

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

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Judgment delivered on: 07.10.2022

+ **FAO(OS) (COMM) 47/2022 & CM APPL. 9305/2022 & CM
APPL. 9306/2022**

SNG DEVELOPERS LIMITED

..... Appellant

versus

VARDHMAN BUILDTECH PRIVATE LIMITED Respondent**Advocates who appeared in this case:**

For the Appellant : Mr. Dharmesh Mishra, Mr. Prateek Gupta
& Mr. Nikhil Saini, Advs.

For the Respondent : None.

HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT**AMIT MAHAJAN, J**

1. Feeling aggrieved by the judgment dated 09.12.2021 passed by the learned Single Judge under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') dismissing the challenge raised to the interim award dated 01.11.2021, the appellant has filed the present appeal under Section 37 of the A&C Act.



Relevant Facts

2. The respondent, Vardhman Buildtech Private Limited (hereafter 'Vardhman') filed a Statement of Claims before the Arbitral Tribunal, claiming that they had entered into a Collaboration Agreement dated 16.03.2010 for development of the appellant's land situated at P-8, Greater Noida, District Gautam-budh Nagar (U.P.). It claims that it had paid a sum of ₹6.5 crores at the time of execution of the said agreement.

3. It is claimed that the appellant, thereafter, decided to sell part of the plot of the said land and entered into an Agreement to Sell dated 04.04.2011 for a total sale consideration of ₹7.5 crores.

4. Certain disputes arose in relation to the transactions, which led to the arbitral proceedings.

5. Before the Arbitral Tribunal, Vardhman claimed as under:

- a. Direct respondent to get registered the sale deed of 2.929 Acres of plot (as per Annexure of site plan) out of plot No. S-5001, P-8, Greater Noida, District Gautam Budh Nagar, Uttar Pradesh.

In the alternative if it is not possible to transfer due to the legal restriction direct the respondent to refund sum of Rs. 7.5 crores with 18% interest from 01.06.2011 till actual payment.



- b. Compensation of Rs. Two crores be awarded to claimant against respondent with interest as determined by Hon'ble Arbitrator.
- c. Cost of Rs. Thirty lakhs be awarded to claimant against respondent.
- d. Make any other award in favour of claimant and against respondent

6. The appellant filed its Statement of Defence and admitted to have executed the Agreement to Sell dated 04.04.2011, however, sought rejection of the claim on various grounds including that the claim was barred by limitation; Vardhman had failed to fulfil its obligation under the Agreement to Sell dated 04.04.2011; Vardhman was unable to establish its readiness and willingness for the Sale Deed to be executed in its favour; and that the Agreement to Sell dated 04.04.2011 was abandoned by Vardhman.

7. It is pertinent to mention that no objection that the Agreement to Sell dated 04.04.2011 was insufficiently stamped, was taken by the appellant.

8. The learned Arbitral Tribunal *vide* order dated 09.05.2019, in consultation with the parties / their counsel, fixed a schedule for conduct of arbitral proceedings and with their consent also passed certain practice directions.

9. The practice direction, relevant for the purpose of the present dispute, is stated as under:



7.8 In the Affidavits of Admission/Denial, the parties will list and describe such of the documents the existence / genuineness of which are in dispute, setting out the reasons therefor in brief. In the absence of the same, the document shall be available for being read in evidence, dispensing with the need of formal proof thereof. However, the question of evidentiary value to be attached to the document shall remain open for consideration at the final hearing.

10. The timelines were also fixed wherein the Statement of Claims was to be filed by 23.05.2019 and the Statement of Defence and rejoinder were to be filed by 20.06.2019 and 11.07.2019 respectively. The affidavits of admission and/or denial of respective documents were to be exchanged by the parties by 01.08.2019 and the proposed draft points for determination by the Arbitral Tribunal, were to be exchanged by the parties by 08.08.2019.

11. Issues were, thereafter, framed by the Arbitral Tribunal in its order dated 09.08.2019. No specific issue was either sought by the appellant or framed by the Arbitral Tribunal, in respect of improper stamping or non-registration of the Agreement dated 04.04.2011.

