

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS

FMAT (ARBAWARD) 40 of 2022
With
IA No. CAN 1 OF 2022

M/s Lovely Promoters Private Limited
Vs.
Shri Manoj Kumar Bothra & Anr.

Appearance:

For the Appellant : **Mr. Krishnaraj Thakur, Adv.**
Ms. N. Banerjee, Adv.
Mr. Sidhartha Sharma, Adv.
Ms. Shalani Bose, Adv.
Mr. Rishav Dutt, Adv.
Mr. Aman Kataruka, Adv.

For the Respondents : **Mr. Jishnu Chowdhury, Adv.**
Mr. Abhishek Roy, Adv.
Mr. Joey Chatterjee, Adv.

Judgment On : **20.04.2023**

Harish Tandon, J. :

Although an application under Section 9 of the Arbitration and Conciliation Act, 1996 filed by the appellant has been dismissed solely on the ground that the Memorandum of Understanding entered into between the parties is not a contract and, therefore, not a legally binding document,

the respective Counsels appearing before us have digressed from the said point and argued the other points having a larger impact in relation to dealing with an application under Section 9 of the said Act, before the Commercial Court. The parties restricted the arguments on the nature and construction of the Memorandum of Understanding, in pursuit of understanding whether it is a concluded contract or mere signifying the intention of the parties to enter into further agreement.

Before we proceed to decide the points urged before us it would be profitable to adumbrate the salient facts discerned from the respective pleadings of the parties which, in our opinion, are more or less undisputed.

The respondent claimed absolute right, title and interest in respect of Flat no. 3702 measuring 5318 square feet on 37th floor in tower 2 along with two car parking space in establishing NRI Complex situated at 783, Urbana NRI Complex, Anandpur, Kolkata. The said flat was in possession of a HUF through its Karta allegedly as a licensee on permission of the respondents for a period of 11 months which has admittedly expired. The said alleged permissive occupant filed Title Suit no. 114 of 2021 against the respondent and obtained an ad-interim order of injunction restraining from creating any disturbance in peaceful possession and from dispossession without due process of law. It is undisputed that the said order of injunction is still operative as the suit is pending. Subsequently, the parties herein entered into a MoU on March 2, 2021 containing a stipulation that the Respondent no. 2 shall sell, transfer and convey the said property in favour of the appellant for the total consideration of Rs. 5 crores. The said MoU obligated the appellant to conduct and take care of the pending litigation between the

respondent and the said alleged permissive occupant and all expenses would be treated as a part of the consideration. However, it is also contained in the said agreement that a sum of Rs. 50 lakhs would be paid after vacating the injunction passed in the Title Suit no. 114 of 2021 and a fresh agreement for sale/transfer shall be entered into by and between the parties. The respondent subsequently cancelled the agreement on various allegations including that the appellant has not performed his obligation under the said MoU which raises a dispute and in view of the arbitration clause having incorporated in the said MoU, the appellant invited the respondent to refer the disputes to the arbitration. Pending reference, the approach is made to the Court with an application under Section 9 of the said Act seeking interim measures by way of injunction restraining the respondents from selling, transferring, encumbering, and/or dealing with the property with the 3rd party pending the dispute to be resolved through arbitration.

As indicated above, by the impugned order the Trial Court dismissed the application under Section 9 of the Arbitration and Conciliation Act primarily on the ground that the moment one of the terms incorporated in the said Memorandum of Understanding contemplates further agreement for sale to be executed, it is not a concluded contract and, therefore, has no binding efficacy. The respective Counsels urged several points including the point decided in the impugned order pertaining to the nature and the construction of the said Memorandum of Understanding. The Counsels are at variance as to whether the said MoU reduced on a paper without the requisite stamp duty to be levied thereupon can be acted upon by the Court even at the stage of the interim measures contemplated under Section 9 of

the said Act. The Counsels are also not ad idem on the proposition of law as to whether the Clauses contained in the said MoU constituted a valid contract capable to be enforced in the Court of law.

