

(2012) 04 DEL CK 0093
In the Delhi High Court
Case No : O.M.P. 266 of 2011

Avantha Holding Limited

APPELLANT

Vs

M/s. Osian's Connoisseurs of ART (P) Ltd. and Another

RESPONDENT

Date of Decision : 11-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 16(1), 17, 9
Stamp Act, 1899 — Section 23A, 33, 33(2), 35, 37

Citation : (2012) 04 DEL CK 0093

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : D.K. Malhotra with Mr. Rajesh Kumar Malhotra, for the Appellant;
Pragyan Pradip Sharma with Mr. Gautam Dhamija, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—Can an agreement, containing an arbitration clause, requiring to be duly stamped under the provisions of the Indian Stamp Act, 1899 ("ISA") be acted upon by the Court when approached by one of the parties for interim relief u/s 9 of the Arbitration and Conciliation Act, 1996 ("Act")? This is the question that arises for determination in the present petition. Respondent No. 1 M/s. Osian's Connoisseurs of Art (P) Limited ["OCAPL"] entered into a loan-cum-security agreement ("LSA") dated 9th September 2008 with M/s. Solaris Holdings Limited ("SHL"), the predecessor-in-interest of the Petitioner M/s. Avantha Holding Limited. In terms of the said agreement SHL was to disburse a loan amount of Rs. 5 crores to Respondent No. 1. The said loan amount was to carry interest @ 18% per annum. The loan amount was to be refunded on or before 10th March 2009, or before such extended period as mutually agreed between the parties. Clause 3 of the said agreement reads as under:

3. Security

In consideration of "Lender Company" having advanced the loan amount to the Borrower, the Borrower & Mr. Neville Tuli (hereinafter shall be referred to as

surety) hereby agree to offer 80,000 (Eighty thousand) fully paid equity shares held by said Mr. Neville Tuli in Osian's - Connoisseurs of Art Private Limited as security, which are in the physical form. These shares are free from all charges, pledge, mortgage. It is undertaken by the surety that he will not deal in these shares in any manner till entire loan amount together with interest and costs, if any, are paid by the borrower to the lender company and the charge so created by them shall remain in full force all the times until it is released by the lender company. It is also agreed by borrower and surety that they shall comply with lawful procedure for creation of charge in favour of the lender company upon the shares described hereinabove. Surety has handed over 80,000 (Eighty thousand) shares together with duly signed share transfer deed.

In the event of any default in making repayment on due date the Lender Company shall be entitled to deal with the securities at its sole discretion without making any reference to the Borrower/surety and borrower and surety can only be discharged from its obligation once entire amount due and payable is paid to the satisfaction of the lender company.

2. Clause 7 contains the arbitration clause which reads as under:

7. Jurisdiction

In case of any dispute arising out of or in respect of this agreement, the same shall be referred for arbitration to a sole arbitrator to be appointed by a Director of the Lender Company and the decision of such sole arbitrator shall be the final and binding upon both the parties. The venue of Arbitration shall be at New Delhi. Such arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act 1996.

3. Preceding the above agreement a Resolution dated 30th July 2008 of the Board of Directors of Respondent No. 1 was passed where inter alia it was decided to avail of the inter-corporate deposit from SHL. It was further resolved as under:

Resolved further that a request be made to Mr. Neville Tuli to create a pledge on 80,000 equity shares of "Osian's Connoisseurs of Art Private Limited" for providing security in the form of pledge in favour of Solaris Holdings Limited against the Inter Corporate Deposit of Rs. 5 crores.

4. On 10th September 2008 Respondent No. 1 wrote to the SHL enclosing inter alia its board resolution, DP note, receipt, the LSA, and "transfer deed and share certificate (80,000 shares) Certificate No. 74 and 75."

5. With Respondent No. 1 failing to repay the loan amount by the due date, the Petitioner filed the present petition inter alia seeking to restrain the Respondents from selling, transferring, alienating any of its immovable assets/properties of Respondent No. 1 and also for a direction to the Respondents to furnish security in the form of a bank guarantee for an amount sufficient to meet the sum owed to the Petitioner.

6. At the first hearing of the present petition, the following order was passed by this Court on 5th April 2011:

OMP No. 266/2011

Issue notice to the Respondents, returnable on 25th July 2011.

