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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 15th July, 2021

+ **ARB. P. 217/2021 & I.A. 2044/2021**

TEJSWI IMPEX PVT. LTD.

..... Petitioner

Through: Mr. Sourav Roy, Mr. Kaushal Sharma
and Mr. Prabudh Singh, Advocates.

versus

R-TECH PROMOTERS PVT. LTD.

..... Respondent

Through: Mr. Rajiv Bakshi, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The background facts of the case are that the Petitioner executed a Lease Deed dated 15th December, 2017 in favour of the Respondent in respect of a property situated at Plot No. 44, Sector 44, Gurugram, Haryana-122001, for a period of 9 years with a lock-in period of 36 months, beginning from 01st November, 2017 to 31st October, 2020. The relevant clause under the said Deed, containing the arbitration agreement between the parties, reads as follows:

“All disputes and difference of whatsoever nature arising between the parties with relation to this Agreement, shall be referred to the arbitration of mutually agreed sole arbitrator. If the parties hereto fails to agree on the name of sole arbitrator, then both parties shall be entitled to appoint

one arbitrator each and the two arbitrators so appointed, shall appoint the third presiding arbitrator. The seat/venue of the arbitration shall be at New Delhi and same shall be governed by the provision of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof the time being in force. Decision of such Arbitral Tribunal shall be final and binding an language of arbitration shall be English.”

2. It is contended that the Respondent did not pay the fixed monthly rent for the period of 16th March, 2020 to 06th June, 2020 and unilaterally decided to vacate the premises on 06th June, 2020, which is before the expiry of the lock-in period. In such circumstances, Petitioner contends that the Respondent is in breach of the terms of the Lease Deed and is *inter-alia* liable to pay: (i) the rent for the unexpired lock-in period including arrears of rent; (ii) TDS for Financial Year 2020-21; (iii) unpaid electricity and diesel bills; and (iv) interest on the late payment of monthly rent. The aforesaid disputes were raised by the Petitioner in a legal notice issued to the Respondent on 16th June, 2020. Respondent replied on 01st July, 2017 stating that the lease was a month-on-month tenancy without a lock-in period on account of non-registration of the Lease Deed by the Petitioner.

3. Petitioner invoked the Arbitration Clause contained in the Lease Deed *vide* notice dated 23rd December, 2020 and nominated the name of a retired Additional District Judge for appointment as a Sole arbitrator. The Respondent *vide* letter dated 07th January, 2021 declined reference of disputes to arbitration.

4. In the circumstances noted above, the instant petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking

appointment of a Sole Arbitrator. Although there is no reply on behalf of the Respondent, Mr. Bakshi, counsel for the Respondent, has been heard extensively on the objections to the present petition. He does not deny the existence of the Lease Deed, but contends that the present petition is not maintainable as the Lease Deed is an unregistered and unstamped document. Elaborating this contention, Mr. Bakshi submits that since the agreement is not in compliance with statutory provisions of the Indian Stamp Act, 1899 and the Registration Act, 1908, the agreement is unenforceable. These prerequisites have to be necessarily complied with before the court can proceed to appoint an arbitrator, and as such the Court should impound the Lease Deed and send the same to the Collector of Stamps for the purpose of adjudication and collection of deficient stamp duty. Only once that exercise is complete, should the Court look into the document and grant appropriate relief. He further contends that the Lease Deed is inadmissible for want of registration, and therefore, all the terms therein, including the arbitration agreement, are inadmissible and unenforceable. Thus, the Petitioner cannot rely upon the Lease Deed in question for seeking appointment of an Arbitrator. In support of his submission, he relies upon the judgment of the Supreme Court in *M/S. Dharmaratnakara Rai Bahadur v. M/S. Bhaskar Raju & Brothers*.¹

5. Mr. Roy, learned counsel for the Petitioner, on the other hand submits that Respondent's objections are miscomprehended. In view of the recent judgment of the Supreme Court in *N.N. Global Mercantile Pvt. Ltd.*

¹ (2020) 4 SCC 612.

v. Indo Unique Flame Ltd.,² the issue relating to the maintainability of a petition under Section 11 of the Act in respect of an unstamped document has been put to rest. As regards the document being unregistered, he argues that the dicta of the Supreme Court in **SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Private Ltd.**,³ still holds the field, wherein the Court dealt with the aspect of maintainability of a petition in the respect of an unregistered document, and held as follows:

“12. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts—one in regard to the substantive terms of the main contract and the other relating to resolution of disputes—had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registerable—are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer.

