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

Reserved on: 29th November, 2016
Date of Decision: 13th January, 2017

+ **ARB. P. 254/2015**

BALESHWAR SHARMA Petitioner
Through: Mr. Rohit Kumar, Advocate.

versus

NAGESHWAR PANDEY Respondent
Through: Mr. Sunil Kumar, Senior Advocate with
Mr. Santosh Mishra and Mr. Harshvardhan
Jha, Advocates.

And

+ **OMP (I) 193/2015 & IA 1450/2016, OA 76/2016**

BALESHWAR SHARMA Petitioner
Through: Mr. Rohit Kumar, Advocate.

versus

NAGESHWAR PANDEY Respondent
Through: Mr. Sunil Kumar, Senior Advocate with
Mr. Santosh Mishra and Mr. Harshvardhan
Jha, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

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13.01.2017

1. These are two petitions filed by Baleshwar Sharma against Nageshwar Pandey, the Respondent. Arb. P. No.254/2015 has been filed under Section

11(5) of the Arbitration & Conciliation Act, 1996 (Act) seeking the appointment of an Arbitrator to resolve the disputes between the parties arising out of a Memorandum of Understanding (MoU) dated 24th May, 2014. The companion petition, OMP (I) No.193/2015, has been filed under Section 9 of the Act seeking interim reliefs.

2. The background facts are that the Respondent is stated to have approached the Petitioner in April, 2007 with a proposal of jointly purchasing and developing land in Goa. The Petitioner states that the Respondent informed him that he had already entered into an Agreement to Sell dated 8th January, 2007 in respect of two plots, being plot No. D-3 admeasuring 68,325 sq. mts. and plot No. D-1 admeasuring 65,000 sq.mts. at Bainguinim, Tiswadi Taluka within the jurisdiction of Village Panchayat of Se (Old Goa) surveyed under Survey No.26/2. He informed the Petitioner that the owners of the said plots were Mr. R. C. P. Navelcar and Mr. Mahesh R. P. Navelcar and that the said owners had obtained requisite sanctions for the development of the plots for the purposes of residential or commercial or group housing etc. The Respondent is also said to have assured the Petitioner that he had duly verified the antecedents of the land and other details. He claimed to have paid almost Rs. 5 crores to the owners of the property stating that the balance consideration was yet to be paid.

3. The Petitioner states that on the above assurance, he entered into an MoU dated 5th June, 2007 with the Respondent and paid a sum of Rs.3,95,00,000. Under the said MoU dated 5th June, 2007, the parties agreed that they would form a partnership firm having 50% share each. The Petitioner claims to

have made further payments of Rs. 25 lakh and Rs. 15 lakh through the account of his firm, M/s. E-Square International, to the Respondent.

4. According to the Petitioner, the Respondent subsequently proposed that instead of constituting a partnership firm they should float a private limited company as that would help in availing loans. Accordingly, on 14th June, 2007, a company under the name and style of M/s. Anirva Developers Private Limited (ADPL) was incorporated with the Petitioner and the Respondent being the two Promoters and Directors, each holding 5,000 equity shares. The Petitioner then prepared and handed over a demand draft (DD) in the sum of Rs. 65 lakh from the account of his firm in favour of Mr. R.C.P. Navelcar (owner of plot No.D-3) and Power of Attorney holder, Mr. Mahesh R.P. Navelcar (owner of plot No.D-1) towards further payment of the consideration. For the purposes of stamp duty, a further sum of Rs. 35 lakh is supposed to have been paid. The Respondent was authorised to have the sale deed registered in the name of the Company i.e., ADPL.

5. The Petitioner states that the Respondent conveyed to him that the sale deed in respect of plot D-3 was executed on 19th September, 2007. However, he did not produce either the original or a copy of the sale deed. When ultimately in July 2008, the Petitioner was given a copy of the sale deed he realised that it had been registered with the wrong Sub-Registrar by incorporating another property which did not form subject matter of the sale. Upon making enquiries, it was revealed that plot D-3 was already under litigation. It had been attached by the Goa State Cooperative Bank and sold by way of public auction. The Respondent along with other purported

Directors of ADPL got the sale deed dated 2nd February, 2010 executed in his own name from the auction-purchaser of the property, Ms. Nirupa Udhar Pawar. That sale deed was registered with the Sub-Registrar, Ilhas, Goa on 3rd February, 2010.

