

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

Date of decision: January 23rd, 2023

(1) Arbitration Case No. 216 of 2021

Om Shree Thakurji Educational Society

Petitioner

Versus

Career Institute Educational Society

Respondent

(2) Arbitration Case No. 220 of 2021

Om Shree Thakurji Educational Society

Petitioner

Versus

Career Institute Educational Society

Respondent

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. Anuj Gupta and Ms. Saguna Gupta, Advocates for
the petitioner(s).

Mr. V. K. Jindal, Senior Advocate with
Mr. Samar Ahluwalia, Mr. Vineet Choudhary and
Mr. Jagdeep Singh Rana, Advocate for the respondent(s)

AVNEESH JHINGAN, J:

1. The afore-mentioned two petitions have been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') for appointment of an arbitrator. As the parties are common and the facts are similar, both the petitions are being decided by a common order. For the sake of convenience, facts are being taken from Arbitration Case No. 216 of 2021.

2. The brief facts are that the petitioner by two lease agreements leased out the premises to the respondent. The lease deed provided for

dispute resolution by arbitration. Clauses 14 and 15 thereof are reproduced below:

“ Dispute Resolution

Any dispute under this Agreement shall be referred to arbitration in accordance to Arbitration and Conciliation Act, 1996. The Sole Arbitrator shall be appointing by the mutually consent of both parties. The place of Arbitration shall be at Ambala, Haryana.

15. Governing Law and Jurisdiction

This Agreement and the relationship between the parties hereto shall be governed by, and interpreted in accordance with, the laws of India. All Disputes shall be subject to the exclusive jurisdiction of the courts at Ambala, Haryana, India.”

3. As per the petitioner, the respondent breached the terms and conditions of lease deed and due rent was not paid. A termination notice was issued and the petitioner issued notice dated 21.1.2021 for invoking arbitration and proposing the name of arbitrator.

4. The respondent vide reply dated 27.1.2021 rejected the arbitrator proposed by the petitioner and raised objection that the arbitration cannot be invoked on the basis of an unregistered lease deed.

5. It would be appropriate to mention that the respondent filed a suit for permanent injunction in which application under Section 8 of the Act was filed by the petitioner. The application was allowed but in appeal, the order was reversed. The appellate order was challenged in Civil Revision No. 672 of 2021. The said revision petition was attached with these petitions and was withdrawn on 6.1.2023 with liberty to avail remedies in accordance with law.

6. FIR No. 52 dated 4.3.2021, under Sections 120-B, 201, 323, 379, 406, 420, 447, 504 and 506 IPC and FIR No. 18 dated 21.1.2021 under Section 57 of the Disaster Management Act and 188 IPC were registered against the respondent in Police Station Mulana, District Ambala at the instance of the representative of the petitioner.

7. Learned counsel for the petitioner submits that the fact of leasing the property on the basis of lease deed as also that there is a clause of arbitration in the lease deed is not disputed by the respondent. He prays that the petitions be allowed and the arbitrator be appointed.

8. Learned senior counsel appearing for the respondent raises following three objections to oppose the prayer made in the petition:

- (i) There are serious allegations of fraud made in the FIRs by the petitioner hence the dispute cannot be resolved by the arbitrator;
- (ii) the dispute between the tenant and the landlord is governed by the provisions of Transfer of Property Act, 1882 and is not arbitrable; and
- (iii) the lease deed is unregistered and unstamped, cannot be relied upon for invoking arbitration proceedings. He relies upon the decision of the Supreme Court in ***Garware Wall Ropes Limited v. Coastal Marine Construction and Engineering Ltd., (2019) 9 SCC 209.*** *The contention is that the judgment of Garware Wall Ropes Limited's case (supra) was cited with approval in Vidya Drolia and others v. Durga Trading Corporation, (2021) 2 SCC 1.*

9. The contentions raised by learned senior counsel for the respondent lacks merit. The allegations in FIR No. 52 are with regard to illegal running of boys and girls hostels, non-payment of rent and that the

cheque issued by the respondent bounced due to insufficient funds. Further that the cheque was issued in spite of knowing that sufficient amount was not in the account, hence fraud was committed.

10. FIR No. 18 was registered for violating the Standard Operating Procedure of COVID-19 and keeping the students in the institution.

11. In ***Vidya Drolia and others' case (supra)***, the decision in ***N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72*** was over-ruled and it was held that the allegations of fraud relating to civil dispute can be subject matter of arbitration, the exception being of a fraud which invalidates the arbitration clause. In the case in hand, the allegations in the FIR are of simple fraud and for issuing a cheque having knowledge that there were not sufficient funds in the account. No pleading or contention has been raised of a fraud vis-a-vis the lease deed or the arbitration clause.

