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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: October 15, 2009
Date of Order: November 09, 2009

+IA No.148/2009 in CS(OS) 1928/2008

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Ruchi India Ltd.

Through: Mr. Amit Goel, Advocates

09.11.2009

...Plaintiff

Versus

V. Customer Services India Pvt. Ltd.

Through: Mr. Vikas Dhawan & Mr. S. Prasad Das, Advocates

...Defendant

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

ORDER

1. This application under Section 8 of Arbitration & Conciliation Act, 1996 has been preferred by applicant for referring the parties to the arbitration.
2. Succinctly stated the facts for deciding this application are that the plaintiff and defendant entered into a lease deed in respect of premises bearing number B-1/G-3, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi-110 044 consisting of basement, ground floor, mezzanine floor, first floor with terrace thereon and measuring 30,000 sq. ft. on a plot of 2078 sq. yards. The lease deed was entered into between the parties for a period of five years initially and started from 1st April, 2004. The rate of rent as agreed between the parties was different for different periods. The lease was renewable after five year at the sole option of the lessee and a fresh lease deed was to be executed on such renewal between the parties. The rent even for the subsequent period of five years for which lease was to be renewed at the option of lessee was reserved and given in the terms of the lease. The lessee had deposited a sum of Rs.27 lac as interest free renewable

security at the time of execution of lease deed and had also given Rs.22 lac as advance rent out of which TDS was deducted and this advance rent was to be adjusted gradually over a period of 17 months in terms of the lease. During continuation of the lease, a dispute arose between the parties as to who shall pay the service tax since the service tax became applicable in the cases of tenancy, after execution of this lease. Plaintiff, (the lessor) took a stand that the service tax was payable by the defendant. Defendant on the other hand took the stand that it was payable by the plaintiff. Ultimately, plaintiff vide a legal notice dated 10th May, 2008 terminated the tenancy of defendant and filed the present suit for recovery of possession and ejectment of defendant and for recovery of Rs.55,35,112/- and also sought a direction for defendant to pay service tax to the plaintiff from 1st June, 2008 till vacation of the suit premises. A further prayer was also made for grant of pendent lite and future damages @ Rs.20 lac per month. The stand of plaintiff was that since the lease deed executed between the parties was not a registered document neither it bore appropriate stamp duty, the lease was to be considered as month to month lease and was therefore a terminable lease and the tenancy was validly terminated by a legal notice.

3. The defendant/ applicant filed the instant application under Section 8 of the Arbitration & Conciliation Act on the basis of an arbitration clause as provided in the lease deed and sought reference of the dispute to arbitration. The arbitration clause, as given in the in lease, reads as under:

“19. Resolution of Disputes:

That if any dispute(s), claim(s), reference(s), or difference(s) arising out of or touching any clause, matter or concerning anything whatsoever, herein contained or the operation or construction thereof or any matter or thing in any way connected with the Deed or the rights, duties, or liabilities of same shall be

referred to two arbitrations, one nominated by dispute, they will appoint a mutually acceptable Umpire Arbitrator, whose award shall be binding on both the parties. The proceedings shall be governed by the provisions of the Arbitration and Conciliation Act, 1996. The place of arbitration proceedings shall be New Delhi.”

4. The application is opposed by the plaintiff on the ground that lease deed dated 25th February, 2004 executed between the parties was not a registered document nor it was properly stamped and, therefore, it was not receivable in evidence of any transaction affecting the suit property. The relationship between the parties was terminated by the plaintiff rightfully and no arbitration agreement could survive after determination of the lease deed.