6. The case of the Petitioner is that the Respondent in collusion with Mr. Satish Julka manipulated the records of ADPL and sought to oust the Petitioner therefrom. This led to the Petitioner filing CS (OS) No.470/2009 in this Court against the Respondent, Mr. Satish Julka and others. Later, the said suit was withdrawn and a petition was filed before the Company Law Board (CLB), being CP No.74/2010 on 11th August, 2010 against the Respondent, Mr. Julka and others. By its judgment dated 28th April, 2014, the CLB held that the alleged board meetings of ADPL were manipulated and it recognised the Petitioner and the Respondent to be the only Directors of ADPL. As regards plot D-3, the CLB held that the sale deed dated 3rd February, 2010 that had been executed was only in favour of the Respondent and that the said property did not belong to ADPL.

7. Meanwhile, Mr. Julka and others filed a civil suit in Goa against the Respondent. The Petitioner alleges that the parties connived to have a consent decree passed in the matter to reflect as if the property was conveyed to ADPL. The Respondent, however, did not act upon the said compromise.

8. Thereafter, on 24th May, 2014, according to the Petitioner, another MoU was entered into between him and the Respondent in which the earlier MoU dated 5th June, 2007 was acknowledged. Under the new MoU, the

Respondent acknowledged that he was bound by the terms of the earlier MoU. The Petitioner's equal right in plot D-3 and the Petitioner's joint possession thereof was also acknowledged. The Respondent agreed to develop or sell the plot through the Petitioner only and undertook not to create any interest in favour of any person with respect to the said plot D-3.

9. The Petitioner states that after the execution of the above MoU, the Petitioner learnt about the disputes between the Respondent and Ms. Nirupa Udhav Pawar. He also learnt that the sale deed dated 3rd February, 2010 had been retained by Ms. Pawar. On the pretext of having disputes resolved, the Respondent kept delaying the development/sale of the plot in terms of the MoU dated 24th May, 2014 while at the same time assuring the Petitioner that the Petitioner's interest in the property would not be jeopardised.

10. The Petitioner then filed OMP No. 1649 of 2014 in this Court under Section 9 of the Act apprehending that the Respondent was intending to sell the plot D-3 to M/s Ocean View Private Limited (OVPL). In the said petition, this Court on 22nd December, 2014 passed an interim order while issuing notice to the Respondent subject to the Petitioner satisfying the Court as regards the jurisdiction to entertain the petition and further directing that any action by the Respondent vis-a-vis plot No. D-3 would be subject to the final orders of the Court.

11. According to the Petitioner, he immediately informed the Sub-Registrar of Ilhas by letter dated 24th December, 2014 of the above order and the petition. In the meanwhile, the Petitioner also received a response from the Sub-Registrar on an earlier communication dated 16th December, 2014 by a

letter dated 22nd December, 2014, which advised him to produce proper order/restraining order from appropriate authority and/or court which prohibited the Sub-Registrar from registering the sale deed “within 10 days from the date of this letter.” The Petitioner had requested that no document of transfer or sale with regard to the aforesaid property by any person whatsoever including Shri Nageshwar Pandey or Mrs. Nagesh Pandey or any alleged Attorney of the aforesaid two people should be accepted or registered by the said authority/office.

12. However, when OMP No. 1649 of 2014 was listed for hearing on 3rd February 2015, the Court was informed by the Respondent that the property had already been sold on 12th December, 2014. The Court then passed the following order:

“1. Learned counsel for the Respondent informs the Court that the property in question has already been sold by the Respondent on 12th December, 2014. The Respondent will write a letter to the Petitioner giving the sale details of the property in question and enclosing therewith a copy of the registered sale deed dated 12th December, 2014.

2. In that view of the matter, the interim order passed by the Court on 22nd December 2014 stands vacated, it will be open to the Petitioner to seek other appropriate interim reliefs in the arbitral proceedings.

3. It is made clear that if the above statement is found to be incorrect it will be open to the Petitioner to approach this Court for appropriate orders.

4. The petition is disposed of in the above terms.”

13. Two days thereafter, on 5th February, 2015, the Respondent wrote to the

Petitioner enclosing a copy of the registered sale deed dated 12th December, 2014. It was stated that “the said property is sold vide Sale Deed executed on 12/12/2014 and same [has] been duly registered in the office of Sub Registrar Ilhas...”

