

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 192/2009

Judgment Reserved on: 12.11.2009

Judgment delivered on: 20.11.2009

ASPIRE INVESTMENTS PRIVATE LTD.

..... Plaintiff

Through: Mr V P Singh, Sr Advocate with
Mr Atishi Dipankar

versus

M/S NEXGEN EDUSOLUTIONS PRIVATE LTD.

..... Defendant

Through: Mr Sangram Patnaik with Ms Santa
Pandey & Ms Bimla Devi, Advocates

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | No |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

IA No. 5332/2009

1. This is an application preferred by the defendant under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') seeking a reference of the 'matter' raised in the suit to an arbitrator. The defendant's prayer is pivoted on an arbitration agreement contained in an unregistered lease deed dated 27.03.2008 (hereinafter referred to in short as the 'parent contract'). There is no dispute between the plaintiff and the defendant that the parent contract is in existence and duly executed between them. They are at issue only on the aspect as to whether, such an arbitration agreement, can be relied upon by the defendant in order to maintain its application under Section 8 of the Arbitration Act. According to me, much would depend on the answer to the question: whether agreement to arbitrate, arrived at between the plaintiff and defendant, which is part of a parent contract, which is both unregistered and unstamped; can trigger an arbitration.

2. The facts which are necessary for disposing of the present application under Section 8 of the Arbitration & Conciliation Act fall in a narrow compass:-

2.1 The defendant/applicant is in the field of rendering educational services, having branches all over India. The defendant/applicant entered into a lease agreement dated 27.03.2008 with the plaintiff/respondent (hereinafter referred to as the 'parent contract') with respect of Flats bearing numbers F-601 to 608 and F-610 to 619, 6th Floor, Aditya Tower Building/Plot No.5, Laxmi Nagar, District Centre, Delhi-110092 (hereinafter referred to in short as the 'demised premises'). The undisputed fact is that the demised premises were let out for a period of ten years w.e.f. 15.06.2008 till 14.06.2018. Furthermore, the rent of the demised premises was fixed at Rs 1,50,000/- per month. There are also averments in the application with respect to various breaches purportedly committed by the plaintiff/respondent which could have been attended to but were not attended to by the plaintiff/respondent. However, these aspects are not within the scope and ambit of the issue with which I am concerned in the present application.

2.2 Coming back to the narrative, on 13.11.2008 a notice was issued by the defendant/applicant seeking to appoint its nominee as an Arbitrator in terms of Clause 8 of the parent contract. The receipt of the arbitration notice is not disputed. As a matter of fact, the plaintiff/respondent replied to it vide its reply dated 29.01.2009. The written statement was filed by the applicant/defendant on 15.04.2009 while the present application under Section 8 of the Arbitration Act was filed on 18.04.2009. The plaintiff/respondent has opposed the application.

3. The learned counsel for the plaintiff has opposed the application of the defendant. The gravamen of his submission is that, the parent contract being unregistered and unstamped it cannot be relied upon by the defendant for reference of the issues raised in the suit to an Arbitrator. In this regard it was submitted that in view of the fact that the arbitration clause is contained in a parent contract which is a document of the nature described in Section 17(1)(d) of the Registration Act, i.e., a lease agreement for the period of over one year, the bar of Section 49 of the Registration Act will come into play. Similarly, Section 35 of the Indian Stamp Act, 1899 was relied upon to contend that the parent contract could not be relied upon by the defendant, which expressly prohibited the receipt of an unstamped document in evidence for "any purpose". In support of his submissions the learned counsel placed reliance on the following judgments: *Atma Ram Properties (P) Ltd. vs M/s Golden Phoenix Travels Pvt Ltd; Arb.P.No. 58/2008 decided on 14.05.2008; Chemical Sales Agencies vs Smt Naraini Newar; 114 (2004) DLT 272; Bimla Rani Gupta vs S R Sachdeva; 2000 (1) Arb.LR 437; Om*

Prakash Chawla vs Union of India: Punjab Law Reporter Vol. LXXIV-1972 at Page 53 and Avinash Kumar Chauhan vs Vijay Krishna Mishra; (2009) 2 SCC 532.

