

THE HONOURABLE SRI JUSTICE SANJAY KUMAR

ARBITRATION APPLICATION NO.101 OF 2015

ORDER

By way of this application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), the applicant seeks appointment of a sole Arbitrator for resolution of his disputes with the first respondent firm and its partners, respondents 2 to 7. The applicant valued his claim at Rs.3,12,00,000/-.

According to the applicant, respondent 2, being the Managing Partner of the first respondent firm, was well acquainted with him and approached him in February, 2009 stating that he had entered into a registered Development Agreement-cum-General Power of Attorney with the owners of an extent of Ac.3.03 guntas situated at Pocharam Village, Ghatkesar Mandal, Ranga Reddy District. He informed the applicant that they were falling short of finance and requested him to invest in the said development. As security for the said investment, the respondents agreed to transfer some of the flats in the project to the applicant. The respondents promised that they would complete the multi-storied apartment complex within 40 months from the date of entering into an agreement with the applicant and also promised that a buyback option would be given to him in the event they failed to complete the project within the stipulated time or if the applicant was not willing to purchase the flats. In such an event, the respondents agreed to refund the amount invested by the applicant with attractive returns thereon. Five agreements of sale dated 20.03.2009, 27.03.2009, 02.04.2009, 06.04.2009 and 10.04.2009 were executed in relation to the five flats offered to the applicant. According to the applicant, he paid Rs.1,56,00,000/- to the respondents and as per the buyback option, the respondents agreed to

repay him Rs.3,12,00,000/-. Alleging that the respondents failed to adhere to the schedule of construction, the applicant stated that he demanded repayment from the respondents in October, 2013. Three post-dated cheques were given to him by the respondents but they thereafter expressed difficulty in making payment owing to financial troubles. The applicant stated that as on 15.12.2014, the respondents had only paid him Rs.25,22,000/-. He got issued notice dated 08.07.2015 to the respondents invoking Clause 27, the arbitration clause in the agreements of sale. Despite receipt of the notice, the respondents did not choose to reply or give their consent for resolution of the disputes through arbitration. He therefore filed the present application.

Notice having been ordered, Sri Sharad Sanghi, learned counsel, entered appearance for the respondents and filed a counter-affidavit. Therein, respondent 2, the Managing Partner of the first respondent firm, asserted that the other partners of the firm, respondents 2 to 7, were not parties to the agreements of sale and therefore, the arbitration application filed against them was not maintainable. He stated that the agreements of sale were in the nature of bonds and therefore, they had to suffer stamp duty accordingly. He contended that in the light of Section 35 of the Indian Stamp Act, 1899 (*for brevity*, 'the Act of 1899'), the agreements of sale could not be looked into. He also contested the claim of the applicant on merits. A separate counter was filed by respondents 3 to 7 pointing out that they were not signatories or parties to the agreements of sale and therefore, no arbitration proceedings could be initiated against them. They contended that the arbitration application was barred by limitation.

Smt.Manjiri S.Ganu, learned counsel for the applicant, would assert that the documents in question are primarily agreements of sale and stamp duty was paid treating them accordingly. She would point out that

the first page of each of the agreements of sale was drafted on a Rs.100/- non-judicial stamp paper, as per Article 6(C) of the Act of 1899, and assert that the contention of Sri Sharad Sanghi, learned counsel, that these documents should be treated as bonds is untenable.

The issue as to whether the agreements of sale translate into bonds would turn upon the intention of the parties, as embodied in the agreements of sale. Perusal of the clauses in the Agreement of Sale dated 20.03.2009 demonstrate that the tone and tenor thereof are in conformity with a conventional agreement of sale that would be executed in relation to purchase of a flat from a developer. Clause 3(c) of the agreement however gives scope for controversy. In the event the said clause results in the document partaking the nature of a bond, it would have to suffer stamp duty under Article 13 of Schedule I-A appended to the Act of 1899. Sri Sharad Sanghi, learned counsel, would contend so and assert that the subject agreements of sale cannot be looked into without the deficit stamp duty being collected in the first instance.