5. While applicant/ defendant to press the application relied on (2007) 5 SCC 692 *National Agricultural Co-op. Marketing Federation India Ltd. vs. Gains Trading Ltd.*; 2008(2) ALJ 663 *M/s ARC Overseas Pvt. Ltd. vs. M/s Bougainvillea Multiples and Entertainment Centre Pvt. Ltd. &Anr.*; (2000) 4 SCC 539 *P. Anand Gajapathi Raju & Ors. vs.PVG Raju (Dead) & Ors*; AIR 1961 Madras 504 (Full Bench) *Board of Revenue, Madras Chief Controlling Revenue Authority, Madras Vs. N. Narasimhan & Anr’ AA NO.244/2008 NIIT Institute of Information and Technology vs. West Star Constructions Pvt. Ltd.*, the plaintiff on the other hand relied upon *Indian Drugs & Pharmaceuticals Ltd. vs. M/s Indo Swiss Synthetics GEM Manufacturing Co. Ltd. & Ors.* 1996 SCC (1) 54 and *Avinash Kumar Chauhan vs. Vijay Krishna Mishra* (2009) CLT 157 (SC).

6. It is submitted by counsel for plaintiff that the lease deed relied upon by the defendant has to be impounded in view of Section 35 of Indian Stamps Act as it did not

bear the necessary stamp duty and once the document is impounded, it cannot be relied upon.

7. In NIIT Institute (supra), a Division Bench of this Court has held that arbitration agreement contained in an unregistered lease deed or improperly stamped lease is severable and is a separate contract and even if the unregistered lease deed cannot be read in evidence or has to be impounded, the arbitration agreement would still be effective. The Court observed that after coming into force of Arbitration & Conciliation Act, 1996, the arbitration agreement has to be considered a separate and independent contract between the parties, even if it is a part of the lease deed, in view of Section 16 (1)(b) of the Arbitration & Conciliation Act, 1996.

8. The Supreme Court in *National Agricultural Co-op.*(supra) observed that Section 16(1) of the Arbitration & Conciliation Act makes it clear that while considering any objection with respect to existence or the validity of the arbitration agreement, an arbitration clause which forms part of the contract has to be treated independent of the other terms of the contract and a decision that the contract was null and void shall not entail ipso jure the invalidity of the arbitration clause. In *ARC Overseas* (supra), the Supreme Court observed that arbitration clause constituted an agreement by itself and it was separable from other clauses of the deeds. The plaintiff cannot take a plea that the arbitration agreement would become non est in the eyes of law since it was contained in an unregistered lease deed.

9. The plaintiff's reliance on *Indian Drugs'* case (supra) is of no help since in this case the Supreme Court had not considered the implications of the new Arbitration & Conciliation Act and when the judgment was delivered, the new Act had not come into force. In *National Textiles Corp* (supra), the agreement between the parties was as old as

16th August 1978 and it was for a period of three years starting from 3rd March 1977 with an option to renew the lease upon mutually agreed terms. The agreement expired in 1980 and no new agreement was executed. The agreement was also unregistered and the arbitration clause contained in the agreement was sought to be invoked in 2007. The tenancy of tenant had continued after 1980 on month to month basis and was terminated by notice on August, 2006. It was under these circumstances that this Court had observed that the arbitration agreement cannot be enforced and it perished along with the contract of 1978 between the parties.

10. The facts of the present case are altogether different. In the case in hand, the arbitration agreement and the unregistered lease were for a period of five years further renewable at the option of the lessee for another period of five years. The only fact to be seen by the Court is whether the arbitration agreement would survive if the lease deed was unregistered. I consider that in view of the law laid down by the Supreme Court and by the Division Bench of this Court, as discussed above, no doubt should remain that the arbitration clause survives even if the lease deed was an unregistered lease deed and was not properly stamped. An arbitration clause would constitute an independent contract.

11. It is settled law that in case that there is an arbitration agreement between the parties, the Court has to refer the parties to arbitration. I, therefore, consider that the present suit is not maintainable and plaintiff should invoke the arbitration clause and the dispute should be referred to the arbitration. This application under Section 8 of Arbitration & Conciliation Act is, therefore, allowed. The suit filed by the plaintiff does not survive and is hereby dismissed being not maintainable.

November 09, 2009
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SHIV NARAYAN DHINGRA J.