

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

Judgment reserved on: 25.09.2018
Judgment pronounced on: 10.01.2019

+ ARB.P. 273/2018

SUNIL GUPTA

..... Petitioner

Through: Mr. Rajiv Bansal, Sr. Adv. with Mr. Lokesh Bhola, Ms. Harshita Agarwal, Ms. Fiza Saluja, Ms. Aprajita Gupta and Ms. Kamna Singh, Advs.

versus

ROOTS CORPORATION LIMITED

..... Respondent

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Nikhil Chawla, Mr. Saswat Pattnaik and Mr. Aditya Panda, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

Prefatory Facts:

1. The petitioner is in the second round of litigation. In the first round a similar petition was filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act") which was disposed of via order dated 04.10.2016. This petition was numbered as ARB. P. No.444/2012. The petitioner was unable to get any relief in the first round; principally, on account of the objection raised by the respondent that the Agreement to Lease dated 01.03.2007 (ATL), which contained the purported arbitration agreement obtaining between the parties was not adequately stamped and registered. The operative directions contained in the order dated 04.10.2016 read as follows: -

".....The course that commends to the Court itself is to dispose of the present petition with liberty to the Petitioner to revive its plea after he gets the Agreement to Lease properly stamped and

registered by approaching the Collector of Stamps, Ludhiana again for that purpose. If the Petitioner files an appropriate application before the Collector of Stamps, Ludhiana within a period of four weeks from today, then the Collector of Stamps will endeavour to enquire into the matter and complete the exercise of determining the stamp duty, registration fees and the penalty payable by the Petitioner within a further period of eight weeks thereafter. The amount stated to have been already paid by the Petitioner will be accounted for while calculating the balance deficit stamp duty, registration fees and penalty payable by the Petitioner. As already indicated, after the said exercise is complete and the Petitioner has paid the amounts in the manner determined by the Collector of Stamps, it will be open to the Petitioner to revive its plea for appointment of an Arbitrator. However, it is clarified that the Court has not examined any of the other objections raised by the Respondent and all those objections are permitted to be raised by the Respondent at the appropriate stage.”

2. Pursuant to the aforesaid, the petitioner appears to have written to the Collector of Stamps (Ludhiana West District), Ludhiana, on 06.10.2016. The request made by the petitioner was that the Collector of Stamps should recalculate the stamp duty in accordance with law which was required to be paid in respect of the ATL. A copy of the order dated 04.10.2016, passed by this Court as also the ATL were enclosed.

2.1 It was disclosed in this letter that a determination had been made by the Sub-Registrar (Ludhiana - West District), Ludhiana (in short “Sub-Registrar”), on an earlier occasion i.e. on 15.01.2015, whereby, the petitioner was asked to pay stamp duty in the sum of Rs.6,83,100/-.

2.2 It was indicated that the said stamp paper was purchased by the petitioner as per the determination made by the Sub-Registrar. A copy of the stamp paper dated 28.01.2015, bought, pursuant to the determination dated 15.01.2015 of the Sub-Registrar was also enclosed with this letter.

3. As to why the determination was made, has its genesis in the earlier arbitration, petition to which I have made reference above, i.e. ARB. P. No.444/2012.

3.1 In that arbitration petition, an initial order dated 03.09.2014, was passed as even while the counsel for the respondent was seeking an accommodation, a preliminary objection was raised by him that the ATL had not been sufficiently stamped. Given this background and based on the stand taken on behalf of the respondent that the ATL was not sufficiently stamped and willingness shown on behalf of the petitioner's counsel to pay the differential stamp duty, the following directions were issued: -

“...Accordingly, an attested copy of the document in issue will be sent by the Registry to the Controller of Stamps. The Controller of Stamps will determine the deficit stamp duty, if any, payable by the petitioner in accordance with the extant provisions of law. A report in this behalf will be generated and placed before this court on the next date of hearing.

Mr. Kohli, at this stage, says that if the petitioner were called upon to pay the deficit stamp duty, it should be open to the petitioner to recover the same as part of the arbitration proceedings, if and when an arbitrator is appointed. Needless to say, if the court is persuaded by the petitioner that an arbitrator needs to be appointed, it would be open to the petitioner to lodge a claim in that behalf before the arbitrator...”

