

## ***Black Pearl Hotels (Pvt) Ltd v. M/s Planet M Retail Ltd***

**Dipak Misra, J.** Delay condoned.

2. Leave granted.

3. The present appeals, by special leave, call in question the legal propriety of the order dated 11.1.2013 passed by the learned Single Judge of the High Court of Karnataka at Bangalore in CMP No.122 of 2012 and the order dated 17.12.2013 passed in review, i.e., I.A. No.1 of 2013.

4. The facts which are necessary to be stated for adjudication of these appeals are that the appellant had entered into an agreement, which is called a “Conducting Agreement”, with the respondent on 01.02.2008. In terms of the agreement, the appellant was required to enable the respondent to conduct its business from the premises and to extend to it the benefit of permissions and licences granted to the appellant. The appellant was further required to secure an extension of its own lease in the premises in order to enable the respondent to conduct the retail shop from the premises and in return, the respondent was to pay a fixed percentage of its net sales proceeds subject to a minimum guaranteed sum of Rs. 11,00,000/- per month. Additionally, the respondent was also liable to furnish the appellant with an interest free refundable security deposit in a sum of Rs. 99,00,000/-. The said agreement stipulated that all disputes between the parties shall be referred to arbitration. As the appellant felt certain breaches were committed by the respondent, correspondences were made between the parties and ultimately, the appellant filed a petition under the Arbitration and Conciliation Act, 1996 (for brevity, “the 1996 Act”) before the City Civil Court, Bangalore, *inter alia*, seeking for an order of temporary injunction restraining the respondent from interfering with the peaceful possession of the appellant in respect of the premises pending conclusion of the arbitration proceedings. Thereafter the appellant issued a notice on 13.06.2012 calling upon the respondent to concur in the appointment of his nominated arbitrator as the sole arbitrator to adjudicate the disputes between the parties. The said notice was replied to by the respondent asserting, *inter alia*, that the arbitration proceedings were required to be held in Mumbai and not at Bangalore and refused to concur with the appointment proposed by the appellant. That apart, it did not propose to nominate any other arbitrator.

5. As the respondent failed to concur in the appointment proposed by the appellant or to appoint an arbitrator as required under the contract, the appellant filed a petition under Section 11 of the 1996 Act. The Judge designated by the Chief Justice took up the matter and issued notice on C.M.P. No. 122 of 2012. On 11.01.2013 the learned Judge *prima facie* was of the view that the “conducting agreement” may be a lease of the immovable property. Learned counsel for the appellant, as the impugned order would reflect, contended that it was not so and sought time to canvas

argument that it was a licence. Thereafter, the learned Judge passed the following order:-  
“Therefore, the matter shall be placed before the Registrar (Judicial), who shall determine whether the transaction is in the nature of lease or licence and stamp duty that is attracted, since whether it is lease or licence, the agreement is apparently not duly stamped. Therefore,

he after determining whether lease or licence, recover the duty and penalty and take further steps and thereafter remit the matter for further consideration.”

6. The appellant filed an application seeking review of the aforesaid order and the learned Single Judge vide order dated 17.12.2013 declined to entertain the same and in that context held thus:- “The matter having been referred to the Registrar, notwithstanding the application in I.A. 1/13, having been filed, the matter ought not to have been listed before this Court. Hence, the office is directed to place the matter before the Registrar, who shall, in accordance with the earlier direction, determine the stamp duty payable on the document impounded as a lease or licence and thereafter call upon the petitioner to pay such duty or penalty and after collection of such duty or penalty and after complying with such steps, as provided in law, place the matter for further consideration before this Court.”

