

SUPREME COURT OF INDIA

Present: S.A. Bobde, CJI, Justice B.R. Gavai and Justice Surya Kant, JJ.

M/S. DHARMARATNAKARA RAI BAHADUR ARCOT NARAINSWAMY MUDALIAR CHATTRAM AND ORS. — Appellant,

versus

M/S BHASKAR RAJU & BROTHERS and others — Respondent.

Civil Appeal No. 1599 of 2020 (Arising out of SLP(C) No. 7088 of 2015)

14.02.2020

Arbitration and Conciliation Act, 1996 - Section 11(6) - When a lease deed or any other instrument is relied upon as containing the arbitration agreement, the Court is required to consider at the outset, whether the document is properly stamped or not - Even when an objection in that behalf is not raised, it is the duty of the Court to consider the issue - If the Court comes to the conclusion, that the instrument is not properly stamped, it should be impounded and dealt with, in the manner specified in Section 38 of the Stamp Act, 1899 - Court cannot act upon such a document or the arbitration clause therein - However, if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, 1899, the document can be acted upon or admitted in evidence - Lease deed containing the arbitration clause which was required to be duly stamped, was not sufficiently stamped and though the Registrar (Judicial) had directed the respondents to pay deficit stamp duty and penalty of Rs. 1,01,56,388/- the respondents failed to do so, the High Court has erred in relying on the said lease deed - Order appointing arbitrator - Set aside.
[Para 20]

Cases Referred

1. *SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited*, (2011) 14 SCC 66

Ms. Pritha Srikumar, Advocate, for the Appellant; Mr. Balaji Srinivasan, Advocate, for the Respondent

JUDGMENT

1. Leave granted.
2. Heard the learned counsel for the parties.
3. By way of present appeal, the appellants challenge the judgment and order dated 1.12.2014, passed by the single judge of the High Court of Karnataka at Bangalore in Civil

Miscellaneous Petition No. 167 of 2013 whereby, Justice L. Sreenivasa Reddy, former judge of the High Court of Karnataka, was appointed as Arbitrator to conduct arbitration proceedings at the Arbitration Centre, Bangalore, as per the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") read with the Arbitration Central Rules.

4. The facts, in brief, giving rise to the present appeal are as under:

5. The appellant No.1 is a registered Charitable Trust. Rest of the appellants are Trustees of the appellant No. 1 -Trust. The appellant No.1 - Trust desired to develop the land owned by it and construct a multi-purpose community hall with office complex.

6. As such, the respondent No.1 offered to develop the said property and also to renovate the Samadhi of the founder of the Trust existing on the said piece of land. Negotiations were held between the appellant No. 1 - Trust and the respondent No.1.

7. As an outcome of the negotiations, a lease deed was executed between the appellant No.1 -Trust and the respondent No. 1 - lessee for a period of 38 years. As per the said lease deed, the respondent No.1 - lessee was required to pay an amount of Rs.55,00,000/- (Rupees Fifty five lakh only) as an interest free deposit, which was to be refunded to it at the end of the period of 38 years, if the lease was not extended between the parties. As per the terms of the said lease deed, a certain monthly ground rent was also required to be paid by the respondent No.1 -lessee to the appellant No.1 -Trust. As per the said lease deed, the respondent No.1 - lessee was to construct a multi-purpose auditorium with minimum seating capacity of one thousand persons. The said auditorium was to be used for marriages, etc. together with dining hall, kitchen, guest rooms, etc. The respondent No.1 - lessee had also undertaken to obtain vacant possession of property mentioned in Schedule 'B' subject to all co-operations being extended to it, by the lessor for ejection of the existing tenants of the lessor. The said lease deed was executed on 31.5.1996 on the basis of the resolution of the appellant No. 1 - Trust dated 30.4.1996.

8. A subsequent lease deed dated 12.3.1997 came to be executed between the appellant No.1 and the respondent No.1. Most of the terms and conditions in the subsequent/fresh lease deed dated 12.3.1997 are identical with the terms and conditions as are found in the first lease deed dated 31.5.1996.

9. It appears, that during the period between 1997 till 2000, there was not much progress in the development of the said project. It further appears that in the year 2008 certain re-negotiations took place between the appellants and the respondents. However, the same failed to materialize. It is the case of the appellants, that except paying initial amount of Rs.25 lakhs towards the security deposit, the balance amount towards the security deposit was not paid by the respondents. It was also the case of the appellants that the respondents were trying to interfere with the possession of the trust property in collusion with one of the trustees. In this background, the appellant -Trust filed Original Suit being O.S. No.8952 of 2010 before the City Civil Court at Bangalore. In the said suit, it was also contended on behalf of the appellants that the respondent No. 1 - lessee had also

desecrated the Samadhi of the founder of the Trust and had damaged part of it. It was further contended that, the respondent No.1 – lessee, in collusion with the respondent No.4, was trying to get a fresh lease deed executed illegally. The following prayers were made in the said suit:

“a. Decree of permanent injunction restraining the Defendants 1 to 3, their agents, servants from interfering with the peaceful possession and enjoyment of the 1st Plaintiff Trust over the A schedule property.

b. Permanent injunction restraining the Defendants 1 to 4 from entering into, executing or registering any lease deed or other document transaction concerning the A schedule property or any portion of it.

c. Decree granting of costs of the case and such other relief/reliefs as the Court may deem fit in the circumstances.”

