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

+ **ARB.P. 349/2020 & I.A. 7711/2020**

SH. B. R. SETHI Petitioner
Through **Mr. Rajesh Bhatia, Adv.**

versus

SH. RAJAT KAPOOR Respondent
Through: **Mr. Rajat Wadhwa, Adv. with**
Mr. Devanshu Chauhan, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **22.03.2021**

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act").

2. *Vide* the unregistered licence agreement dated 22nd October, 1998, the respondent was inducted by the petitioner as a licensee in respect of three shops located at 24, Patel Road, West Patel Nagar, Market Side, New Delhi.

3. The petition asserts that the petitioner, as licensor, was entitled to terminate the license agreement at his absolute option.

4. On 21st October, 2019, the petitioner served a legal notice to the respondent, revoking the license in respect of the aforesaid three shops and calling on the respondent to hand over peaceful and vacant

ARB.P. 349/2020

Page 1 of 2 ##

possession thereof, or to pay user or occupation charges in default. This was followed by a notice dated 21st December, 2019, whereby the petitioner invoked clause xiv in the license agreement, which reads thus:

“xiv) xxx

It is hereby further declared that every or any dispute, difference or question which, may at any time arise between the parties hereto, touching or arising out or in respect of this agreement, or the subject matter thereof whether during the continuance of the Agreement or after is determination in any manner, shall be referred to the Arbitration of any person mutually agreed by the Licensor and the Licensee and the decision of the Arbitrator shall be binding on both the parties.”

5. The petitioner submits that despite having invoked the arbitration clause *vide* notice dated 21st December, 2019, the respondent did not participate in the exercise of appointing the arbitrator, resulting in the petitioner having to approach this Court.

6. The respondent has filed a reply to the petition.

7. Though the respondent does not dispute the existence of the arbitration clause or the arbitrability of the dispute *per se*, it is asserted that the licence agreement is an unregistered document and that, therefore, no rights could be claimed by the petitioner thereunder and that, therefore, it could neither be enforced nor could any right be claimed by the petitioner thereunder. As such, it is submitted that, even if an arbitrator were to be appointed, the arbitral exercise would be abortive.

8. Learned counsel for the respondent relies, in this context, on the judgment of the Supreme Court in *SMS Tea Estates Pvt. Ltd. v. M/s Chandmari Tea Co. Pvt. Ltd*¹.

9. Mr. Wadhwa, learned counsel for the respondent, very fairly acknowledges that, even in this case, the Supreme Court had held that the arbitration agreement, being in the nature of a separate agreement though ensconced within the “main” agreement, existed separately and that, therefore, any infirmities attaching to the main agreement would not invalidate the arbitration agreement or impact its enforceability. Even so, he points out, the Supreme Court went on to notice that, as the agreement was unregistered, no rights could have been claimed thereunder.

10. As such, learned counsel submits that even if this petition were to be allowed, the learned arbitrator could not rely on the licence agreement as a basis to award any claim to the petitioner.

11. The issue raised by Mr. Wadhwa falls entirely outside the periphery of consideration of this Court exercising jurisdiction under Section 11(6) of the 1996 Act, in view of Section 11(6A) thereof, read with the judgment of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation*².

12. The existence of the arbitration agreement is not in dispute.

¹ (2011) 14 SCC 66

² 2020 SCC OnLine SC 1018

13. The issue of whether the licence agreement could be enforced or whether any rights could enure to the petitioner thereunder, would appropriately have to be examined by the Arbitral Tribunal and not by this Court exercising jurisdiction under Section 11 of the 1996 Act.

14. Mr. Wadhwa submits, additionally, that the agreement is not a licence but a lease, and is also unstamped.

15. The issue of stamping also stands covered by the following passages in *N.N. Global Mercantile Pvt. Ltd v. Indo Unique Flame Ltd.*³:

“84. The *Garware*⁴ judgment has followed the judgment in *SMS Tea Estates*¹. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration clause would be nonexistent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract.

85. We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying substantive commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.”

86. We notice that the judgment in *Garware Wall Ropes Limited*⁴ has been cited with approval by a co-ordinate bench of this Court in *Vidya Drolia v. Durga Trading Corporation*².

87. We doubt the correctness of the view taken in paragraph 92 of the three-judge bench in *Vidya Drolia*. We

³ 2021 SCC OnLine SC 13

⁴ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.* (2019) 9 SCC 209

consider it appropriate to refer the findings in paras 22 and 29 of *Garware Wall Ropes Limited*⁴, which has been affirmed in paragraph 92 of *Vidya Drolia*, to a Constitution Bench of five judges.

16. I may note, here, that in holding that the arbitration agreement would survive, even if the original contract were unstamped, the Supreme Court, in *Indo Unique Flame Ltd*³, differed from the earlier view in *Garware Wall Ropes*⁴. The bench in *Indo Unique Flame Ltd*³, also noticed that *Garware Wall Ropes*⁴ had been approved in *Vidya Drolia*². Doubting the correctness of the principle enunciated in *Vidya Drolia*², the following question was referred, by the Bench in *Indo Unique Flame Ltd*³, to the Hon'ble Chief Justice of India to be placed before a Constitution Bench:

“Whether the statutory bar contained in Section 35 of the Indian Stamp Act, 1899 applicable to instruments chargeable to Stamp Duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, un-enforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument ?”

17. Be that as it may, the most recent authoritative pronouncement on the issue is that in *Indo Unique Flame Ltd*³.

18. In any event, the consequence of non-stamping of the agreement could also be decided by the learned Arbitral Tribunal.

19. There is no other opposition to the appointment of the arbitrator.

20. In view thereof, this Court appoints Ms. Girija Krishan Verma, Advocate (Mobile No. 9910194228 and e-mail ID: girijav@stanfordalumni.org), as the arbitrator to arbitrate on the dispute between the parties.

21. The contact details of the learned arbitrator are as under:

22. The sole arbitrator would file the requisite disclosure under Section 12(2) of the 1996 Act within two weeks from entering on the reference.

23. The fees of the learned sole arbitrator would be determined by the learned arbitrator in consultation with the parties.

24. All issue of fact and law, including the issue of stamping of the licence agreement, whether the agreement is in the nature of a lease or a licence, and whether it could be enforced in favour of the petitioner herein, are left to be agitated and decided by the learned sole arbitrator.

25. The petition accordingly stands disposed of, without any order as to costs.

C. HARI SHANKAR, J.

MARCH 22, 2021

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