7. It is submitted by Ms. Pritha Srikumar Iyer, learned counsel for the appellant that the learned Judge has erroneously focussed on the issue whether the document in question was a lease or licence, for it is an agreement simplicitor and incorporates an arbitration clause. Alternatively, it is argued that whether it is a lease or a licence was required to be decided by the learned Judge and the said judicial determination could not have been delegated to the Registrar of the Court. It is urged by her that the Court can only require the Registrar for determining whether the document deserves to be impounded or not only after alluding to the nature of the document under Sections 33 and 37 of the Karnataka Stamp Act, 1957 (for short, “the 1957 Act”). To bolster the said pronouncement, she has placed reliance on the authority in *Chillakuri Gangulappa vs. Revenue Divisional Officer, Madanpalle & Anr.*<sup>1</sup>

8. Mr. Sandeep S. Ladda, learned counsel for the respondent submits that the decision that has been placed reliance upon by the appellant is distinguishable inasmuch as that the said authority deals with Section 38 of the Indian Stamp Act, 1899 and is not a judgment rendered in the context of the 1957 Act. Learned counsel would further expound that regard being had to the language employed under Section 33(2)(b) of the 1957 Act, the order passed by the High Court is absolutely impeccable.

9. At the outset, we think it appropriate to make it clear that we are not determining whether the agreement in question is a lease or licence or an agreement simplicitor as put forth by the learned counsel for the appellant. That is required to be dwelt upon and addressed by the High Court while dealing with an application under Section 11 of the Act. It is well settled in law that while delving into the appointment of an arbitrator under Section 11, regard being had to the nature of agreement as stipulated under Section 7 of the 1996 Act, the Judge designated by the learned Chief Justice is obliged to consider the nature of agreement and whether the document requires to be stamped or not, and if so, whether requisite stamp duty has been duly paid on the same. We are so stating as in the instant case there is a written instrument and there is dispute as regards the nature and character of the document.

10. In *SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited*<sup>2</sup> the Court has ruled that:- “21. Therefore, when a lease deed or any other instrument is relied upon as contending 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.”

11. After so stating, the Court laid down the procedure to be adopted where the arbitration clause is contained in an agreement which is not registered but is required to be compulsorily registered and which is not duly stamped.

Thereafter, the Court set out the duty of the Court in a chronological manner. The said passage is extracted below:-

“22.1. 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 registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the 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 Sections 35 and 38 of the Stamp Act.

22.3. 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 Section of the Stamp Act), and the defect

with reference to deficit stamp is cured, the court may treat the document as duly stamped.

22.4. Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registerable. If the document is found to be not compulsorily registerable, the court can act upon the arbitration agreement, without any impediment.

22.5. If the document is not registered, but is compulsorily registerable, having regard to Section 16(1)(a) of the Act, the court can delink 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 15 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.

22.6. Where the document is compulsorily registerable, 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.”

12. There is no dispute that the present controversy is covered by the 1957 Act. However, we think it apposite to refer to Section 38 of the Indian Stamp Act, 1899. The said provision reads as follows:-

“38. **Instruments impounded, how dealt with.**-(1) Where the person impounding an instrument under section 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.”

13. Interpreting the said provision, this Court in *Chilakuri Gangulappa* (supra) has ruled thus:- “It is clear from the first sub-section extracted above that the court has a power to admit the document in evidence if the party producing the same would pay the stamp duty together with a penalty amounting to ten times the deficiency of the stamp duty. When the court chooses to admit the document on compliance of such condition the court need forward only a copy of the document to the Collector, together with the amount collected from the party for taking adjudicatory steps. But if the party refuses to pay the amount aforesaid the Collector has no other option except to impound the document and forward the same to the Collector. On

receipt of the document through either of the said avenues the Collector has to adjudicate on the question of the deficiency of the stamp duty. If the Collector is of the opinion that such instrument is chargeable with duty and is not duly stamped 'he shall require the payment of the proper duty or the amount required to make up the same together with a penalty of an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof.”