There is no dispute that the parties consciously entered into a MoU in respect of the flat in question but dissented on the score whether such MoU partakes the character of a concluded contract. It is no longer *res integra* that the nomenclature of an agreement is not a determinant factor nor is a guiding tool for ascertaining the intention of the parties. The intention of the parties can be gathered from the terms and conditions incorporated in various Clauses of the document. The reading of the said MoU would reveal that the said document was entered into by and between the parties in relation to the subject flat on disclosure of the consideration price to be paid on the basis of the modalities incorporated therein. Clause 5 of the MoU would reveal that the respondent is obligated to execute and register the deed of conveyance/transfer in respect of the subject flat along with two car parking spaces in favour of the appellant after the subject flat is vacated by the alleged permissive occupant and upon payment of the consideration price. Clause 7 thereof is divided into 2 compartments upon disclosure of the total consideration price. First compartment relates to a payment of 50 lakhs after deducting the TDS upon vacating the suit filed by the permissive occupant and entering into a fresh agreement for sale/transfer. The second compartment is relatable to the completion of the litigation and making the property free from encumbrances and the payment of the balance consideration price upon deducting the TDS. Clause 9 thereof provides for the legal expenses to be included in the consideration price as a part payment of the intention to purchase the said subject flat and further

obligated the respondent to effect the transfer and sale of the subject flat in favour of the appellant or his nominee upon observing the legal formalities.

The aforesaid 3 Clauses is projected to ascertain the nature of the said MoU for the purpose of a binding contract enforceable in law or a mere intention to enter into further agreement for sale of the property. It is manifestly seen from the said MoU that the consideration price has been mentioned and an obligation is cast upon the appellant to pay in order to effectuate the sale in its favour, subject to the other conditions to be complied with. Clause 5 and 7 are pitted against each other and according to the Trial court the later Clause incorporated in the MoU shall be considered as the final intention. In order to have a clarity Clause 5 in its unequivocal terms obligated the respondent to execute and register the deed of conveyance with 2 car parking space in favour of the appellant or its nominee upon vacating the property by the alleged permissive occupant and upon payment of the consideration money to the respondent. The first compartment of Clause 7 encompasses that upon payment of Rs. 50 lakhs after deducting the TDS and vacating the title suit instituted by the alleged permissive occupant, a fresh agreement for sale/transfer shall be entered into between the parties.

The earliest judgment on the nuances of law as cited before us relating to the construction of a document and ascertaining of the intention of the parties can be traced from a Privy Council judgment rendered in case of ***Harichand Mancharam v. Govind Luxman Gokhale reported in AIR 1923 Privy Council 47***. The question involved in the said case was in relation to two documents being the foundation of the suit filed in the

Original Side of the Bombay High Court to be regarded as a completed contract or a provisional arrangement conditional to the preparation of a formal document evidencing the contract. The Privy Council held that the decision arrive at the final conclusion whether an agreement is a contemplated bargain or merely a provisional arrangement, depends upon the intention of the parties to be gathered from the language used therein. It is further held that merely a further document was prepared does not wish away the binding nature of the earlier agreement in the following:

“He has also examined at some length the cases in which the principle applicable to the construction of such documents is laid down; it is, therefore, not necessary to refer to them in detail in this judgment. Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Granworth) in Ridgway V. Walton (1) the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In Von Hatzfeldt-Wildenburg V. Alexandar (2), Lord (then Mr. Justice) Parker laid down that where “the acceptance by the plaintiff was subject to a condition that the plaintiff’s solicitors should approve the title to and covenants contained in the lease, the title from the freeholder and the form

of contract,” the negotiations did not form a binding agreement between the parties.”

The Apex Court in case of ***Kollipara Sriramulu (Dead) by his legal representative v. Aswatha Narayana (dead) by his legal representative & Ors., reported in AIR 1968 SC 1028*** held:

“3. We proceed to consider the next question raised in these appeals, namely, whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and no such agreement was executed. We do not accept this argument as correct. It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the reparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton*, the fact of a subsequent agreement being

prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In Von Hatzfeldt Wildenburg v. Alexander it was stated by Parker, J. As follows:

“It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.”

4. In other words, there may be a case where the signing of a further formal agreement is and a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. In Rossiter v. Miller Lord Cairns Said:

“If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise than you cannot find a concluded contract.”

In Currimbhoy and Company Ltd. v. Creet the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. In Von Hatzfeldt – Wildenberg v. Alexander was applicable in India. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of Respondent 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and

area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr. Gokhale is unable to make good his argument on this aspect of the case.”