3.2 In the very same petition i.e. ARB.P. No.444/2012, on 02.02.2015 another order was passed, whereby, the following directions were issued: -

“On the last date of hearing, learned counsel for the petitioner conceded that the document in issue i.e. agreement to lease is insufficiently stamped. This court noting such a submission had directed the Registry to send the document to the Collector of Stamps. In terms of the said order, the Collector of Stamps was to determine the deficit stamp duty, if any. I note that the petitioner had represented to the Collector of Stamps to which a response has been received by the petitioner, the same has

been filed by way of an affidavit. Since then the Registry has not received the report from Collector of Stamps. Collector of Stamps, Ludhiana is directed to send the report on the document sent by this court in terms of the order of this court dated 03.09.2014 within four weeks from today.

Let a copy of this order be sent to the Collector of Stamps, Ludhiana, within one week.

Renotify on 16.03.2015.”

4. It is in this background that the Sub-Registrar, on 15.1.2015, determined that the stamp duty that the petitioner ought to have affixed was Rs.6,83,100/-. In addition thereto, the petitioner was also called upon by the very same determination to pay a registration fee of Rs.2 lakhs and pasting fee of Rs.100/-.

4.1 Since, the report of the Collector of Stamps was assailed and a direction was sought by the respondent from this Court that the stamp duty, inclusive of penalty, should be determined afresh based on average monthly rent as per the provisions of Clause 9.3 of the ATL, the order dated 04.10.2016 came to be passed.

4.2 It is important to note that the respondent had taken this objection in I.A. No.5623/2016 which was disposed of on 04.10.2016, along with the main petition as noticed hereinabove.

4.3 In this application, the respondent had raised an alternative plea as well which was that the petitioner should be called upon to pay deficit stamp duty inclusive of penalty.

5. The record shows that pursuant to the Collector of Stamps, communication dated 14.12.2017, the petitioner has, in fact, paid an additional sum of Rs.7,57,787.40, as directed. Furthermore, upon the petitioner seeking to know from the Sub-Registrar as to whether further

dues, if any, were payable – he was informed vide communication dated 26.03.2018 that upon payment of the balance sum of Rs.7,57,787.40 no further sums towards stamp duty were payable. This figure of Rs.758,787.40 was reached by deducting from the figure of Rs.16,41,487.40 (which is a summation of total assessed stamp duty, registration and pasting fees) the stamp duty already paid by the petitioner i.e. Rs.683,100/-. Pertinently, this communication was sent by the Sub-Registrar in response to petitioner's letter dated 25.01.2018 sent by the petitioner.

Transactional Backdrop:

6. This is insofar as the background as to why the petitioner has approached this Court for the second time. However, as to why the disputes have arisen between the parties and the reason why the ATL came to be executed, based on which, the petitioner has moved the instant petition for the second time also requires to be noticed:-

7. An entity by the name of Sonia Farms Pvt. Ltd. (in short "SFPL") had, it appears, purchased a free hold land admeasuring 29 kanals, located in Village Kadian in District Ludhiana, Punjab; a more detailed description of this parcel of land is set out in paragraph 3 of the petition. However, for the sake of this judgment, it would be described hereafter as "subject land".

7.1 The subject land was purchased by SFPL vide sale deed dated 24.8.2004 from an entity by the name: Scott Industries Ltd.

8. SFPL, thereafter, entered into a Collaboration Agreement dated 18.02.2005 (in short "C.A.") with an entity known as Aerens Gold Souk International Ltd. (in short "AGSL"). The C.A. envisaged development and construction of a commercial complex (in short "subject complex"). The obligation to construct the subject complex, though, was that of AGSL.

8.1 AGSL was, therefore, required to not only incur cost and expenses for building the subject complex but was also obliged to obtain requisite permissions and approvals. In addition thereto, AGSL was also required to maintain and manage the subject complex by appointing relevant agencies in that behalf.

9. In and about March, 2007 the respondent offered to take on lease the 4th and 5th floor of the subject complex (which had a super area of 43125 sq. ft.), to run a hotel by the name “Ginger Hotel” or as agreed by any other brand name (hereafter referred to as “Subject Premises”). This agreement, as alluded to above, translated into an ATL. As noticed at the outset, the ATL was executed on 1.3.2007. The ATL was entered into among SFPL, AGSL and the respondent.

9.1 In the meanwhile, a Letter of Intent dated 20.12.2006 (LOI) was executed by AGSL in favour of the Respondent. The LOI was followed by an Agreement to Sell dated 31.7.2007 (in short “ATS”) which was executed amongst the following: the petitioner, AGSL (i.e. the Developer) and SFPL (i.e. the owner of the subject land).