12. Thereafter, on 10.10.2019, when the claimant's witness was to be cross-examined, the appellant put the objection with regard to the Agreement to Sell dated 04.04.2011, for the first time during the proceedings.



13. It was contended on behalf of the appellant that the original copy of the Agreement to Sell dated 04.04.2011 was not furnished; that the Agreement to Sell dated 04.04.2011 is not properly stamped; and is also not registered. Thus, it cannot be received in evidence and is required to be impounded. It was also contended that since the Agreement to Sell dated 04.04.2011 is coupled with delivery of possession, it required compulsory registration under Section 17 of the Registration Act, 1908. Since it was not registered, it could not be received in evidence in terms of Section 49 of the Registration Act, 1908.

14. The learned Arbitral Tribunal rejected the objection with regard to improper stamping of the Agreement to Sell dated 04.04.2011. In so far as the objection as to compulsory registration under Section 17 of the Registration Act, 1908 and consequently the restriction to receive it as evidence under Section 49 of the Registration Act, 1908 is concerned, the Tribunal left the issue to be decided at the stage of final hearing and held as under:

“11. Keeping these considerations in mind, I agree with the learned counsel for the Claimant that the pleas/objections raised by the Respondent with regard to the non-registration of the said Agreement ought to be considered at the stage of final hearing/ arguments. In any event, this aspect is already subsumed in the various issues formulated for consideration pertaining to the said Agreement.”



15. With regard to the objection as to improper stamping, the Arbitral Tribunal relied upon ***Shyamal Kumar Roy Vs. Sushil Kumar Agarwal : (2006) 11 SCC 331*** and held as under:

“8. XXXX XXXX XXXX

Since, the said Agreement is admitted by the Respondent and is not disputed, it is available for being read in evidence. This being the position, section 36 of the Indian Stamp Act, 1899 would come into play. The said provision reads as under:

“36. Admission of instrument where not to be questioned.-Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

*The exception of section 61 does not apply in the present case, therefore, as the said Agreement has already been admitted in evidence, such admission cannot be called in question at any stage of the present proceeding on the ground that the instrument has not been duly stamped. In ***Shyamal Kumar Roy v. Sushil Kumar Agarwal, (2006) 11 SCC 331***, the Supreme Court held the said section 36 to be a “stand alone” clause which categorically prohibited a court of law [and consequently an Arbitral Tribunal] from reopening the matter of sufficiency or otherwise of the stamp duty paid on an instrument in the event the same has been admitted in evidence. The relevant*



extracts of the said decision are as under:

“14. Section 36, however, provides for a “stand alone” clause. It categorically prohibits a court of law from reopening a matter in regard to the sufficiency or otherwise of the stamp duty paid on an instrument in the event the same has been admitted in evidence. Only one exception has been made in this behalf viz. the provisions contained in Section 61 providing for reference and revision. In a case where Section 33 of the Act, as amended by the West Bengal Act would be applicable, the proviso appended to sub-section (5) carves out an exception that if no action would be taken after a period of four years from the date of execution of the instrument (sic).

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16. The said decision, therefore, is an authority for the proposition that Section 36 would operate even if a document has been improperly admitted in evidence. It is of little or no consequence as to whether a document has been admitted in evidence on determination of a question as regards admissibility thereof or upon dispensation of formal proof therefor. If a party to the lis intends that an instrument produced by the other party being insufficiently stamped should not be admitted in evidence, he must raise an



objection thereto at the appropriate stage. He may not do so only at his peril.

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17. Objection as regards admissibility of a document, thus, specifically is required to be taken that it was not duly stamped. On such objection only the question is required to be determined judicially.

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20. If no objection had been made by the appellant herein in regard to the admissibility of the said document, he, at a later stage, cannot be permitted to turn round and contend that the said document is inadmissible in evidence."

9. In view of the foregoing discussion, the objection raised by the Respondent in connection with the improper stamp duty on the said Agreement, is not tenable and is rejected."

16. The learned Single Judge dismissed the objection filed under Section 34, questioning the legality of the order dated 01.11.2021 by way of impugned judgment dated 09.12.2021.

