

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

Judgment reserved on: 09.07.2018
Judgment pronounced on: 06.09.2018

+ ARB. P. No.413/2017

SANDEEP SONI

.....Petitioner

Through: Mr. Alakh Kumar and Mr.
Rakesh Saini, Advocates.

Versus

SANJAY ROY & ORS.

.....Respondents

Through: Mr. Arjun Mitra and Ms.
Ritika Mitra, Advs. for R-1.
Ms. Rajani Chauhan, Adv. for
R-2 & 3

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

Preface & Background Facts:

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act'). The petitioner seeks the appointment of an Arbitrator in terms of Collaboration Agreement dated 09.08.2016 (hereafter referred to as 'Collaboration Agreement') executed between himself and, one, Late Mrs. Kalyani Roy.

1.1 Late Mrs. Kalyani Roy is the mother of respondent 1 to 4.

1.2 The Collaboration Agreement pertains to an immovable property described as: D-603, Chittaranjan Park, New Delhi – 110019 (hereafter referred to as the "subject property").

2. At the very outset, it would be pertinent to state that respondent no.2 and 3 have no objection to the prayer made in the instant petition for

appointment of an Arbitrator. Presently, respondent no.1 is the only person who seeks to contest the petition.

2.1 At this juncture, it would also be relevant to note that respondent no.4 appears to have left his home of origin some 17 years ago and, is since, then untraceable. Though an attempt was made to serve respondent no.4 via the usual method as well as via substituted service, the exercise carried out proved to be futile. Resultantly, respondent no.4 has been proceeded ex-parte vide order dated 17.10.2017.

3. The record shows (and with regard to the same there appears to be no dispute) that the father of respondent no.1 to 4 had executed a registered Will dated 15.03.1988, whereby, he had bequeathed the subject property in favour of his wife late Mrs. Kalyani Roy.

3.1 I may only enter a caveat at this juncture, *qua* this aspect, which is, that there is a contest between the petitioner and respondent no.2 and 3 on one side and respondent no.1 on the other as to the nature of the right which was vested in late Mrs. Kalyani Roy with regard to the subject property by virtue of the Will dated 15.03.1988. According to respondent no.1, his mother, late Mrs. Kalyani Roy had only a life interest in the property and, therefore, could not have executed the Collaboration Agreement with the petitioner.

3.2 While, I will elaborate on this aspect of the matter in the later part of my judgment, suffice it to say, for the moment, that late Mrs. Kalyani Roy, prior to her death, which took place on 19.01.2017, executed a registered Will dated 30.03.2016, whereby she bequeathed the subject property in favour of respondent no.1 to 4.

3.3 This Will, *inter alia*, also provided that in case respondent no.4 was not found within one year of the demise of Mrs. Kalyani Roy, his share would devolve upon her four grand children.

4. It is also pertinent to note that the subject property stood mutated in favour of Mrs. Kalyani Roy in the records of the L&DO. This aspect, apparently, is reflected in the L&DO's communication dated 06.05.1995. The subject property, evidently, was also converted into a freehold property and a conveyance deed dated 07.12.2001 was executed in favour of late Mrs. Kalyani Roy.

4.1 In so far as the aforesaid aspects are concerned, it is not disputed before me that respondent no.1 along with other siblings conveyed his no objection to the L&DO.

5. It is in the backdrop of these facts and circumstances that the instant petition was filed to seek appointment of an Arbitrator.

5.1 At this juncture, it may be relevant to note certain other attendant facts.

5.2 The petitioner avers that pursuant to the Collaboration Agreement, late Mrs. Kalyani Roy was paid a sum of Rs.25 lacs/- as advance. Furthermore, it was only on 25.09.2016 (as averred by the petitioner) that late Mrs. Kalyani Roy handed over the possession of first floor, second floor and terrace of the subject property to the petitioner. Impediment qua access to the said floors, according to the petitioner, was caused by respondent no.1 (who resides on the ground floor of the subject property), by locking up the main gate on the ground floor.

