

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

S.B. Arbitration Application No. 47 / 2017

M/s. Aarohi Construction, Having their Regd. Office at 21, Pushpanjali Colony, Mahesh Nagar, Jaipur through their Partner Shri Anand Gupta S/o late Shri P.B. Gupta, aged 44 years, R/o 32/124, Shipra Path, Mansarovar, Jaipur

----Petitioner

Versus

M/s. Manglam Build Developers Pvt Ltd., 601-603, 5th Floor, Apex Mall, Lal Kothi, Jaipur-302015 Through their Director Shri Sanjay Gupta

----Respondent



For Petitioner(s) : Mr. J.P. Gargey

For Respondent(s) : Mr. Akash Gupta for Mr. Amit Gupta

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ

Judgment

//Reportable//

23/02/2018

This application has been filed by the petitioner seeking appointment of independent Arbitrator to resolve its disputes with the respondent.

The petitioner is a partnership firm working as a contractor in construction industry. A contract came to be signed in between the petitioner and respondent on 08.01.2011 whereby the petitioner agreed to furnish them construction services worth nearly Rs.1.09 crore. In the contract it was made clear that the liability of payment of service tax would be borne by the respondent. The project was completed by the petitioner without there being any complaint. The services rendered by the petitioner were excellent in respect of time schedule, quality and

investment. In the course of time, the petitioner raised six bills amounting to Rs.1.09 crore and all have been cleared without any objection. As per the agreement/contract, it was the respondent, who had to pay the service tax worth nearly Rs.5.93 lacs to the Central Government, but the respondent failed to comply with the terms of the contract/agreement. The petitioner repeatedly requested the respondent to comply with the terms of the contract/agreement. The petitioner even sent a legal notice dated 16.04.2016 to the respondent through its counsel requesting them to act in fair and clear manner to respect the terms and conditions of the agreement dated 08.01.2011. Despite repeated requests, the respondent failed to make payment of the service tax. Thus, a dispute arose between the petitioner and the respondent. Hence this petition.

Mr. J.P. Gargey, learned counsel for the petitioner has relied on the judgment of the Supreme Court in **Black Pearl Hotels Private Limited Vs. Planet M. Retail Limited – (2017) 4 SCC 498** and argued that now in view of insertion of sub-Section (6A) to Section 11 by the Arbitration and Conciliation (Amendment) Act, 2015, all that this court to see in application under Section 11 of the Act of 1996 is whether there exists an arbitration clause in the agreement and that this court cannot go into any other aspect including whether or not the agreement has been duly stamped. The Supreme Court in **Black Pearl Hotels Private Limited**, supra, has held that the intention of the Legislature manifests in Section 11(6A) ought to be respected, argued the learned counsel.

Mr. Akash Gupta, brief holder of Mr. Amit Gupta, learned



counsel for the respondent however at the outset submitted that in view of the judgment of the Supreme Court in **M/s. SMS Tea Estates Pvt. Ltd. Vs. M/s. Chanmari Tea Co. Pvt. Ltd. - (2011) 14 SCC 66** and that of this Court in **Trade Swift Developers Private Limited Vs. Gopal Prasad Kanoria and others - 2017 (2) WLC (Raj.) 569** and **Ansal Properties and Infrastructure Limited Vs. Smt. Jhamru & Others - 2017 (2) WLC (Raj.) 485**, present application is not maintainable, as the agreement in the present case is not sufficiently stamped. This Court in the aforementioned cases, while dismissing the applications, has granted liberty to the applicants to file fresh arbitration applications after getting the agreements sufficiently stamped.

Heard learned counsel for the parties and perused the material on record.

The question with regard to maintainability of an application for agreement not being duly stamped fell for consideration of this court in **Trade Swift Developers Private Limited Vs. Gopal Prasad Kanoria and others (S.B. Arbitration Application No.30/2014)**. In that case too, the petitioner relied on the judgment of the Supreme Court in **Rajesh Verma vs. Ashwani Kumar Khanna - AIR 2016 SC 1910**, and argued that Supreme Court held therein that the jurisdiction of this Court under Section 11 of the Act is limited and confined to examining whether or not there is an arbitration agreement between the parties and if so, whether any dispute has arisen between them, which calls for appointment of arbitrator. Once that is so held, the Court has to merely make a reference of all such dispute to the arbitrator for