14. These principles have now found statutory recognition in sub-section (1) of Section 16 of the Arbitration and Conciliation Act, 1996 which is extracted below:

*16. Competence of Arbitral Tribunal to rule on its jurisdiction.—
(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or*

² 2021 SCC OnLine SC 13.

³ (2011) 14 SCC 66.

validity of the arbitration agreement, and for that purpose— (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and 21 (b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

15. But where the contract or instrument is voidable at the option of a party (as for example under Section 19 of the Contract Act, 1872), the invalidity that attaches itself to the main agreement may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. For example, if a person is made to sign an agreement to sell his property under threat of physical harm or threat to life, and the said person repudiates the agreement on that ground, not only the agreement for sale, but any arbitration agreement therein will not be binding.

16. 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 the 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.”

[Emphasis Supplied]

6. The Court has considered the contentions of the parties.

7. The Arbitration Agreement is contained in the Lease Deed which has been executed for a term of nine years. Thus, *prima facie*, it was required to be compulsorily registered under Section 17 of the Indian Registration Act, 1908, and seemingly when it was executed, requisite stamp duty had not been paid. Thus, the short question that arises for consideration is whether parties can rely upon the arbitration agreement blended in an unregistered

and unstamped lease deed, for appointment of an arbitrator for adjudication of disputes arising from such an agreement?

8. At this juncture, it must be noted that the Petitioner has apparently made up the deficiency in the stamp duty. In this regard, the Petitioner has relied upon a certificate issued by Collector of Stamps to urge that the deficient stamp duty in respect to the Lease Deed stands paid. However, since the Petitioner has not filed a copy of the order of the competent authority adjudicating the issue of stamp duty, the Respondent contends that the certificate relied upon is inconsequential and has no legal effect. Be that as it may. Non-payment of stamp duty is a curable defect that can be cured at any stage before it is admitted in evidence. Thus, in the considered opinion of this court, this aspect need not be examined as, under law, an unstamped document would not render the petition to be non-maintainable in view of settled position of law on this issue. The Supreme Court in *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*,⁴ revisited the law on the issue of enforceability of an arbitration agreement in an unstamped document and overruled the earlier view held in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Company Pvt. Ltd.*,⁵ and *Garware Wall Ropes Ltd v. Coastal Marine Constructions and Engineering*,⁶ holding as under:

“We are of the considered view that the finding in SMS Tea Estates and Garware that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and un-enforceable, is not the correct position in law.

In view of the finding in paragraph 92 of the judgment in Vidya Drolia by

⁴ 2021 SCC OnLine SC 13.

⁵ (2011) 14 SCC 66.

⁶ AIR 2019 SC 2053.

a co-ordinate bench, which has affirmed the judgment in Garware, the aforesaid issue is required to be authoritatively settled by a Constitution bench of this Court.”

9. Further, the Court also finds merit in the contentions of Mr. Roy that in view of the dicta of the Supreme Court, even if a document, although compulsorily registerable, is unregistered, it does not, in any way, preclude a party from seeking appointment of an Arbitrator.

10. The jurisprudence regarding the validity or enforceability of an Arbitration Agreement based on the doctrine of separability is now well recognised. The arbitration agreement is independent and distinct from the underlying substantive contract in which it is embedded. For the purpose of appointment of the arbitral tribunal, and resolution of disputes arising with reference to any unregistered document, the arbitration agreement would remain unaffected. Thus, the non-registration of the lease deed would not *ipso facto* render the arbitration clause to be invalid. Besides, a document that requires compulsory registration can, notwithstanding the fact that it is unregistered, always be relied upon as evidence of any collateral transaction. This aspect would have to be examined by the Arbitral Tribunal particularly having regard to the nature of claims urged by the Parties. Thus, there is no embargo for relying upon the arbitration clause contained in the lease deed in question and it can be acted upon for the purpose of dispute resolution by arbitration.

11. In view of the above, Mr. Kartar Singh Khurana (Retd. Additional District and Sessions Judge, Delhi (Contact No. 9810257327) is appointed

as the Sole Arbitrator to adjudicate the disputes arising out of and in relation to the Lease Deed dated 15th December, 2017.

12. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

13. The learned Arbitrator will be entitled to charge his fees in terms of the provisions of the Fourth Schedule appended to the Act.

14. It is clarified that the Court has not examined any of the claims of the parties and all the rights and contentions of the parties on merits are left open. Both the parties shall be free to raise their claims/ counter-claims before the learned Arbitrator in accordance with law.

15. In view of the above, the present petition is allowed and stands disposed of. All pending applications also stand disposed of.

SANJEEV NARULA, J

JULY 15, 2021

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(corrected and released on 31st July, 2021)