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

+ CS(OS) 1767/2015 & I.A. 682-683/2016

ISRAEL AEROSPLACE INDUSTRIES

LIAISON OFFICE

..... Plaintiff

Through

Mr. Rajesh Yadav with
Mr. Rajesh Bhardwaj and
Mr. Ajay Tejpal, Advocates

versus

SHRI SHARDA INSTITUTE OF INDIAN

MANAGEMENT

..... Defendant

Through

Mr. Peeyoosh Kalra with
Ms. Sona Babbar, Advocates

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Date of Decision: 23rd November, 2017

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Learned counsel for the plaintiff states that the plaintiff has removed its goods and equipments from the suit premises on 26th October, 2017.

2. On the other hand, learned counsel for the defendant states that though the defendant has received physical possession vide e-mail dated 17th November, 2017, yet the premises are not fully vacant. He, however, states that as the plaintiff has stated in the said email that it does not intend to remove any further goods, the defendant has accepted the possession of the premises on 17th November, 2017.

3. At this stage, learned counsel for the plaintiff states that physical possession of the suit premises had been handed over to defendant on 23rd January, 2015.

4. The aforesaid statement of learned counsel for the plaintiff is vehemently disputed by learned counsel for the defendant.

5. This Court other than holding that the date of handing over possession is disputed, states no more.

6. At this stage, learned counsel for defendant presses his application under Section 8 of the Arbitration and Conciliation Act, 1996. He points out that the Lease Agreement dated 23rd January, 2012 contains an arbitration clause in Article 9. The said Article is reproduced hereinbelow:-

“9.1 In the event of any dispute or difference arising between the parties in any way or manner out of, in relation to or in connection with this Lease Deed, the parties shall attempt in the first instance to resolve such dispute by conciliation. Thereafter, if the parties have failed to reach an amicable settlement on the disputes or differences in respect of performance of this Lease Deed within thirty (30) days, such disputes or differences shall be submitted to arbitration for final disposal.

9.2 Reference to arbitration shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and/or any statutory modifications thereto. The Chairman of the lessor shall on request of either of the Parties nominate and appoint a sole arbitrator within thirty (30) days of receiving the request in this regard. In the event, the chairman fails to appoint a sole arbitrator within thirty (30) days of receiving such request or either Party does not agree with the appointment of Arbitrator by the Chairman then such Party shall approach the Court of

appropriate jurisdiction to appoint an Arbitrator.”

7. Per contra, learned counsel for plaintiff states that as the arbitration clause is a part of an unregistered and insufficiently stamp lease deed, this Court cannot refer the parties to the arbitration. In support of his submission, he relies upon the judgments of the Supreme Court in ***SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Private Limited***, (2011) 14 SCC 66 and ***Naina Thakkar Vs. Annapura Builders***, (2013) 14 SCC 354.

8. Mr. Rajesh Yadav, learned counsel for plaintiff further submits that as the defendant is in possession of the original lease deed, it must produce the same and pay the shortfall in the stamp duty.

9. It is pertinent to mention that none of the parties have expressed their readiness and willingness to pay the deficient stamp duty and the penalty. Admittedly, the arbitration clause is a part of an unregistered and insufficiently stamped lease deed. The Supreme Court in ***SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Private Limited*** (supra) has held as under:-

“22. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registerable) and which is not duly stamped:

22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being

acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or 40 Section of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

22.4. Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registerable. If the document is found to be not compulsorily registerable, the court can act upon the arbitration agreement, without any impediment.

22.5. If the document is not registered, but is compulsorily registerable, having regard to Section 16(1)(a) of the Act, the court can delink the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 15 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

22.6. Where the document is compulsorily registerable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a)

as evidence of contract in a claim for specific performance, and (b) as evidence of any collateral transaction which does not require registration.”

(emphasis supplied)

10. The Supreme Court in ***Naina Thakkar Vs. Annapurna Builders, (2013) 14 SCC 354*** has subsequently held as under:-

“7. It is true that the consequences provided in the Stamp Act, 1899 must follow where sufficient stamp duty has not been paid on an instrument irrespective of the willingness of a party to the instrument to pay deficit stamp duty but the procedure where the arbitration clause is contained in a document which is not registered although compulsorily registerable and which is not duly stamped as summed up by this Court in SMS Tea Estates (P) Ltd. case [(2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] shall not be applicable to the proceedings under Section 8 of the Act where the party making such application does not express his/her readiness and willingness to pay the deficit stamp duty and the penalty. It is not the duty of the Court to adjourn the suit indefinitely until the defect with reference to deficit stamp duty concerning the arbitration agreement is cured. Accordingly, we are of the opinion that no fault can be found in the order of the trial court in rejecting the application made under Section 8 of the Act as the document on which the petitioner relied upon was admittedly unregistered and insufficiently stamped.

8. In view of the above, no case for interference under Article 136 of the Constitution of India is made out. The special leave petition is dismissed accordingly.”

(emphasis supplied)

11. Keeping in view the aforesaid mandate of law as well as the fact that though the present suit has been pending for the last two years, yet none of the parties have made a statement that they are ready and

willing to deposit the deficient stamp duty and penalty, this Court is of the opinion that no relief can be granted to either of the parties in the present suit.

12. At this stage, Mr. Rajesh Yadav, learned counsel for the plaintiff states that recovery of the security deposit is a collateral transaction and for this purpose secondary evidence can be led.

13. However, this Court is of the view that the security deposit clause under the lease agreement is inherently and intrinsically connected to the lease deed and it cannot be regarded as a collateral transaction. Accordingly, the said plea is rejected.

14. Consequently, as the lease agreement is unregistered and insufficiently stamped, this Court is of the view that neither the parties can be referred to the arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 nor the surviving relief of refund of the security deposit can be granted to the plaintiff in the present proceedings.

15. Accordingly, the suit and pending applications are dismissed.

NOVEMBER 23, 2017

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MANMOHAN, J