5.3 It is the petitioner's case that given these circumstances, a Supplementary Agreement dated 25.09.2016 was executed between himself and late Mrs. Kalyani Roy, whereby, late Mrs. Kalyani Roy agreed to defer the receipt of the sum of Rs.80,00,000/- till such time complete physical possession of the subject property was given to the petitioner.

6. It appears that respondent no.1 has instituted two civil suits; the first civil suit was instituted by respondent no.1 in and about 01.10.2016. This suit is numbered as: CS No.52736/2016 (earlier number being CS: 314/2016). This suit, which is for injunction, has been filed in the Court of Senior Civil Judge, Saket. It appears in the suit, respondent no.1 has obtained an interim order dated 21.11.2016, whereby, the petitioner, respondent no.2 and 3 and, at the relevant point in time, late Mrs. Kalyani Roy, were enjoined from dispossessing him from the subject property. Evidently, given the problems that late Mrs. Kalyani Roy faced with regard to handing over vacant and physical possession of the subject property, she entered into an agreement dated 27.10.2016 with the petitioner in order to extend the time for handing over the possession, albeit, till 30.04.2017.

6.1 Besides this, I was told that respondent No. 1 had instituted another Civil Suit bearing No.319/2018. This suit, apparently, was filed for declaration and injunction. The record, however, does not indicate as to what transpired in this Suit.

6.2 I was told, though, that in both the suits, applications under Section 8 of the 1996 Act were filed which are pending adjudication. The pendency of these applications, to my mind, cannot impede adjudication of the instant petition filed under Section 11 of the 1996 Act.

7. Going further, it appears that upon the death of late Mrs. Kalyani Roy (which, as indicated above, occurred on 19.01.2017), the petitioner served a notice dated 01.05.2017 on the respondents seeking appointment of an Arbitrator. Respondent no.1, evidently, via his Advocate, sent a reply dated 30.05.2017. By virtue of the said reply, respondent no.1 called upon the petitioner to withdraw his notice, failing which he would institute criminal proceedings against the petitioner.

Submissions of Counsel:

8. Given these facts and circumstances, arguments in the matter, on behalf of the petitioner, have been advanced by Mr. Alakh Kumar, while on behalf of respondent no.1 submissions have been made by Mr. Arjun Mitra. As indicated above, respondent nos.2 and 3 support the cause of the petitioner. The said respondents were, however, represented by Ms. Rajani Chauhan.

8.1 In so far as, Mr. Alakh Kumar is concerned, his submission, broadly, veered around a singular point, which is, that given the fact that there was an arbitration clause obtaining in the Collaboration Agreement qua which dispute(s) had arisen between the legal heirs of late Mrs. Kalyani Roy and the petitioner, an Arbitrator ought to be appointed in the matter.

8.2 It was Mr. Kumar's submission that the contention advanced on behalf of respondent no.1 that late Mrs. Kalyani Roy had only a life interest in the subject property was liable to be rejected as even a bare perusal of her husband's Will dated 15.03.1988 would show that she had been vested with complete right, title and interest in the subject property. According to Mr. Kumar, late Mrs. Kalyani Roy having been vested with absolute

interest in the subject property was therefore, entitled to execute the Collaboration Agreement.

8.3 It was further contended, the fact that the Will dated 15.03.1988, was not subjected to probate proceedings, was not a good enough ground for rejecting the petitioner's application under Section 11 of the 1996 Act. In support of the aforesaid submissions, learned counsel relied upon the judgments of the Supreme Court in *Madhuri Ghose and Another vs. Debobroto Dutta and Another*, (2016) 10 SCC 805 and *Ravi Prakash Goel vs. Chandra Prakash Goel and Another*, (2008) 13 SCC 667.

9. According to Mr. Kumar, the other objection advanced by respondent no.1 that the Collaboration Agreement resulted in transfer of property and, therefore, since it was not registered, it could not be taken cognizance of, was not sustainable, as possession of the subject property was given to the petitioner not in pursuance of the said agreement but only after its execution.