9.2 Broadly, the ATS required SFPL and AGSL to ensure that a bare bone structure was constructed on the 4th and 5th floor of the subject complex as per the plans, drawings and specifications provided by the respondent. The respondent was to obtain the subject premises on lease for an initial term of 30 years from the date of possession when the subject premises were handed over. Perhaps given the investment, a lock-in-period of 30 years was also provided. The respondent was also required to remit a refundable interest free security deposit of Rs.28,50,000/-, to AGSL. In addition thereto, the respondent was required to pay advance rent of an equivalent amount i.e. Rs.28,50,000/-, to AGSL.

9.3 Besides this, the respondent was to pay monthly rent at the rate of Rs.22/- per sq. ft., calculated, based on the super area, which, as indicated above, was pegged at 43125 sq. ft. Thus, the monthly rent worked out to Rs.9,48,750/-. This was the fixed rent which the respondent was required to pay. In addition to the fixed rent, the respondent was also required to pay a variable fee, *albeit*, on quarterly basis, at the rate of 2% per month of the respondent's gross revenue.

9.4 Insofar as the fixed lease rentals were concerned, as per the ATL, it would be increased by 7.5% of the last paid rent, *albeit*, after every three years.

9.5 Pertinently, if SFPL or AGSL, for any reason, during the subsistence of the initial lease tenure or the extended tenure desired to sell or transfer the subject premises, the respondent had the right of first refusal to buy out the said premises. The respondent was required to exercise this option within 30 days of receipt of such an offer from either SFPL or AGSL.

9.6 It appears that vide communication dated 02.04.2007 AGSL wrote to the respondent giving it the option to purchase the subject premises. The respondent, evidently, refused to exercise the right to purchase the subject premises.

9.7 Consequently, AGSL and SFPL, as indicated above, entered into an Agreement to Sell (ATS) with the petitioner. The petitioner, apparently, at the relevant point of time, was the Director of SFPL.

9.8 In view of the execution of the ATS, AGSL wrote to the respondent on 23.08.2007 to execute a lease deed, and in the meanwhile attorn to the petitioner. In other words, AGSL called upon the respondent to pay the rent for use of the subject premises to the petitioner w.e.f. 01.09.2008.

9.9 In the interregnum, this Court vide judgment dated 04.03.2008 passed in Co. Pet. No.306/2007 approved a scheme of merger, whereby, SFPL merged into AGSL. The record shows that in respect of the subject premises respondent paid a monthly rent of Rs.9,48,750/- to the petitioner till April, 2009, when, based on a meeting held between the respondent's representatives and the petitioner a revision in the rent as well as amounts payable towards water, electricity, power back-up charges and maintenance charges (hereafter collectively referred to as "CAM charges") was brought about. This fact is reflected in a letter dated 06.05.2009 addressed by the respondent to the petitioner. Thus, the revisions in rent and CAM charges were as follows:

"i. Lease rental payable to Mr. Sunil Gupta under clause 9.3 of the Agreement shall stand reduced to Rs.19.20/- per sq. ft. per month on super area of 43,125 sq. ft. for a period of 2 years viz. 01/04/2009 till 31/03/2011. Accordingly, Clause no.9.3 of the Agreement shall consequently stand amended to the extent of revised lease rental.

ii. CAM charges payable under clause 11 of the Agreement shall be Rs.4.20/- per sq. ft. per month from 01/11/2008 till 31/03/2011. Accordingly, Clause no.11 of the Agreement shall be read as referring to CAM charges at the rate of Rs.4.20/- per sq. ft. per month.

iii. We shall offer to you Mr. Sunil Gupta 75 room rights per year on complimentary basis in the said property over a period of 2 years till 31/03/2011. However, you have to send a request for blocking rooms to Mr. Ameet Mehta, Head Corporate Operations at least 5 days in advance and the request should be for blocking 5 rooms at a time. However, if more rooms are available, request for more than 5 rooms at a time may be considered.

iv. We shall offer one of the hotel room in the said property to Mr. Gaurav Gupta of Aerens Gold Souk International Limited. We shall charge a lump sum cost of Rs.4,000/- per

month to Aerens Gold Souk International Limited inwards electricity & house keeping.

v. If the turnover of Ginger Hotel from the said property at Ludhiana exceeds Rs.2 crores in financial years 2009-10 & 2010-11 respectively, the lease rent payable shall be treated as Rs.22/- per sq. ft. per month & the difference lease rental amount between Rs.19.20 per sq. ft. per month & Rs.22/- per sq. ft. per month shall be paid by us to Mr. Sunil Gupta for the financial year 2009-10 on or before 30th June 2010 and for the financial year 2010-11 on or before 30th June 2011 respectively.