11.1 Para No. 78 of ***Vidya Drolia's case (supra)*** is reproduced below:

“78. In view of the aforesaid discussions, we overrule the ratio in N. Radhakrishnan inter alia observing that the allegations of fraud can (sic cannot) be made a subject-matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of Delhi High Court in HDFC Bank Ltd. which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable.”

11.2 In ***M/s N. N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Limited and others, (2021) 4 SCC 379***, the Supreme Court held that

the allegations of fraud arising out of dispute inter-se the parties are arbitrable. Para No. 51 is reproduced below:

“51. In the present case, the allegations of fraud with respect to the invocation of the bank guarantee are arbitrable, since it arises out of disputes between the parties inter se, and is not in the realm of public law.”

12. The second argument that the dispute between the landlord and the tenant is not arbitrable as the provisions of Transfer of Property Act, 1882 apply is noted to be rejected. In ***Vidya Drolia's case (supra)***, the decision in ***Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706*** was over-ruled and it was held that the landlord tenant dispute governed by Transfer of Property Act, 1882 are arbitrable. They are not action in rem and further that the Transfer of Property Act, 1882 does not expressly or impliedly bars arbitration, the exception being where the landlord- tenant dispute is governed by rent control legislation and specific court or forum have exclusive jurisdiction.

13. Paragraphs 79 and 80 of the judgment in ***Vidya Drolia's case (supra)*** are reproduced below:

“79. Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem. Such actions normally would not affect third-party rights or have erga omnes effect or require centralised adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign

functions of the State. The provisions of the Transfer of Property Act do not expressly or by necessary implication bar arbitration. The Transfer of Property Act, like all other Acts, has a public purpose, that is, to regulate landlord-tenant relationships and the arbitrator would be bound by the provisions, including provisions which enure and protect the tenants.

80. *In view of the aforesaid, we overrule the ratio laid down in **Himangni Enterprises** and hold that the landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can be adjudicated and enforced by the specified court/forum, and not through arbitration.”*

14. It must be mentioned here that it is not the case set up by the respondent that relationship between the parties is governed by rent control legislation and that exclusive court or forum have been provided.

15. There is another aspect to be considered that the scope of judicial review and jurisdiction of the court under Section 11 of the Act is extremely limited. The court has to rarely interfere when it is certain that the agreement of arbitration is non-existent, invalid or the dispute is non-arbitrable. The Supreme Court in **Secunderabad Cantonment Board v. B. Ramachandraiah and sons, (2021) 5 SCC 705** relying upon the decision of **Vidya Drolia's case (supra)** held as under:

*“While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time barred and dead, or there is no subsisting dispute. Paragraph 148 of the **Vidya Drolia's case (supra)**, reads as follows:*

*“148. [Section 43\(1\)](#) of the Arbitration Act states that the [Limitation Act, 1963](#) shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the [Arbitration Act](#) and [Limitation Act](#), arbitration shall be deemed to have commenced on the date referred to in [Section 21](#). Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in *Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)]* , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”*

16. The Supreme Court in ***Vidya Drolia's case (supra)*** held that it is not a stage for the court to entertain a mini trial. The only aim is to keep a check for protecting the parties being forced into arbitration when matter is non-arbitrable. Moreover, the arbitrable Tribunal has a jurisdiction of non-arbitrability and thereafter the remedy is provided under Section 34 of the Act. Paragraph 154 of the judgment is reproduced below:

“154. Discussion under the heading ‘Who decides Arbitrability?’ can be crystallized as under:

154.1 Ratio of the decision in Patel Engineering Ltd. on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

154.2 Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3 The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4 Rarely as a demurrer the court may interfere at the Sections 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-

arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

17. The third contention raised has two limbs. Firstly, the consequences of non-registration of compulsorily registerable document and secondly the effect of un-stamped or under-stamped document relied upon for appointment of arbitrator.

18. The issue whether unregistered lease deed can be relied upon for appointing arbitrator was dealt with by the Supreme Court in ***SMS Tea Estates Pvt. Ltd. v. M/s Chandmari Tea Co.Pvt. Ltd., (2011) 14 SCC 66***. It was held that if the dispute resolution mechanism is provided for in the substantive contract, the clause of arbitration is an independent agreement not requiring registration under the Registration Act, 1908 and further that the document can be acted upon for resolving dispute by arbitration.