9.1 It was pointed out that though the Collaboration Agreement was executed on 09.08.2016, only a partial possession was sought to be given of the first floor, the second floor and the terrace portion of the subject property, and that too, on 25.09.2016. It was sought to be emphasized that, at present, the ground floor portion of the subject property was still in possession of respondent no.1.

9.2 Therefore, according to the learned counsel for the petitioner none of the portions of the subject property were given possession of in part performance of the Collaboration Agreement as alleged or at all. In other

words, it was learned counsel's say that the Collaboration Agreement did not require registration as contended on behalf of respondent no.1.

9.3 In so far as the other objection of respondent no.1 was concerned that the Collaboration Agreement was not sufficiently stamped, it was submitted by Mr. Kumar that the agreement was adequately stamped, and that, in any case, given the amendment brought about in Section 11 with the insertion of sub-section (6A) in the said Section, all that the Court is required to examine is as to whether or not an arbitration agreement is in existence before proceeding to appoint an Arbitrator. In support of this submission learned counsel relied upon on the judgment of the Supreme Court in *M/s. Duro Felguera, S.A. vs. M/s. Gangavaram Port Limited*, (2017) 9 SCC 729.

10. On the other hand Mr. Mitra who appeared on behalf of respondent no.1, as alluded to above, made the following submissions in opposition:

(i) That late Mrs. Kalyani Roy had only a life interest in the subject property and, therefore, could not have executed the Collaboration Agreement with the petitioner, and, thus, as a logical sequitur, late Mrs. Kalyani Roy could not have gone on to execute the Supplementary Agreement dated 25.09.2017, the letter dated 21.10.2016 and the agreement dated 23.10.2017. It was emphasized that on the date of execution of the Collaboration Agreement, late Mrs. Kalyani Roy was not in possession of the subject property.

(ii) The Collaboration Agreement was a product of machinations and manipulation employed by respondent no.2. Respondent no.2, in order to achieve this end, had taken away late Mrs. Kalyani Roy to

her house from the “safe custody” of respondent no.1. The result of which was the execution of Collaboration Agreement, *albeit*, with the help of the following co-conspirators i.e., the petitioner, respondent no.2’s husband, a property dealer and the “other brother” of respondent no.1 (presumably, respondent no.4).

(iii) It is this thoughtless and uncaring attitude of respondent no.2 which brought about the death of late Mrs. Kalyani Roy, who had undergone a bypass heart surgery and was suffering from various diseases such as thyroid, hyper tension, acute arthritis, high blood pressure, diabetes mellitus and alzheimer’s.

(iv) Before appointing an Arbitrator, this Court must consider as to whether a dispute in reality subsisted between the petitioner and late Mrs. Kalyani Roy.

(v) The petitioner, in the guise of an arbitration action is seeking to obtain specific performance of a contract via the legal representatives of late Mrs. Kalyani Roy, which is, an aspect that is outside the scope of the 1996 Act.

(vi) The Collaboration Agreement executed on a non-judicial stamp paper of Rs.100/- and described as a Sale Agreement, requires to be compulsorily registered and duly stamped. In the absence of registration and adequate stamp the said document cannot be acted upon and, therefore, the arbitration clause cannot be triggered.

(vii) This Court ought to impound the Collaboration Agreement under Section 33 of the Indian Stamp Act, 1889 (in short “Stamp

Act”) and follow the procedure prescribed under Section 35 and 38 of the very same Act.

(viii) After the amendment brought about in Section 53A of the Transfer of Property Act under the Amendment Act 48 of 2001 which came into effect from 24.9.2001, the petitioner was required to pay stamp duty to the extent of 90% of the sale value. Since, the same has not been done, the document is inadmissible in evidence. Reliance in this behalf, was placed on the judgment of the Supreme Court in *Bajaj Auto Ltd. vs. Behari Lal Kohli*, AIR 1989SC 1806. That existence of a valid and enforceable agreement is a condition precedent for appointment of an Arbitrator under Section 11 of 1996 Act.