10. The City Civil Court at Bangalore, granted an interim order by directing maintaining of status quo over the Schedule property in the said suit. The suit was contested by the respondent Nos. 1 and 2 by filing written statement.

11. Respondent Nos. 1 and 2, after participating in the suit proceedings for almost a period of about two years and three months, issued a notice to the appellants on 6.9.2013 thereby, invoking arbitration clause in the lease deed dated 31.5.1996 and 12.3.1997. On 11.10.2013, the respondent Nos. 1 and 2 filed a petition under Section 11(6) of the Arbitration Act before the High Court of Karnataka. On being served with the notice, the appellants entered their appearance and filed their statement of objections on 2.6.2014 thereby, praying for dismissal of the petition on various grounds.

12. Since it was the basic contention of the appellants, that the lease deed dated 12.3.1997 being insufficiently stamped had to be mandatorily impounded under Section 33 of the Karnataka Stamp Act, 1957 and it could not be relied upon unless proper duty and penalty was paid, the single judge of the Karnataka High Court referred the matter to the Registrar (Judicial) for determination of the said issue. The Registrar (Judicial) of the High Court of Karnataka by a detailed report dated 25.9.2014 held, that the document in question was lease deed and not an agreement to lease and therefore, directed the respondent Nos. 1 and 2 to pay deficit stamp duty and penalty of Rs. 1,01,56,388 /- (Rupees One crore One lakh Fifty-Six thousand Three hundred and Eighty-Eight only).

13. The respondent Nos. 1 and 2 filed their objections to the report of the Registrar (Judicial). The High Court of Karnataka without consideration of the report of the Registrar (Judicial) passed the impugned order thereby, allowing the petition filed by the respondent Nos. 1 and 2 and invoking power under Section 11 (6) of the Arbitration Act, appointed an Arbitrator to decide the dispute between the appellants and the respondents. Being aggrieved thereby, the appellants are before this Court.

14. We have heard Shri Nikhil Nayyar, learned Senior Counsel appearing on behalf of the appellants and Shri Balaji Srinivasan, learned counsel appearing for the respondents.

15. Shri Nikhil Nayyar, learned Senior Counsel, submits, that though clause 36 of the lease deed dated 12.3.1997 provides for arbitration between the parties, since the said lease deed was insufficiently stamped, the same could not have been relied upon by the High Court for appointing Arbitrator. It is further submitted, that the respondent Nos. 1 and 2 had failed to take any steps in furtherance of the lease deed dated 12.3.1997 and belatedly, after a period of almost 16 years and only when the suit filed by the appellants was in the final stages, had invoked the arbitration clause. Learned Senior Counsel submits, that as a matter of fact, the suit filed by the appellants already stands decreed by a judgment and decree dated 2.3.2015.

16. Shri Balaji Srinivasan, learned counsel appearing for the respondents, on the contrary submits, that the agreement was in effect, an agreement to lease the property which was required to be stamped only after all the tenants were evicted and the permission to start the construction was granted by the Corporation. It is submitted, that the respondents were, all the while, trying to negotiate with the various tenants and as such, the High Court was right in holding, that the agreement was for developing the property immediately after the property was made vacant by evicting the tenants.

17. It will be apposite to reproduce Sections 33 and 34 of the Karnataka Stamp Act, 1957, which are as under:

“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 the State of Karnataka when such instrument was executed or first executed:

Provided that,-

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(b) in the case of a Judge of the High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt, the Government may determine,-

(a) what offices shall be deemed to be public offices; and

(b) who shall be deemed to be persons in charge of public offices.

34. 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 not being an instrument chargeable with a duty not exceeding fifteen naye paise only, or a mortgage of crop Article 35 (a) of the Schedule chargeable under clauses (a) and (b) of section 3 with a duty of twenty-five naye paise shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, or 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;

(b) where a [contract](#) or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(c) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(d) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Deputy Commissioner as provided by section 32 or any other provision of this Act and such certificate has not been revised in exercise of the powers conferred by the provisions of Chapter VI.”

18. Admittedly, both the lease deeds are neither registered nor sufficiently stamped as required under the Karnataka Stamp Act, 1957. Admittedly, the Registrar(Judicial) of the High Court of Karnataka had submitted a report to the High Court pointing out, that the document of 1997 executed/entered into between the parties was a lease deed and not an agreement to lease and passed an order directing the respondent Nos. 1 and 2 to pay deficit stamp duty and penalty of Rs. 1,01,56,388 /- (Rupees One crore One lakh Fifty-Six thousand Three hundred and Eighty-Eight only). It is also an admitted fact, that the respondent Nos. 1 and 2 have not complied with the said directions and have not paid the deficit stamp duty and penalty. In this background, a question that would arise for consideration is, as to whether clause 36 in the lease deed dated 12.3.1997 could be acted upon to enforce the arbitration clause contained therein.