17. The learned Single Judge agreed with the view taken by the Arbitral Tribunal and held as under:



“26. Even otherwise, as I have already noted hereinabove, the rigours of procedure which attach to civil proceedings under the CPC and the Evidence Act, would not apply, proprio vigore, to arbitral proceedings. The proceeding before the learned Arbitral Tribunal was governed by para 7.8 of the order dated 9th May, 2019, which was accepted by both parties. That being so, if the learned Arbitral Tribunal, took the view that the petitioner, having admitted the copy of the Agreement to Sell dated 4th April, 2011, as filed by the respondent, at the stage of admission and denial of documents, without reservation, could not be allowed to raise the ground of insufficient stamping at a later stage, that view does not call for interference by this Court in exercise of its jurisdiction under Section 34 of the 1996 Act.”

Reasoning

18. The learned counsel appearing for the appellant assailed the judgment passed by the learned Single Judge upholding the view of the arbitrator and stated that mere admission of existence of insufficiently stamped instrument while conducting admission / denial does not amount to admitting the document in evidence within the meaning of Section 35 of the Indian Stamp Act, 1899 so as to trigger the provision contained in Section 36 of the Indian Stamp Act, 1899.

19. He stated that Para 7.8 of the Practice and Procedure only mandates parties to list and describe the documents, the existence / genuineness of which are in dispute and is however silent about the admission of such document in evidence on account of insufficiency



of stamp or non-registration. It is submitted that mere admission of the document cannot be read as admitting the document in evidence within the meaning of Section 35 of the Indian Stamp Act, 1899.

20. The document, which is insufficiently stamped, should have been first impounded, stamped and only thereafter, the same could be admitted in evidence or be acted upon in the arbitral proceedings.

21. The admission in the pleadings about the existence of document is of no consequence with regard to Section 36 of the Indian Stamp Act, 1899.

22. He, therefore, submitted that the benefit of Section 36 of the Indian Stamp Act, 1899 could have been taken only when the document is admitted in evidence, which stage had not arisen in the present case.

23. The law, it is argued, casts a duty on the arbitrator to impound the document, which is insufficiently stamped even if no objection is raised in this regard.

24. It is further submitted that the benefit of Section 36 of the Indian Stamp Act, 1899 is not available when the same is applied to a copy of the original document.

25. It is contended that, in the present case, only a photocopy had been produced and in the absence of original being admitted in evidence even if the admission/ denial of document is to be considered as admitting a photocopy in evidence, benefit of Section 36 could not



have been taken.

26. In order to buttress the arguments raised, the learned counsel relies upon the following judgments : *N.N. Global Mercantile Pvt. Ltd. Vs. Indo Unique Flame Ltd. And Ors. : MANU/SC/0014/2021* and *Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao and Others: (1971) 1 SCC 545.*

27. We have given our thoughtful consideration to the facts of the case and the judgment passed by the learned Single Judge as well as the order passed by the Arbitral Tribunal.

28. The scope of interference by Court in exercise of power under Section 34 of the A&C Act, is well-settled. The arbitrator is a judge chosen by the parties and the interpretation given by the arbitrator to the document or to the law is final unless the same is found to be perverse. Once it is found that the view taken is a possible one, the Courts cannot interfere with the arbitral award under Section 34 of the A&C Act.

29. Certain facts, which are not disputed by the learned counsel for the appellant and are found to have formed the basis of passing of the order by learned Arbitral Tribunal are that the execution of Agreement to Sell dated 04.04.2011 is admitted by the appellant and that the appellant itself has relied upon certain clauses of the said Agreement in support of its case for denial of the claim filed by the respondent.

30. It is also apparent from the issues, which were framed with consent of the parties that they have to be decided on the basis of the



said Agreement to Sell dated 04.04.2011. The authorized representative of the appellant has also filed his affidavit by way of evidence wherein he admits to have executed the Agreement to Sell dated 04.04.2011.