(emphasis is mine)

10. This letter the respondent concluded by stating that the revised terms shall form part and parcel of the ATL with consequential charges, as may apply *mutatis mutandis*. Since the concession pertaining to reduction in rent and CAM charges was given for a defined period, the petitioner demanded the original agreed rent and CAM charges as provided in the ATL once the stated period expired. The non-fulfillment of the demand as well as default in the payment of variable fee caused disruption in the relationship between the petitioner and the respondent.

10.1 Accordingly, the petitioner expressed his grievance in the letter dated 01.09.2011 addressed to the respondent.

10.2 The respondent, on its part, continued to pay rent at the reduced rate of Rs.19.20 per sq. ft. instead of Rs.22 per sq. ft. even after the expiry of 2 year period for which, according to the petitioner, the concession was accorded by the petitioner to the respondent.

10.3 The petitioner, evidently, sent bills for payment of differential rent and CAM charges for the period spanning between April, 2011 and October, 2011. Furthermore, since, as per the ATL, the petitioner was entitled to

enhance the rate of rent by 7.5% w.e.f. November, 2011 (which came to a figure of Rs.10,19,906.25 per month), a demand in this behalf was also made via a letter dated 08.10.2011.

10.4 Reminders in the form of letters dated 12.11.2011, 25.11.2011 and 06.12.2011 were served on the respondent along with copies of the bills for the period spanning between November, 2011 and July, 2012. The respondent, evidently, issued a reply dated 16.12.2011, whereby, several defences were taken including the defence that the petitioner had failed to fulfill the assurances given by him and that the construction of the subject complex was not of standard quality.

10.5 Faced with the situation, the petitioner had his lawyers issue a notice dated 13.01.2012, to the respondent under Section 433 read with Section 434 of the Companies Act, 1956. Via this notice, the petitioner demanded a sum of Rs.14,20,968.75, towards differential rent and CAM charges along with variable fee at the rate of 2% of the gross revenue, in addition to interest at the rate of 18% per annum.

10.6 The respondent via reply dated 04.02.2012, refuted the claim made by the petitioner. This reply was followed by a termination notice dated 29.06.2012. By virtue of the notice dated 29.06.2012, the respondent terminated the ATL.

10.7 The petitioner served a reply-cum-demand notice dated 25.07.2012 on the respondent. The petitioner called upon the respondent to withdraw the aforementioned termination notice and the pay the differential rent and the outstanding CAM charges along with interest at the rate of 18% per annum.

10.7(a) The petitioner also put the respondent to notice that in case the respondent did not withdraw the aforementioned termination notice, it

would have to pay the rent for the remaining lock-in period i.e. between August, 2012 to October, 2038; which, according to him, worked out to Rs.43,70,09,502/- after adjusting the security deposit and that too based on the premise that the physical possession of the subject premises was handed over to him on the expiry of the contractual tenure. The respondent, though, vide its rejoinder dated 03.09.2012 refuted the claims made by the petitioner.

10.8 The petitioner, in these circumstances, served the respondent with a notice dated 17.09.2012 whereby, he called upon the respondent to agree to appointment of his nominee Arbitrator. The respondent vide its reply dated 01.10.2012, conveyed its intention to not agree to the constitution of the Arbitral Tribunal.

10.9 It is, as noticed above, in this background that the petitioner had moved this Court in the first instance via ARB. P. No.444/2012. As alluded to hereinabove, on account of the objection raised with regard to inadequacy of the stamp duty and deficiency in the payment of penalty and registration fees — the petitioner approached the Collector of Stamps upon order dated 04.10.2016 being passed by this Court disposing of Arb. Pet. No.444/2012 and taking cognizance of the objections.

11. Thus, the present petition for appointment of an Arbitrator has been instituted by the petitioner after paying an additional sum of Rs.7,57,787.40 as noticed hereinabove.

Submission of Counsel:

12. In this backdrop, arguments have been addressed on behalf of the petitioner by Mr. Rajiv Bansal, Senior Advocate, instructed by Mr. Lokesh Bhola and others, while submissions on behalf of the respondent have been

made by Mr. Akhil Sibal, Senior Advocate, instructed by Mr. Nikhil Chawla and others.

