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

+ ARB.P. 370/2009

**M/S HICARE INDIA PROPERTIES
PVT. LTD.**

..... Petitioner
Through: Mr. B.S. Sawhney, Senior
Advocate with Mr. Santosh
Kumar and Mr. Shoeb Alam,
Advocates.

versus

**M/S ADIDAS INDIA MARKETING
PVT. LTD.**

..... Respondent
Through: Mr. Pramod Kumar Singh,
Advocate.

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Date of Decision : APRIL 27, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996").
2. Briefly stated the facts of present case are that on 28th March, 2007, a Commercial Property Buyer's Agreement was executed between M/s. Uppal Housing Limited and petitioner herein. The

relevant clauses of the said agreement are reproduced hereinbelow:

“2. THE SAID ‘UNIT’

2.1 The subject matter of this Agreement is the Shop/Commercial Space in the Shopping Mall and Multiplex known as ‘Uppal’s CENTRA MALL’ being developed on plot no. 177-D, Industrial Area, Phase-I, Chandigarh (hereinafter referred to as the ‘said Unit’) as stated hereunder:

<i>Shop/ Unit No.</i>	<i>Floor</i>	<i>Super Area (Sq.ft.)</i>	<i>Covered area (Sq.ft.)</i>
<i>G-03</i>	<i>Ground</i>	<i>1808.00(approx.)</i>	<i>1130.00 (approx.)</i>

2.2 The term ‘said Unit’ means the inside space of what is hereby agreed to be sold while the term ‘the Mall’ as used in this Agreement refers to the overall complex including the various facilities and common areas therein, and excluding those Shops/Commercial Spaces which have been/shall be sold/leased to others by UHL.

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6.5 That the Buyer are fully aware that UHL is in the process of leasing the said Unit hereby allotted in favour of M/s Adidas India Marketing Private Limited for operating a retail outlet of “adidas” having its office at Sector-37, Institutional Area, Gurgaon. Haryana (hereinafter referred to as “tenant”) as per the LOI dated 19.03.07, a photocopy whereof is being annexed herewith as Annexure-II.

6.6 That UHL shall attorn the said Tenant to the Buyer and the Buyer shall be entitled to receive the monthly rent of Rs.3,61,600/- (Rupees Three Lacs Sixty One Thousand Six Hundred only) subject to deduction of applicable taxes in respect of the said Unit directly from the said Tenant with effect from the date of commencement of Lease rentals in respect of the said Unit. Further, the entire sum of Rs.10,84,800/- (Rupees Ten Lacs Eighty Four Thousand Eight Hundred only) payable by the said Tenant equivalent to three months rent of the said Unit on account of Interest Free Refundable Security Deposit in terms of the said LOI dated 19.03.07/Agreement to Lease shall be remitted by the UHL to the Buyer. The Buyer hereby undertake to abide by all the terms and conditions of the

above referred LOI/Agreement to Lease and shall keep the UHL and the Tenant fully harmless and indemnified in all respects in this regard.”

3. On 02nd August, 2007, an Agreement to Lease was executed between M/s Uppal Housing Limited and the respondent wherein expression ‘Intending Lessor’, i.e., Uppal Housing Limited was deemed to include its executors, administrators, legal representatives, successors-in-interest and assignees. The relevant terms of the said Agreement are reproduced hereinbelow:

“43. That if the INTENDING LESSOR, upon signing of this agreement, transfers, sells or assigns its rights in the Demised Premises as a whole or in part thereof to any person or persons then in such event the INTENDING LESSOR shall attorn to such transferee or transferees on the same terms and conditions as contained herein and to which the INTENDING LESSEE shall have no objection whatsoever and shall be bound to pay the monthly rent to the new Transferee(s)/Assignee(s). At the same time, a letter shall also be issued by the prospective new Transferee(s) in favour of the INTENDING LESSEE confirming and acknowledging all amounts paid by the INTENDING LESSEE to the INTENDING LESSOR, whose benefit shall be transferred to the new Transferee(s). The INTENDING LESSOR shall, however, ensure that the transferee confirms to remain bound and adhere to the terms and conditions provided in this Agreement to Lease and the Lease Deed, to be executed, so as to ensure uninterrupted and peaceful enjoyment of the Demised Premises by the INTENDING LESSEE during the lease period provided herein including extensions, if any.

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48. The Lease term shall be non-terminable for a period of 24 months excluding the 75 (seventy five) days rent free period (hereinafter referred to as the “lock in period”). However, if the INTENDING LESSEE desires to terminate the lease before the lock-in period, the INTENDING LESSEE shall surrender the monthly rent herein before reserved for the entire lock-in period of 24 months or any

balance period which may be remaining therefrom at the time of such termination. After expiry of lock-in period, INTENDING LESSEE may terminate the Lease Agreement by giving three (3) months notice in writing to the INTENDING LESSOR.