(ix) In a case where there are serious allegations of fraud, the Court should not proceed to appoint an Arbitrator without first deciding the issue which relates to the legal tenability and validity of the arbitration agreement. In this context, reference was made to the judgment of the Supreme Court in *Bharat Rashiklal Ashra vs. Gautam Rasilal Ashra*, (2012) 2 SCC 144.

(x) Since, late Mrs. Kalyani Roy had only a life interest in the subject property, after her death, interest in the same devolved upon her children (i.e. respondent no.1 to 4), jointly and in equal measure. Late Mrs. Kalyani Roy, therefore, had no legal right to enter into the Collaboration Agreement without their express consent. Therefore, the Collaboration Agreement cannot bind the legal representatives of late Mrs. Kalyani Roy, which includes respondent No.1.

Reasons:

11. I have heard the learned counsel for the parties and perused the record. According to me, the following issues arise for consideration:

ISSUES:

- (i) Did late Mrs. Kalyani Roy have a life interest in the subject property?
- (ii) Whether the allegation of respondent no.1 that the Collaboration Agreement was a product of fraud and manipulation employed by respondent no.2 and others qua late Mrs. Kalyani Roy is serious enough for this Court not to appoint an Arbitrator?
- (iii) Whether the fact that the Collaboration Agreement is not registered or that, as alleged, is inadequately stamped would disable the Court from acting upon the arbitration clause incorporated in the Collaboration Agreement?

Issue No.(i):

12. Insofar as this issue is concerned, the answer to the same lies in the text of the Will dated 15.03.1988, executed by the husband of late Mrs. Kalyani Roy. For this purpose, I intend to extract the relevant portions of the said Will:

“In order to avoid dispute or litigation in respect of my three storeyed House No.D-603, Chittranjan Park, New Delhi, after my death, I hereby make this will.

I devise and bequeath my three storeyed house No.D-603, constructed on plot of land measuring 160 sq. yds. Situated at Chittranjan Park, New Delhi, in favour of my wife

Mrs. Kalyani Roy, who shall become the owner of the same with all rights, and privileges after my death only and shall get it transferred and mutated in her own name in the records of departments concerned. In case she pre-deceases me then my above said property shall be inherited by (1) Mrs. Gauri Sarkar wife of Mr. Pranob Kumar Sarkar, who is my daughter, and my three sons named (ii) Sh. Partha Sarathi Roy (iii) Sh. Amitabh Roy and (iii) Sh. Sanjay Roy, jointly and in equal shares, after my death only.

I further declare that in case my wife Mrs. Kalyani Roy dies after me, then after her death my above said house shall be inherited by my daughter Mrs. Gauri Sarkar and my three sons named (i) Sh. Partha Sarathi Roy (ii) Sh. Amitabh Roy and (iii) Sh. Sanjay Roy, jointly and in equal shares, who shall be entitled to get the same transferred and mutated in their joints names in the records of the departments concerned.

No other person or legal heir of mine shall have any right, title, claim or interest in my above said house.”

(emphasis is mine)

13. A careful perusal of above said extract would show that late Mr. Subhash Roy/executant vested, absolutely, all rights and privileges in the subject property in favour of his wife Mrs. Kalyani Roy. This is clearly evident from the words used by the executant that she will become "**owner**" of the subject property and shall stand conferred with "*all rights and privileges*" after the executant's death. The executant goes on to say that the subject property shall stand transferred and mutated in the name of Mrs. Kalyani Roy in the records of the concerned department(s). Therefore, quite clearly, the intent of the executant (i.e. Mr Subhash Roy) was that during her lifetime Mrs. Kalyani Roy would have all rights of an absolute owner in respect of the subject property. The executant goes on to state that in case his wife Mrs. Kalyani Roy pre-deceases him, then, the subject