13. Mr. Bansal, broadly, made the following submissions:

i) The respondent had attorned in favour of the petitioner, as was demonstrable upon a perusal of letters dated 28.07.2008 and 31.07.2008. The respondent, in fact, had sought a reduction in the payment of lease rentals and CAM charges as against those payable under the ATL. The fact that the respondent's request was accepted is reflected in its letter dated 06.05.2009.

ii) The respondent is precluded from disputing the title of the petitioner, in view of the provisions of Section 116 of the Indian Evidence Act, 1872 (in short "Evidence Act"). Reliance in this behalf was placed on the judgment of the Supreme Court in *Om Prakash & Anr. vs. Mishri Lal (Dead) Rep. by His L.Rep. Savitri Devi*, AIR 2017 SC 1597.

iii) The respondent had filed a Civil Suit bearing No.48142/2013 in which the petitioner had filed an application under section 8 of the 1996 Act which had been allowed vide order dated 03.04.2017, passed by the Civil Judge, Senior Division, Ludhiana. In paragraph 13 of this order, the concerned Court has observed that the title of the petitioner could not be denied.

iv) The respondent, while terminating the ATL vide notice dated 29.06.2012, had not objected to the title of the petitioner in the subject premises.

v) The petitioner had both, pursuant to order dated 03.09.2014 and order dated 04.10.2016, passed in ARB. P. No.444/2012, paid the requisite stamp duty determined by the statutory authority. As a

matter of fact, pursuant to order dated 4.10.2016, whereby ARB. P. No.444/2012 was disposed of, the petitioner had vide letter dated 06.10.2016, written to the Collector of Stamps to recalculate the stamp duty payable by him. In response thereto, upon the Collector of Stamps calling upon the petitioner vide communication dated 14.12.2017 to pay the balance sum of Rs.7,58,787.40, the said sum was, in fact, paid. The petitioner, thereafter, in fact, called upon the Sub-Registrar to indicate as to whether any further amount was payable; whereupon, he was informed via communication dated 26.03.2018 that no further amounts were payable.

vi) Section 11 has undergone a change with the insertion Sub section (6A) in the said provision with effect from 23.10.2015. The objection, if any, with regard to the alleged inadequacy of stamp duty and/ or penalty could not come in the way of this Court appointing an Arbitrator in the matter. In support of this submission, reliance was placed on the judgment rendered by this Court in *Sandeep Soni vs. Sanjay Roy & Ors.*, dated 06.09.2018, passed in ARB. P. No.413/2017 and judgment of a Single Judge of the Bombay High Court dated 09.03.2018, passed in ARB. P. No.24/2017, titled: *Coastal Marine Construction and Engineering Ltd. vs. Garvare-Wall Roads Ltd.*

14. On the other hand, Mr. Sibal raised a whole host of objections with regard to instant petition:

i) The petitioner was not a party to the ATL. The petitioner claims to be a party to the ATL by virtue of the ATS which was executed between AGSL, SFPL and the petitioner. The petitioner cannot claim to be party to the ATL as it is neither the owner nor the landlord of the subject premises.

ii) The ATS, based on which the petitioner claims ownership in the subject premises, is both deficiently stamped and an unregistered document and, therefore, cannot transfer title in the subject premises in his favour.

iii) This Court, in the proceedings held on 16.10.2015, had called upon the petitioner to examine whether he could be a successor-in-interest in law, if the documents, based on which he claims title in the subject premises was transferred in his favour were unregistered documents which were executed post 24.09.2001, that is, after Section 53A of the Transfer of Property Act, 1882, had been amended via Amendment Act No.48 of 2001.

iv) The ATL contained a right of first refusal clause which required that an option be given to the respondent to purchase the subject premises in the first instance. The offer given to the respondent vide communication dated 02.04.2007 pegged the price at Rs.30 crores whereas a perusal of the ATS would show that the total consideration which the petitioner was required to pay was only Rs.5.175 crores. In effect, by this arrangement the provisions of Clause 8 of the ATL which gave the right of first refusal to the respondent was breached.

v) The petitioner's claim that the respondent had attorned to him is a submission which is flawed in law as it was based on a misrepresentation that he was the owner of the subject premises. Thus, the letters dated 28.07.2008, 31.07.2008 and 06.05.2009 cannot be construed to hold that the respondent had attorned to the petitioner.

vi) The misrepresentation made by the petitioner that the subject premises was sold to him is also borne out upon a mere perusal of

notice dated 17.09.2012, whereby, the arbitration agreement was sought to be triggered.

vii) The order of the Civil Judge, Ludhiana, dated 03.04.2017 has been challenged by the respondent by way of a Civil Revision Petition instituted in the Punjab and Haryana High Court.

viii) The provisions of Section 116 of the Evidence Act (assuming without admitting that the petitioner is the landlord), do not apply to a “subsequent landlord”. In other words, the petitioner being the subsequent landlord the respondent can still lay a challenge to his title and ownership of the subject premises since the act of attornment was based on deception. In this behalf, reliance was placed on the following judgments: -