4. In the context of the background facts let us examine the legal provisions Section 17(1)(d) of the Registration Act, 1908 (hereinafter referred to as the ‘Registration Act’) mandates that any lease for a period exceeding one year would require to be registered mandatorily. Section 49 of the Registration Act provides as follows:-

“49. **Effect of non-registration of documents required to be registered-** No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall-

- (a) affect any immovable property comprised therein, or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any *collateral transaction not required to be effected by registered instrument*.]”

4.1. Therefore, in terms of Section 49 of the Registration Act, a lease agreement, which is what the parent contract in the present case is, can neither affect the immovable property comprised therein nor be received as evidence of any transaction affecting such property or conferring such power unless it is registered. The exception to this bar is where an unregistered lease agreement is sought to be relied upon as evidence of *“any collateral transaction not required to be effected by registered document”*.

5. To wit, is an arbitration agreement a ‘collateral transaction’? I don’t think it could be disputed that a stand alone arbitration agreement would not require registration under the provisions of the Arbitration Act. The reason for this is

short. Section 2(a) of the Arbitration Act defines that an arbitration agreement is one which is referred to in Section 7 of the Arbitration Act. It, therefore, becomes necessary to refer to Section 7 of the Arbitration Act, which reads as follows:

“7. Arbitration agreement- (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in –

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

© an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract

is in writing and the reference is such as to make that arbitration clause part of the contract.”

5.1. Sub-Section (2) of Section 7 of the Arbitration Act contemplates one such situation with which one is bedeviled in the present case – that is, where an arbitration agreement forms part of a parent contract. Sub-Section (3) of Section 7 requires that it can only be evidenced by writing. And what would constitute writing is provided in the illustrations given in sub-section (4) clause (a) to (c) of Section 7. Sub-section (5) of Section 7 goes a step further: where in the parent contract there is only a reference to another document containing an arbitration clause; as long as the reference is such that it makes the arbitration clause part of the main clause it would constitute a valid arbitration agreement.

5.2. Thus, a bare reading of Section 7 of the Arbitration Act would show that a valid arbitration agreement is one whereby parties agree to submit their disputes to arbitration whether arising out of a contract or otherwise, and this agreement is reflected in a 'writing'. Instances of 'writing' which the Arbitration Act recognizes as valid are given in sub-section 4(a) to (b) and sub-Section (5) of Section 7. There is no requirement of registration or stamping. Therefore, the position vis-à-vis a stand alone arbitration agreement is clear that it does not require registration.

6. Therefore, would the position be any different if the arbitration agreement is part of a parent contract which affects an immovable property. For this purpose, let us examine the provisions of the Registration Act. Section 17 of the Registration Act is in two parts. Sub-section (1) clauses (a) to (e) refers to all such documents which require compulsory registration. Sub-section (2) clauses (i) to (xii) of Section 17 refers to those documents which do not require compulsory registration. Interestingly, there is no reference to an arbitration agreement in either sub-section (1) or sub-section (2) of Section 17 of the Registration Act.

6.1 Since the parent contract deals with an immovable property, to escape the rigours of Section 17 of the Registration Act, recourse would have to be had to the escape clause, which is, the proviso to Section 49 of the Registration Act.

6.2 Section 49 of the Registration Act provides that any document which requires registration in Section 17 shall not be received as evidence of any transaction affecting a property which is part of such an unregistered document save and except where it is placed as evidence of any '*collateral*' transaction which is not required to be effected by a registered instrument. The word '*collateral*' by itself would mean something which is not inconsistent with or directly connected with the principal obligation or issue in dispute (*See Prem's Law Dictionary, Vol.1 at Page 350*). Thus, it is related to; is complimentary; accompanying as a co-ordinate (*See Black's Law Dictionary, 6th Edition at Page 261*). The word '*transaction*' in the present context would mean any act or agreement between or among parties whereby a cause of action or alteration of legal rights occur (*See Black's Law Dictionary, 6th Edition at Page 1496*). There is no doubt that the transaction in issue is an agreement to arbitrate between the plaintiff and the defendant. The arbitration agreement is not inconsistent with but on the other hand, is both complimentary and related to the present contract. If that be so, then surely, it would fall within the expression '*collateral*' transaction.

