

**IA No. GA 2 of 2020
in
CS 80 of 2020**

**IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division**

**Institute for Indian Labour
v.
Terai Tea Company Limited**

For the Plaintiff : Mr. Anirban Ray, Advocate
Mr. Rajarshi Dutta, Advocate
Mr. A.K. Dhar, Advocate
Mr. S. Bhattacharyya, Advocate

For the Defendant : Mr. Sagar Bandhyapadhyay, Advocate
Mr. Ratul Das, Advocate
Mr. Soumyajyoti Nandy, Advocate
Mr. Asutosh Singh, Advocate

Hearing concluded on : February 9, 2021

Judgment on : February 15, 2021

DEBANGSU BASAK, J. :-

1. The Defendant has applied under Section 8 of the Arbitration and Conciliation Act, 1996, for reference of the disputes involved in the suit to arbitration.

2. Learned Advocate appearing for the defendant has submitted that, the plaintiffs entered into a tenancy agreement dated May 22, 2009. By and under such tenancy agreement, the defendant was put into possession of the suit premises as a tenant thereof. Such tenancy agreement has an arbitration agreement. He has referred to Clause 18 of the Tenancy Agreement and submitted that such Clause is the arbitration between the parties. He has submitted that, the parties had entered into a Consolidated Charges Agreement on May 22, 2009. Such Consolidated Charges Agreement also has an Arbitration Agreement at Clause 9. He has submitted that, the disputes in the suit has arisen out of the Tenancy Agreement and the Consolidated Charges Agreement. Such disputes have to be resolved through the agreed mechanism of arbitration as provided in the two agreements. In support of the contention that, the disputes in the suit can be referred to arbitration, learned Advocate appearing for the defendant has relied upon **2020 SCC OnLine SC 1018 (Vidya Drolia & Ors. v. Durga Trading Corporation)**.

3. Learned Advocate for the defendant has submitted that, where the Arbitration Agreement is not in dispute, then, the necessity to produce the original Arbitration Agreement under Section 8(2) of the Act of 1996

stands waived. In support of such contentions he has relied upon **2017 Volume 5 Supreme Court Cases 185 (Ananthesh Bhakta v. Nayana S. Bhakta & Ors.)** and **2017 SCC Online Cal 13097 (Paras Marketing Pvt. Ltd. v. Air India Ltd. and Anr.)**.

4. Learned Advocate for the defendant has submitted that the Tenancy Agreement is adequately stamped. In support of his contention he has referred to and relied upon Article 5 of Schedule I A of the Indian Stamp Act, 1899. He has submitted in the event the court requires the defendant to deposit the original Tenancy Agreement and the Consolidated Charges Agreement in court, the defendant is ready and willing to do so.

5. Learned advocate appearing for the plaintiff has submitted that, the documents that the defendant is seeking to rely upon to claim that there exists an arbitration agreement between the parties is inadequately stamped. He has relied upon **2008 Volume 2 Supreme Court Cases 602 (Atul Singh & Ors. v. Sunil Kumar Singh & Ors.)**, in support of the contention that a document which is inadequately stamped cannot be admitted in evidence.

6. Learned Advocate appearing for the plaintiff has submitted that, the tenancy agreement is essentially one of lease. He has referred to the definition of a lease as appearing in Section 105 of the Transfer of Property Act, 1882. He has submitted that, the lease deed is compulsorily registrable and since the tenancy agreement which is a lease deed is not registered, the defendant cannot be allowed to rely upon the same. He has submitted that, since the tenancy agreement is a lease, this has not been adequately stamped. Should the defendant rely upon the tenancy agreement in original then the same should be impounded. The tenancy agreement should not be looked into till the proper stamp duty has been paid. In support of such contentions, he has relied upon **2019 Volume 3 Cal LT 416 (Cossipore Commercial Society & Ors v. Board of Trustees for the Port of Kolkata & Ors.)**.

7. The plaintiff has filed CS 80 of 2020 against the defendant seeking a decree for eviction of the defendant and a decree for the sum of Rs. 71,72,179/- on account of proportionate rate of monthly taxes, unpaid rent, and consolidated monthly charges. The plaintiff has also prayed for mesne profits from the defendant.

