(2010) 02 DEL CK 0367

In the Delhi High Court

Case No : OMP No. 78 of 2003

Eider PW1 Paging Limited and Eider PW1 Communications Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 03-02-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 36
Civil Procedure Code, 1908 (CPC) — Section 47
Probation of Offenders Act, 1958 — Section 18, 5(2)
Punjab High Court Rules and Orders — Rule 1
Registration Act, 1908 — Section 17
Stamp Act, 1899 — Article 12, 15, 13, 14, 33

Citation : (2010) 115 DRJ 263

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Sanjay Bhatt, for the Appellant;

Judgement

Valmiki J Mehta, J.—In this petition, filed u/s 34 of the Arbitration and Conciliation Act, 1996, a preliminary issue has arisen with regard to whether the hearing of the petition on merits can take place or the same is to be deferred till payment of the requisite stamp duty and applicable penalty. The need for decision on this preliminary issue has arisen because of the objection taken by this Court, suo moto, with regard to the non-entitlement of the petitioner to argue the petition unless the impugned Award is impounded u/s 33 of the Stamp Act, 1899 and stamp duty with penalty is paid either as per the orders of this Court u/s 33 of the Stamp Act or by the Collector u/s 40 of the said Act. The respondent Union of India was not represented at the hearing, and as already stated by me, the objection u/s 33 of the Stamp Act has been raised by this Court suo moto. There is another issue as to whether by one petition two separate Awards can be challenged, but, I am not taking notice of the same for the present.

2. The Awards came to be passed on account of the disputes which arose

between the parties wherein the petitioners were granted licences of the Radio Paging Services by the respondent in terms of the Licence Agreements dated 9.9.1996. The License Agreements total to eleven in number and were for different cities such as Delhi, Mumbai, Calcutta etc. The petitioners had lodged a claim in the arbitration proceedings for Rs. 1325 crores. One relevant additional fact to be noted is that admittedly the Radio Paging Services were not started in any of the eleven cities for which licences were granted to the petitioners. The Arbitrator dismissed the claims of the petitioners and the operative paragraph of each of the two Awards reads as under:

22. For the reasons discussed hereinabove, it is necessary to hold that none of the three claims (1) return back, with interest, of initial payment of licence fee (2) return back, with interest, of the money received from invocation of the bank guarantees; and (3) payment of wasted expenditure calculated in crores are correct. The claim of paying back of all these claims are liable to be rejected. Similarly, the claim for remainder licence fee made on behalf of non-Claimant is not correct and is left undecided. However, the retention and appropriation of the initial payment and money received on invocation of bank guarantee respectively is permissible and correct. This award is passed accordingly. The parties shall bear their own costs.

3. The Arbitrator while passing the Awards and dismissing the claims of the petitioner has noted that he was forced to pass the Award on plain paper because in spite of the directions, the claimant/petitioners failed to furnish the stamp paper of the requisite value.

4. The issue therefore to be decided by this Court is, whether this Court before hearing objections to the Award on merits, is entitled to impound the Awards u/s 33 of the Stamp Act, 1899 and, only when the requisite stamp duty is paid with appropriate penalty only then can the objections on merits be heard.

5. The following Sections of the Stamp Act, 1899 are relevant for arriving at a decision on this issue:

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 under Chapter XII of Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 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.

(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.

38. Instruments impounded how dealt with.-(1) Where the person impounding an instrument u/s 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by Section 35 or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

(2) In every other case, the person so impounding an instrument shall send it in original to the Collector.

40. Collector''s power to stamp instruments impounded.-(1) When the Collector impounds any instrument u/s 33, or receives any instrument sent to him u/s 38; Sub-section (2), not being an instrument chargeable 1[with a duty not exceeding ten naye paise only or a bill of exchange or promissory note, he shall adopt the following procedure:

(a) if he is of opinion that such instrument is duly stamped, or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be;

(b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of the five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees:

Provided that, when such instrument has been impounded only because it has been written in contravention of Section 13 or Section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

(2) Every certificate under Clause (a) of Sub-section (1), shall, for the purposes of this Act, be conclusive evidence of the matters stated therein.