19. The issue is no longer res integra. This Court in the case of **SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited, (2011) 14 SCC 66** had occasion

to consider the provisions which are in *pari materia* with the provisions of the Karnataka Stamp Act, 1957. The relevant paragraphs are as under:

" 17. What if an arbitration agreement is contained in an unregistered (but compulsorily registerable) instrument which is not duly stamped? To find an answer, it may be necessary to refer to the provisions of the Stamp Act, 1899 ("the 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.'

18. Section 35 of the Stamp Act provides that instruments not duly stamped are 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;'

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 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."

20. It can thus clearly be seen, that this Court has in unequivocal terms held, that when a lease deed or any other instrument is relied upon as containing the arbitration agreement, the Court is required to consider at the outset, whether the document is properly stamped or not. It has been held, that even when an objection in that behalf is not raised, it is the duty of the Court to consider the issue. It has further been held, that if the Court comes to the conclusion, that the instrument is not properly stamped, it should be impounded and dealt with, in the manner specified in Section 38 of the Stamp Act, 1899. It has also been held, that the Court cannot act upon such a document or the arbitration clause therein. However, if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, 1899, the document can be acted upon or admitted in evidence. It is needless to state, that the provisions that fell for consideration before this Court are analogous with the provisions of Sections 33 and 34 of the Karnataka Stamp Act, 1957. In this view of the matter, we are of the considered view, that in view of the law laid down in the case of **SMS Tea Estates Private Limited** (supra), that the lease deed containing the arbitration clause which is required to be duly stamped, was not sufficiently stamped and though the Registrar (Judicial) had directed the respondent Nos. 1 and 2 to pay deficit stamp duty and penalty of Rs. 1,01,56,388/- (Rupees One crore One lakh fifty-six thousand Three hundred and Eighty-eight only), the respondents failed to do so, the High Court has erred in relying on the said lease dated 12.3.1997.

21. Though the appellants deserve to succeed only on the aforesaid question of law, we find, that even on equity the respondents are not entitled to any relief.

22. After lease deed was executed in the year 1996-1997, though the respondent Nos. 1 and 2 have placed on record some settlement deeds with tenants executed in 1998, except one bald statement, that last of the tenants was evicted in the year 2010, nothing has been placed on record. It appears, that only after the appellants had filed a suit for injunction against the respondents which was duly contested by the respondents by filing written

statement on 18.6.2011, the respondents after participating in the suit proceedings for a period of about 2 years and 3 months, filed the present application before the High Court under Section 11(6) of the Arbitration Act. It is further to be noted, that if in the pursuit of the respondents, the lease deed dated 12.3.1997 was legal and valid document and it could be relied on for referring the dispute to arbitration in view of clause 36 thereof, nothing precluded them from filing an application under Section 8 of the Arbitration Act before the City Civil Court at Bangalore in O.S. No.8952 of 2010 at the earliest opportunity available. It appears, that the respondent Nos. 1 and 2 are taking self-contradictory stands. In the written statement before the City Civil Court at Bangalore, they have admitted, that the document was a lease deed, whereas before the High Court they have taken a stand, that the document was an agreement for developing the property after the property is made vacant by evicting the tenants. The stand is also totally contrary to the terms expressed in the lease deed. It will be relevant to refer to clause 5 of the lease deed dated 12.3.1997, which reads thus:

“5. The tenure of the lease shall be 38 years commencing from the date of signing of this lease deed.”

23. It can thus clearly be seen, that the tenure of the lease deed was to be 38 years from the date of signing of the lease deed.

24. A perusal of the clauses of the lease deed dated 12.3.1997 would also reveal, that the lessee had undertaken all the responsibility of obtaining vacant possession of Schedule ‘B’ property and to secure vacant possession by ejecting the unauthorised occupants. Responsibility of sanctioning the building plans was also undertaken by the respondents. It would further reveal, that it was also agreed between the parties, that in the event of any of the tenants approaching a court of law, such period of litigation shall not in any manner affect the agreed tenure of the lease deed of 38 years.

25. In that view of the matter, the submission made by Shri Balaji Srinivasan, learned counsel for the respondents, that the agreement was to be registered only after all the tenants were evicted and the building plans were sanctioned is not supported by any of the terms in the lease deed dated 12.3.1997.

26. In that view of the matter, we find, that the High Court has totally erred in relying on the lease deed dated 12.3.1997, which was found to be insufficiently stamped and brushing aside the report of the Registrar (Judicial), when the respondents had failed to pay the insufficient stamp duty and penalty as determined by the Registrar (Judicial) of the High Court of Karnataka.

27. In the result, the appeal is allowed. The impugned judgment and order dated 1.12.2014 passed by the High Court of Karnataka in CMP No. 167 of 2013 is quashed and set aside. The petition/application filed by the respondents under Section 11 of the Arbitration Act is rejected. There shall be no order as to costs.

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