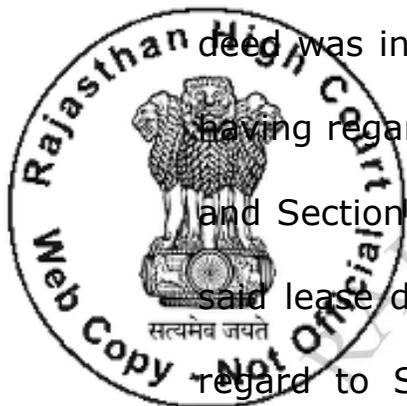
decision. The objection raised by the respondents with regard to non-registration of MoU and non-payment of stamp duty, is therefore, liable to be rejected. The agreement in Trade Swift Developers Private Limited, supra, was in fact the MoU executed between the non-applicants as sellers and the applicant as purchaser on a non-judicial stamp paper of Rs.100/-, with respect to 8883 sq. yards of land for a total agreed lumpsum sale consideration of Rs.47,25,00,000/-, on the conditions mentioned therein, out of which amount of Rs.4,00,00,000/- was paid in advance and thereafter, a further amount of Rs.2,20,00,000/- was also paid in different installments.



This question in the context of appointment of an Arbitrator under the scope of Section 11 of the Act of 1996 fell for consideration of the Supreme Court in **M/s. SMS Tea Estates Pvt. Ltd. Vs. M/s Chandmari Tea Co. Pvt. Ltd. - (2011) 14 SCC 66**. Therein, a lease deed was executed between the parties under which the respondent agreed to lease to the appellant two tea estates with all appurtenances for a term of 30 years. Clause 35 of the said lease deed provided for settlement of the dispute between the parties by arbitration. Prior to the execution of the lease deed, the respondent offered to sell tea estates to the appellant for a sale consideration of Rs.4,00,000/-. The appellant agreed to purchase them subject to detailed verification and 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. The appellant issued notice calling upon the respondent to refer the matter to arbitration under Clause 35 of the lease deed, which the respondent failed to comply. The appellant then approached the Gauhati High Court by filing the application under Section 11 of the Act for appointment of the Arbitrator. The respondent contended that the unregistered lease deed was invalid, unenforceable and not binding upon the parties having regard to Section 107 of the Transfer of Property Act, 1882 and Section 17 and 49 of the Registration Act, 1908 and that the said lease deed was also not duly stamped and therefore having regard to Section 35 of the Stamp Act, 1899, it was invalid, unenforceable and not binding and further that clause 35 providing for arbitration being part of the said lease deed, was also invalid and unenforceable. The High Court dismissed the application filed by the applicant holding that the lease deed was compulsorily registerable under Section 17 of the Registration Act and Section 106 of the Transfer of Property Act and as the lease deed was not registered, no term in the said lease deed could be relied for any purpose and, therefore, Clause 35 could not be relied 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 also not assist the appellant. The Supreme Court having regard to the facts aforesaid, formulated the following three questions:

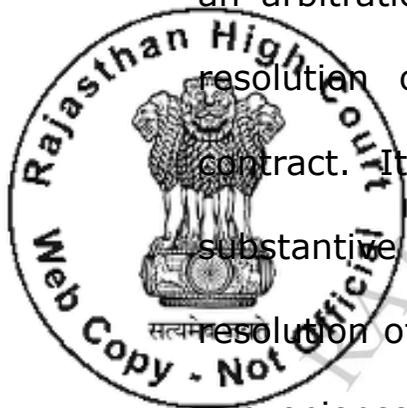
“(i) Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?



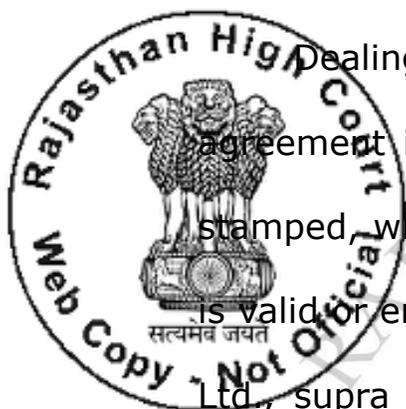
(ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

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

On question no.(i), it was held that 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. 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. 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, held the Supreme Court in answer to question no.(i) so posed.



Dealing with question no.(ii) whether an arbitration agreement is a document compulsorily registered required to be stamped, which is unregistered and/or which is not duly stamped, is valid or enforceable, the Supreme Court in SMS Tea Estates Pvt. Ltd., supra analysed the provisions of Section 33 and 35 of the Stamp Act, 1899 (which are substantially in para materia with Section 37 and 39 of the Rajasthan Stamp Act, 1998 respectively) held that when a lease deed or any other instrument is relied upon as containing 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.