14. As the factual matrix would further unfurl, there was no consent by the appellant and, therefore, even under the Stamp Act, the matter has to be sent to the competent authority. In this context, we have to analyse the anatomy of Section 33 of the 1957 Act which reads as follows:-

“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.” [underlining is ours]

15. On a plain reading of the aforesaid provision, it is manifest that sub-section (1) of Section 33 stipulates that for the purpose of finding out as to whether the instrument is ‘duly stamped’ or not and consequently as to whether such instrument liable to be impounded or not, examination of the instrument is necessary. Thus, Section 33 fundamentally pertains to the examination and impounding of an instrument. To appreciate the sweep and purport of Section 33(2)(b), it is necessary to refer to the dictionary clause. The definition “duly stamped” as contained in Section 2(1)(e) of 1957 Act postulates that unless the context otherwise requires “Duly Stamped” as applied to an instrument, means that the instrument bears an adhesive stamps of not less than the proper amount and that such stamp has been affixed or used in accordance with law for the time being in force in the territories of the State of Karnataka. Thus, the “Duly Stamped” instrument should comply with three requirements, namely, (i) the stamp must be of a proper amount; (ii) should bear proper description of stamp; and (iii) the stamp must have been affixed and used according to law for the time being in force in the State of Karnataka.

16. In this context, proviso (b) to Sub-Section (2) of Section 33, has to be appreciated. It is quite plain that it empowers the Judge of the High Court to delegate the duty of examination and impounding the instrument to such officer as the Court appoints in that behalf. The question arises where the nature of document is disputed, the same can be done by the delegated authority. For example, if a document tendered is a sale deed and dispute arises with regard to its character, namely, sale deed or deed of mortgage, can it be done by the officer concerned. The stamp duty payable on a lease deed or a licence may be different. The delegation by a Judge of the High Court will not clothe the officer the jurisdiction of determining the nature and character of the instrument inasmuch as such fact needs to be determined by the Judge while exercising judicial function. Such judicial function is not to be delegated to an officer of the Court by the Judge of the High Court. What is delegated under the proviso (b) of sub-section (2) of Section 33 is only to examine the instrument for the purpose of determining as to whether the instrument is duly stamped or not and for

impounding the same. We are disposed to think that Section 33(2)(b) does not contemplate or permit any adjudication as regards the nature and character of the instrument. The delegated power has to be restricted to cover the area, that is, whether the instrument bears the proper stamp and thus complies with the requirement of being “duly stamped”, and the stamp duty payable on the same must be determined only with reference to the terms of the instrument. Proviso (b) to sub-section 33(2) does not empower the Judge of the High Court to direct the officer of the High Court to enquire and to find out the nature and character of the document. The word “examination” used in proviso (b) to Section 33(2) of the Act cannot be allowed to have such wide amplitude as the context does not so envisage. It has to be conferred restricted meaning which is in consonance with the provision and the scheme of the 1957 Act. And the narrow meaning, as we find, is examination by the officer of the Court is only to determinate as to the adequacy or inadequacy of the stamp duty paid and to impound the instrument.

17. It is evincible from the impugned order that the learned Judge has left both the aspects, that is, determination of the nature and character of the document and impounding of the same to the Registrar. Therefore, the sentinel question that arises for consideration is whether the learned Single Judge for the purpose of determining the character of the instrument could have delegated the authority to the Registrar. A judicial functioning has to be done in a judicial manner. The duty of determination of an instrument or, to explicate, to determine when there is a contest a particular document to be of specific nature, the adjudication has to be done by the Judge after hearing the counsel for the parties. It is a part of judicial function and hence, the same cannot be delegated. Be it noted, under the High Court Rules, in certain High Courts, the computation is done by the authorities in the Registry with regard to the court fees but that also is subject to challenge before the Court when the applicability of a particular provision of the Court-fees Act, 1870 is concerned. Thus analysed, we are inclined to think that the authority is not empowered to determine the nature and character of the document. He may at the best send a report to the Court expressing his views on a document which is subject to final determination by the Court.

18. In view of the aforesaid analysis, we allow the appeals, set aside the order passed in the main case as well as in the review and remit the matter to the High Court requiring the learned Single Judge to determine the nature and character of the document and thereafter proceed with the matter in accordance with law. There shall be no order as to costs.

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