There is no scintilla of doubt that the law enunciated in the above report laid down the proposition that in order to ascertain whether a document partakes the character of a completed contract or mere a contemplation to execute a completed contract can only be ascertained from the intention of the parties and the moment a document is executed in writing, the language used therein. The above report manifested that mere contemplation to execute a formal agreement does not *ipso facto* rendered the document as incomplete contract or a mere bargain document not enforceable in law. The intention of the parties is evident from the several Clauses of the MoU that both of them contemplated to transfer/sale the subject flat upon fulfilment of the obligations incorporated therein.

Incidentally a point has been taken whether the later Clause would prevail over the earlier Clause in case of repugnancy. The Apex Court in case of ***Radha Sundar Dutta vs. Mohd. Jahadur Rahim Ors., reported in AIR 1959 SC 24*** held that if later Clause destroys altogether the earlier Clause, the later Clause shall be rejected as repugnant in the following:

“ 13. We must now refer to the decision on which the learned Judges in the Court below have relied in support of their conclusion. In Kanchan Baran Debi v. Umesh Chandra the facts were that the Maharaja of Burdwan had created a Patni of lot Kooly in 1820. The Choukidari Chakran lands situated within

that village were resumed under the Act and transferred to the Zamindar who granted them in 1899 to one Syamlal Chatterjee in Patni on terms similar to those in exhibit B. In 1914 the patni lot Kooly was sold under the Regulation, and purchased by Smt. Kanchan Barani Debi. She then sued as such purchaser to recover possession of the choukidari Chakran lands. The defendants who represented the grantees under the Patni settlement of 1899 resisted the suit on the ground that the sale of Patni Kooli did not operate to vest in the purchaser the title in the Choukidari Chakran lands, as they formed a distinct Patni. Dealing with this contention, B.B. Ghose, J. Who delivered the judgment of the the Court, observed:

“It is certainly open to the only two parties concerned to alter the terms of the original patni if they chose to do so; and what we have to see is whether that was done. In order to do that, we have to examine the terms of the pattah by which the Choukidari Chakran lands were granted to Syamlal Chatterjee.”

The learned Judge then refers to the two clauses corresponding to the last two clauses in Exhibit B, and comes to the conclusion that their effect was merely to, restore the position as it was then the original Patni was created in 1820, and that the plaintiff was entitled to the possession of the choukidari Chakran lands as being part of the Patni. Now, it is to be observed that in deciding that the Choukidari Chakran lands granted in 1899 became merged is lot

Kooly, as it was in 1820, the learned Judge did not consider the effect of the clause providing for sale of those lands as a distinct entity under the provisions of the Regulation when there was default in the payment of rent payable thereon under the deed, and that, in our opinion, deprives the decision of much of its value. In the result, we are unable to hold that the two clauses on which the learned Judges base their conclusion are really inconsistent with the earlier clauses which support the view that the grant under Exhibit B is of a distinct Patni. Nor do we agree with them that the earlier clause providing for the sale of the Chaukidari Chakran Lands in default of the payment of jama, should be construed so as not to override the later clauses. If, in fact, there is a conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa. In Forbes v. Git Lord Wrenbury stated the rule in the following terms:

“If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later.” We accordingly hold that Exhibit B created a new Patni and that the sale of the lands comprised therein is not bad as of a portion of a Patni.”

As discussed above, Clause 5 of the MoU is definite and categorical that the deed of conveyance shall be executed after the said title suit filed by the alleged permissive occupant is finally concluded and the entire consideration money is paid. The first compartment of the Clause 7 talks about a payment of Rs. 50 lakhs after the said suit ended and a fresh agreement for transfer and/or sale to be executed. Although the aforesaid two Clauses are pitted against each other and the Trial Court relied upon of the later Clause as the final intention of the parties. The law laid down by the Apex Court in the above report in unequivocal terms held that in case of repugnancy between the two Clauses of a document, the earlier Clause would prevail; even apart the other Clauses in MoU is also required to be considered in the perspective of ascertaining the intention of the parties in pursuit of harmonising both the Clauses to ascertain the intention of the parties so that the documents partakes a character of a completed contract. The intention is laudable that the parties agreed to sale the subject flat upon the conditions to be fulfilled which is normally contained in any agreement for sale. We do not find any incongruity in harmonising the aforesaid two Clauses in juxtaposition with the other Clauses of the MoU that it is a completed contract. The one and the foremost conditions evident from the said MoU can be taken as a manifest intention of the parties that any expenditure incurred for bringing the said suit filed by the alleged permissive occupant to bring its to an end and lifting of any impediment on the part of the respondent in conveying the title, shall be regarded as a part payment towards the total consideration money. It is further evident from the conduct of the parties that at the time of repudiating the contract the respondents enclosed the expenditures incurred by the appellant in relation

to the said title suit treating the same to be a part payment. We are, therefore, not in agreement with the submission of the respondent that the MoU cannot be enforced as a completed contract.