31. It is also not in dispute that no objection was ever raised by the appellant to the execution or to the admissibility of the said Agreement in evidence. The parties had also agreed to the procedure adopted by the Arbitral Tribunal, which specifically provides that affidavits of admission / denial of the parties will list such documents, the existence / genuineness of which are in dispute. Concededly, the said agreement was not one such document.

32. It was also agreed by the parties that in the documents, which were not in dispute, shall be available for being read in evidence dispensing with the need of formal proof thereof. The parties agreed that the evidentiary value to be attached to such documents would be agitated at the time of final hearing.

33. The parties having agreed to the procedure adopted and having agreed that in the absence of denial in the affidavit of admission / denial, they will not raise the objection of such document being read in evidence, are estopped from doing so at the belated stage. A party, who has agreed to a procedure being adopted, cannot be allowed to raise the objection in relation to the admission / denial of the document and its effect.

34. It is a settled law that a party cannot be permitted to approbate



and reprobate on the same facts and take inconsistent stands. The appellant, therefore, cannot be allowed to re-agitate and re-open an issue with regard to admissibility of a document in evidence, having once agreed to before the learned Arbitral Tribunal.

35. The proceedings before the Arbitral Tribunal are governed by the procedure as recorded in the order dated 09.05.2019 which was passed with consent of both the parties. The view, therefore, taken by the learned Arbitral Tribunal that having admitted the copy of the Agreement to Sell dated 04.04.2011 without any reservation at the stage of admission / denial, it is not open to the objection under Section 35 of the Indian Stamp Act, 1899, cannot be faulted. The view taken is plausible view and cannot be interfered with in exercise of jurisdiction under Section 34 of the A&C Act.

36. Section 35 of the Indian Stamp Act, 1899 provides that no instrument chargeable with duty shall be admitted in evidence unless such instrument is duly stamped. Section 36 of the Indian Stamp Act, 1899, however, provides for an exception to the said rule. It provides that an instrument cannot be called in question even if not duly stamped, where such instrument has been admitted in evidence. The Hon'ble Apex Court, in the case of *Shyamal Kumar Roy Vs. Sushil Kumar Agarwal* (*supra*), while dealing with the interpretation of Section 36 of the Indian Stamp Act, 1899, held that if the party has consented to the document being marked as an exhibit, it cannot then object to it on the ground of it being under-stamped. It was held that once the document has been marked as an exhibit and is being used



for the purpose of examination and cross-examination, Section 36 of the Indian Stamp Act, 1899 comes into play.

37. In the present case also, it is an admitted fact that affidavit of admission / denial was filed. The case was listed for cross-examination of the respondent's witness, who had already filed the affidavit by way of evidence. The procedure agreed to between the parties specifically states that the document once not denied in admission / denial, would be read in evidence dispensing with the need of formal proof.

38. The learned Arbitral Tribunal rightly relied upon the judgment referred above. We, therefore, see no reason to find fault with the view taken by the Arbitral Tribunal that warrants any interference under Section 34 of the A&C Act.

39. The Hon'ble Apex Court, in the case of, ***Javer Chand and Others Vs. Pukhraj Surana : AIR 1961 SC 1655***, in relation to a document which was exhibited and admitted in evidence where the defendant had admitted the execution of the documents, however, had raised objection that the same was inadmissible because of not being stamped, held as under:

“4.Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the document is tendered in evidence. Once the court, rightly or wrongly, decides to admit the document in evidence, so far



as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the court. The court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. The record in this case discloses the fact that the hundis were marked as Exts. P-1 and P-2 and bore the endorsement "admitted in evidence" under the signature of the court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or to a court of appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same court or a court of superior jurisdiction.

5. In our opinion, the High Court has erred in law in refusing to act upon those two hundis which had been properly proved — if they required any proof, their execution having been admitted by the executant himself. As on the findings no other question arises, nor was any other question raised before us by the parties, we



accordingly allow the appeal, set aside the judgment and decree passed by the High Court and restore those of the trial court, with costs throughout.”

40. The contention raised by the learned counsel for the appellant, that document being admitted in the affidavit of admission / denial does not amount to document being admitted in evidence as provided in Section 36 of the Act, is misconceived.