14. The Petitioner points out that the said sale deed revealed that although the date was 12th December, 2014, it was apparent from the copy itself that it had been registered only on 6th January, 2015. This led the Petitioner to file the present petition i.e., OMP (I) No.193/2015 under Section 9 of the Act praying *inter alia* for a direction that the aforementioned sale deed dated 12th December, 2014 registered on 6th January, 2015 will be subject to the order dated 22nd December, 2014 passed in OMP No.1649/2014 and restraining the Respondent from further transferring, selling or creating any third party interest of any nature or kind whatsoever and/or parting with possession of plot No. D-3. The third prayer is for a direction to the Respondent to deposit the amount received by him from OVPL as mentioned in the alleged sale deed dated 12th December, 2014 in the Court.

15. When this petition OMP (I) No. 193/2015 came up for hearing on 1st May, 2015, the Court while issuing notice to the Respondent restrained him from selling, transferring or creating any third party interest in respect of property bearing Plot D-3.

16. It was pointed out to the Court by the Respondent at the subsequent hearing on 3rd November, 2015 that since plot No. D-3 had already been sold on 12th December, 2014 on payment of stamp duty of Rs. 88 lakh on the entire consideration amount, the subsequent registration of the document on

6th January, 2015 would be of no consequence. Therefore, the injunction against the Respondent would be infructuous as the property had already been sold to a third party.

17. Nevertheless, the contention of the Petitioner was that the sale deed was not complete. In the circumstances, the interim order passed by the Court was directed to continue till the next date of hearing “whatever be its import.”

18. At this stage, the Petitioner filed IA No. 1450/2016 in OMP (I) No. 193/2015 seeking to implead OVPL as an additional Respondent. The Court, however, held that under Section 9 of the Act, the Court can only decide the dispute between the parties to the arbitration agreement. Accordingly, the application was dismissed as not maintainable. The appeal against the said order, being OA No.76/2016, was filed and is pending before this Court.

19. At the hearing on 15th November, 2016, Mr. Sunil Kumar, learned Senior Advocate appearing for the Respondent raised a preliminary objection as to the maintainability of both these petitions. According to him, the disputes which are sought to be referred to arbitration by the Petitioner purportedly stem from the MoU dated 24th May, 2014, which according to the Respondent was a forged and fabricated document and ought not to be acted upon at all. It was submitted by him that even before the said issue could be decided, the Court had to first determine whether the MoU dated 24th May, 2014 which contained the arbitration clause was required to be compulsorily stamped as per the rate of stamp duty prescribed by the State of Goa since the property is located there. His further submission was that

the MoU was required to be compulsorily registered under Section 17 of the Registration Act, 1908 ('RA'). Inasmuch as the MoU dated 24th May, 2014 was neither stamped nor registered, the Court cannot proceed to act on the basis of the arbitration clause contained in the said MoU. Reliance is placed on the decision in *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited (2011) 14 SCC 66*. It is submitted that an unstamped document cannot be looked into and the arbitration clause contained therein cannot be acted upon.

20. Relying on the decision in *Avantha Holding Limited v. Osian's Connoisseurs of Art (P) Ltd. 2012 SCC OnLine Del 2044*, Mr. Kumar submitted that the said document ought to be impounded and forwarded to the Collector of Stamps, District North Goa for adjudication as regards the stamp duty and penalty that is required to be paid by the Petitioner on the said document. Further, in terms of Section 35 of the Indian Stamp Act, 1899 ('ISA'), the MoU also cannot be looked into for the purposes of Section 9 of the Act.

21. Mr Kumar further maintained that no incorrect statement was, in fact, made before the Court on 3rd February, 2015 when OMP No.1649/2014 was being heard. It is stated that the necessary formalities for registration of the sale deed were completed and the possession of the immovable property was handed over and the document were presented for registration on 12th December, 2014 itself. The registration was complete on 6th January, 2015. In terms of Section 47 of the RA, once a document was registered, the document would relate back to the date on which it was presented for

registration, i.e., 12th December, 2014. The Respondent points out that the Registration had to be completed within four months of the execution of the MoU. At the time of presentation of a document for registration, the parties to the documents as well as witnesses are required to be physically present. The Respondent questions the very validity of the MoU itself. Further, there were no witnesses and the MoU cannot be registered. Therefore, the said MoU cannot be looked into. The question of granting any interim relief did not arise.

