

IN THE HIGH COURT AT CALCUTTA
ORIGINAL JURISDICTION
ORIGINAL SIDE

A.P. No. 927 of 2017

SRI BIMAL CHANDRA ROY

VS

SMT. SOBHA GHATAK & ANR.

BEFORE:

The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY

For the petitioners : Mr. Arijit Bardhan, Adv.
Mr. Salman Hasan, Adv.
Mr. Ashish Shah, Adv.

For the respondent : Mr. Kallol Basu, Adv.
Mr. B.K. Dey, Adv.

Judgement on : 10/01/2019

Ashis Kumar Chakraborty, J.

In this application, under Section 11 (6) of the Arbitration and Conciliation Act, 1996, the petitioner has prayed for appointment of an arbitrator to adjudicate the disputes between the parties herein, relating to the Memorandum of Agreement dated June 05, 2007 as stated hereinafter.

The said Memorandum of Agreement dated June 05, 2007(hereinafter referred to as "the said agreement") is a development agreement whereby Dhirangshu Ghatak, since deceased as the owner of premises no. 120, Gangapuri, P.S- Regent Park, Kolkata- 700093 (hereinafter referred to as, "the said premises") agreed to develop the said premises through the petitioner by constructing a multistoried building thereat. In the said agreement dated June 05, 2007 said Dhirangshu Ghatak, since deceased was described as "the owner" and the petitioner's proprietorship firm, M/s Raycon was described as "the developer", respectively.

Clause 25 of the said agreement contemplates that in case of any dispute arising between the parties regarding any affair thereto shall be referred to arbitration of the arbitrators, one each to be appointed by the parties and in case of difference of opinion between them, it shall be referred to an umpire who shall be appointed before the commencement of the arbitration proceeding and whose decision shall be final and binding on the parties.

According to the petitioner, the said Dhirangshu Ghatak, the predecessor-in-interest of the respondents herein, wrongfully terminated the said development agreement. Thus, disputes have arisen between the parties herein and the petitioner invoked the arbitration agreement contained in the said agreement, which is

also binding upon the respondents. The petitioner seeks specific performance of the said agreement by the present respondents, as the heirs and legal representatives of the said Dhirangshu Ghatak, since deceased who asserted the agreement to have already been terminated by their predecessor-in-interest. Thus, disputes have arisen between the parties herein and the petitioner invoked the arbitration agreement contained in the said agreement, which is also binding upon the respondents. By a letter dated April 04, 2017 the petitioner, through his advocate informed the respondent that he has nominated an advocate to be his arbitrator and requested the respondents to appoint their nominee arbitrator, but the respondents have refused to act in terms of the arbitration agreement. Therefore, the petitioner has filed this application seeking for the relief mentioned above.

At the very outset, a strong objection was raised on behalf of the respondents to the maintainability of the present application. Mr. Kallol Basu, learned advocate appearing for the respondents contended that admittedly the said agreement is a development agreement which is not duly stamped and, as such, in view of the provisions contained in Section 35 of the Indian Stamp Act, 1899, (hereinafter referred to as, "the Stamp Act") the said agreement is liable to be impounded by this Court. In support of such contention, learned advocate appearing for the respondents

relied on the decision of the Supreme Court in the case of SMS Tea Estate Pvt. Ltd. -Vs- Chandmari Tea Co. Pvt. Ltd. reported in (2011) 14 SCC 66. The respondents pressed for impounding of the said agreement dated June 05, 2007 by this Court.

However, Mr. Arijit Bardhan, learned Advocate appearing for the petitioner submitted that there is no merit in the contention raised by the respondent with regard to the maintainability of the application. He argued that admittedly, the development agreement sought to be enforced by the petitioner was executed on June 05, 2007, when there was no requirement for registration or for payment of any stamp on the development agreement. He submitted that it is only in view of incorporation of clause 5(f) in schedule (I-A) of the Stamp Act as applicable to the State of West Bengal, with effect from April 01, 2012, a development agreement in respect of an immovable property situated within the State of West Bengal is required to be stamped. Mr. Bardhan further referred to the definition of the term "chargeable" as provided in Section 2(6) of the Stamp Act to mean chargeable under the law in force in India when such instrument was executed or where several persons executed the instrument at different times, first executed. He next referred Section 17 of the Stamp Act stipulating that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of

execution. It was strenuously argued for the petitioner that a conjoint reading of the definition of the terms "chargeable" read with the provisions in Section 17 of the Stamp Act it is evident that an instrument is required to be stamped only if the same is chargeable under the law in force in India at the time of its execution. He further contended that it is settled law that collection of stamp duty by the State is part of collection of revenue and unless expressly provided, any provision for imposition of a duty or tax in a revenue statute does not have any retrospective operation.

It was further argued for the petitioner that there is no dispute between the parties with regard to the existence of the arbitration agreement contained in clause 25 of the said agreement and the disputes between the parties are covered by the said arbitration agreement. Learned counsel for the petitioner relied on the decision of the Supreme Court in the case of Duro Felguera S.A. -Vs- Gangavaram Port Ltd. reported in (2017) 9 SCC 729 and urged that in view of the provisions of sub-section (6-A) of Section 11 of the Act of 1996, in the absence of any dispute either with regard to the existence of the arbitration agreement between the parties or that the disputes between the parties are covered by the arbitration agreement, this Court would allow the present application.