According to the Petitioner, the Respondents took a loan of Rs. 5 crores under a Loan-cum-Security Agreement dated 9th September 2008. The loan was repayable in instalments. However, the Respondents have defaulted in making payment of the instalments due. As of now, including interest, amount payable outstanding is to the tune of Rs. 6.50 crores. It is submitted by learned counsel for the Petitioner that the security of 80,000 shares of the Respondent company furnished by Respondent No. 2, the Managing Director, has also become worthless as the Respondent company is not doing financially well. The Petitioner submits that the Respondent company is intending to dispose of its valuable property situated in Mumbai. He has placed on record the advertisements published in the Times of India, Mumbai on 28th March 2011 by M/s. Karthikeya and Associates on behalf of the proposed buyer.

In view of the aforesaid, I direct that in case the Respondent proposes to dispose of its aforesaid property for a sale consideration of less than Rs. 5 crores, the same shall not be disposed of till the next date. In case, the sale consideration is Rs. 5 crores or more, the Respondents shall not appropriate the sale consideration received from the prospective buyer to the extent of Rs. 5 crores, and shall keep the same in a separate account till further orders.

7. After service of notice in the petition, Respondent No. 1 filed IA No. 11571 of 2011 for vacation of the aforesaid interim order. On 25th August 2011 the following order was passed in the said application:

IA No. 11571/2011

By this application, the Respondent seeks vacation of the interim order dated 5th April 2011. By the said order, this Court had directed that in case the Respondent is proposing to dispose of its property situated at Mumbai, then out of the sale consideration, Rs. 5 crores shall be kept in a separate account till further orders. The submission of the Respondent-Applicant is that the property is mortgaged to various banks including IDBI Bank who has a first charge on the property. However, the Applicant has not placed on record any document to show that the proposed sale is being made by any of the secured creditors. From the advertisement placed on record by the Petitioner, it appears that a private sale is proposed to be undertaken by the Respondent. There is no clarity as to the amount due and outstanding to the secured creditors and the amount at which they are willing to settle the Respondent's account. Let the Respondent file an additional affidavit, placing on record the amount outstanding towards each of the secured creditors and the amount at which the secured creditors are willing to settle the Respondent's liability supported by the certificates issued by the

respective secured creditor. The Respondent should also place on record the amount on which the property in question is likely to be sold. The affidavit be filed within two weeks. Adjourned to 30th September 2011. Interim order to continue.

8. Later the Respondent No. 1 filed an application bearing IA No. 3329 of 2012 pointing out that the arbitration clause in LSA had been invoked by the Petitioner, and arbitration proceedings had commenced before the sole Arbitrator Mr. S.M. Chopra before whom Respondent No. 1 had filed an application u/s 16 of the Act challenging the validity and existence of arbitration agreement. It was pointed out by the Respondent in the said application that the LSA was inadequately stamped and therefore, was not admissible in evidence. Accordingly, it was prayed that the present petition u/s 9 of the Act be dismissed as not maintainable. IA No. 3331 of 2012 was for condoning the delay of 14 days in re-filing I.A. No. 3329 of 2012. The Petitioner has filed a reply to I.A. No. 3329 of 2012.

9. This Court has heard the submissions of Mr. D.K. Malhotra, learned counsel for the Petitioner and Mr. Pragyan Sharma, learned counsel for the Respondents.

10. Mr. Malhotra contends that the LSA is in fact not a document creating a pledge as such. It only makes an offer of a pledge of 80,000 shares held by Respondent No. 2. Consequently, the LSA is not required to be stamped as document of pledge. Alternatively, it is submitted that if at all, the LSA can at best be an agreement in respect of which stamp duty is payable under Article 5 of the Schedule I to the ISA as read with Section 23A thereof.

11. This Court is unable to accept the above submission. A collective reading of Board Resolution dated 30th July 2008 of Respondent No. 1, the LSA dated 9th September 2008 containing Clause 3 (extracted hereinabove), and letter dated 10th September 2008 by Respondent No. 1 to SHL enclosing inter alia the transfer deed and share certificates pertaining to 80,000 shares, indicates that the parties intended the LSA to be a document evidencing the loan as well as the creation of pledge of shares. The actual pledging of the shares took place contemporaneously with the execution of the LSA. The LSA therefore answers the description of an agreement relating to a pledge within the meaning of Article 6 (2) of the Schedule I to the ISA, and was required to be duly stamped as such.