Clause 3(c) of the five agreements of sale reads as under:

'03. c) That the VENDEE having paid a sum of Rs.31,20,000.00 (Rupees Thirty-One Lakhs Twenty Thousand Only) mentioned as above, is more interested in good returns for his investment. In case the VENDEE is not interested in buying and registering the said flat in his favour, then the VENDOR will explicitly buy-back the said flat vide no. 901 on 9th floor from the VENDEE by paying the above said amount and Rs.31,20,000.00 (Rupees Thirty-One Lakhs Twenty Thousand Only) i.e. both totaling to Rs. 62,40,000.00 (Rupees Sixty-Two Lakhs Forty Thousand Only) after 40 months. The amount of Rs. 62,40,000.00 (Rupees Sixty-Two Lakhs Forty Thousand Only) will be paid after cancellation of the agreement, but if the VENDEE retains the above flat no extra amount will be paid and the terms of this agreement will be in force.'

Section 2(5) of the Act of 1899 defines 'bond' inclusively as under:

'5) "Bond".—“bond” includes—

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.'

According to Sri Sharad Sanghi, learned counsel, Section 2(5)(a) would apply to the case on hand inasmuch as the first respondent firm undertook the obligation of paying Rs.62,40,000/- to the applicant if he was not interested in buying and registering a flat eventually but in the event he retained the flat, no extra amount would be paid and the terms of the agreement would be in force.

At this stage, it would be apposite to examine case law:

IN THE MATTER OF HAMDARD DAWAKHANA (WAKF), DELHI¹, a Full Bench of the Delhi High Court considered the scope of an 'agreement' in the context of whether it should be treated as a 'bond' for the purposes of stamp duty. Noting that every 'bond' is an 'agreement', the Full Bench stated that what has to be seen is whether the agreement acquires the character of a 'bond'. Referring to the decision of the Calcutta High Court in GI SHORNE & CO. V/ s. SUBAL BOWRI², the Full Bench pointed out that the test laid down therein for distinguishing a 'bond' from an 'agreement' was that in the case of a 'bond', in the event of breach, the party to the instrument who had obliged to pay money to the other is

¹ AIR 1968 DEL 1 (FB)

² ILR 8 CAL 284

liable to pay the sum stipulated in the instrument, whereas in an 'agreement', the quantum of damages would be fixed by the Court.

In *JI WANLAL ACHARIYA V/ s. RAMESHWARLAL AGARWALLA*³, the Supreme Court agreed with the view of the Federal Court in *SURENDRA PRASAD NARAIN SINGH V/ s. SRI GAJADHAR PRASAD SAHU TRUST ESTATE*⁴ that the language of the instrument itself must expressly create the obligation to pay money for it to qualify as a 'bond'.

As regards the issue of registration and stamp duty, reference may be made to *SMS TEA ESTATES PRIVATE LIMITED V/ s. CHANDMARI TEA COMPANY PRIVATE LIMITED*⁵, wherein the Supreme Court observed that an arbitration agreement does not require registration under the Registration Act, 1908, and if it is found as one of the clauses in an instrument, it is an independent agreement to refer disputes to arbitration, which is independent of the main instrument. Therefore, an arbitration agreement, *per* the Supreme Court, in an unregistered but compulsorily registrable document, can still be acted upon and enforced for the purpose of dispute resolution. However, coming to the question as to what would happen if an arbitration agreement is contained in an unregistered instrument which is not duly stamped, the Supreme Court observed that having regard to Section 35 of the Act of 1899, unless stamp duty and penalty due in respect of an instrument is paid, the Court cannot act upon the instrument, which would mean that it would not act upon the arbitration agreement also which is part of the said instrument. In such circumstances, the Supreme Court observed that when an instrument is relied upon as containing the arbitration agreement, the

³ AIR 1967 SC 1118

⁴ (1940) FCR 39

⁵ (2011) 14 SCC 66

Court should consider at the outset whether an objection is raised as to whether the document is properly stamped and 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 Act of 1899. The Supreme Court held that the Court cannot act upon such a document or the arbitration clause therein, but if the deficit duty and penalty are paid, the document can be acted upon.

