

SUPREME COURT OF INDIA

SMS Tea Estates P.Ltd.

Vs.

Chandmari Tea Co.P.Ltd.

C.A.No.5820 of 2011

(R.V. Raveendran and A.K.Patnaik,JJ.,)

20.07.2011

JUDGMENT

R.V.Raveendran,J.,

SLP (Civil)No.24484/2010

1. Leave granted. Heard.

2. The appellant filed an application under section 11 of the Arbitration & Conciliation Act, 1996 ('Act' for short) for appointment of an arbitrator. The averments made in the said application in brief were as under :

“2.1) On 7.10.2006 the appellant requested the respondent to grant a long term lease in respect of two Tea estates (Chandmari Tea Estate and Burahapahar Tea Estate). A lease deed dated 21.12.2006 was executed between the respondent and appellant under which respondent granted a lease to the appellant for a term of 30 years in regard to the said two Tea estates with all appurtenances. Clause 35 of the said lease deed provided for settlement of disputes between the parties by arbitration. As the estates were hypothecated to United Bank of India, on 27.12.2006, the respondent requested the said bank for issue of a no objection certificate for entering into a long term lease. The Bank sent a reply dated 17.7.2007, stating that it would issue a no objection certificate for the lease, if the entire balance amount due to it was deposited by 14.8.2007.

2.2) Prior to the execution of the said lease deed, on 29.11.2006 the respondent had offered to sell the two Tea estates to the appellant for a consideration of Rupees four crores. The appellant agreed to purchase them subject to detailed verification. The appellant wrote a letter dated 27.6.2007 to the respondent agreeing to purchase the said two Tea estates.

2.3) The appellant invested huge sums of money for improving the tea estates in the expectation that it would either be purchasing the said estates or have a lease for 30 years. The respondent however abruptly and illegally evicted the appellant from the two estates and took over their management in January 2008. The appellant thereafter wrote a letter dated 28.3.2008 to the respondent expressing its willingness to purchase the said two estates for a mutually agreed upon consideration and also discharge the liability towards the bank.

2.4) The appellant issued a notice dated 5.5.2008 calling upon the respondent to refer the matter to arbitration under section 35 of the lease deed. The respondent failed to comply. According to appellant the dispute between the parties related to the claim of the appellant that the respondent should either sell the estates to the appellant, or permit the appellant to continue in occupation of the estates for 30 years as lessees or reimburse the amounts invested by it in the two estates and the payments made to the Bank.

3. The respondents opposed the said application. The respondents contended that the unregistered lease deed dated 21.12.2006 for thirty years was invalid, unenforceable and not binding upon the parties, having regard to section 107 of Transfer of Property Act 1882 ('TP Act' for short) and section 17 and section 49 of the Registration Act, 1908 ('Registration Act' for short); that the said lease deed was also not duly stamped and was therefore invalid, unenforceable and not binding, having regard to section 35 of Indian Stamp Act, 1899; that clause 35 providing for arbitration, being part of the said lease deed, was also invalid and unenforceable. The respondent denied that they had agreed to sell the two tea estates to the respondent for a consideration of Rupees four crores. The appellant also denied that the respondent had invested any amount in the tea estates. It contended that as the lease deed itself was invalid, the appellant could not claim appointment of an arbitrator under the arbitration agreement forming part of the said deed.

4. The learned Chief Justice of Guwahati High Court dismissed the appellant's application by order dated 28.5.2010. He held that the lease deed was compulsorily registrable under section 17 of the Registration Act and section 106 of the TP Act; and as the lease deed was not registered, no term in the said lease deed could be relied upon for any purpose and therefore clause 35 could not be relied upon for seeking reference to arbitration. The High Court also held that the arbitration agreement contained in clause 35 could not be termed as a collateral transaction, and therefore, the proviso to section 49 of the Registration Act would not assist the appellant. The said order is challenged in this appeal by special leave.

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?

Re : Question (i)”

6. Section 17(1)(d) of Registration Act and section 107 of TP Act provides that leases of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Section 49 of the Registration Act, 1908, sets out the effect of non-registration of documents required to be registered. The said section is extracted below :

"49.Effect of non-registration of documents required to be Registered.- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) as evidence of any collateral transaction not required to be effected by registered instrument."

Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act.

7. 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 or 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. 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 registrable - 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. These principles have now found statutory recognition in sub-section (1) of section 16 of the Arbitration and Conciliation Act 1996 ('Act' for short) 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."

8. But where the contract or instrument is voidable at the option of a party (as for example under section 19 of the Indian 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.

9. 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 Registration Act read with section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

Re : Question (ii)

10. What if an arbitration agreement is contained in an unregistered (but compulsorily registrable) instrument which is not duly stamped? To find an answer, it may be necessary to refer to the provisions of the Indian Stamp Act, 1899 ('Stamp Act' for short). Section 33 of the Stamp Act relates to examination and impounding of instruments. The relevant portion thereof is extracted below :

"33.Examination and impounding of instruments.-(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same. (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed :

x x x x "

Section 35 of Stamp Act provides that instruments not duly stamped is inadmissible in evidence and cannot be acted upon. The relevant portion of the said section is extracted below :

"35. Instruments not duly stamped inadmissible in evidence, etc. -- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that—

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

x x x x x

Having regard to section 35 of 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 Stamp Act is distinct and different from section 49 of Registration Act in regard to an

unregistered document. Section 35 of Stamp Act, does not contain a proviso like to section 49 of Registration Act enabling the instrument to be used to establish a collateral transaction.