It leads us to another question as to whether the Court can act upon an agreement or a completed contract deduced in writing without putting the requisite stamp duty leviable thereupon. We noticed various judgments of the Apex Court which we will deal with hereinafter on the applicability of the fiscal statute i.e. Stamp Act *vis-a-vis* the Arbitration and Conciliation Act, 1996 more particularly, when the substantive agreement which attracts a stamp duty to be put thereupon containing an arbitration clause can be acted upon in view of the embargo having created in the fiscal statute.

Section 33 of the Stamp Act creates an impediment on the part of the Court having authority to receive the document in evidence unless impounded. However, Section 35 which contained more or less the same language as appearing in Section 33 of the Stamp Act with additional words “acted upon” which raises a debate in ***SMS Tea Estates (P) Ltd. vs. Chandmari Tea Co. (P) Ltd. reported in (2011) 14 SCC 66***, in relation to a lease deed for 30 years with regard to two tea estates which was neither stamped nor registered. The question which fell for consideration before the Bench was whether an arbitration clause contained in an unregistered (but compulsory registerable) Instrument is valid and enforceable and whether an arbitration agreement in an unregistered agreement which is not duly stamped is invalid and not enforceable and whether there is an arbitration

agreement between the appellant and respondent and the arbitrator to be appointed. The Apex Court held :

“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 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 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

(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 compulsory registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.”

19. Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.

20. The scheme for Appointment of Arbitrators by the Chief Justice of Gauhati High Court, 1996 requires an application under Section 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty

that has been paid on the original. Section 33 casts a duty upon every court, that is, a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per Section 38 of the Stamp act.

21. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.

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 Section 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, of 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.”

It is evident from the above noted observations that an embargo is created upon a Court competent to receive a document in evidence to receive the said document or act upon the same unless impounded. Even in case of Section 11 of the Arbitration and Conciliation Act, 1996 the Chief Justice cannot act upon the arbitration clause unless the document is impounded in appointing an arbitrator provided the unregistered document chargeable with the duty is duly stamped.

The Judgment of ***SMS Tea Estates Private Limited (Supra)*** came up for consideration in another decision of the Supreme Court rendered in ***Garware Wall Ropes Limited vs. Coastal Marine Constructions and Engineering Limited reported in (2019) 9 SCC 209***. An argument was

advanced before the said Bench that in view of the language employed in various Sections of the Arbitration and Conciliation Act, it is very difficult to accept the proposition that the arbitration clause contained in the substantive agreement has an independent existence and, therefore, the substantive agreement having not sufficiently stamped shall have a far reaching impact on the arbitration clause as well which cannot be segregated and/or separated therefrom in the following:

19. It will be seen that neither in the Statement of Objects and Reasons nor in the Law Commission Report is there any mention of SMS Tea Estates. This is for the very good reason that the Supreme Court or the High Court, while deciding a Section 11 application, does not, in any manner, decide any preliminary question that arises between the parties. The Supreme Court or the High Court is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect revenue. SMS Tea Estates has taken account of the mandatory provisions contained in the Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11 . A close look at Section 11 (6-A) would show that when the Supreme Court or the High Court considers an application under Sections 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement , as a whole, can be acted upon. It is important to

remember that the stamp act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. In SMS Tea Estates when it comes to an unregistered agreement or conveyance. However, the Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11 (6-A) does not, in any manner, deal with or get over the basis of the judgment in SMS Tea Estates, which continues to apply even after the amendment of Section 11(6-A) .

20. Looked at from a slightly different angle, an arbitration agreement which is contained in an agreement or conveyance is dealt with in Section 7 (2) on the facts of the present case, and therefore, the arbitration clause that is contained in the sub-contract in question is the subject-matter of the present appeal. It is significant that an arbitration agreement may be in the form of an arbitration clause “in a contract.”

Ultimately the Apex Court held:

“37. One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time-frame provided by Section 29-A of the 1996 Act.”