In the light of the aforestated decision, it is clear that unless the document containing the arbitration agreement suffers adequate stamp duty, it cannot be acted upon even for referring the parties to arbitration for resolution of their disputes under an arbitration agreement contained therein. As already noted *supra*, the agreements of sale executed by and between the parties only suffered stamp duty to the tune of Rs.100/- each. The core question however is whether Clause 3(c) lends itself to the interpretation that the agreement constitutes a 'bond' as defined under Section 2(5)(a) of the Act of 1899. In this regard, it may be noted that the aforestated sub-section requires a person to oblige himself to pay money to another on the condition that such obligation would be void if a specified act is performed or not performed, as the case may be. The obligation must therefore be 'to pay money'. However, Clause 3(c) of the agreement of sale dated 20.03.1999 does not straightaway visit upon the respondent firm an obligation to pay money in the event the applicant is not interested in buying and registering the flat. On the other hand, it states that in the event the applicant is not interested in buying and registering the said flat, then the respondent firm would explicitly buyback the said flat from the applicant by paying the sale consideration amount of Rs.31,20,000/- and an equal sum of Rs.31,20,000/-, aggregating to Rs.62,40,000/-. Therefore, what is contemplated by the aforestated clause

is a buyback agreement in the event the applicant ultimately showed disinterest in buying and registering the flat. Therefore, the obligation to 'pay money', being the sum of Rs.62,40,000/-, was dependent upon the buyback of the flat by the respondent firm. There was, in effect, no obligation offered by the respondent firm to straightaway pay money but the same was consequent upon the explicit buyback of the flat. The clause therefore does not lend itself to an interpretation which would bring it within the ambit of Section 2(5)(a).

However, there is one other clause in the agreements of sale which is of relevance, though it has not been relied upon or adverted to by Sri Sharad Sanghi, learned counsel. Significantly, it is not the case of the applicant that he wishes to assert a claim under Clause 3(c) by exercising his discretion whether or not to buy and register the flat. It is his specific case that the first respondent firm failed to adhere to the schedule of construction and did not complete the development within forty months as specifically agreed. His claim is therefore based upon Clause 33 of the Agreement read with Clause 3(c). Clause 33 reads as follows:

'33. In case the VENDOR fails to fulfil the terms of this agreement the VENDOR hereby agrees to pay back the entire amount received from the VENDEE as on that date. The VENDOR also agrees and undertakes to pay additional amount which would be calculated on the pro-rata of the investment made by the VENDEE for 40 months as per the clause No.3(c) on page No.6 of this agreement and in no event shall the VENDEE be entitled to claim any other damages for that reason.'

The situation that emerges under this clause is entirely different. If the respondent firm did not fulfil the terms of the agreement, its obligation to pay back the entire amount received from the applicant as on that date along with the additional amount which would be calculated on pro-rata of the investment made by the applicant for forty months as

per Clause 3(c) comes into play. The first respondent firm obligated itself to pay the quantified amount in terms of Clause 33 read with Clause 3(c) of the Agreement of Sale in the event it failed to fulfil the terms of the agreement. Further, Clause 33 also makes it clear that in no event would the applicant be entitled to claim any other damages for that reason. Therefore, the liquidated amount payable by the first respondent firm as per its obligation in this clause constitutes a 'bond'.

In any event, the agreements of sale would not fall under Article 6(C) of Schedule IA in the Act of 1899. Being agreements relating to construction of apartments, they would come within the ambit of Article 6(B) and stamp duty of Rs.100/- is wholly insufficient. The agreements would therefore have to suffer stamp duty as per Article 13 or Article 6(B) of Schedule I-A appended to the Act of 1899 or both. However, as the original agreements have not been produced before this Court, the question of exercising power under Section 33 of the Act of 1899 does not arise.

The Arbitration Application is accordingly dismissed leaving it open to the applicant to renew his request for appointment of an Arbitrator under Clause 27 of the Agreements of Sale after payment of requisite stamp duty and penalty on these documents. No order as to costs.

SANJAY KUMAR, J

1st APRIL, 2019

Svv/ PGS