- a) *Shambhunath Mitra and Ors. v. Khaitan Consultant Ltd. and Ors.*, MANU/WB/0045/2005 Para 47.
- b) *Subhash Chandra v. Mohammad Sharif and Ors.*, (1990) 1 SCC 252 Para 7.
- c) *Mohd Ilyas and Anr. v. Mohd. Adil and Ors.*, MANU/DE/0952/1994 Para 11.

ix) There has been non-compliance of the order dated 4.10.2016. The petitioner in his application to the Collector of Stamps had not asked for determination of penalty. The authority concerned also failed to apply its mind with regard to the same. In sum, it was contended that the ATL remained insufficiently stamped and hence, the Arbitration Agreement contained therein, could not be relied upon or looked into by the Court. Since, Section 7 of the 1996 Act required the agreement to be in writing, an insufficiently stamped agreement would not meet the parameters laid down in the said provision. In support of this submission, reliance was placed on the

judgment of the Supreme Court in *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited*, (2011) 14 SCC 66.

Reasons:

15. I have heard the learned counsel for the parties and perused the record. The background in which the petitioner has approached the Court for the second time and the broad contours of the transaction which led to the petitioner receiving rent and CAM charges qua the subject premises have already been set out hereinabove by me. Therefore, the issues required to be answered, given this backdrop, are as following: -

- i) First, can the petitioner *dehors* the ATS and/or ATL both of which are unregistered, *prima facie*, demonstrate the character of the transaction between himself and the respondent?
- ii) Second, will the alleged inadequacy of the stamp duty become an impediment for this Court to deal with the instant petition, given the fact that the petitioner has paid the entire amount as determined by the Collector of Stamps?

Issue No.(i)

16. Insofar as the first aspect is concerned, it is not in dispute that the initial signatories to the ATS were SFPL, AGSL and the petitioner. Upon demand, a copy of the same was furnished to the respondent. This is evident upon perusal of communication dated 17.12.2008. This communication has been addressed by the respondent to, one, Mr. Goel of AGSL. It is important to note, this communication was sent in the context of two earlier letters of AGSL dated 30.10.2008 and 02.12.2008, wherein, it is indicated that the petitioner was the new owner of the “leased premises” (i.e. the subject premises) and hence, the respondent should pay the rent to

the petitioner w.e.f. 01.12.2008. In both these letters reference was made by AGSL to its earlier letter dated 28.07.2008.

16.1 More importantly, the respondent's own letter dated 06.05.2009, clearly indicated that it had accepted the petitioner as the new owner. I must indicate herein that in the letter dated 06.05.2009 the respondent had, in a manner of speech, hedged its bets by referring to AGSL's letter dated 28.07.2008 whereby, it was indicated by AGSL that it had conveyed and transferred the leased premises (i.e. the subject premises) to the petitioner, and therefore, the rent should be paid to him w.e.f. 01.09.2008. What is interesting is that the letter dated 06.05.2009 is addressed to the petitioner as well as to one Mr. Gaurav Gupta, Director of AGSL. Admittedly, (and there appears to be no dispute about this fact) which is between 2008 and June, 2012 rent was paid by the respondent to the petitioner, first at the rate provided for in the ATL, which was, Rs.22/- per sq. ft. per month along with CAM charges, and thereafter, at Rs.19.20 per sq. ft. per month, once again, along with CAM charges though at revised rate in respect of the agreed super area, equivalent to, 43125 sq. ft.

16.2 The respondent, while not disputing the fact that it had attorned to the petitioner claims that the same was done based on a misrepresentation that the petitioner was the owner of the subject premises. Undoubtedly, the material on record does show that both AGSL and the petitioner conveyed to the respondent that the petitioner had acquired ownership in the subject premises. That being said there is nothing on record to show that a sale deed has been executed in favour of the petitioner. Thus, though the ATS would not create an interest in the immovable property in issue, however, because it was executed after the amendment had been brought in Section 53A of the Transfer of Property Act, it possibly, had to be registered. The crucial point is that the benefit of the provisions of Section 53A can be

claimed only against the transferor and that too as a shield and not a sword. As to whether the petitioner will be relying upon the provisions of Section 53A of the Transfer of Property Act and to what effect, at this stage, can only be in the realm of conjecture.