8. The plaintiff has based its claim against the defendant on a Tenancy Agreement dated May 22, 2009 and a Consolidated Charges Agreement dated May 22, 2009. The plaintiff has claimed eviction of the defendant on the basis of such Tenancy Agreement. The plaintiff has claimed money decree on the basis of the Consolidated Charges Agreement.

9. The tenancy agreement dated May 22, 2009 has the following arbitration agreement :-

“18. All disputes in any way arising out of or relating to this Agreement shall be referred to arbitration of one Arbitrator each from both sides and the said two Arbitrators shall appoint a third Arbitrator whose decision shall be final and binding upon the parties.”

10. The Consolidated Charges Agreement dated May 22, 2009 has the following arbitration agreement :-

“9. All disputes in any way arising out of or relating to this Agreement shall be referred to arbitration of one Arbitrator each from both sides and the said two Arbitrators shall appoint a third Arbitrator whose decision shall be final and binding upon the parties.”

11. ***Vidya Drolia & Ors. (supra)*** has decided the reference made to the three judges by the order dated February 28, 2019 passed in Civil Appeal No. 2402 of 2019 titled ***Vidya Drolia & Ors. v. Durga Trading Corporation***. In ***Vidya Drolia & Ors. (supra)*** the Supreme Court has framed the issues falling for consideration as follows :-

“2. A deeper consideration of the order of reference reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:

(i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and

(ii) the conundrum - “who decides” - whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.

The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short, the ‘Arbitration Act’).”

12. In **Vidya Drolia & Ors. (supra)** the Supreme Court has held as follows :-

“210. From a study of the above precedents, the following conclusion, with respect to adjudication of subject-matter arbitrability under Section 8 or 11 of the Act, are pertinent:

- a) In line with the categories laid down by the earlier judgment of Boghara Polyfab (supra), the Courts were examining ‘subject-matter arbitrability’ at the pre-arbitral stage, prior to the 2015 amendment.*
- b) Post the 2015 amendment, judicial interference at the reference stage has been substantially curtailed.*
- c) Although subject matter arbitrability and public policy objections are provided separately under Section 34 of the Act, the Courts herein have understood the same to be interchangeable under the Act. Further, subject matter arbitrability is inter-linked with in-rem rights.*
- d) There are special classes of rights and privileges, which enure to the benefit of a citizen, by virtue of constitutional or legislative instrument, which may affect the arbitrability of a subject matter.*

.....

229. *Before we part, the conclusions reached, with respect to question no. 1, are:*

- a. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*
- b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.*
- c. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*
- d. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.*
- e. The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:*
 - a. Whether the arbitration agreement was in writing? or*
 - b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?*
 - c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*

d. On rare occasions, whether the subject-matter of dispute is arbitrable?”

13. As has been laid down in ***Vidya Drolia & Ors. (supra)*** in the facts of the present case it cannot be said that, the subject matter of the dispute in the suit is deadwood. The plaintiff has not established a case of non existence of valid arbitration agreement by summarily portraying a strong case that it is entitled to such a finding. The parties have agreed to arbitration in writing as appearing from the Tenancy Agreement and the Consolidated Charges Agreement. The contractual ingredients qua the arbitration agreement has been fulfilled in the facts of the present case. The plaintiff has not established that the subject matter of the suit is not arbitrable.

14. In the facts of the present case, the plaintiff has raised the issue that the tenancy agreement cannot be looked into since it is a lease and it requires compulsory registration. The plaintiff has claimed that the tenancy agreement is a lease agreement for a period in excess of one year and therefore is compulsorily registrable under the provisions of Section 107 of the Transfer of Property Act, 1882. The plaintiff has also relied upon Section 105 of the Transfer of Property Act, 1882 in order to

contend that the tenancy agreement is essentially one which is of lease since it is for a period of excess of one year and since, the tenancy agreement does not come within the scope and ambit of the provisions of West Bengal Premises Tenancy Act, 1997.