While dealing with question no.(iii) whether there is an arbitration agreement between the appellant and respondent and whether an Arbitrator should be appointed, the Supreme Court held that since the lease deed was for a term of thirty years and

was 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, held the Supreme Court.

This Court in **Nakoda Granite and Marmo Pvt. Ltd. Vs. Yogendra Singhvi – AIR 2014 Rajasthan 91**, dealt with a case in which application u/s.11 of the Act was filed for appointment of arbitrator. Application was founded on lease deed executed on nonjudicial stamp of Rs.100. Lease deed was held to be not sufficiently stamped for invoking arbitration clause. Relying on the judgement of Apex Court in SMS Tea Estates Pvt. Ltd., supra, this Court dismissed the application, however, with liberty to the applicant to move afresh after getting the instrument in question duly stamped.

This Court in **Aeren R. Entertainment Pvt. Ltd. Vs. National Engineering India Ltd. - 2014 (2) WLN 546 (Raj.)**, was dealing with application under Section 11 of the Arbitration and Conciliation Act for appointment of the Arbitrator. An objection



was raised by the non-applicant that the agreement to sale has been executed on a stamp of Rs.100 only and, is therefore, insufficiently stamped and inadmissible in evidence as per Section 3 read with Article 5 of the Schedule appended to the Stamp Act, 1899. Such agreement, therefore, cannot be acted upon as per Section 35 of the Indian Stamp Act, 1889. Reliance was placed on

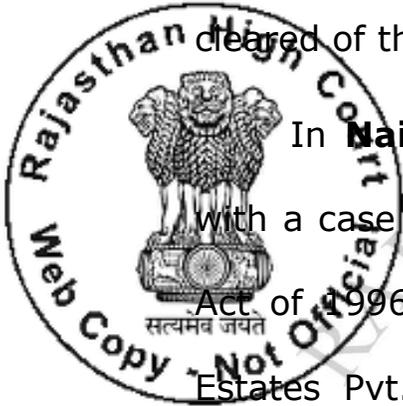
Article 5(bb) of the Schedule to the Rajasthan Stamp Act, according to which stamp duty at the rate of 3% of the total sale consideration of the property as set forth in the agreement was payable. Relying on the judgement of the Supreme Court in **Naina**

Thakkar Vs. Annapurna Builders-(2013) 14 SCC 354, and on

considering provisions of Sections-2(xi), 3, 18(1), 37 and 39 and Articles 5(bb), 5(c) and 21 of the Schedule to the Rajasthan Stamp Act, it was observed that conduct of the parties is to be seen and the Court is not required to wait indefinitely for cure of defect of stamp duty. When the agreement to sale being not sufficiently stamped, the arbitration application is not maintainable under Section 11 of the Act. Although additionally, this Court in the aforesaid judgement held the arbitration clause in the agreement also illegal on account of pendency of land ceiling proceedings. The aforesaid judgement was challenged before the Supreme Court in Civil Appeal No.6977/2016. The Supreme Court was informed that Collector (Stamps) has passed the order with regard to inadequate stamp duty on the agreement, which has been assailed in the revision petition. As far as proceedings under the Rajasthan Imposition of Ceiling on Agriculture Holdings Act, 1973 is concerned, it was informed that separate litigation with



regard thereof was pending. The Supreme Court therefore held that if the appellant stands cleared of those proceedings, it will be entitled to file a fresh application under Section 11 of the Act of 1996. The Supreme court further held that the High Court should not have declared the agreement void as it was subject to paying adequate stamp duty under the Stamp Act and also getting cleared of the proceedings initiated under the Ceiling Act.



In **Naina Thakkar**, supra, the Supreme Court was dealing with a case where an application was filed under Section 8 of the Act of 1996. While reiterating its earlier judgement in SMS Tea Estates Pvt. Ltd., supra, the Supreme Court in the context of

application under Section 8 filed before the Civil Court held that the lease deed in that case entered into between the parties was an unregistered and prepared on a non-judicial stamp of Rs.100. It was required to be registered and also suffered from deficit stamp duty. While pressing the application under Section 8 of the Act, the petitioner did not show any inclination to pay the deficit stamp duty, nor to pay the penalty as may be imposed by the Collector if the document was impounded and stamp duty payable thereon was determined. The order of the trial court rejecting the application under Section 8 of the Act was held to be valid. The Supreme Court in that case held that the Court while dealing with Section 11 of the Act cannot wait endlessly for the applicant to comply with its obligations to pay the stamp duty. According to Section 32 of the Stamp Act, 1998, it is purchaser's liability to pay stamp duty and registration charges on sale of an immovable property. The Supreme Court in **Naina Thakkar**, supra has

reiterated the law propounded in **SMS Tea Estates Pvt. Ltd.**,
supra and held in para 6 as under:

"6. In the light of 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 19.12.2005 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."