16.3 Therefore, in sum, while in the absence of registration neither the ATS nor the ATL will “affect” the immovable property comprised therein or be received in evidence of any transaction affecting the subject property or even confer any such power, they can, however, be used as evidence in a suit for specific performance or as evidence of collateral transaction not required to be effected by a registered instrument. Thus, while it could be argued that the ATS and/or ATL are inadmissible as evidence for proving title and/or interest in the subject premises, they could possibly be used to prove the character of the respondent’s possession (See observations of Subba Rao, J. in *Rahimansa Rowther vs. Madras Islamia Educational Institute, Vallam*, AIR 1953 Madras 366¹).

16.4 Furthermore, other uncontroverted material in this case, that is, the letter dated 6.5.2009 could always be relied upon to demonstrate as to the nature of the relationship between the petitioner and the respondent; which according to the petitioner, was one that of landlord and a tenant. (See *Ahmed Saheb & Ors. vs. Sayed Ismail*, (2012) 8 SCC 516 and *Anthony Vs. K.C. Ittop & Sons & Ors.*, (2000) 6 SCC 394).

16.5 As to whether the petitioner, in fact, deceived the respondent as to his having acquired ownership of the subject premises is a mixed question of fact and law which, in my view, I am not required to examine in a Section

¹ It is then contended that this document though not admissible to establish title of Kadirsa or his heirs could be relied upon for the collateral purpose of showing the nature of possession. It is undoubtedly true that a document inadmissible for want of registration can be relied upon for proving the character of possession. The appellants can, therefore, rely upon this document for the purpose of showing that after Ismail Bivi redeemed the mortgages, that is from the years 1931 and 1933 she claimed to be in possession in her own right.

11 action. This is more so as the respondent has, admittedly, attorned to the petitioner, *albeit*, under a mistaken belief that he was the owner of the subject premises. Section 116 of the Evidence Act, contrary to what has been argued, does create an estoppel in law in the tenant questioning the title of the landlord, save and except when it is a case of deception or fraud. Fraud as is often said unravels all. A transaction impregnated with fraud is voidable at the instance of the aggrieved party. But then, as adverted to hereinabove, it requires the matter to be tried by an appropriate adjudicatory forum.

16.6 The judgments cited by the respondent in the matter of *Shambhunath Mitra and Ors. v. Khaitan Consultant and Ors.*; *Subhash Chandra v. Mohammad Sharif and Ors.* and *Mohd Ilyas and Anr. v. Mohd. Adil and Ors.* in support of the submission that the estoppel placed on the tenant to challenge the title of the landlord by virtue of Section 116 of the Evidence Act does not apply to a subsequent landlord is flawed. A bare perusal of the judgment in the case of *Shambhunath Mitra* would show that the proposition formulated on behalf of the respondent would not apply where the tenant has attorned to the subsequent landlord. In fact, this was not even the submission of the counsel for the appellant-tenant before the Supreme Court as is discernible upon a bare perusal of paragraph 6 of the judgment in *Shambunath Mitra's case*. As adverted to hereinabove, in the course of narration of facts, the respondent in this case did attorn to the petitioner. The issue, which, to my mind, would require trial is: whether the respondent attorned to the petitioner under a mistaken belief that the petitioner was the owner or was the attornment done willingly knowing fully well that the ATS or the ATL were not registered documents. This position, to my mind, is not any manner impacted by any of the above-referred judgments cited on behalf of the respondent.

16.7 Thus, to my mind, the petitioner has even *dehors* the ATS and the ATL, at this stage, been able to show that the character of his relationship with the respondent was that of a landlord and tenant. As indicated above, the issue as to whether there was a misrepresentation will require adjudication after evidence is led in that behalf. In this regard, I must note that even though the respondent on its own showing had asked for a copy of the sale deed via its communication dated 17.12.2008 it continued to pay, curiously, the rent to the petitioner till 2012 despite its stated stand that it did not receive a copy of the same.

16.8 As to whether it was a case of misrepresentation or a case where the respondent looked the other way knowing fully well that the petitioner had not acquired legal title to the subject premises is an aspect which would be known, as alluded to above, once evidence is led by the parties.

16.9 Suffice it to state that an Arbitration Agreement does not require registration and therefore, even in the absence of registration of the parent agreement, arbitration can be triggered. (See *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited*, (2011) 14 SCC 66)

17 Furthermore, for a person to show that he or she has the status of a landlord, it is not necessary for him or her to show that he or she is the owner of the premises qua which such status is claimed. For this purpose, one need not go further then look at rent legislations across the country. By way of example one may look to Section 2(e)² of the Delhi Rent Act, 1958.