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61. All or any disputes arising out of or touching upon or in relation to the terms of this Lease Agreement including the Interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi. The Courts at New Delhi alone shall have jurisdiction in all matters arising out of/touching and/or or in connection with this Agreement.”

4. Learned senior counsel for petitioner submits that after execution of the Sale Deed in favour of the petitioner by M/s. Uppal Housing Limited on 01st October, 2008, petitioner stepped into the shoes of M/s. Uppal Housing Limited insofar as it pertains to the Agreement to Lease dated 02nd August, 2007.

5. On the other hand, Mr. Pramod Kumar Singh, learned counsel for respondent submits that though the Agreement to Lease was capable of assignment, it was not assigned in the facts of the present case as no tripartite agreement was executed between the original owner and the new purchaser as well as the respondent. Consequently, according to him, there is no privity of contract between the petitioner and respondent.

6. Learned counsel for respondent further submits that since the aforesaid Lease Agreement executed between M/s. Uppal Housing Limited and the respondent is an unregistered and unstamped document, the same cannot be relied upon before this Court. In this connection, he places reliance upon a judgment of a learned Single Judge of this Court in *M/s. Chemical Sales Agencies vs. Smt. Naraini Newar* in *W.P.(C) No. 52/2003* wherein it has been held as under:

“..... On going through the provisions of Section 7 quoted above, it is abundantly clear that an 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. The expression “defined legal relationship” is of some importance. For, it is only the agreement of the parties to submit to arbitration disputes with regard to this “defined legal relationship” which constitutes an “arbitration agreement” within the meaning of Section 7.

.....Section 107 of the Transfer of Property Act, 1882 clearly provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered document. It further provides that all other leases of immovable property must be either by a registered instrument or by oral agreement accompanied by delivery of possession. Thus, only if there is a registered instrument or there is an oral agreement accompanied by delivery of possession can it be said that a relationship of lessor and lessee is created. In the present case, I find that there is no registered instrument creating any such relationship. The purported lease agreement dated 01.05.1992 is not a registered document. It is not properly stamped and by virtue of Section 49 of the Registration Act, 1908, the said document shall not effect any immovable property nor be received as evidence of any transaction affecting such property.”

7. However, keeping in view the aforesaid facts, I am of the opinion

that petitioner is an assignee of M/s. Uppal Housing limited as petitioner has bought the said property. I am further of the opinion that if the contract is capable of assignment, which is not disputed in the present case, the arbitration clause will follow the assignee. This has been so held by the Supreme Court in *Khardah Company Ltd. vs. Ramymon and Co. (India) Private Ltd.* reported in *AIR 1962 SC 1810*. The English Courts have also taken a similar view in *Shayler vs. Woolf* reported in *1946 2 All ER 54* and *Baytur SA vs. Finagro Holding* reported in *1991 4 All ER 12*.

8. Even a Division Bench of this Court in *Punjab State Industrial Development Corporation Ltd. vs. Triveni Engineering Industries Ltd. & Ors.* reported in *2008 (3) Arb. LR 575* has held as under:

“7. In our view, the initial agreement dated 27th April, 1991 specifically defines Respondent No. 2 to include its successors and assignees. The subsequent tripartite agreement dated 24th June, 1993 leaves no doubt that the Appellant is an assignee of Respondent No. 2. The Appellant is also estopped from arguing to the contrary in view of the admissions contained in the letter dated 11th October, 1993 referred to hereinabove.

8. Moreover, in view of the settled legal position that if a contract is capable of being assigned and is actually assigned, then the arbitration clause in the initial agreement would also bind the assignee.”

9. As far as the submission that Agreement to Lease being an unregistered and unstamped document, cannot be relied upon is concerned, I am of the view that the arbitration clause being a collateral term can always be looked at in an agreement irrespective of the fact that the lease deed is not registered or properly stamped. This has been

so held by a Division Bench of this court in *N.I.I.T. Institute of Information Technology vs. West Star Construction Pvt. Ltd. and Anr.* reported in **2009 (2) Arb. LR 535**. In the said judgment, the Division Bench having considered the judgment of *M/s. Chemical Sales Agencies* (supra) has held as under:-

“9. The decision in Chemical Sales Agencies v. Smt.Naraini Newar (supra) relied upon by the learned counsel for the respondents is clearly distinguishable on facts. In that case the defendants in the written statement had categorically contended that they did not recognize any such relationship with the plaintiff inasmuch as defendants did not admit that the plaintiff is a landlady or the owner in respect of the suit premises. The Court therefore, has held that when there is no ‘defined legal relationship’, there is no question of there being any agreement amongst them to submit to arbitration all or certain disputes in respect of such an undefined legal relationship. It was further observed in para 14 as follows:

“14. There is another aspect of the matter and that is with regard to the nature of the purported lease agreement dated 1.5.1992. Section 107 of the Transfer of Property Act, 1882 clearly provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered document. It is further provides that all other leases of immovable property must be either by a registered instrument or by oral agreement accompanied by delivery of possession. Thus, only if there is a registered instrument or there is an oral agreement accompanied by delivery of possession can it be said that a relationship of lessor and lessee is created. In the present case, I find that there is no registered instrument creating any such relationship. The purported lease agreement dated 1.5.1992 is not a registered document. It is not properly stamped and by virtue of Section 49 of the Registration Act, 1908, the said document shall not affect any immovable property nor be received as evidence of

any transaction affecting such property. Though, such a document may be received as evidence of a co-lateral transaction not required to be effected by registered instrument.