property will be inherited by his four children i.e. respondent nos.1 to 4, jointly and in equal measure, *albeit*, after his death. Besides this, the executant has also stated, that if late Mrs. Kalyani Roy dies or expires after him, the subject property will be inherited by respondent nos.1 to 4 jointly and in equal proportions. A conjoint, sensible and holistic reading of the two parts of the Will dated 15.03.1988 would show that the later part of the said Will where the executant says that after his and Mrs. Kalyani Roy's death, the subject property will be 'inherited' by respondent nos.1 to 4 jointly and in equal measure is, obviously, subject to the right of Mrs. Kalyani Roy to deal with the said property during her lifetime as she chooses. In other words, only if late Mrs. Kalyani Roy had left the subject property untouched, that upon her death, it would stand vested in her children (i.e. respondent no.1 to 4) in the manner indicated in the Will dated 15.03.1988. Furthermore, if there is, as sought to be contended on behalf of respondent no.1, an apparent conflict between the earlier part of the said Will as against the later part, the earlier part which vests absolute title in Mr. Kalyani Roy will override the later part; though, in my view, there is no conflict if the Will is read in a holistic manner. The earlier part of the will, in my opinion, vests absolutely the subject property in favour of late Mrs. Kalyani Roy. According to me, late Mrs. Kalyani Roy had acquired upon the death of her husband complete right, title and interest in the subject property, which enured in her the authority to enter into the Collaboration Agreement with the petitioner, contrary to Mr. Mitra's contention.

Issue No.(ii):

14. The general principle of law is that the person against whom an allegation of fraud is made is entitled in law to insist that the matter be

placed before a public fora (i.e. a Court) for adjudication. This of course comes with the caveat, which is, that even though the person against whom the allegation of fraud is made says that he would want the matter to be tried by a private forum (i.e. an Arbitral Tribunal), the Court hearing a petition under Section 11 may still, having regard to the seriousness of the allegation, chose to relegate parties to a civil action and, thus, decline to appoint an Arbitrator while exercising powers under Section 11 of the 1996 Act. The observations made in this behalf in *Punjab National Bank vs. Kohinoor Foods Limited*, 2015 SCC OnLine Del 7351, being relevant are extracted hereafter: -

“D.1 To my mind, ordinarily the leeway as to the forum, where adjudication should take place, is available to the party which is charged with fraud, as against one which makes the allegation. This proposition, however, is hemmed in by a caveat, which is that, ultimately the discretion in that behalf is vested in the court. If, the one who levels the charge makes out a tenable case, that is, a prima facie case, in the very least, the court, could in the given facts of the case refuse to send the parties to arbitration. The reason, to my mind, is simple: parties could not have agreed to have the charge of “cheating” or “serious fraud” involving complicated questions of law referred to an arbitral tribunal. The rationale though, for grant of a leeway by courts, to a party charged with fraud, is that, he could desire a public vindication of allegation made against him and, therefore, may convey to the court that he does not want such an allegation to be tried by a private forum. Therefore, ordinarily, the court would sustain the plea of a person charged with fraud that his case should be tried by a public fora such as a court.

D.1.1 The same, however, is not true of a person leveling a charge, save and except where the court comes to a conclusion that the matter requires adjudication by a court of law as it involves serious allegations of fraud. The person making the allegation of fraud qua another may want a trial qua an

allegation of fraud before a public forum, to which the accused could respond, and quite reasonably, if I may say so, that he desires to have the matter tried by a private forum, such as an arbitral tribunal, without a (sic: the) public glare as it is easy to filing (sic: file) trumped-up charges of fraud, which could irreversibly damage his character by the time trial by a public fora gets concluded.

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D.1.3 The Supreme Court in the case of Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, adopted the Russell v. Russell principle. The relevant observations made in the said judgment of the Supreme Court, which support this principle, are extracted hereinbelow:

“There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Russel’s case (1880) 14 Ch. D. 471.”

We are clearly of the opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated and so on that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russel’s case (1880) 14 Ch. D. 471 to order an arbitration agreement to be filed and will not make a reference.

It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitration agreement to be filed and in refusing to make a reference....”

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8.3 In my view, the ratio of the judgment is that the decision of the court whether or not parties should be relegated to a public forum is not wholly dependent on who takes the plea but is governed by the assessment of the court as to whether a serious case of fraud is made out which requires a public trial.”