The Three Judge Bench of the Supreme Court in **N.N.Global Markentile Private Limited vs. Indo Unique Flame Limited & Ors. reported in (2021) 4 SCC 379** was considering the issue relating to a doctrine of separability of an arbitration agreement from the substantive

contract in which it is embedded when the said substantive contract does not contain the requisite stamp duty as per the relevant Stamp Act. The earlier judgment rendered in **SMS Tea Estates (P) Ltd. (Supra) and Garware Wall Ropes Limited (Supra)** became a centre of debate more particularly on the proposition of law that the moment the arbitration agreement is inbuilt and ingrained into a substantive contract it cannot be separated and shall fall out on the deficiency of the substantive contract. The Bench held that the arbitration agreement contained in an underlying substantive contract is independent and distinct and such a deficiency cannot be an obstacle in proceeding under Section 11 of the Arbitration and Conciliation Act in the following:

“24. The arbitration agreement contained in the work order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which provides the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of stamp duty, unlike various other agreements enlisted in the Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, unenforceable or non-existent, even if the substantive contract is

not admissible in evidence, or cannot be acted upon on account of non-payment of stamp duty.”

The Apex Court further held that the deficiency of the stamp duty leviable upon the main contract does not *ipso facto* rendered the said contract invalid or in other words such deficiency is not incurable but can be cured by impounding the said document and thereafter to act upon the same in these words:

“22. In our view, the non-payment or deficiency of stamp duty on the work order does not invalidate the main contract. Section 34 provides that an unstamped instrument would not be admissible in evidence, or be acted upon, till the requisite stamp duty is paid. This would amount only to a deficiency, which can be cured on the payment of the requisite stamp duty.”

However, an exception can be seen from the above report in relation to the modalities and the powers of the Court at the time of entertaining an application under Section 9 of the Arbitration and Conciliation Act. It is no doubt true that the said provision can be activated before or during the arbitral proceedings for emergent interim reliefs. The moment the aforesaid provisions can be activated before the parties are relegated to arbitration, the another incidental question that fell for consideration as to whether the Court upon looking into the terms and conditions of the substantive contract and allegation as to breach thereof can act upon the same for a limited purpose of extending the protection despite the fact that the

substantive contract which attracts stamp duty does not contain so. The Apex Court held:

“37. In the case of an application under Section 9 of the Arbitration Act, 1996 the situation would be different. If an application for urgent interim reliefs is filed under Section 9 before the court, and it is brought to the attention of the court that the substantive contract is not duly stamped, the court would grant an interim relief to safeguard the subject-matter of the arbitration. However, the substantive contract would then be impounded, and the party concerned be directed to take the necessary steps for payment of the requisite stamp duty in accordance with the provisions of the relevant Stamp Act, within a time-bound period.”

The two important facets appeared from the above noted reports that in ***SMS Tea and Garware (Supra)*** it was held that the moment the arbitration agreement is ingrained into a substantive contract which attracts stamp duty leviable thereupon, it cannot be acted upon unless the substantive contract is impounded as arbitration agreement is inbuilt into a substantive contract and the doctrine of separability or doctrine of severability is blurred and/or diluted. However, in ***N.N.Global (supra)*** the 3 Judge Bench propounded the applicability of doctrine of separability or severability in holding that the arbitration agreement is independent and separate from the substantive agreement and, therefore, there is no impediment on the part of the Court in proceeding on the basis thereof despite the fact that the substantive contract is insufficiently stamped. The

relevant observations in ***N.N. Global (Supra)*** which in our opinion is attracted in the instant case can be a guiding factor in relation to an application under Section 9 of the Arbitration and Conciliation Act, 1996. It is held that the fiscal statute would not stand in the way of considering an application under Section 9 of the Arbitration and Conciliation Act as the Court may grant an interim measures by putting a condition that the substantive contract should be sent to the authority for ascertaining the stamp duty and the impounding to be done with in the time frame.

Having found the proposition of law enunciated in the above reports we have taken to a recent decision of the 3 Bench of the Supreme Court delivered in case of ***Intercontinental Hotels Group (India) Private Limited & Anr. Vs. Waterline Hotels Private Limited reported in (2022) 7 SCC 662***. The later Bench agreed to the views expressed in ***N.N. Global (Supra)*** that because of the conflicting decisions operating, the point needs to be resolved by constituting a larger Bench but proceeded to accept the proposition of doctrine of seperability as the Court should not wait until the decision of the Constitution Bench is taken in the following:

“25. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court – until the larger Bench decides on the interplay between Sections 11 (6) and 16 – should ensure that arbitrations are

carried on, unless the issue before the Court patently indicates existence or deadwood.”

