HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

ARBITRATION APPLICATION No.27 of 2017

ORDER:

This application is filed, under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter called the "Act") seeking appointment of an arbitrator.

The Arbitration Clause is said to form part of the lease agreement executed on 04.05.2015 between the applicant and the first respondent. While reliance is placed by the applicant on Clause 14 of the said lease deed to contend that, in terms thereof, any differences or disputes, arising among the parties to the agreement, is to be referred to and settled by arbitration, the objection taken by Sri Arvind Kumar Agarwal, Learned Counsel for the 1st respondent, is that, since the lease deed dated 04.05.2015 is neither stamped nor registered, its contents cannot be looked into; the only manner in which the contents of this document can be looked into is after the said document is impounded, and stamp duty with penalty is paid by the applicant; and only thereafter can the document be said to have been properly stamped enabling this Court, in proceedings under Section 11 of the Act to admit the said document in evidence, and to examine its contents. Learned Counsel would rely on **SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd**[1] in this regard.

While Mrs. L. Vani, Learned Counsel for the applicant, would place reliance on Section 7(2)(4)(a) of the Act, and on Section 3(18) of the General Clauses Act, 1897, to submit that, even exchange of letters

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[1] (2011) 14 SCC 66

can form the basis of an arbitration agreement; and, since such letters would also constitute an arbitration agreement which is not required to be stamped, this Court is not disabled from looking into the contents of the lease deed to the limited extent of ascertaining whether or not there exists an arbitration agreement between the parties. She would further state that the existence of a lease deed was admitted by the first respondent in its letter dated 24.11.2015; it is evident from the said letter, that existence of a lease deed is not in dispute; and, as the first respondent admits existence of a lease deed, this Court is not precluded from looking into the said lease deed to ascertain whether or not it contains an arbitration agreement. She would rely on **Geo Group Communications Inc v. IOL Broad Band Ltd.**[2] and **N.I.I.T Institute of Information Technology v. West Star Construction Pvt. Ltd.**[3].

Learned Counsel would further submit that, since all these questions can also be agitated before the arbitrator, and as Section 11(6A) of the Act requires the Court to confine itself only to an examination of whether or not an arbitration agreement exists, the questions as to whether the lease deed is stamped and is registered; what are the consequences of non-registration or the effect of the applicant's failure to have the lease deed stamped etc., can all be agitated before the Arbitral Tribunal.

Before examining the rival contentions, it is necessary to note that this application is filed against two respondents, the first of whom alone is represented before this Court. It is wholly unnecessary for us to examine whether or not the dispute between the applicant and the second respondent can be referred to arbitration, as the admitted case

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[2] (2010) 1 SCC 562
[3] (2009)5 ILR Delhi 394

of the applicant is that the second respondent is not even a party to the lease deed which is said to contain the arbitration clause. This application, in so far as the second respondent is concerned, must be dismissed on this ground alone.

Section 7 of the Act relates to an arbitration agreement. Section 7(2) stipulates that an arbitration agreement may be in the form of an arbitration clause in a contract, or in the form of a separate agreement. Clause 4(a) of Section 7 of the Act stipulates that the arbitration agreement shall be in writing if it is contained in a document signed by the parties (the applicant and the first respondent). It is not in dispute that the said lease deed necessitates being stamped in terms of Section 35 of the Indian Stamp Act, and is required to be registered under the Registration Act, 1908. Section 3(18) of the General Clauses Act defines a document to include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter. The fact that the lease deed is a document, under Clause 18 of Section 3 of the General Clauses Act, is not in dispute.

The question which necessitates examination is whether this Court can look into an unregistered and unstamped lease deed to ascertain whether there exists an arbitration clause therein. Section 11(6A) of the Act, on which reliance is placed by the applicant, requires the High Court, while considering any application under Section 11(4) and (6) of the 1996 Act, to confine its examination only to the existence of an arbitration agreement. It is only if this Court can look into the contents of the lease deed can it then examine whether there exists an arbitration agreement in the form of an arbitration clause therein. If, as is contended by Sri Arvind Kumar Agarwal, Learned Counsel for the 1st respondent, the lease deed cannot even be looked into, the question whether or not the said lease deed contains an arbitration clause cannot be examined by this Court.

In **Bondar Singh v. Nihal Singh**[4], the appeal before the Supreme Court arose in a Suit against the judgment and decree passed in a Suit for declaration that the plaintiff had become the owner of the subject land by adverse possession. It is in this context that the Supreme Court observed:

"………….The main question, as we have already noted, is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9-5-1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor-in-interest of the plaintiffs, is an admitted document in the sense its execution is not in dispute. The only defence set up against the said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of the plaintiffs. **Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land**. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorized. It is significant to note that the sale deed is dated 9-5-1931 and Fakir Chand died somewhere in the year 1949-50. During his lifetime Fakir Chand never disputed the plaintiffs' title or possession of the suit land. There is other reliable evidence on record which establishes that the plaintiffs have been in continuous possession of the land in question. There is a notice dated 16-4-1956 Exhibit P-6. The notice was issued on behalf of the defendants and is addressed to the predecessor-in-interest of the plaintiffs. By the notice the defendants called upon the plaintiffs to hand over possession of the suit land to them. According to the notice, the plaintiffs were trespassers on the suit land and were liable to hand over its possession to the defendants. This notice is an admission on the part of the defendants that the plaintiffs were in possession of the suit land at least on the date of the notice i.e. 16-4-1956. The notice was followed by an application dated 8-5-1956 (Exhibit P-3), filed by the defendants under Section 58 of the Madhya Bharat Land Revenue and Tenancy Act, 1950 before the Revenue Authorities. In the said application the defendants admit that the land in question was in possession of the plaintiffs since the lifetime of their father. It is further admitted that the land was being cultivated by the plaintiffs. It was prayed in the said application that the plaintiffs be declared trespassers over the suit land and possession of the land be given to the defendants. In their reply to the application, the present plaintiffs denied the allegation that they were trespassers on the suit land; they refer to the sale deed of 9-5-1931 by Fakir Chand in favour of their predecessor. Thus the plaintiffs were all along asserting that they were in possession of the land in their own right. The Tahsildar vide his order dated 3-10-1959 dismissed the said application of the defendants. He relied on an admission on the part of Punam Chand, eldest son of Fakir Chand that the present plaintiffs were in possession for the last 26-27 years. Relying on the said statement the Revenue Authorities held that since possession of the present plaintiffs was continuing for the last 26-27 years they could not be dispossessed from the suit land. The application of the defendants was dismissed. The defendant filed an appeal against the said order which was also

[4] (2003) 4 SCC 161

dismissed on 6-8-1962. A copy of the order of the Tahsildar is Exhibit P-8 while a copy of the order of the Appellate Authority i.e. SDO is Exhibit P-9. These judgments of the Revenue Authorities establish that at least till 1962 the plaintiffs were in possession of the suit land. They also totally nullify the assertion of the defendants in their written statement in the present suit that they had taken possession of the suit land in 1957-58. If they had taken possession of the suit land in 1957-58, why were they pursuing the matter before the Revenue Authority till 1962 when the appeal was contested before the SDO and the decision of the SDO was given on 6-8-1962?"

The law declared by the Supreme Court, in the aforesaid judgment, is that, though an unregistered sale deed is not admissible in evidence, it can be looked into for the collateral purpose of ascertaining the nature of possession of the plaintiffs over the subject land. Section 49(c) of the Registration Act, 1908 stipulates that no document, required by Section 17 of the Registration Act to be registered, shall be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. Under the proviso thereto, an unregistered document, affecting immoveable property and required by the Registration Act 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, or as evidence of any collateral transaction not required to be effected by a registered instrument. In view of the proviso to Section 49, an unregistered document can be taken in as evidence of any collateral transaction which, in **Bondar Singh**[4], was that the plaintiffs were in possession of the subject lands.

Unlike Section 49 of the Registration Act, Section 35 of the Indian Stamp Act, 1899 stipulates that no instrument, chargeable with duty, shall be admitted in evidence for any purpose by any person having by law, or consent of the parties, authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. An unstamped document cannot be taken in evidence even of a collateral transaction such as possession. It has not been disputed before us that the subject lease deed requires to be stamped under the Indian Stamp Act, and is required to be registered under Section 17 of the Registration Act. It is wholly unnecessary for us to dwell on this issue any further, as an identical question arose for consideration in **SMS Tea Estates Pvt. Ltd.**[1], and the Supreme Court observed:

> "...........**Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.**
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> **Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence**............" (emphasis supplied)

The law declared, in **SMS Tea Estates Pvt. Ltd**.[1], is that, when the lease deed is relied upon to contend that it contains an arbitration agreement, the Court should, at the outset, examine whether an objection in that behalf is raised; if it is raised, whether the document is properly stamped; and, if the Court comes to the conclusion that it is not properly stamped, whether it may be impounded, and dealt with in the manner specified in the Stamp Act.

As the subject lease deed is required to be stamped, I asked Mrs. L. Vani, Learned Counsel for the applicant, whether the applicant was willing to have the document impounded, and to pay the prescribed stamp duty with penalty. Learned Counsel, on instructions, would submit that the applicant is not willing to have the said document impounded. Consequently, the contents of the lease deed cannot be examined by this Court even to ascertain whether it contains an arbitration clause.

The letter dated 24.11.2015, addressed by the first respondent to the applicant, is a notice of termination of the lease agreement dated 04.05.2015, and may possibly be taken as an admission of the existence of a lease deed. The said letter does not, however, refer to the arbitration clause in the lease deed, nor is there any mention therein for the *inter-se* disputes to be referred to arbitration. This letter would not enable this Court to presume that there exists an arbitration agreement between the parties. It is only if the contents of the lease deed were to be examined, would this Court then be in a position to determine whether or not there exists an arbitration agreement between the parties. As noted hereinabove, such a course of action is impermissible, since the said lease deed is unstamped.

Reliance placed, on behalf of the applicant, on **N.I.I.T Institute of Information Technology**[3], is also misplaced. In the said judgment the Division bench of the Delhi High Court observed:

> "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**............." (emphasis supplied)

The judgment of the Delhi High Court dated 24.07.2009 was delivered much prior to the judgment of the Supreme Court in **SMS Tea Estates Pvt. Ltd.**[1] which was decided on 20.07.2011. As the law declared by the Supreme Court is binding on this Court, under Article 141 of the Constitution of India, reliance placed on the earlier Division bench judgment of the Delhi High Court is of no avail.

Viewed from any angle, this Court cannot examine the contents of the lease deed, which is an unstamped document, to determine whether there exists an arbitration agreement between the parties. An application, under Section 11 of the Act, is not maintainable in the absence of an arbitration agreement between the parties. The application is, therefore, dismissed. The miscellaneous petitions pending, if any, shall stand closed.

RAMESH RANGANATHAN, ACJ

Date: 27.04.2018

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