(emphasis is mine)

15. In this case, respondent no.1 says that respondent no.2 i.e. his sister, and her husband along with the petitioner and the broker manipulated late Mrs. Kalyani Roy into executing the Collaboration Agreement, the letter and the Supplementary Agreement which followed thereafter. It is also contended that late Mrs. Kalyani Roy was suffering from various ailments such as thyroid, hypertension, acute arthritis, high blood pressure, diabetes mellitus and alzheimer's. Apart from a bare assertion, there is nothing placed on record to establish or support the assertions made by respondent no.1 in his reply. Respondent no.2 and 3 have filed a common affidavit denying the allegations of respondent no.1. As a matter of fact, respondent no.2 and 3 say that they did not enter the subject property except at the time of the death of late Mrs. Kalyani Roy and that too, to perform the last rites.

15.1 To my mind, merely, based on bald allegations of fraud and manipulation, the prayer made for appointment of Arbitrator cannot be rejected. The Arbitrator will be better placed to examine this allegation, if

at all worthy of merit, after evidence is led by respondent no.1 in that behalf. The submission made in this regard on behalf of respondent no.1 though, cannot be quibbled with, is certainly not applicable in the facts and circumstances arising in the present case for the reasons stated hereinabove.

Issue No.(iii):

16. The argument advanced on behalf of respondent no.1 that because the Collaboration Agreement was neither registered nor adequately stamped and, therefore, the Court is disabled from appointing an Arbitrator is primarily based on the judgments of the Supreme Court in *SMS Tea Estate Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd.*, (2011) 14 SCC 66 and in *Naina Thakkar vs. Annapurna Builders*, (2013) 14 SCC 354.

16.1 It requires to be noted that these judgments were rendered prior to the amendment brought about in the 1996 Act by virtue of Amendment Act No.3 of 2016. By virtue of the said amendment Act, which was brought into effect on 23.10.2015 several provisions of 1996 Act were amended including Section 11.

16.2 Importantly, apart from other provisions, a reference may be made to sub-section (6A), (6B), (7) and (13) of Section 11 amongst others. Crucially, with the insertion of sub-section (6A) the legislature has made it clear that the Supreme Court and the High Courts when considering the application under sub-sections (4), (5) or even sub-section (6) shall notwithstanding any judgment, decree or order of any Court confine its examination to the existence of an arbitration agreement.

16.3 Sub-section (6B) of Section 11, in no uncertain terms, provides that the designation of any person or institution by the Supreme Court or as the case may be, by the High Court, for the purposes of Section 11 shall not be regarded as delegation of judicial power by the Supreme Court or the High Court.

16.4 Sub-section (7) of Section 11 goes on to say that a decision taken in respect of a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or as the case may be, to the High Court or the person or institution designated by such Court would be final and no appeal including the Letters Patent Appeal shall lie against such decision.

16.5 Lastly, sub-section (13) of Section 11 provides that an application is filed under Section 11 shall be disposed of by the Supreme Court or the High Court or the person or institution designated such court as the case may be as expeditiously as possible; the endeavour being to dispose of the same within a period of 60 days from the date of service of the notice on the opposite party.

16.6 A conjoint reading of the aforementioned sub-sections which form a part of Section 11 would show that there has been a diametric shift in the manner in which an application for appointment of an Arbitrator is dealt with. The statute now requires the concerned Court or its designate to only confine its scrutiny to the examination of existence of an arbitration agreement. Once a conclusion is reached that an arbitration agreement exists, which of course would be subject to the concerned Court or the designate having requisite jurisdiction to entertain a petition for appointment of an Arbitrator, then, all questions including those raised with regard to admissibility of the document whether on account of lack of

registration or inadequacy of stamp duty would have to be left to be dealt with by the Arbitrator.