(3) Where an instrument has been sent to the Collector u/s 38, Sub-section (2), the Collector shall, when he has dealt with it as provided by this section, return it to the impounding officer.

6. A reading of the aforesaid sections show that when an instrument, which ought to be stamped with the requisite non-judicial stamp paper, is not so stamped, then, in such circumstances, such instrument is bound to be impounded. I use the expression ''bound'' because Section 33 uses the expression ''shall''. That the expression ''shall'' in Section 33 is a mandatory expression and not a directory expression i.e. it has to be read as ''shall'' and not ''may'' is no longer res integra. It has been held by the Supreme Court in its recent judgment reported as Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi, , vide para 16 thereof, that the duty of the Court u/s 33 of the Stamp Act is mandatory in nature and the person before whom such insufficiently stamped instrument comes, is duty bound to impound such instrument. The said para reads as under:

16. A perusal of the said provision shows that when a document is produced (or comes in the performance of his functions) before a person who is authorised to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word shall in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word shall in Section 33(1) does not mean may but means shall. In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions. Hence the view taken by the High Court that the document can be returned if the party does not want to get it stamped is not correct.

In view of the aforesaid judgment in P. Laxmi Devi''s case, there is no discretion in the authority as mentioned u/s 33(1) to impound the document or not to do so, such authority shall do so and is bound to do so.

7. To a similar effect is another judgment of a three judge Bench of the Supreme Court reported as Ram Rattan (Dead) by Lrs. Vs. Bajrang Lal and Others, of the judgment is relevant, and which shows that an insufficiently stamped instrument has necessarily to be impounded, and which paragraph reads under:

7. Mr Desai then contended that where an instrument not duly stamped or insufficiently stamped is tendered in evidence, the court has to impound it as obligated by Section 33 and then proceed as required by Section 35 viz. to recover the deficit stamp duty along with penalty. Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person

before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, stricto sensu the instrument is not admissible in evidence. Mr Desai, however, wanted us to refer the instrument to the authority competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tendered the instrument in evidence is in any event bound to pay and, therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that the learned trial Judge declined to decide the objection on merits and then sought refuge u/s 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would not decline to take it into consideration because the trial court is bound to impound the document and deal with it according to law.

(underlining added)

8. In view of the aforesaid judgments, and the provision of Section 33, this Court is duty bound to mandatorily impound the Award which is unstamped. As per the Schedule 1A of the Stamp Act, as applicable to the Delhi, an Award as per Article 12 is to be stamped with the stamp duty as applicable to a Bond under Article 15. A conjoint reading of Articles 12 and 15 shows that the Award has basically to be stamped at 2% of the value of claims. In the facts of the present case, when the claim of the petitioner was for Rs. 1325 crores, 2% of this amount comes to 26.5 crores. It is only on account of the deliberate act of the petitioner in failing to provide the necessary stamp papers to the Arbitrator, that the Award had to be written on a plain paper and hence penalty has also to be paid. Ten times the penalty of Rs. 26.5 crores therefore would come to Rs. 265 crores per Award. Prima facie, and subject to the decision of Collector u/s 40, of the Stamp Act, the total of the aforesaid two amounts is the amount which would be payable by the petitioner before the Award can be looked into by virtue of the provision of Section 33 of the Stamp Act.

9. The counsel for the petitioner has however placed reliance upon M. Anasuya Devi and Another Vs. M. Manik Reddy and Others, in which there are observations that the requirement of stamping of the Award has to be considered at the stage of enforcement of the Award u/s 36 of the Arbitration and Conciliation Act, 1996 viz in execution proceedings. Para 4 of this judgment is relevant and the same reads as under:

4. After we heard the matter, we are of the view that in the present case this issue was not required to be gone into at the stage of the proceedings u/s 34 of

the Act. In fact, this issue was premature at that stage. Section 34 of the Act provides for setting aside of the award on the grounds enumerated therein. It is not in dispute that an application for setting aside the award would not lie on any other ground, which is not enumerated in Section 34 of the Act. The question as to whether the award is required to be stamped and registered, would be relevant only when the parties would file the award for its enforcement u/s 36 of the Act. It is at this stage the parties can raise objections regarding its admissibility on account of non-registration and non-stamping u/s 17 of the Registration Act. In that view of the matter, the exercise undertaken to decide the said issue by the civil court as also by the High Court was entirely an exercise in futility. The question whether an award requires stamping and registration is within the ambit of Section 47 of the CPC and not covered by Section 34 of the Act.