Issue No.(ii)

18. In the facts and circumstances of this case, as narrated above, what has emerged is that the petitioner pursuant to the order dated 04.10.2016

² "landlord" means a person who, for the time being is receiving, or is entitled to receive, the rent of any premises, whether on his own account or on account of or on behalf of, or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant;

passed by this Court in ARB. P. No.444/2012 has, in fact, paid the deficit sum towards stamp duty, registration and pasting fee amounting to Rs.7,57,787.40 as determined by the Collector of Stamps. The argument advanced on behalf of the respondent is that the determination by the Collector of Stamps is not in accordance with law and the directions contained in the order dated 04.10.2016, passed by this Court in ARB. P. No.444/2012.

18.1 As noted hereinabove, the petitioner had after order dated 4.10.2016, passed by this Court, written to the Collector of Stamps, Ludhiana, on 06.10.2016. Along with this communication the petitioner had, in fact, enclosed amongst other documents the order dated 04.10.2016. The Collector of Stamps, thereafter, made his determination and (after making adjustment qua the stamp duty already paid) called upon the petitioner to pay the deficit sum amounting to Rs.7,57,787.40. The petitioner complied with the direction and, in fact, as a measure of abundant caution wrote to the Sub-Registrar, Ludhiana (who, according to the petitioner has been assigned the duties of the Collector of Stamps) vide letter dated 25.01.2018 to indicate if further amounts were payable. The Sub-Registrar, in response thereto, vide communication dated 26.03.2018, indicated to the petitioner that no further dues were payable towards stamp duty.

18.2 The respondent, however, insists that since the aspect of the penalty was required to be examined by the Collector of Stamps and as that aspect was not inquired into there was inadequate stamp affixed on the ATL, and therefore, this petition cannot proceed further. In my view, this submission fails to appreciate the tenor of the order dated 04.10.2016 passed by this Court. It was, as per the order dated 4.10.2016 the duty of the concerned statutory authority to determine the deficit stamp duty and penalty, if any, imposable on the petitioner. It was neither any part of the petitioner's duty

to invite imposition of penalty nor can this Court's order be construed as directing the Collector of Stamps to impose penalty. In any case, if the respondent was aggrieved by the determination made by the Collector of Stamps (as indicated in his letter dated 14.12.2017) it ought to have taken recourse to an appropriate remedy as provided in law.

18.3 Given the aforesaid facts and circumstances one cannot sustain the plea that the determination by the Collector of Stamps was motivated. Attribution of motive by the respondent without requisite material being placed on record, cannot be sustained. It, however, goes without saying that if the respondent were to assail, in accordance with law, the determination made by the Collector of Stamps as reflected in his communication dated 14.12.2017 and if the appropriate forum were to call upon the petitioner to pay further amounts, the same would have to be paid by the petitioner.

18.4 Thus, in the factual matrix of this case I need not necessarily delve deep on the submission that whether after amendment of the 1996 Act, whereby, sub-section (6A) was inserted in Section 11, the court, is mandatorily required to look into the issue with regard to inadequacy of stamp affixed on a document produced before it.

18.5 Suffice it to state the fact that this objection can be taken before the learned Arbitrator who would have, in my view, the authority to impound the document, if necessary, and send it for examination for imposition of adequate stamp duty. This, however, ought not to delay the adjudication of the instant petition and appointment of an Arbitrator in view of the change brought by the legislature with the insertion of sub-section (6A) in Section 11 which requires the Court to examine only the aspect concerning the existence of the arbitration agreement and its applicability to the dispute at

hand in a very narrow sense, an exercise which eschews leading of evidence and prolix arguments.

18.6 Likewise, I need not defer the rendering of a ruling on this petition merely because a Civil Revision Petition has been filed against an order of Civil Judge, Ludhiana, on a Section 8 petition filed by the petitioner in a suit filed by the respondent. (See *Vijay Kumar Sharma @ Manju vs. Raghunandan Sharma @ Babu Ram & Ors*, (2010) 2 SCC 486)

19. Thus, for the foregoing reasons, I am inclined to allow the petition. Consequently, Mr. Justice Madan B. Lokur, former judge, Supreme Court of India (Cell No.:9868219007), is appointed as Arbitrator in the matter. Learned Arbitrator will be paid his fee as per the provisions of the Fourth Schedule appended to the Arbitration and Conciliation Act, 1996. Before entering upon reference, the learned Arbitrator will file a declaration as required under Section 12 and other attendant provisions of the 1996 Act.

20 The Registry will dispatch a copy of the order to the learned Arbitrator.

RAJIV SHAKDHER
(JUDGE)

JANUARY 10, 2019

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