

IN THE HIGH COURT AT CALCUTTA

(Civil Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

C.O. 586 of 2023

Nemai Chandra Roy Karmakar alias Nemai Roy

Vs.

Sarada Construction

For the Petitioner

:Mr. Arnab Roy, Adv.

Mr. Satyam Mukherjee, Adv.

Ms. Ishita Kundu, Adv.

For the Opposite party

:Mr. Ashim Kumar Roy, Adv.

Mr. Ashok Kumar Roy, Adv.

Mr. Anirban Roy, Adv.

Heard on

: April 27, 2023

Judgment on

: May 19, 2023

Bibhas Ranjan De, J.

1. The order no 20 dated 21.12.2022 passed by the Learned Civil Judge, Junior Division, 1st Court, Barasat, North 24 Parganas

in connection with TS 907 of 2021 is challenged. Learned Judge by the order impugned allowed one application under Section 5 & 8 of the Arbitration and Conciliation Act, 1996 filed on 09.06.2022 along with written statement, for referring the subject matter of the dispute to arbitration.

Background facts in Brief:-

2. Petitioner/plaintiff being owner of the subject property entered into a development agreement on 16.08.2010 with the opposite party/defendant to develop a multi storied building thereon, on condition to complete the development work within 36 months with additional period of 6 months from the day of execution of agreement. Accordingly, Registered General Power of Attorney was also executed between the parties. Thereafter, non performance on the part of the opposite party/defendant in terms of agreement compelled the petitioner/ plaintiff to cancel the registered power of attorney by a deed of cancellation dated 09.12.2021. Immediately, opposite party/defendant took possession of the land and installed a gate and also restrained petitioner/plaintiff from entering into the subject property. That is why, plaintiff/petitioner filed a suit being no. T.S no. 907 of 2021.

In that suit Learned Trial Judge passed an interim injunction directing the parties to maintain *status quo* in connection with alienation of the same.

- 3.** Feeling aggrieved, opposite party/defendant preferred one Misc. Appeal no. 4 of 2022. Learned Appellate Court vacated the order of interim injunction. Again petitioner/plaintiff preferred an application under Article 227 of the Constitution of India registered as C.O. 1831 of 2022 wherein Hon'ble Court modified the order of Learned Appellate Court directing preservation of the subject property under the possession of opposite party/defendant but not giving any right to create any 3rd party interest over the same till decision of the application for temporary injunction.
- 4.** Opposite party/defendant filed an application under Section 5 & 8 of the Arbitration and Conciliation Act, 1996 along with written statement before the Learned Trial Judge in TS No. 907 of 2021 on 09.06.2022 with a prayer for referring the dispute to arbitration in terms of clause 39 of the development agreement dated 16.08.2010. Learned Judge allowed the application by referring the dispute to arbitration and stayed the Title Suit awaiting order of arbitral tribunal.

5. Learned advocate, Mr. Arnab Roy, appearing on behalf of the petitioner/plaintiff has advanced two fold arguments. In the beginning, Mr. Roy has submitted that the development agreement being compulsorily registrable, was not registered and the document is liable to be impounded. In support of his contention he relied on a case of ***M/s. N.N. Global Mercantile Vs. M/s. Indo Unique Flame Ltd. & ors*** reported in **2023 SCC OnLine SC 495, Sms Tea Estates Private Limited Vs Chandmari Tea Company Private Limited** reported in **(2011) 14 Supreme Court Cases 66** and ***Booz Allen and Hamilton Inc vs SBI Home Finance Limited and others*** reported in **(2011) 5 Supreme Court Cases 532**.
6. Mr. Roy, next, contended that application under Section 8 of the Arbitration and Conciliation Act, 1996 should have been filed before submission of first statement on substance of the dispute, in terms of the scheme of the act, while opposite party/ defendant already participated in the proceeding of the suit by filing a written statement.
7. Learned Advocate, Mr. Asim kumar Roy, appearing on behalf of the opposite party/defendant has argued that the opposite party/defendant filed written statement along with petition

under Section 5 & 8 of the Arbitration and Conciliation Act on the same day showing inclination to participate in the arbitral proceeding. In support of his argument, he relied on a case of ***Balasundarma Nagarajan Vs. Mohan Kumar Thakur*** reported in ***2020 SCC OnLine KAR 3434***, ***Parasramka Holdings Pvt. Ltd. Vs. Ambience Private Ltd. & Anr.*** reported in ***2018 SCC OnLine Del 6573*** and ***Lindsay International Private Limited and Others Vs. Laxmi Niwas Mittal and Others*** reported in ***2020 SCC OnLine Cal 1658***.

8. In this revision application issues to be adjudicated as follows:-

A. Whether Learned Judge ought to have impounded the development agreement dated 16.08.2010 before taking the same into consideration.