16.7 Insofar as the objection *qua* the absence of registration is concerned, it requires to be noticed that in cases where the arbitration clause is incorporated in the parent contract even as per the ratio laid down in *SMS Tea Estate Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd.*, (2011) 14 SCC 66, the arbitration clause would survive and the Court could refer the parties to arbitration or appoint an Arbitrator in the matter. The following observations in the judgment make that clear:

9. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to section 49 of Registration Act read with section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

16.8 The inadequacy of stamp duty, as per the ratio laid down in the very same judgment i.e. *SMS Tea Estate Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd.*, mandates impounding of document and requires the concerned authority to proceed in accordance with Section 35 and 38 of the Stamp Act, before the matter is taken up for appointment of an Arbitrator.

16.9 This aspect, however, in my view has undergone a change. I am fortified in my view the observations made by the Supreme Court in *Dura Felguera, S.A. case*. In that case the Supreme Court was called upon to, broadly, decide whether a composite reference to an Arbitral Tribunal could be made given the fact that several contracts had been entered into between the parties, each of which contained an arbitration clause. Declining the plea for composite reference advanced on behalf of the respondent, in the lead judgment, Hon'ble Ms. Justice Banumathi, made the following apposite observations:

“...19. The effect of the Arbitration and Conciliation (Amendment) Act, 2015 in Section 11 of the Act has been succinctly elucidated in the textbook ‘Law Relating to Arbitration and Conciliation’ by Dr P.C. Markanda, which reads as under:

“The changes made by the amending Act are as follows:

1. The words ‘Chief Justice or any person or institution designated by him’ shall be substituted by the words ‘the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court’. Thus, now it is not only the Chief Justice who can hear applications under Section 11, the power can be delegated to any Judge as well.

2. As per sub-section (6-A), the power of the Court has now been restricted only to examination of the existence of an arbitration agreement. Earlier, the Chief Justice had been given the power to examine other aspects as well i.e. limitation, whether the claims were referable for arbitration, etc. in terms of the judgments of the Supreme Court in SBP and Co. v. Patel Engg. Ltd. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] Now all preliminary issues have been left

for the Arbitral Tribunal to decide in terms of Section 16 of the Act.

3. The amending Act has categorically provided in sub-section (6-B) that designation of any person or institution by the Supreme Court or High Court would not be construed as delegation of judicial power. The order passed by a designated person or institution would continue to be regarded as a judicial order.

4. It has been provided in sub-section (7) that the order passed under this section shall not be appealable. This change means that finality is attached to the order passed under this section and it would not be subject to further examination by an appellate court.

5. Sub-section (8) has been amended to bring it in conformity with amended Section 12 with regard to ensuring independence and impartiality of the arbitrator. Before appointing any arbitrator, a disclosure in writing has to be obtained in terms of Section 12(1) of the Act. This is to ensure that the appointed arbitrator shall be independent and impartial and also harmonizes the provisions of Sections 11 and 12 of the Act.

6. The amending Act has introduced sub-section (13) which provides that the disposal of the application under this section has to be expeditious and endeavour shall be made to dispose of the application within a period of 60 days from the date of service of notice on the opposite party. This sub-section would ensure speedy disposal of applications under this section and all contentious issues have been left to be decided by the Arbitral Tribunal.

7. For determining the fee structure of the Arbitral Tribunal, it has been recommended that the High Courts may frame the necessary rules and for that purpose, a model fee structure has been provided in the Fourth Schedule of the amending Act. However, this sub-section would not be applicable for the fee structure in case of international commercial arbitrations and domestic arbitrations where the parties have agreed for determination of fee as per rules of an arbitral institution. This sub-section has been inserted to ensure a reasonable fee structure since the cost of

arbitration has increased manifold due to high charges being levied on the parties by the Arbitral Tribunal and other incidental expenses.”

(emphasis is mine)

16.10 In a concurring but a separate judgment, Hon’ble Mr. Justice Korian Joseph has made the following crucial observations:

“...56. Having said that, this being one of the first cases on Section 11(6-A) of the 1996 Act before this Court, I feel it appropriate to briefly outline the scope and extent of the power of the High Court and the Supreme Court under Sections 11(6) and 11(6-A).”

