the expression 'certified copy' should be understood with reference to Section 74 and 76 of the Indian Evidence Act, 1872, (hereinafter referred to as 'Evidence Act') and why the said form of secondary evidence is available to be 'acted upon' without formal proof of existence and execution of the original document.

9. Section 62 defines 'primary evidence' thus:-

> ***62. Primary evidence****. — Primary evidence means the document itself produced for the inspection of the Court. Explanation 1. —Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each*

counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Explanation 2. – – Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

10. Section 63 of the Indian Evidence Act defines secondary evidence which reads thus: -

*"**63. Secondary evidence.** — Secondary evidence means and includes —*

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the

accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it."

11. Thus, the definition 'secondary evidence' means and includes what are mentioned in clauses '1 to 5'. Though, the inclusive definition speaks of different kinds of secondary evidence, such as, mentioned under clauses '1 to 5', a careful scanning of the Evidence Act would reveal that copies which fall under clause (1) of Section 63 alone carry the presumption of genuineness and correctness, by virtue of the provision under Section 79 of the Evidence Act. Section 79 reads thus:-

*"**79. Presumption as to genuineness of certified copies.** — The Court shall presume [to be genuine] every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer [of the Central*

Government or of a State Government, or by any officer [in the State of Jammu and Kashmir] who is duly authorized thereto by the Central Government]:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper."

12. Thus, it can be said that the genuineness and correctness of copies falling under clause 1 of Section 63 shall be presumed under Section 79 of the Evidence Act. The definition of 'shall presume' is defined under Section 4 of the Evidence Act, thus:-

*"**Shall presume**".—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.*

13. Section 79 proceeds upon the maxim '*omnia praesumuntur rite esse acta*, i.e., all acts are presumed to be done rightly and regularly. When the acts of official

nature went through the process, the presumption arises in favour of the regular performance.

14. Section 65 of the Evidence Act, in so far as, it is relevant reads thus:-

> ***65. Cases in which secondary evidence relating to documents may be given.—****Secondary evidence may be given of the existence, condition, or contents of a document in the following cases: – –*
>
> *……*
>
> *(e) when the original is a public document within the meaning of section 74;*
>
> *(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;*

15. In terms of the provisions under Section 79 of the Evidence Act a certified copy of a document allegedly carrying an arbitration clause is produced and that document can be received in evidence for the purpose of Section 11 (6) of the Act and by virtue of Section 79 of the Evidence Act, the Court shall presume the genuineness of the document which could be accepted as evidence and shall presume the genuineness of the contents of the document unless the presumption is not

rebutted by other evidence. Thus, it can be seen that besides permitting to produce the original document which is primary evidence in terms of Section 62 of the Evidence Act, despite the existence of different kinds of secondary evidence, under paragraph 2 (a) of Scheme framed by the Hon'ble the Chief Justice of India, only certified copy alone is permitted to be adduced, purposefully, as by virtue of Section 79 of Evidence Act presumption of genuineness and correctness of the certified copies of the documents mentioned under Section 63 (1) of the Evidence Act shall have to be presumed. In other words, the other modes of production of secondary evidence would not permit the Court to draw the presumption of genuineness and correctness and that is why in paragraph 2(a) of the scheme framed in terms of the provisions under Section 11 (10) provides only for production of certified copy of the primary evidence to act upon for the purpose of applying for appointment of Arbitrator under Section 11 (6) of the Act, in the alternative of production of the original instrument.

16. As already found the nature of exercise of power under Section 11 (6) is 'judicial' and therefore, it was thought only fit to permit to exercise such power only on

the original instrument or else, on its certified copy, to be understood with reference to Section 63 (1) read with Section 74 and 76 of the Evidence Act. When once the intention behind paragraph 2(a) of the scheme is understood in that manner with reference to the provisions under Section 63 (1), 74, 76 and 79 of the Evidence Act, the expression 'certified copy' employed in paragraph 2(a) of the scheme framed under Section 11(10) of the Act cannot be interpreted to mean any other kind of copies provided under Section 63 of the Evidence Act other than under Section 63 (1) of the Evidence Act.

17. Learned brother Justice K. M. Joseph, after explaining as to how the expression 'certified copy' must be understood, held that the Court exercising the power under Section 11 (6) has to exercise the power under Section 33 of the Indian Stamp Act when the original is produced before the Court. In other words, according to me, it is rightfully held that when the original document carrying the arbitration clause is produced and if it is found that it is unstamped or insufficiently stamped, the Court acting under Section 11 is duty bound to act under Section 33 of the Indian Stamp Act as held in the draft judgment.

18. I am also concurring with the view that what is permissible to be produced as secondary evidence i.e., other than the original document in terms of Section 2(a) of the scheme framed under Section 11(10) of the Act, is nothing but certified copy as mentioned earlier. But such a certified copy, would not be available to be proceeded with under Section 33 of the Stamp Act if it is unstamped or insufficiently stamped. In such circumstances, such certified copy shall not be acted upon.

19. In the contextual situation, to understand the difference between 'certified copy' and 'a copy certified to be true copy', it is only appropriate to refer to Rule 1 of Order VIII of the Supreme Court Rules, 2013, framed invoking the power conferred by Article 145 of the Constitution of India. Rule 1 of Order VIII reads thus: -

> *"1. The officers of the Court shall not receive any pleading, petition, affidavit or other document, except original exhibits and certified copies of public documents, unless it is fairly and legibly written, type-written or lithographed in double-line spacing, on one side of standard petition paper, demy-foolscap size, or of the size of 29.7 cm x 21 cm, or paper which is ordinarily used in the High Courts for the purpose. Copies filed for the use of the*

Courts shall be neat and legible, and shall be certified to be true copies by the advocate-on-record, or by the party in person, as the case may be." *(Emphasis added)*

20. It cannot be presumed that despite the conspicuous difference in the said expressions, under paragraph 2 (a) 'certified copy' alone was permitted to be appended along with the application under Section 11 of the Act, unintentionally. I am of the considered view that it was so prescribed, fully understanding the nature of exercise of power under Section 11 (6) of the Act and also the presumption of genuineness and correctness of 'certified copy' available by virtue of Section 79 of the Evidence Act.

With this addendum, I fully endorse all the conclusions and findings in the judgment of my learned brother Justice K. M. Joseph.

....., J.
(C.T. Ravikumar)

New Delhi;
April 25, 2023