6.3 I am fortified, in my view, by the discussion in the case of ***Damodar Valley vs K.K. Kar: AIR 1974 SC 158***, in paragraphs 10 and 11 at pages 162-163 of the report. The Supreme Court while adverting to its own judgment in the case of ***Union of India vs Kishorilal Gupta & Bros AIR 1959 SC 1362*** has observed that an arbitration clause is a collateral term of a contract as distinguished from its substantive terms. An arbitration clause perishes only if the parent contract is void ab initio. The cases which fall between two extreme situations, that is, where the parent contract is void or is substituted by a new contract there may be a situation where disputes may arise in respect of parent contracts which are repudiated or there are issues of breach or frustration. In these circumstances, even though the performance of an agreement may come to an end but the contract is in existence for the purposes of reference of disputes to an arbitration.

6.4 There is no requirement either under Section 17 of the Registration Act or under the provisions of Section 7 of the Arbitration Act that an Arbitration Agreement should be effected by a registered instrument. Therefore, just because it forms part of a parent contract it does not stand to reason that it cannot be relied upon because the parent contract is not registered. It is no one's case; as it cannot be, that the parent contract is void or non est in law for want of registration or stamping. Therefore, assuming that such a submission were to be accepted, it would still not help the cause of the plaintiff as such an Arbitration Agreement would fall within the ambit of the proviso to Section 49 of the Registration Act. This in sum and substance is the view taken by a single Judge of this Court in ***Gaajara International vs Food Corporation of India: 96 (2002) DLT 581***.

Analysis of the judgments cited by the plaintiff/respondent

7. In so far as the first judgment i.e., ***Atma Ram Properties (supra)*** is concerned, what was not brought to the notice of the Court was perhaps the proviso to Section 49. Therefore, there was no occasion to discuss as to whether an arbitration agreement would fall within the ambit and scope of the expression 'collateral transaction'. The second judgment, i.e., ***Chemical Agencies (supra)***, in my view, turned on peculiar facts, that is, the pre-requisites of Section 7 of the Arbitration Act were not fulfilled. In that case the Court observed that for a valid arbitration agreement to subsist there should be in place a "***defined legal relationship***". In view of the fact that the tenant had taken a defence in the written statement that there did exist a landlord-tenant relationship; the Court concluded that there was no defined legal relationship between the parties and hence, no valid

arbitration agreement subsisted between the parties. This is evident from the observations made at Page 278 in Paragraph 12 of the judgment. The discussion in Paragraphs 14 and 15 at Page 279 only fortifies this aspect of the matter where the Court while distinguishing the judgment of *Gaajara International (supra)* and *Trans World Finance & Real Estate Co. Pvt. Ltd. Vs Union of India: 97 (2002) DLT 767* has distinguished the aforesaid judgments on the following grounds: *Gaajara International (supra)*, according to the learned Judge, dealt with the definition of Arbitration Agreement as it obtained in Section 2(a) of the Arbitration Act, 1940 which was entirely different from the definition of arbitration agreement as provided in Section 7 of the Arbitration Act. Similarly, even though *Trans World Finance Real Estate (supra)* dealt with the Arbitration Act there was no discussion specifically with respect to Section 7 of the Arbitration Act. In my view, as observed above, the aforesaid judgments were sought to be distinguished essentially on the ground of absence of defined legal relationship in *Chemical Agencies (supra)*. This is clear on a reading of the observations made in Paragraph 17 of the judgment at Page 280. The said judgment, according to me, is clearly distinguishable. In so far as the third judgment is concerned, i.e., *Bimla Rani Gupta (supra)*, in my view, that is also distinguishable. A reading of the judgment would show that there is no discussion with respect to the provisions of Section 49 of the Registration Act. In my view, the case dealt with an application made under Section 34 of the Arbitration Act, 1940. In my view, the said judgment has no applicability. Similarly, *Om Prakash Chawla (supra)* dealt with the provisions of Section 34 of the Arbitration Act, 1940. As regards the other case i.e., *Avinash Kumar Chauhan (supra)*, the same is, in my view, also distinguishable as it dealt with the issue as to whether an unregistered document dealing with sale of an immovable property could be received in evidence. The matter did not pertain to the issue with which I am concerned with in the present case. It is well settled that a judgment can be relied upon as a precedent only in respect of what it decides and not what logically follows from it. [See *Bhavnagar University vs Palitan Sugar Mill (P) Ltd; (2003) 2 SCC 111*].