However, it was found in the said report that the stamp duty was subsequently put in on the documents including the penalty and kept the question whether such stamp duty is sufficient enough to be decided at a later point of time. The aforesaid report can be viewed from the angle that there is no impediment on the part of the Court in proceeding on the basis of the applicability of the earlier judgment despite the reference made to the Constitution Bench. The aforesaid proposition of law deduced from the said ***Intercontinental Hotels Group (India) Private Limited (Supra)*** can further lend support from a Division Bench of this Court in case of ***Gurik Bal Singh & Anr. Vs. Indusind Bank Ltd. reported in (2009) SCC 1 Cal 2532*** where the Division Bench held that despite the matter have been referred to a larger Bench the binding efficacy of the earlier decision has not been diluted nor effaced in these words:

“Notwithstanding the aforesaid position, we are of the opinion that so long the earlier view taken by a two-Judges-Bench in the case of P. Das Goel (supra) is not set aside by a larger Bench of the Supreme Court, the same is binding upon us as a precedent and not the ones which took contrary view.

It is now settled law that merely because the legality of a decision of an earlier Bench has been doubted by a subsequent Bench of equal standing and referred the matter for decision to a larger Bench, such fact does not destroy the value of the earlier decision as a precedent.”

The law enunciated in the aforesaid report indicates that the arbitration agreement contained in a substantive contract is independent and separate. Even if the substantive contract is insufficiently stand, there is no impediment on the part of the Court in proceeding to decide an application under Section 9 of the Arbitration and Conciliation Act subject however, to the condition that the Court after passing an interim order shall direct the parties to impound a document by fixing a timeline. The object and purpose behind the incorporation of Section 9 of the said Act is to grant interim reliefs before or during the arbitral proceedings as by the time the document is impounded, the position may become irreversible. Based upon the proposition of law as indicated above whether the Trial Court was justified in rejecting an application under Section 9 solely on the ground that it is not a completed contract, we have already discussed the aforesaid point and did not find any reason to support the view expressed by the Trial Court in this regard. We have held that the nature of the MoU and the different clauses appearing therein gives an inescapable conclusion that it is a completed contract and not a bargain simplicitor. Clause 5 and the first compartment of Clause 7 can be harmonised in the manner that both complements each other and does not override its applicability nor can be said to be repugnant to each other. The parties have agreed to transfer the subject flat on a disclosed consideration and Clause 7 in our opinion, is the schedule of payment and in the event a sum of Rs. 50 lakhs is paid an agreement for sale/transfer may be executed. It is only to effectuate and facilitate the further payment of the balance consideration money but does not have a overriding effect on an unequivocal agreement for transfer and sale of the subject flat after completion of the title suit and the payment of

the consideration money. It is clearly stipulated in the said agreement that any expenditure incurred for completing the said title suit and lifting the interdict, shall be treated as a part payment towards the consideration money. The conduct of the respondent would fructify the aforesaid stipulated term that at the time of cancelling the MoU, the cheque covering the expenditure incurred by the appellant was also returned and/or refunded. The interim relief was sought alleging that the respondents are contemplating to transfer, alienate, sale and/or deal with the subject flat to the 3rd party and in the event it is done, it may invite a multiplicity of the proceedings. It may accrue a right to the bona fide purchaser to lay equitable defence as a *bona fide* purchaser for value without notice.

We, thus, find that the appellant has been able to make out a prima facie, balance of convenience and inconvenience lies in his favour and in the even the interim relief is not granted, it would cause irreparable loss and injury.

Accordingly the order impugned in the instant appeal is set aside.

The respondents are restrained from transferring, alienating and/or dealing with the property in favour of the 3rd party in any manner whatsoever.

The appellants are directed for a period of 4 months from the date or until further orders. Let the MoU be sent to the collector for ascertainment of the stamp duty leviable upon an agreement for sale and the entire exercise shall be completed within a period of one month. After determining the stamp duty leviable upon said MoU/agreement the appellant shall put

in the requisite stamp duty with penalty as directed by the collector within one month therefrom. In the event the stamp duty is not put in on the said MoU/agreement within the time indicated hereinabove, the interim order shall stand vacated automatically without any interference to the Court. With these observations the appeal is disposed of.

No order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)