22. The further case of the Respondent is that even if the MoU is taken on face value, it would be hit with Section 17 read with Section 49 of the RA. In the absence of the registration it would not come into effect. Consequently Section 9 of the Act cannot be invoked. It is further pointed out by the Respondent that the case of the Petitioner that he had paid Rs. 3.95 crores in cash to the Respondent was not believed by the CLB. In its judgment dated 28th April, 2014, the CLB noted that the aforementioned payment was not reflected in the Petitioner's Income Tax Returns (ITRs). The CLB also noted that, "on 21st May, 2013, the Petitioner filed an affidavit that the said transaction was not reflected in his income tax return as he had secured an advance of Rs. 2.40 crores from his friend Mr. Mukesh Kumar and Rs. 1.91 crores from another friend Mr. Pawan Kumar." The date of the said advance was not mentioned in the affidavit. The affidavits of neither Mr. Mukesh Kumar nor Mr. Pawan Kumar were filed. As a result, the CLB came to the conclusion that the transaction of payment of Rs. 3.95 crores by the Petitioner to Respondent No. 2 was not recognised by law. The Respondent maintains his denial of execution of the MoU while reserving

his right to dispute its validity at the appropriate stage.

23. During the pendency of this matter, the Petitioner appears to have, without seeking any prior permission of the Court, approached the Sub-Divisional Magistrate (SDM) seeking his opinion whether the MoU in question was required to be stamped. Also produced before the Court is a copy of an order dated 28th November, 2016 passed by the SDM (Hauz Khas) stating that the MoU was a scheme but not an agreement in itself and would, therefore, attract stamp duty of Rs.50. Since the Petitioner had already paid Rs.100 towards stamp paper, no additional stamp duty was required to be paid by the Petitioner towards “misc. document.”

24. Relying on the decisions in *Ram Saran Lall v. Mst. Domini Kuer* (1962) 2 SCR 474 and *Hiralal Agrawal v. Ram Padarath Singh* (1969) 1 SCR 328, it is submitted that registration is concluded only after the endorsement of the Sub-Registrar on the document concerned in terms of Section 61 of the RA.

25. On the other hand Mr. Rohit Kumar, learned counsel for the Petitioner placed reliance on the decisions in *Value Advisory v. ZTE Corporation* 2009 (3) Arb. LR 315, *GATX Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd.* 2015 (V) AD (Delhi) 190 and *VLX Finance Ltd. v. BMS Institute Pvt. Ltd.* 220 (2015) DLT 113 and submitted that ad-interim reliefs can be passed even against third parties especially when a right is claimed by them through or on account of any act of a party to the agreement. The Petitioner maintains that the sale deed is a sham transaction since the consideration amount mentioned in the sale deed dated 12th December, 2014 is Rs. 12.5

crores whereas in the plaint of the suit filed by the firm at Goa, the valuation is shown at Rs. 23 crores. The price mentioned in the MoU is Rs. 31 crores. 23.

26. First and foremost, the Court has to consider whether the MoU dated 24th May, 2014 is required to be duly stamped and registered for the Court to further proceed in the matter. The relief in both these petitions i.e., one under Section 11(6) of the Act and the other under Section 9 of the Act would hinge upon this question. If the document is not required to be compulsorily registered, then the Court can proceed to appoint an Arbitrator and leave all the questions regarding the validity of the MoU to be decided in the arbitral proceedings. If, on the other hand, the Court is of the view that the document is required to be compulsorily registered, then clearly the Court will have to insist with the requirement of the law being complied with.

27. It must be noticed at this stage that the Respondent maintains that the MoU itself is a fabricated document and that his signatures thereon have been forged. This is a separate issue, which will have to be examined at the appropriate stage.

28. The law in respect of documents that are compulsorily registrable has been explained by the Supreme Court in its decision in ***SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited*** (supra). The Supreme Court analysed Section 33 read with Section 38 of the ISA and the consequences of the decision in payment of stamp duty. The Court summarised the legal position 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 registrable) 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 registrable.

22.2. If the document is found to be not duly stamped, Section 35 of 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 section 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 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 registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

22.5. If the document is not registered, but is compulsorily registrable, 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 registrable, 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.”

29. The first question is whether the Court is of the view that the document in question is compulsorily registrable. For this purpose one has to look at Section 17 of the RA, which reads as under:

“17. Documents of which registration is compulsory.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether

vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:] Provided that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) [any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create,

declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court 29 [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by [Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

(xa) any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer.

[Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.”

30. The critical words for the purposes of Section 17(1)(b) of the RA, viz., “non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.” Section 17(1)(c) of the RA talks of “non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest.”

31. A careful perusal of the MoU dated 24th May, 2014 reveals that it does fit the description of documents mentioned in Section 17(1)(b) of the RA. Para 1 of the said MoU after narrating the background of the case reads as under:

“1. That the first party hereby acknowledges that though the sale deed has been executed in his individual name he is bound by the terms of the memorandum of understanding dt. 5.6.2007 and the right of the second party of being equal partner/owner in the plot of land admeasuring 68325 sq. meters situate at village Bainguinim of Tiswadi Taluka and within the Jurisdiction of village Panchayat of Se Old Goa, surveyed under Survey No.26/2 of the said village.”