B. Whether application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act 1996') filed along with written statement can be said to have been submitted before submission of first statement on the substance of the dispute.

9. Before entering into the issues raised in this revision application, I would like to reproduce Section 8 of the Arbitration and Conciliation Act, 1996 which runs as follows:-

“ 8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

10. Aforesaid provision suggests limitation of judicial intervention in the arbitration process. Through various judicial precedents, it is clear that where there is a valid arbitration clause and a party to the dispute notifies the judicial authority regarding the same, then nobody can stop the party from taking their matter to arbitration. The intention of the legislature is to encourage parties to resolve their dispute through arbitration.

11. Tone and tenor of the provision of Section 8 is that Judicial Authority can refuse the application under Section 8 on the grounds as follows:-

A. If the party waived his right to invoke the provision before submission of first statement regarding dispute.

B. When no contract has been concluded between the parties or contract is illegal or non-existent.

12. According to judicial precedent, conditions of provisions of Section 8 of the Act, 1996 are fulfilled in the following facts and circumstances:-

A. There must be an arbitration agreement or an arbitration clause between the parties.

B. Either of the parties filed a case against the other party before the Judicial Authority.

C. Subject matter of the case and that of the arbitration agreement are same.

D. Either of the parties moves the court seeking a reference to arbitration before submission of first statement.

Issue no. A

13. In the case in hand, it is not disputed that there was a development agreement between the parties and there is one

arbitration clause. It is also not disputed the development agreement is not registered document.

14. In ***SMS Tea Estates*** (supra) Hon'ble Apex Court ruled as follows:-

“ 22. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registerable) and which is not duly stamped:

22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or 40 Section of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

22.4. Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registerable. If the document is found to be not compulsorily registerable, the court can act upon the arbitration agreement, without any impediment.

22.5. If the document is not registered, but is compulsorily registerable, having regard to Section 16(1)(a) of the Act, the court can delink the arbitration

agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 15 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

22.6. *Where the document is compulsorily registerable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance, and (b) as evidence of any collateral transaction which does not require registration.”*

- 15.** Therefore, ***SMS Tea Estates*** (supra) extended space for the court to cure the defect of insufficient stamp of the document. After curing the defect Court can act upon the agreement if it is not compulsorily registerable. But, in case of compulsorily registerable the Court can decide the issue **before proceeding to appoint an arbitrator.**

- 16.** In ***M/s. N.N. Global Mercantile*** (supra) Hon’ble Apex Court clearly laid down the principle:-

“ 120. *An instrument, which is exigible to stamp duty, may contain an Arbitration Clause and which is not stamped,*

cannot be said to be a contract, which is enforceable in law within the meaning of Section 2(h) of the Contract Act and is not enforceable under Section 2(g) of the Contract Act. An unstamped instrument, when it is required to be stamped, being not a contract and not enforceable in law, cannot, therefore, exist in law. Therefore, we approve of paragraphs-22 and 29 of Garware (supra). To this extent, we also approve of Vidya Drolia (supra), insofar as the reasoning in paragraphs-22 and 29 of Garware (supra) is approved.”

- 17.** Therefore, a document which is not duly stamped or being compulsorily registerable not registered, cannot be acted upon by the Court. In our case, admittedly, the development agreement was not registered. Therefore, Learned Trial Judge ought to have pried into the track of impounding the development agreement prior to act upon the same.

Issue No B:-

- 18.** With regard to filing of application under Section 8 of the Act, 1996 it is the duty of the petitioner to file the application under Section 8 of the Act, 1996 before first statement waiving his right to participate in arbitral proceeding. In our case, the application under Section 8 of the Act, 1996 was filed along with the written statement on the same date. In ***Balasundarma Nagarajan*** (supra) it was held that the filing

of application under Section 8 of the Act, 1996 along with the written statement cannot lead to an inference that the defendant had submitted to jurisdiction of Civil Court and had waived its right to seek for reference to arbitration. Same view was taken in ***Lindsay International Private Limited*** (supra) also in ***Parasramka Holdings Pvt. Ltd.*** (supra).

19. In the aforesaid view of the matter, I am unable to hold that filing of an application under Section 8 of the Act, 1996 along with the written statement can lead to any presumption that opposite party/defendant waived his right of referring the dispute for arbitration.

20. In the result, Order No. 20 dated 21.12.2022 passed in connection with 907 of 2021 stands set aside.

21. With the aforesaid observation the instant revision application disposed of with the request Learned Trial Judge to re-hear the application under Section 5 & 8 of the Act, 1996 after completion of due process for impounding the development agreement and also directing the opposite party/defendant to pay deficit stamp, if not paid.

- 22.** All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.
- 23.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]