11. The scheme for appointment of arbitrators by the Chief Justice of Guwahati 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. 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 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.

12. 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 registrable) and which is not duly stamped :

“(i) 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 registrable.

(ii) If the document is found to be not duly stamped, Section 35 of 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.

(iii) 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 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found

to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

(v) If the document is not registered, but is compulsorily registrable, having regard to section 16(1)(a) of the Act, the court can de-link 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 8 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.

(vi) Where the document is compulsorily registrable, 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.

Re : Question (iii)

13. Where a lease deed is for a term of thirty years and is unregistered, the terms of such a deed cannot be relied upon to claim or enforce any right under or in respect of such lease. It can be relied upon for the limited purposes of showing that the possession of the lessee is lawful possession or as evidence of some collateral transaction. Even if an arbitrator is appointed, he cannot rely upon or enforce any term of the unregistered lease deed. Where the arbitration agreement is not wide and does not provide for arbitration in regard to all and whatsoever disputes, but provides only for settlement of disputes and differences arising in relation to the lease deed, the arbitration clause though available in theory is of little practical assistance, as it cannot be used for deciding any dispute or difference with reference to the unregistered deed.

14. In this case, clause 35 of the lease deed reads as under :

"That any dispute or difference arising between the parties in relation to or in any manner touching upon this deed shall be settled by Arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 which shall be final and binding on the parties hereto. The Government law will be Indian. The venue of Arbitration shall be at Assam and Court at Assam alone shall have jurisdiction for disputes and litigations arising between the lessor/first party and the lessee/second party in context with the above mentioned scheduled property."

Having regard to the limited scope of the said arbitration agreement (restricting it to disputes in relation to or in any manner touching upon the lease deed), the arbitrator will have no

jurisdiction to decide any dispute which does not relate to the lease deed. Though the Arbitrator will have jurisdiction to decide any dispute touching upon or relating to the lease deed, as the lease deed is unregistered, the arbitration will virtually be a non-starter. A party under such a deed may have the luxury of having an arbitrator appointed, but little else. Be that as it may.

15. Before an Arbitrator can be appointed under section 11 of the Act, the applicant should satisfy the learned Chief Justice or his designate that the arbitration agreement is available in regard to the contract/document in regard to which the dispute has arisen. For example if the parties had entered into two agreements and arbitration clause is found only in the first agreement and not in the second agreement, necessarily an arbitrator can be appointed only in regard to disputes relating to the first agreement and not in regard to any dispute relating to the second agreement. This court in *Yogi Agarwal vs. Inspiration Clothes & U¹* - held :

"When Sections 7 and 8 of the Act refer to the existence of an arbitration agreement in regard to the current dispute between the parties, they necessarily refer to an arbitration agreement in regard to the current dispute between the parties or the subject-matter of the suit. It is fundamental that a provision for arbitration, to constitute an arbitration agreement for the purposes of Sections 7 and 8 of the Act, should satisfy two conditions. Firstly, it should be between the parties to the dispute. Secondly, it should relate to or be applicable to the dispute."

16. In this case, the appellant seeks arbitration in regard to the following three distinct disputes: (a) for enforcing an alleged agreement of sale of two tea estates, (b) for enforcing the lease for thirty years; and (c) for recovery of amounts spent by it in regard to the estates on the assumption that it was entitled to purchase the property or at least have a lease of 30 years.

17. It is clear from the petition averments (Para 11 of the application) that the alleged agreement of sale was entered prior to the lease deed dated 21.12.2006 and there was no arbitration agreement in regard to such agreement of sale. When admittedly there is no arbitration agreement in regard to the alleged agreement of sale, the appellant cannot seek arbitration with reference to any dispute regarding such agreement of sale, whether it is for performance or for damages for breach or any other relief arising out of or with reference to the agreement of sale.

18. An Arbitrator can no doubt be appointed in regard to any disputes relating to the lease deed. But as noticed above, as the lease deed was not registered, the Arbitrator can not rely upon the lease deed or any term thereof and the lease deed cannot affect the immovable property which is the subject matter of the lease nor be received as evidence of any transaction affecting such property. Therefore, the Arbitrator will not be able to entertain any claim for enforcement of the lease.

19. Lastly we may consider the claim for recovery of the amounts allegedly spent towards the tea estates, as a consequence of respondents not selling the estates or not permitting the

appellant to enjoy the lease for 30 years. If this claim is treated as a claim for damages for breach in not granting the lease for 30 years then it would be for enforcement of the terms of the lease deed which is impermissible under section 49 of the Registration Act. If it is treated as claim de hors the lease deed then the arbitrator may not have jurisdiction to decide the dispute as the arbitration agreement (clause 35) is available only to settle any dispute or difference arising between the parties in relation to or in any manner touching upon the lease deed and not in regard to disputes in general.

20. In paras 18 and 19 above, we have considered and stated the general legal position for guidance in arbitrations, even though the same does not directly arise for consideration within the limited scope of the proceedings under section 11 of the Act.

Conclusion

21. In view of the above this appeal is allowed, the order of the High Court is set aside and the matter is remitted to the learned Chief Justice of Guwahati High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law.

¹(2009) 1 SCC 0372