Mr. Kallol Bose, learned Advocate appearing for the respondent, however, did not advance any argument to refute the above contentions of the petitioner.

I have considered the facts of the case and the arguments advanced by the learned advocates appearing for the respective parties. In the present case, there is no dispute between the parties with regard to the existence of the arbitration agreement contained in clause 25 of the said agreement or that the present respondents as the successors-in-interest of the original owner of the said premises are bound by the said arbitration agreement. The short question that falls for the decision of this Court is whether the said agreement being a development agreement is liable to be impounded under Section 35 of the Stamp Act on the ground of the same being not sufficiently stamped.

Section 3 of the Stamp Act prescribes what instruments are chargeable with stamp duty. All instruments mentioned in schedule I and schedule IA (as applicable to state in particular) and not exempted by the said schedules or any notification under Section 9 are chargeable if they are executed outside India and in some cases when executed in India. Admittedly, as on the date of execution of the development agreement dated June 05, 2007 the same was not chargeable with stamp duty. It is only by virtue of incorporation of sub-clause (f) in clause 5 of Schedule (I-A) of

the Stamp Act, as applicable to the State of West Bengal, with effect from April 01, 2012, an agreement for development of an immovable property is required to be stamped.

Now, the expression "Chargeable" has been defined in Section 2(6) of the Stamp Act as follows:-

"Chargeable.- Chargeable means, as applied to an instrument executed of first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed." Further, the terms "executed" and "execution" with reference to instruments are defined in Section 2 (12) of the Stamp Act to mean "signed" and "signature", respectively.

From a bear reading of the above difinition of the expressions "Chargeable", "executed" and "execution" it is clear that an instrument is chargeable to stamp duty if such instrument is so chargeable as on the date of its execution, that is, when the parties sign the instrument or where several persons executed the instrument at different times, the first party signs the instrument. Further, Section 17 of the Act provides that all

instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution.

From the above definitions of the expressions "chargeable" and "excuted" and "execution", respectively as well as the provisions of Section 17 of the Stamp Act, it is clear beyond any doubt that stamp duty is payable on an instrument mentioned either in schedule I of the Stamp Act or in schedule (I-A) thereof at the time of execution of the instrument, that is, when an instrument is signed by the parties thereto or where several persons execute the instrument at different times, first signed. Therefore, in the present case, when the said development agreement dated was executed on June 05, 2007 at a point of time when the same was not chargeable to stampt duty under the Stamp Act, I find that the petitioner is absolutely correct in its contention that in the present case there was no requirement of the said agreement being stamped.

Even the reliance placed by the respondent on the decision of the Supreme Court in the case of SMS Tea Estate Pvt. Ltd. (supra) is misplaced. In the said case, the disputes between the parties sought to be adjudicated related to a lease deed dated December 21, 2006 whereby the respondent before the Supreme Court granted a lease of two estates to the appellant for a term of 30 years. As on the date of its execution, the said deed of lease

was not only compulsorily registerable the same was also chargeable to stamp duty. However the said deed was neither registered nor stamped. Thus, when the appellant before the Supreme Court filed an application under Section 11 of the Act of 1996 for enforcing the arbitration agreement contained in the said deed of lease dated December 21, 2006 it was held that the said deed of lease being not duly stamped, the provisions of Section 35 of the Stamp Act was clearly applicable. Consequently, the Supreme Court upheld the decision of the Gauhati High Court dismissing the said application under Section 11 of the Act of 1996. It is settled law that a decision of a Court should not be read as a statute and the ratio of any decision must be understood in the facts of that case. Accordingly, in the present case, when the said development agreement was not chargeable to stamp duty as on the date of its execution, the said decision of the Supreme Court in the case of SMS Tea Estate Pvt. Ltd. (supra) is not no assistance to the respondent.

For the reasons as aforesaid, I do not find any merit in the contention raised by the respondent that the said development agreement dated June 05, 2007 is required to be impounded under Section 35 of the Stamp Act. When there is no dispute between the parties with regard to the arbitration agreement contained in clause 25 of the said agreement, in view of the provisions of sub-section (6A) of Section 11 of the Act of 1996 and the decision of

the Supreme Court in Duro Felguera S.A.(supra) the present is well maintainable.

Accordingly, the present application filed by the petitioner succeeds.

Mr. Kumar Gupta, Advocate of Bar Library Club is appointed as the nominee Arbitrator for the respondent and Mr. Suman Dutt, Advocate of Bar Library Club (First Floor) as the Presiding Arbitrator of the Arbitral Tribunal. The Arbitrators and the Presiding Arbitrators shall be free to fix their remuneration and to engage the secretarial staff for conducting the arbitral proceeding.

The fees of the Arbitrators and the Presiding Arbitrators of the Arbitral Tribunal shall be borne by the parties in equal share.

The Arbitral Tribunal shall make an endeavour to conclude the arbitral proceeding expeditiously preferably, within ten months from the date of the claimant filing its statement of claim.

Urgent certified copies of this judgement, if applied for, be made available to the parties subject to compliance with all requisite formalities.

(ASHIS KUMAR CHAKRABORTY,J.)