(Emphasis supplied)

10. In my opinion, though the observations in para 4 of the aforesaid judgment seem to go in favour of the petitioner, however, this judgment is of a Bench of two Judges of the year 2003 and wherein the earlier judgment of three Judges in the case of Ram Rattan (Supra), which holds that impounding is mandatory has not been considered. A decision of the Supreme Court of a three Judge Bench prevails over the decision of a two Judge Bench vide Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., . Further, there is now a later 2009 decision of the Supreme Court whereby the provision of Section 33 of the Stamp Act has been held to be mandatory viz of P. Laxmi Devi (supra). The aspect of whether the provision of Section 33 is directory or mandatory was not considered by the Supreme Court in the case of M. Anasuya Devi''s case (supra), and in fact, Section 33 of the Stamp Act has not even been adverted to in the said judgment. The Supreme Court in the case of N. Bhargavan Pillai v. State of Kerala 2004 (13) SCC 217 has laid down that when any judgment, even of a Supreme Court, does not advert to a direct provision of law then, the judgment is to be treated as having been rendered per incursion .Para 14 of the judgment in the case of M. Bhargavan Pillai is relevant and the same reads as under:

14. Coming to the plea relating to benefits under the Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered u/s 5(2) of the Act. Therefore, there is no substance in the accused-appellant''s plea relating to grant of benefit under the Probation Act. The decision in Bore Gowda case does not even indicate that Section 18 of the Probation Act was taken note of. In view of the specific statutory bar the view, if any, expressed without analysing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct.

11. There is another reason, in my opinion, why the decision of M. Anasuya Devi''s case does not apply to the facts of the present case and hence may not

be binding. This is because facts of each case are different and it is now settled law that difference of even one vital fact would change the ratio of a judgment. The Constitution Bench of the Supreme Court has said so in the case of Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, of this judgment is relevant in this regard and the same reads as under:

9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in British Railways Board v. Herrington. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

12. The facts of M. Anasuya Devi''s case (supra) are different than the facts of the present case inasmuch as whereas in the present case firstly, it is this Court which is suo moto taking an objection u/s 33 of the Stamp Act whereas in the said case the objection was raised on behalf of a party to the case, and secondly, the decision in M. Anasuya Devi''s case was passed with respect to objection to an Award passed in a family dispute where the issue therein of partition was of joint Hindu family properties and the issue was not of impounding of the Award but of the Award being set aside on account of the same not being sufficiently stamped. In the present case, I am not seeking to set aside the Award and hold the same as invalid and without jurisdiction as was done by the High Court in the case of M. Anasuya Devi and therefore, which finding was set aside by the Supreme Court, but, in the present case, I am only seeking to impound the unstamped Award u/s 33 of the Stamp Act.

13. The issue which arises for decision in the present case is of vital importance because in cases where a person makes a huge claim of money and whose claims are dismissed, then obviously in these cases, there would not arise the issue of execution of the Awards because the claims are dismissed. Therefore, there arises no question of enforcement of the Award as was considered to be the aspect in the case before the Supreme Court in M. Anasuya Devi''s case. Not only this, if Section 33 of the Stamp Act is not invoked by a court, in spite of the fact that on the face of it a recalcitrant litigant deliberately fails to provide the stamp papers for making the Award, then, in my opinion, very serious consequences will ensue for the arbitration proceedings. The serious consequences are that no person who knows his claims will be dismissed, will file the necessary non-judicial stamp papers for drawing up of the Award and would on the basis of the judgment of the Supreme Court in M. Anasuya Devi contend that objections be heard in spite of the petitioner deliberately flouting the provisions of the Stamp Act, 1899. I may note that unlike in suits before Civil Courts where the stamp duty in the form of court fee is payable at the outset by a litigant who approaches the court, in the arbitration proceedings, the necessary

stamp duty under the Stamp Act, is only payable at the time of delivering of the Award which has to be affixed on a non-judicial stamp paper, and it is this which will cause, if I can say so, a havoc in arbitration proceedings whereby most frivolous claims of very high disproportionate amounts would be filed and even in spite of dismissal of the same, there would be no fear to a person of anything adverse against him because it can be contended relying on M. Anasuya Devi''s case that no stamp duty need be paid and which issue can be raised only in execution proceedings. I am of the opinion that the Supreme Court in M. Anasuya Devi''s case did not intend such an eventuality in cases where claim petitions before the Arbitrator are dismissed and there consequently did not arise any issue of execution of such Awards and thereby consequently the issue of stamping to be raised in execution proceedings.