7.1 Fortuitously, my task has become easier - a further research has revealed, that a Division Bench of this Court in *N.I.I.T. vs M/s West Star Construction Pvt. Ltd. & Anr, Arb.P.No. 244/2008 dated 27.04.2009* has accepted the view expressed in *Gaajara International (supra)* and *Travel Finance Pvt Ltd (supra)*. The decision in *Chemical Sales Agencies (supra)* has been distinguished. The

Division Bench has come to the conclusion, after noticing Section 7 and Section 16(1)(b) of the Arbitration Act and Section 107 of the Transfer of Property Act, 1882, that an arbitration clause contained in a lease deed is a collateral term which would survive whether or not it is registered or properly stamped.

7.2 Stamping like registration would effect the admissibility of the document, its absence cannot exclude the reliance on the parent contract for the purposes of triggering an arbitration. The Arbitration Act, which undoubtedly, is a special statute dealing with an arbitration should in my view take precedence over the provisions of both the Registration Act and the Indian Stamp Act, 1899. Respectfully following the Division Bench of this Court, I am of the view that even though the parent contract is neither registered nor stamped, the arbitration clause contained in the parent contract would survive. The arbitration agreement, in my view, is a collateral transaction which would fall within the proviso to Section 49 of the Registration Act, 1908.

8. There is another issue which arose during the course of oral submissions made by the counsel, to which I must advert to. The issue being: whether the defendant/applicant was entitled to maintain an application under the provisions of Section 8 of the Arbitration Act, in as much as, the defence with regard to the maintainability of the suit was taken in the first instance in the written statement in the form of a preliminary submission and that, it was only thereafter a formal application under Section 8 of the Arbitration Act was filed. In other words, did the defendant take a 'step in proceedings' and thereby waive its right under Section 8 of the Arbitration Act? In my view, the requirement of Section 8 of the Arbitration Act is that; before a defence on the substance of the dispute, that is, on merits, is preferred by the party seeking to adhere to the arbitration agreement arrived at between itself and the other party, it ought to convey in no uncertain terms its willingness to subscribe to the arbitration agreement. The legislature by enacting sub-Section (1) of Section 8 statutorily recognized a situation, which may arise; where a party to an action in Court instituted by the other party choses by its conduct to waive its right to invoke an arbitration agreement subsisting between itself and the other party. The fact that in the instant case the applicant/defendant indicated its intent to exercise its right to invoke the arbitration agreement in the preliminary submissions made in the written statement would not, in my view, result in rejection of the prayer of the applicant/defendant that parties be referred to an arbitration. As long as the intention to arbitrate is indicated the judicial

authority before whom the action is placed is duty bound to refer the parties to arbitration; with a caveat that it complies with the other provisions of the Arbitration Act including sub-section (2) of Section 8 of the Arbitration Act. Therefore, in my view, any objection in this regard is completely untenable and hence, rejected.

9. Accordingly, in view of the discussion above, the plaint is rejected. The suit is, accordingly, disposed of.

CS(OS) No. 192/2009

In view of the orders passed in IA No 5332/2009, the suit is disposed of as the defendant's application under Section 8 of the Arbitration & Conciliation Act, 1996 referring the parties to arbitration has been allowed.

NOVEMBER 20, 2009
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RAJIV SHAKDHER, J