

Naina Thakkar

v.

M/s. Annapurna Builders

(Supreme Court Of India)

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Special Leave to Petition (Civil) No. 31311 Of 2011 | 13-07-2012

1. We have heard Mr. Abhinav Mukerji, learned counsel for the petitioner, and Ms. Prabha Swami, learned counsel for the respondent.

2. Learned counsel for the petitioner places reliance upon a decision of this Court in M/s SMS Tea Estates Pvt. Ltd. Vs. M/s Chandmari Tea Co. Pvt. Ltd.[1] and submits that the 2nd Additional Chief Judge, City Civil Court at Hyderabad in his order dated July 20, 2010 in the application made by the petitioner under Section 8 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') having held that the lease deed dated December 19, 2005 is insufficiently stamped ought to have impounded the said lease deed and followed the procedure prescribed under Sections 35 and 38 of the Indian Stamp Act, 1899 and, if the document was found to be not duly stamped, should have given an opportunity to the petitioner to make up the deficit stamp duty and pay penalty if directed by the Collector. Having not followed the above procedure, the said court committed serious illegality in rejecting petitioner's application under Section 8 of the Act and the High Court was in error in not interfering with such illegal order.

3. Admittedly, the lease deed dated December 19, 2005 entered between the petitioner and the respondent is an unregistered document prepared on a non-judicial stamp paper of Rs. 100/-. This is also an admitted position that the period of lease as per the lease deed dated December 19, 2005 is five years. Having regard to this, it is also an admitted position that the lease deed was required to be registered and it suffers from deficit stamp duty.

4. In M/s SMS Tea Estates Pvt. Ltd. case (supra), this Court was concerned with, inter alia, two questions - (i) Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?, and (ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

5. While dealing with question (i), the Court referred to statutory provisions contained in Sections 17(1)(d) and 49 of the Registration Act, 1908, Section 107 of the Transfer of Property Act, 1882, Section 19 of the Indian Contract Act, 1872 and Section 16 of the Act. While dealing with question (ii), the Court referred to Sections 33, 35, 38 and 40 of the Indian Stamp Act, 1899 and Section 49 of the Registration Act, 1908. The Court then summed 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 as under :

"(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."

6. In light of the above legal position, when we look at the facts of the present case, we find that while pressing the application under Section 8 of the Act, the petitioner did not show any inclination to pay the deficit stamp duty on the lease deed dated December 19, 2005 nor expressed her desire that she was willing to pay the penalty as may be imposed by the Collector if the document was impounded and stamp duty payable thereon was determined.

7. It is true that the consequences provided in the Indian Stamp Act, 1899 must follow where sufficient stamp duty has not been paid on an instrument irrespective of the willingness of a party to the instrument to pay deficit stamp duty but the procedure where the arbitration clause is contained in a document which is not registered although compulsorily registrable and which is not duly stamped as summed up by this Court in *M/s SMS Tea Estates Pvt. Ltd. case (supra)* shall not be applicable to the proceedings under Section 8 of the Act where the party making such application does not express his/her readiness and willingness to pay the deficit stamp duty and the penalty. It is not the duty of Court to adjourn the suit indefinitely until the defect with reference to deficit stamp duty concerning the arbitration agreement is cured. Accordingly, we are of the opinion that no fault can be found in the order of the trial court in rejecting the application made under Section 8 of the Act as the document on which the petitioner relied upon was admittedly unregistered and insufficiently stamped.

8. In view of the above, no case for interference under Article 136 of the Constitution of India is made out. Special leave petition is dismissed accordingly.

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