14. Finally I may add that whereas till recently the Award was to be stamped only on a fixed nominal amount of stamp duty of Rs. 75, however this position has changed inasmuch as Article 12 of the Stamp Act with respect to the state of Delhi was amended w.e.f. from the year 2001 and whereby now the fixed stamp duty has been done away with and now an Award has to be stamped with ad valorem stamp duty of 2% of the value of the disputes. I prima facie feel that if a litigant is deliberately allowed to flout the requirements of payment of the necessary stamp duty as per Articles 12 and 15 of the Stamp Act as applicable to Delhi, then, the intention of the legislature in requiring payment of the higher stamp duty will be set at naught in cases where an Award dismisses the claims of claimants and there is no insistence of payment of stamp duty because it can be claimed on the basis of M. Anasuya Devi''s case that such issue should be taken up at the stage of execution, whereas in these cases where the claims are dismissed, there is in fact no issue of execution at all.

15. Since, this is a question of vital importance affecting the state exchequer, I think it fit that this issue should be decided by a larger Bench if Hon''ble the Chief Justice thinks it so to be appropriate. Accordingly, in accordance with Chapter-3, Part-B, Rule 1 Proviso of Volume 5 of the Punjab High Court Rules as applicable to this Court and read with all other enabling provisions, I place the papers before Hon''ble the Chief Justice for considering the placing of the issue at hand for decision by a larger Bench. The issues which, inter alia, requires the consideration of a larger Bench, are as under:

(i) Whether a Court cannot exercise power of impounding an unstamped or an insufficiently stamped document, although, it is so empowered u/s 33 of the Stamp Act, 1899 and also as so held by the Supreme Court in the judgments of Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi, and Ram Rattan (Dead) by Lrs. Vs. Bajrang Lal and Others, because such power can only be exercised at the stage of enforcing of the Award u/s 36 of the Arbitration & Conciliation Act, 1996?

(ii) Whether the decision in M. Anasuya Devi and Another Vs. M. Manik Reddy and Others, takes away the power of the court to impound insufficient or unstamped documents u/s 33 of the Stamp Act if the court seeks to suo moto exercise the power, and which is, in fact, a duty of the Court as per Section 33 of the Stamp Act and the aforesaid judgments in the cases of Govt. of A.P. v. P. Laxmi Devi and Ram Rattan v. Bajrang Lal (supra)?

(iii) Can the decision in M. Anasuya Devi (supra) apply where a claim petition including one for recovery of a monetary amount is dismissed and there would therefore not arise any question of execution proceedings of such an Award and therefore also the requirement of consideration of this issue of the requirement of stamp duty on the Award at the stage of execution?

(iv) Is the decision of M. Anasuya Devi, which has been rendered without considering the relevant provisions including Section 33, 38 and 40 of the Stamp Act 1899 is per incurriam as per the ratio of the decision of the Supreme Court in N. Bhargavan Pillai (Dead) by Lrs. and Another Vs. State of Kerala,

(v) Will such interpretation of Section 33 of the Stamp Act that the requirement of impounding of unstamped Award can be taken only at the execution stage, not negate the intention of the legislature in amending Article 12 of the Stamp Act whereby the stamp duty on the Award was enhanced from a fixed lump sum nominal amount to an ad valorem duty of 2% of the value of the claims?

16. Accordingly, let the papers of this case along with the present order be placed before Hon''ble the Chief Justice for his consideration as stated above. Since many cases are coming up before this Court where reliance is being placed upon Anasuya Devi''s case, I may request that if a larger bench is to be constituted, then the larger bench may be constituted at an early date.