Indisputably, in the present case, an agreement was executed between the petitioner as contractor and respondent as developer, in which the petitioner agreed, on payment as per the rates prescribed therein, to construct and erect the Residential Row Housing Scheme of the respondent. The said agreement has been executed on a non-judicial stamp paper of Rs.100/- only. Entry No.58 of the Schedule appended to the Rajasthan Stamp Act, 1998, provides the stamp duty for works contract for works and labour or services involving transfer of property in goods (whether as goods or in some other form) in its execution and includes a sub-contract. The scope of work in the agreement in the present case includes the earth work in excavation and earth filling in available earth, complete structure as per drawings Stone Soling, PCC, Stone Masonry, RCC Brick masonry, plaster, flooring etc. complete with elevation effect, cornice, pergola, dola design etc. complete, flooring work as per drawings of tiles/marbles/granite with grinding as required for rooms and open space front and back side set back area, tiles work, fixing of door, chukhat, window, ventilator etc., brick masonry, centering and shuttering etc. This kind of agreement, subject to what the

registering authority has to decide, prima facie fall within the purview of the contract. Section 37 of the Act provides that every person having by law or consent of parties authority to receive evidence and every person incharge of a public office, except an officer of a 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. Section 39 of the Rajasthan Stamp Act, 1998 provides that no instrument chargeable with duty under the said Act of 1998, unless being duly stamped, 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.



The application under Section 11 of the Act of 1996 for seeking reference to the Arbitrator/appointment of the Arbitrator is therefore liable to be held to be not maintainable in view of the dictum of Supreme Court in **SMS Tea Estates Pvt. Ltd.**, supra, because the agreement / MoU containing the arbitration clause was not duly stamped. Similar view has been taken by Karnataka High Court in **Satyam Cineplexes Ltd. vs. Patel Realty India Ltd. and Bellona Estate Developers Ltd.-2013 (4) AKR 432**, Madras High Court in **Karismaa MEP Services Pvt. Ltd. vs. KGS Milestone Constructions Ltd.-2015 (7) MLJ 15**. Similarly, the same view has been taken by Delhi High Court in **Avantha Holding Limited vs. M/s.Osian's Connoisseurs of ART (P) Ltd. & Anr., O.M.P. No.266/2011** decided on 11.04.2012 and

Bombay High Court in **Jayraj Devidas vs. Nilesh Shantilal Tank, Arbitration Appeal No.45/2013** decided on 22.8.2014 in regard to maintainability of application under Section 9 of the Act of 1996.

Sub-Section (6A) inserted in Section 11 by the Arbitration and Conciliation (Amendment) Act, 2015, has, in an application under Section 11 of the Act of 1996, confined the scope of examination to bare minimum by providing that the High Court, while considering the application under sub-section (4), (5) or (6) of Section 11 of the Act of 1996, shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement. But this would not mean that the court would entertain an application under Section 11 of the Act of 1996 on the basis of agreement even when it has not been duly stamped or has been insufficiently stamped. The law propounded by the Supreme Court in **M/s. SMS Tea Estates Pvt. Ltd. Vs. M/s Chandmari Tea Co. Pvt. Ltd.**, supra, has again reiterated by three-Judge-Bench of the Supreme Court in **Black Pearl Hotels Private Limited Vs. Planet M. Retail Limited**, supra, which judgment has been rendered after insertion of Section (6A) of the Amendment Act 2015. Existence of agreement/contract having arbitration clause may not be deniable but the question is whether the court can at all look at the agreement which is not duly stamped, in view of the law propounded by the Supreme Court in **M/s. SMS Tea Estates Pvt. Ltd. Vs. M/s Chandmari Tea Co. Pvt. Ltd.**, supra, and reiterated in **Black Pearl Hotels Private Limited Vs. Planet M.**



Retail Limited, supra. And in view of the law propounded in those judgments, it must be held that when the agreement is found to be not duly stamped, it cannot be looked at even for the limited purpose of finding out whether it contains the arbitration clause.

In view of above, the application is dismissed as not maintainable, however, with liberty to the applicant to file a fresh arbitration application after getting the agreement duly stamped.



(MOHAMMAD RAFIQ)J.

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