12. It was then submitted by Mr. Malhotra that the mere fact that the document was either not stamped or inadequately stamped, would not result in the present petition u/s 9 of the Act being dismissed. Referring to the decision of the Supreme Court in SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited 2011 (4) ALR 265 (SC), it is submitted that this Court can impound the said document u/s 35 of the ISA and send it to the Collector for determining the appropriate duty and penalty payable. After payment of the said amount by the Petitioner, this Court could resume the hearing of the present petition. He further submitted that in the meanwhile the interim order against

Respondents should continue.

13. Countering the above submission, Mr. Pragyan Sharma, learned counsel for the Respondents, contends that in terms of Section 35 ISA, the LSA is inadmissible in evidence, as explained by the Supreme Court in SMS Tea Estates Private Limited. Unless the requisite stamp duty and penalty as determined u/s 35 ISA was paid by the Petitioner the question of entertaining any submission of the Petitioner in relation to such document does not arise. He, accordingly, submitted that appropriate course would be for this Court to vacate the interim stay, impound the LSA in original and transmit it to the Collector of Stamps for determination of the appropriate duty and penalty to be paid by the Petitioner. He further pointed out that with the arbitration proceedings having commenced, the Petitioner should, after paying the appropriate stamp duty and penalty approach the learned Arbitrator u/s 17 of the Act for interim relief and such prayer can then be considered on its merits by the learned Arbitrator.

14. The above submissions have been considered. As already explained, the LSA is a document creating a pledge of movable property, i.e., shares. Stamp duty as indicated in Article 6 of Schedule I to the ISA is required to be paid thereon. Admittedly, the LSA has not been engrossed on adequate stamp papers and therefore is, as such, inadmissible in evidence. u/s 33 (2) (b) of the ISA, the LSA is liable to be impounded either by this Court or by any officer to which such task may be delegated. In terms of Section 35 of the ISA, the LSA cannot be acted upon till such time it is duly stamped. In the present case, since the LSA contains the arbitration clause, the arbitration clause itself cannot be acted upon till such time the LSA is not properly stamped. Section 38 ISA, which is relevant in this regard, reads as under:

38. Instruments impounded, how dealt with - (1) Where the person impounding an instrument u/s 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by Section 35 or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

(2) In every other case, the person so impounding an instrument shall send it in original to the Collector.

15. The Supreme Court has in SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited analysed the above provisions and summed up the legal position as under:

11. The scheme for appointment of arbitrators by the Chief Justice of Guwahati High Court 1996 requires an application u/s 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 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 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 u/s 33 of the Stamp Act and follow the procedure u/s 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.

16. It is plain, therefore, that as far as the present case is concerned, this Court is required to proceed to impound the LSA in original u/s 33 ISA and follow the procedure under Sections 35 and 38 ISA.

17. Pursuant to the order passed by this Court on 9th April 2012, learned counsel for the Petitioner has produced original of the LSA, which, in terms of Section 33 of the ISA, is hereby impounded by this Court for the reason that it has not been duly stamped in terms of ISA. The Registrar General of this Court will arrange to have the original of the LSA dated 9th September 2008 delivered in a sealed cover through a Special Messenger to the Collector of Stamps within one week from today. The Collector of Stamps will, within a period of four weeks thereafter, determine the proper stamp duty as well as penalty to be paid in relation to the LSA by the Petitioner in accordance with law and communicate it to the Petitioner within one week thereafter. If the Petitioner pays the stamp duty and penalty as determined by the Collector of Stamps under the ISA within two weeks thereafter, the Petitioner will bring it to the notice of the learned Arbitrator forthwith. Till such time the learned Arbitrator will not finally decide the application filed by Respondent No. 1 u/s 16 of the Act. However, if the Petitioner fails to make such payment within the time stipulated, the learned Arbitrator will proceed to decide the application u/s 16 of the Act on its merits.

18. If the Petitioner makes payment of the stamp duty and penalty as determined by the Collector of Stamps within the time stipulated, it will be open to the Petitioner to also file an appropriate application u/s 17 of the Act before the learned Arbitrator which will then be decided on its merits by the learned Arbitrator as expeditiously as possible. Needless to mention that if the Petitioner fails to pay the stamp duty and penalty as determined, then obviously the LSA cannot be acted upon and the arbitration proceedings will automatically stand closed. Accordingly, the interim order passed by this Court on 5th April 2011 is vacated. OMP No. 266 of 2011 and IA Nos. 11471 of 2011 as well as 3329 of 2012 are disposed of in the above terms. The delay in filing the application (IA No. 3329 of 2012) is condoned and IA No. 3331 of 2012 is allowed.