15. In the plaint the plaintiff has averred in Paragraph 4 that , the defendant was inducted as a monthly tenant in respect of Flat 3 and a portion of Flat 4 on the First Floor of Premises No. 16E and part of 16F, Hemanta Basu Sarani, Kolkata – 700 069 on June 1, 2009. In Paragraph 5 of the plaint the defendant has averred that the defendant is in occupation of the suit premises as a monthly tenant. In Paragraph 6 and 7 of the plaint, the plaintiff has averred that the defendant was liable to pay monthly rent for the tenancy. The Plaintiff has dealt with the Tenancy Agreement dated May 22, 2009 and averred in Paragraph 10 that, the understanding of the parties relating to the tenancy was reduced in writing by such agreement. The plaintiff has claimed in Paragraph 11 of the plaint that the defendant was required to pay the entire proportionate rate of municipal taxed for the area of the tenancy. The Plaintiff claims against the defendant on account of consolidated charges agreement dated May 22, 2009.

16. The parties have treated the jural relationship between them as one of landlord and tenant. The plaintiff has never taken any steps for the purpose of having the Tenancy Agreement dated May 22, 2009 registered. The plaintiff has averred in the plaint that the defendant was granted a tenancy by virtue of such Tenancy Agreement. At no point of time contemporaneously and even at the time of filing of the plaint, has the plaintiff considered the Tenancy Agreement to be one of lease. The stand of the plaintiff that the Tenancy Agreement dated May 22, 2009 is a lease, has been taken for the first time while opposing the application under Section 8 of the Act of 1996. The plaintiff cannot be allowed to approbate and reprobate. The contention of the plaintiff that the Tenancy Agreement dated May 22, 2009 is a lease is not supported by the conduct of the plaintiff as has been noted above.

17. Chapter V of the Transfer of Property Act, 1882 has dealt with leases of immovable property. Section 105 of the Act of 1882 has defined lease. Section 107 of the Act of 1882 has prescribed how leases are made. It has prescribed that a lease of an immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by a registered instrument. In the facts of the present case, the Tenancy Agreement dated May 22, 2009 is not registered. The plaintiff

did not take any steps for the purpose of having such agreement registered at any point of time. Therefore, the Tenancy Agreement dated May 22, 2009 cannot be said to be a Lease Agreement given the conduct of the parties and the provisions of the Act of 1882.

18. The plaintiff has relied upon **Cossipore Commercial Society & Ors. (Supra)** for the contention that, when a lease deed is not registered, it is void and that the Arbitration Agreement contained in such lease deed should perish with the lease deed becoming void. In **Cossipore Commercial Society & Ors. (Supra)**, the parties had referred to a lease in respect of the immovable property concerned in that matter, through exchange of correspondence. In that case the parties did not execute a formal Tenancy Agreement as is in the present case. In such circumstances, since the parties did not execute the lease deed, it was held that, the plea of Kolkata Port Trust that there was a lease between the parties, was not accepted. The jural relationship between the writ petitioner therein, and Kolkata Port Trust authorities, was held to be one of monthly tenancy. The ratio of **Cossipore Commercial Society & Ors. (Supra)** has no manner of application in the facts of the present case.

19. ***Atul Singh & Ors. (Supra)*** has in the facts of that case found the defendant not to have filed the original Arbitration Agreement or a duly certified copy thereof along with the petition under Section 8 of the Act of 1996. ***Atul Singh & Ors. (Supra)*** has been considered in ***Paras Marketing Pvt. Ltd. (Supra)*** and ***Ananthesh Bhakta (Supra)***. ***Paras Marketing Pvt. Ltd. (Supra)*** has observed that the requirement to file original copy or a duly certified copy of the document containing the arbitration agreement is to ensure that at a later stage no one is allowed to urge that the agreement containing the arbitration clause is forged or fabricated or the said agreement has never been signed by the parties.