57. This Court in SBP & Co. v. Patel Engg. Ltd. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] overruled Konkan Railway Corpn. Ltd. v. Mehul Construction Co. [Konkan Railway Corpn. Ltd. v. Mehul Construction Co., (2000) 7 SCC 201] and Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd. [Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388] to hold that the power to appoint an arbitrator under Section 11 is a judicial power and not a mere administrative function. The conclusion in the decision as inimized by Balasubramanyan, J. speaking for the majority reads as follows: (SBP & Co. case [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618], SCC pp. 663-64, para 47)

“47. We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) *In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the Designated Judge would be that of the Chief Justice as conferred by the statute.*

(iv) *The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the Designated Judge.*

(v) *Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.*

(vi) *Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.*

(vii) *Since an order passed by the Chief Justice of the High Court or by the Designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.*

(viii) *There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.*

(ix) *In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have*

the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd. [Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

58. *This position was further clarified in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] To quote: (SCC p. 283, para 22)*

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. *The issues (first category) which the Chief Justice/his designate will have to decide are:*

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. *The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:*

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. *The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:*

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267: (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to inimize the Court’s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

(emphasis is mine)

17. I may also indicate that after *M/s. Duro Felguera case*, the Supreme Court has rendered a judgment in the matter of *United India Insurance Co. Ltd. & Anr. vs. Hyundai Engineering and Construction Co. Ltd. & Ors.* (Civil Appeal No.8146 of 2018) dated 21.08.2018.

17.1 This judgment has adverted to, amongst others, to the judgment rendered in *M/s. Duro Felguera case* as well as the judgment in the case of *Oriental Insurance Company Limited vs. Narbheram Power and Steel Private Limited*, (2018) 6 SCC 534. In both judgments, the Court was called upon to decide as to whether the parties intended to refer their *inter se* disputes to an arbitral tribunal having regard to the provisions of the Insurance Policy. The insurance company in both cases disputed that it was liable under the policy to make good the claim. In other words, the dispute between the parties was not with respect to the quantum of money that had to be paid under the policy, but the factum of liability itself.

18. Based on the clause obtaining in the policy, the Court came to the conclusion in both cases that the ratio laid down by the Supreme Court in *M/s. Duro Felguera case* would not apply. In the instant case, though, the arbitration clause reads as follows:

"... That if any dispute arises between the parties regarding any matter concerning herewith, the same shall be mutually decided or be referred to arbitrator mutually appointed by both the parties. The provisions of Arbitration and Conciliation Act, 1996, shall apply to such proceedings. The place of arbitration shall be at New Delhi..."

19. A plain reading of the arbitration clause would show that every aspect including the aspect of liability has to be considered by the arbitral

tribunal. Thus, to my mind, the ratio laid down in *M/s. Duro Felguera case* would apply in the matter.

20. It may be relevant to note in this behalf that Section 33 of the Stamp Act, which empowers impounding of an instrument which is not duly stamped confers such power on every person, who by law or consent of parties has authority to receive evidence, as also, every person in charge of a public office, except an officer of police. In my opinion, the arbitrator is an authority who by consent of the parties has the right to receive evidence.

21. Therefore, as contended on behalf of the petitioner, the Collaboration Agreement even if found to be inadequately stamped cannot impede the appointment of an Arbitrator. The Arbitrator can exercise the power available under Section 33 and other attendant provisions of the Stamp Act if he comes to the conclusion that the Collaboration Agreement is deficient in stamp duty.

22. The submissions, to the contrary, advanced by Mr. Mitra, on behalf of respondent No.1 are, thus, to my mind, unsustainable.

23. Therefore, in my view, this issue will also have to be decided in favour of the petitioner and against respondent no.1. Accordingly, for the reasons given above, I am of the view that the petition would have to be allowed. It is ordered accordingly. Mr. R.V.Easwar, Former Judge, Delhi High Court, is appointed as the Arbitrator in the matter. The fee payable will be as per the Fourth Schedule appended to the 1996 Act.

**RAJIV SHAKDHER
(JUDGE)**

SEPTEMBER 06, 2018/hs