41. The parties have specifically agreed that the document shall be available for being read with evidence in case the same is not denied in the affidavit of admission / denial. The document being admitted in evidence does not mean the evidentiary value of the document has been assessed. The parties had agreed that the same will be decided at the time of final hearing. Once the admission / denial of documents had taken place and the affidavit of evidence has been filed in terms of the procedure adopted and agreed between the parties, the document in question has to be considered to be admitted in evidence for the purpose of applicability of Section 36 of the Indian Stamp Act, 1899.

42. The reliance placed by the learned counsel on the judgments, in the case of ***N.N. Global Mercantile Pvt. Ltd. Vs. Indo Unique Flame Ltd. And Ors.*** (*supra*) is also misplaced.

43. ***N.N. Global Mercantile Pvt. Ltd. Vs. Indo Unique Flame Ltd. And Ors.*** (*supra*) case relates to the validity of the arbitral agreement embedded in a contract, which is not stamped as per the Indian Stamp Act, 1899. The Hon’ble Apex Court, in the earlier decision in ***SMS***



Tea Estates: (2011) 14 SCC 66 had held that an arbitral agreement in an unstamped commercial contract cannot be acted upon. The Hon'ble Apex Court, on finding that a contrary view has been taken by another Bench, has referred the disputes to the Constitutional Bench.

44. In our opinion, the issues raised have no applicability to the facts of the present case. The judgment, in the case of ***Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao and Others*** (*supra*), has rightly been distinguished by the learned Single Judge in its impugned judgment. It was rightly noticed that in the said case, the admissibility of the copy of the agreement in issue is questioned on the ground of the original document being not produced at the very threshold.

45. In the present case, it is an admitted fact that the genuineness of the document is not in question at all and, in fact, even the appellant is relying upon the contents of the said document. The agreement in question, in the present case, has not only been relied upon by the appellant but the document has also been admitted to be read in evidence in terms of Para 7.8 of the Practice Directions contained in order dated 09.05.2019 passed by the Arbitral Tribunal.

46. Even otherwise, if the argument of the appellant is accepted that in terms of the ratio laid down by ***Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao and Others*** (*supra*) case, the photocopy of the agreement should not be termed as an instrument for the purpose of Section 36 of the Act, then by the same analogy the said agreement will also not be covered by the provisions of the Section 35 of the Indian Stamp Act, 1899 on account of it being a photocopy.



47. The ratio laid down by the Courts are to be applied on the basis of facts / situation of each case. The facts, in the present case, are not similar to the judgments relied upon the learned counsel for the appellant.

48. It is a settled law that the Arbitral Tribunal is not bound by the strict rules of either the Code of Civil Procedure, 1908 (CPC) or the Indian Evidence Act, 1872. The proceedings, before the Arbitral Tribunal, shall be governed by the procedure being adopted and agreed between the parties. (*Reference : Section 19 of the A&C Act.*)

“19. Determination of rules of procedure.— (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

49. A Coordinate Bench of this Hon'ble Court in the case of ***Mahanagar Telephone Nigam Limited Versus Applied Electronics Ltd. & Anr. : 2014 SCC OnLine Del 3829***, held as under:



“19. So far as the application of Civil Procedure Code in the arbitral proceedings is concerned, Section 19 of the said Act exempts the arbitral tribunal from the shackles of the Code as also the rules of evidence contained in the Indian Evidence Act, 1872 and empowers it to formulate its own rules of procedure.”

50. It is also settled law that the patent illegality, as referred in Section 34 (2A) of the A&C Act, is illegality which goes to the root of the matter. It is also settled that every error even of law committed by the Arbitral Tribunal or the erroneous application of law, would not fall within the definition of ‘patent illegality’.

51. In view of the above, we find that the view taken by the arbitrator is a plausible view and does not call for any interference while exercising power under Section 34 of the Act. We also feel that the appellant has initiated these unnecessary litigations in order to delay the proceedings before the Arbitral Tribunal.

52. The present appeal is, therefore, dismissed with the cost of ₹25,000/-.

AMIT MAHAJAN, J

VIBHU BAKHRU, J

OCTOBER 07, 2022

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