19. Before advertng to the second limb of the third contention that un-stamped document cannot be relied upon for appointment of arbitrator, it would be important to notice the judgments of the Supreme Court ***SMS***

Tea Estates Pvt. Ltd.'s case (supra), Garware Wall Ropes Ltd.'s case (supra) and M/s N. N. Global Mercantile Pvt. Ltd.'s case (supra).

20. In ***SMS Tea Estates Pvt. Ltd.'s case (supra)***, following three issues were dealt with:

“5. On the contentions urged the following questions arise for consideration:

(i) Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?

(ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

(iii) Whether there is an arbitration agreement between the appellant and respondent and whether an Arbitrator should be appointed?”

21. While dealing with issue No. 2, the Supreme Court laid the procedure to be adopted in a case where un-stamped document contained an arbitration clause. Further, it was held that even the arbitration clause of an un-stamped document cannot be acted upon.

22. In ***Garware Wall Ropes Ltd.'s case (supra)***, the issue under consideration was whether the arbitration clause in an un-stamped document would be enforceable after insertion of clause (6A) in Section 11 of the Act. Following the judgment in ***SMS Tea Estates Pvt. Ltd.'s case (supra)***, it was held that the arbitration clause would be non-existent and unenforceable till the matter of stamp duty is adjudicated and paid on the substantive contract. Both the decisions on this issue were over-ruled in ***M/s N. N. Global Mercantile Pvt. Ltd.'s case (supra)***. The decision in ***Garware Wall Ropes Ltd.'s case (supra)*** was cited with approval by three-Judge Bench in ***Vidya Drolia and others' case (supra)***. In ***M/s N. N. Global Mercantile Pvt. Ltd.'s case (supra)*** after over-ruling the decisions

in *SMS Tea Estates Pvt. Ltd.'s case (supra)* and *Garware Wall Ropes Ltd.'s case (supra)* doubting the view taken by three-Judge Bench in *Vidya Drolia and others' case (supra)*, in paragraph 146 of the judgment it was referred to the Constitution Bench.

23. In *M/s N. N. Global Mercantile Pvt. Ltd.'s case (supra)*. It was held that the arbitration agreement is independent and is not chargeable to payment of stamp duty. Paragraphs No. 28 to 32 are reproduced below:

“ 28. In our view, the decision in *SMS Tea Estates* does not lay down the correct position in law on two issues i.e. (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as u/s 19 of the Indian Contract Act, 1872.

29. We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it un-enforceable, since it has an independent existence of its own. The view taken by the Court on the issue of separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the [Stamp Act](#). The non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite Stamp Duty.

30. The second issue in *SMS Tea Estates* that a voidable contract would not be arbitrable as it affects the validity of the arbitration agreement, is in our view not the correct

position in law. The allegations made by a party that the substantive contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue. These issues can certainly be adjudicated through arbitration.

31. We overrule the judgment in SMS Tea Estates with respect to the aforesaid two issues as not laying down the correct position in law.

32. The Garware judgment has followed the judgment in SMS Tea Estates. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration clause would be non-existent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract. 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.

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54. In the present case, since both the parties have admitted the existence of the arbitration agreement between the parties, as recorded in the judgment of the High Court, and even before this court during oral submissions, parties may either appoint a sole arbitrator consensually; failing which, an application u/S 11 for appointment of the arbitrator may be made before the High Court. ”

24. In view of the legal position discussed above that the decisions in ***SMS Tea Estates Pvt. Ltd's case (supra)*** and ***Garware Wall Ropes Ltd.'s case (supra)*** were specifically over-ruled and thereafter citation with

approval in *Vidya Drolia's case (supra)* was doubted and referred to the Constitution Bench and in the present case, both the parties have admitted the existence of arbitration agreement, the petitions are disposed of by appointing Mr. Vimal Bakshi, District & Sessions Judge (Retd.), BDPO Residence near Kali Mata Mandir, Naraingarh, Ambala as an arbitrator. The appointment is subject to the declaration to be made by him under Section 12 of the Act with regard to his independence and impartiality to settle the dispute between the parties.

25. Needless to say that the parties would be at liberty to raise legal issues in arbitration proceedings at the appropriate stage.

26. The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator. Fee of Arbitrator will be equally borne by both the parties. The Arbitrator is requested to complete proceedings as per time limit specified under Section 29-A of the Act.

27. It is clarified that the reference shall be subject to the petitioner's complying with all the requirements of the agreement including the condition of pre-deposit.

28. Copy of the order be sent to the appointed Arbitrator.

29. Photocopy of the order be placed on the file of connected case.

[AVNEESH JHINGAN]
JUDGE

23rd January, 2023

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| 1. Whether speaking/ reasoned | : | Yes / No |
| 2. Whether reportable | : | Yes / No |