10. The above observations are sought to be interpreted by the learned counsel for the respondents to mean that if the lease is unregistered, it will not create any legal relationship. The argument has to be rejected in view of the decision in Anthony v.K.C.Ittoop & Sons and Others (supra). When there is no dispute that the petitioner was inducted into the possession of the demised premises and the petitioner was paying monthly rent or had agreed to pay rent in respect of the demised premises, the legal character of the petitioner's possession has to be attributed to a jural relationship and on the fact-situation of the instant case, would be the same as that of lessor and lessee falling within the purview of second paragraph of Section 107 of the Transfer of property Act.

*11. Secondly, last para of Section 49 of the Registration Act, as above, specifically says that that an unregistered document may be received 'as evidence of any collateral transaction not required to be effected by registered instrument'. In Rana Vidya Bhushan v. Ratiram (supra), the Supreme Court held that a document required by law to be registered, if unregistered, is inadmissible as evidence of a transaction affecting immovable property but it may be admitted as evidence of collateral facts, or for any collateral purpose, that is for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. The proviso clearly empowers the courts to admit any unregistered document as evidence of collateral transaction not required to be registered. In **Satish Chand Makhan and others v. Govardhan Das Byas and others** AIR 1984 SC 143 and **Rai Chand Jain v. Miss Chandra Kanta Khosla** AIR 1991 SC 744, it was held that unregistered lease executed by both the parties can be looked into for collateral purpose. In **National Agricultural Co-op Marketing Federation India Ltd. v. Gains Trading Ltd.** (supra), the Supreme Court held that an arbitration clause is a collateral term in the contract, which relates to resolution of disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. This position is*

statutorily recognized under Section 16(1) of the Act, which, inter alia, provides that an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

12. In *Firm Ashok Traders and another v. Gurumukh Das Saluja and others*, AIR 2004 SC 1433, it has been categorically held that in the scheme of the new Act, the arbitration clause is separable from other clauses of a deed (there it was partnership) and it constitutes an agreement by itself. Further, in a recent decision of the Supreme Court in *P. Manohar Reddy and Bros.v. Maharashtra Krishna Valley Development Corporation and others* (2009) 2 SCC 494, the Court observed in paragraphs 27 & 28 as under:

“27. An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to an end of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in Article 16(1). The Indian law - The Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach in Section 16 (1)(b), which reads as under:

“16. Competence of Arbitral Tribunal to rule on its jurisdiction. –

(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

Modern laws on arbitration confirm the concept.

28. The United States Supreme Court in the recent judgment in Buckeye Check Cashing, Inc. v. Cardegna 546 US 460 (2005) acknowledged that the separability rule permits a court "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." The Court, referring to its earlier judgments in Prima Paint Corporation v. Flood & Conklin Mfg. Co. 388 U. S. 395 (1966), and Southland Corporation v. Keating 465 U. S. 1 (1984), inter alia, held:

“Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”

But this must be distinguished from the situation where the claim itself was to be raised during the subsistence of a contract so as to invoke the arbitration agreement would not apply.”

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14. Thus “all or certain disputes” between the parties having a defined legal relationship whether “contractual or not” can be submitted to arbitration. In the present case arbitration clause contained in the contract of lease being a collateral term would survive irrespective of the fact that the lease deed is not registered or properly stamped.”

10. In view of the aforesaid discussion, the legal pleas raised by the respondent are untenable in law and accordingly, present petition is allowed.

11. With consent of parties, I appoint Mr. Justice (Retd.) Avadh Behari Rohtagi, N-217, Greater Kailash-I, New Delhi-110048

Telephone Nos. 26485615, 26423834, 51632893 as the sole Arbitrator to adjudicate upon all the disputes between the parties. The learned Arbitrator shall be entitled to fix his own fee schedule, subject to a ceiling of Rs.3 lacs for the entire proceedings. The fees would be equally shared by both the parties.

12. Both the parties are directed to appear before the learned Arbitrator on 28th May, 2010 at 4:30 p.m. on which date, petitioner would file its claim statement. Since date of hearing has been fixed in the presence of both the counsel, no notice is required to be issued by the learned Arbitrator for the said date of hearing. The Arbitrator is requested to expeditiously adjudicate all the disputes between the parties.

13. Registry is directed to communicate a copy of this order to the learned Arbitrator.

14. With the aforesaid observations, present petition stands disposed of.

MANMOHAN,J

APRIL 27, 2010
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