32. Thus, the above clause does acknowledge that the Respondent was bound by the earlier MoU dated 5th June, 2007. It also records the acknowledgement of the Petitioner in that “the right of the second party being equal partner/owner in the plot of land...”

33. The MoU dated 5th June, 2007 having been expressly referred to, it should be taken that the rights and obligations flowing thereunder and the narrations thereunder regarding receipt of monies should also be taken to

have been acknowledged in the subsequent MoU dated 24th May, 2014. In the preamble to the MoU dated 5th June, 2007, it is specifically acknowledged that payments have been made to the owners of the plot by the second party i.e., the Petitioner herein. In particular, the MoU notes that “the Second Party has already paid a sum of Rs. 3,95,00,000 (Rupees Three crore ninety five lakhs only) to the First Party...” Thus, the requirement of Section 17(1)(c) of the RA also stands satisfied.

34. At this juncture, the Court should note that the order obtained from the SDM (Hauz Khas) was an *ex parte* one for which no prior permission of the Court was sought and also, no notice was given to the Respondent. The said order, which is simply in two paragraphs records the ‘opinion’ of the SDM that the MoU was a scheme and not an agreement in itself. It was imply described as an instrument prescribed for adjudication under Section 31 of the ISA. The SDM does not appear to have examined whether it answered the description of the documents under Section 17(1) of the RA. Thus, the examination was only vis-a-vis the ISA.

35. Consequently, the Court is of the view that assuming that the MoU dated 24th May, 2014 was validly executed as claimed by the Petitioner, it requires compulsory registration as it purports to declare a right in an immovable property and also acknowledges receipt of the payment of consideration by the Petitioner as a result of declaration and assignment in such right, title and interest.

36. Now turning to the ISA, what is relevant is to examine the amendment

thereto by the Indian Stamp (Goa, Daman and Diu Amendment) Act, 1968 in the ISA since the property in question is located in Goa. Therefore, the determination of the stamp duty payable thereon has to be made by the Collector of Stamps in Goa and not by an authority in Delhi where the MoU may have been executed. In other words, the stamping of the MoU cannot be in Delhi since the property which forms the subject matter of the MoU is located in Goa.

37. Going by the decisions in *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited* (*supra*) and *Avantha Holding Limited v. Osian's Connoisseurs of Art (P) Ltd.* (*supra*), a two-step process is envisaged. First, there has to be a determination as to the stamp duty payable on the MoU in question. Thereafter, the question of registration of that document would arise. Here, it requires to be noticed that in terms of the decision in *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited* (*supra*) after the determination of stamp duty and penalty payable under the ISA and after the deficit stamp duty and penalty is paid, the Court should then proceed to consider whether the document is compulsorily registrable.

38. Having regard to Section 16(1)(a) of the Act, the Court can de-link the arbitration agreement from the main document as an agreement independent of the other terms of the document. The only exception would be if the Respondent in the application demonstrates the agreement itself is void and unenforceable. It is at that stage that the Court will consider the objection before proceeding to appoint an Arbitrator.

39. As far as the present case is concerned, the Court is satisfied that the original MoU dated 24th May, 2014 should be compounded and sent to the Collector of Stamps in Goa for a proper determination of the stamp duty payable thereon.

40. The Court, accordingly, impounds the MoU dated 24th May 2014 and directs the Registry to put a certified copy thereof in a sealed cover and dispatch it through registered Speed Post to the Collector of Stamps, Goa for determination of proper stamp duty and penalty to be paid by the Petitioner. A certified copy of this order will also be sent to the Collector of Stamps, Goa along with the said document. It will be open to the parties to participate in the proceedings before the Collector of Stamps. The Collector of Stamps will fix a date and intimate the same to the parties at least ten days in advance of the hearing. Once the stamp duty and penalty so determined is paid by the Petitioner to the concerned authority in Goa in the manner as prescribed, the Court will take up the further issues including whether the said document is forged or fabricated as contended by the Respondent, and further whether, if the answer to the said question is in the negative, the said document requires compulsory registration.

41. The petitions are accordingly adjourned *sine die* with liberty to the parties to mention them for listing after the above steps are completed.

S. MURALIDHAR, J

JANUARY 13, 2017

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