20. ***Ananthesh Bhakta (Supra)*** has observed that, in ***Atul Singh & Ors. (Supra)***, the earlier judgment of 2007 ***Volume 7 Supreme Court Cases 737 (Bharat Sewa Sansthan v. U.P. Electronics Corporation Ltd.)*** was not cited. In ***Ananthesh Bhakta (Supra)*** the Supreme Court had rejected the plea of non production of the original agreement under Section 8(2) inter alia, on the ground that, the plaintiff therein had relied upon the very documents containing the arbitration clause in the proceeding. It has held as follows:-

“28. Section 8(2) has to be interpreted to mean that the court shall not consider any application filed by the party under Section 8(1) unless it is accompanied by the original arbitration agreement or duly certified copy thereof. The filing of the application without such original or certified copy, but bringing original arbitration agreement on record at the time when the court is considering the application shall not entail rejection of the application under Section 8(2).”

21. In the facts of the present case the parties have not disputed the Tenancy Agreement dated May 22, 2009 and the Consolidated Charges Agreement dated May 22, 2009. The plaintiff has annexed copies of the Tenancy Agreement dated May 22, 2009 and the Consolidated Charges Agreement dated May 22, 2009 in the plaint. The defendant has offered to file the original of the two agreements in court if so directed. In fact the defendant has carried the originals of the two agreements in court and produced the same at the hearing of the application under Section 8 of the Act of 1996.

22. There is no impediment in the Court considering an application under Section 8 of the Act of 1996 without the original document

containing the arbitration clause or a duly certified copy thereof being annexed to the application so long the same is brought on record at the time when the Court is considering the application. In view of the ratio of **Anantesh Bhakat (Supra)** and **Parash Marketing Company Pvt. Ltd. (Supra)** it cannot be said that, the present application is barred under the provisions of Section 8(2) of the Act of 1996 as the defendant had produced the originals of the two agreements containing the arbitration agreement in Court and offered to deposit them in Court as and when directed.

23. Since the Tenancy Agreement dated May 22, 2009 is not a lease, the relevant article of the Indian Stamp Act, 1899 in Schedule I A thereof is Article 5. The Tenancy Agreement dated May 22, 2009 has been adequately stamped in accordance with Article 5 of Schedule I A of the Indian Stamp Act, 1899.

24. The plaintiff has contended that, the disputes involved in the suit are over two agreements namely the Tenancy Agreement and the Consolidated Charges Agreement and therefore, a single reference is not possible and consequently, the provisions of Section 8 of the Act of 1996 are not attracted. In the facts of the present case, in my view, such a

contention is without any substance. Conceptually a composite reference in an arbitration is not alien to the Act of 1996. That apart, the issue as to whether, a composite reference should be made need not be gone into while considering an application under Section 8 of the Act of 1996. The parameters of consideration of an application under Section 8 of the Act of 1996 have been laid down in ***Vidya Drolia & Ors. (Supra)***. The parameters, as so laid down, have been satisfied in the facts and circumstances of the present case warranting invocation of Section 8 of the Act of 1996.

25. In such circumstances, since the provisions of Section 8 of the Act of 1996 stands attracted, it would be appropriate to direct IA GA 2 of 2020 in CS 80 of 2020 to be listed on February 26, 2021 under the heading “New Motion” so as to take on record the original of the two agreements that the defendant is relying upon and to pass consequential orders under Section 8 of the Act of 1996.

[DEBANGSU BASAK, J.]

Later:

The Court: Upon the judgment being pronounced in Court, learned advocate appearing for the defendant submits that the original of the Tenancy Agreement dated May 22, 2009 and the Consolidated Charges Agreement dated May 22, 2009 are with him and can be filed immediately if the Court permits.

Since the defendant produce the originals of the two agreements containing the arbitration clauses it would be appropriate to permit the defendant to file the same.

The Tenancy Agreement dated May 22, 2009 and Consolidated Charges Agreement dated May 22, 2009 filed today be taken on record.

The application need not appear on February 26, 2009.

There will be an order in terms of prayer (a) of the application. IA No. GA 2 of 2020 in CS No.80 of 2020 is allowed, CS No. 8 of 2020 is disposed of accordingly.

[DEBANGSU BASAK, J.]