



ARBITRATION AND CONCILIATION

Court Can't Appoint Arbitrator, if the Agreement containing arbitration clause is inadequately stamped

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The Hon'ble Supreme Court presided by a division bench of J. R.F. Nariman and J. Vineet Saran in *Garware Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.*^[1] examined the effect of an arbitration clause contained in an insufficiently stamped contract and held that such arbitration clause has no existence until the contract is duly stamped. The Court was considering an application under Section 11 (6) the Arbitration and Conciliation Act, 1996 ("Arbitration Act") for appointment of arbitrator.

In this case, the Court examined the validity of its earlier judgment^[2] that if the agreement is insufficiently stamped, then the provisions of the Indian Stamp Act 1899 ("Stamp Act") require the Judge to impound the agreement and ensure that stamp duty and penalty (if any) are paid before proceeding with the Section 11 application. The question before the Court was whether this judgment is still valid, in the light of Section 11(6A), which has been introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015.

Section 11(6A) provides that while considering application for appointment of arbitrator under Section 11, the Court shall confine itself to the examination of the existence of an arbitration agreement only. It was argued that the object this amendment was to confine the Court's jurisdiction, while hearing the Section 11 application, to examine the existence of an arbitration agreement and nothing more. Hence, at this stage, the Court is not required to enquire into the adequacy of stamp duty of the underlying contract; instead, the Court shall look merely into the existence an arbitration agreement in the underlying contract and appoint the arbitrator, if such agreement exists. The arbitrator so appointed can consider the adequacy of stamp duty of underlying contract and order for impounding the contract and ensure payment of duty.

The Court refused to accept this contention and held that arbitration clause contained in an agreement does not have an independent existence. Therefore, it is not possible to bifurcate the arbitration clause contained in such an agreement or the underlying transaction so as to give it an independent existence. *"When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. Under the Indian Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped."* Hence, the Stamp Act applies to the agreement or transaction as a whole.

The Court laid down the following procedure, when the contract is not sufficiently stamped:

1. While proceeding with the Section 11 application, the Court must impound the instrument, which is not adequately stamped.
2. The instrument must be handed over to the Authority under the Stamp Act. The Authority will then adjudicate the stamp duty and penalty (if any). The Authority need to expedite the adjudication as possible, preferably within a period of 45 days from the date on which the Authority receives the instrument.
3. After stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the Court.
4. The Court will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, then the arbitrator can then proceed to decide the dispute within the time frame provided under the Arbitration Act.

Concluding Remark

The ambit of courts enquiry under Section 11 of the Arbitration Act is now expanded to determine adequacy of stamp duty of the underlying instrument. Such an enquiry can consume more time than merely enquiring into the existence of arbitration agreement. The process can be further delayed, since the agreement needs to be impounded and adjudicated during the initial stage of Section 11 application. Any delay in adjudication process can significantly impact the arbitration process at the initial stage itself. Incidentally, this judgment also invalidates a recent judgment of the Full Bench of Bombay High Court where it was held that as per the amended provision Section 11 (6A), the power of the Supreme Court or the High Court is only to examine the existence of an arbitration agreement and all that the Courts need to see is whether an arbitration agreement exists – nothing more, nothing less.^[3]

[1] Civil Appeal No. 3631 of 2019

[2] SMS tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd. (2011) 14 SCC 66

[3] <http://www.indialaw.in/blog/blog/arbitration-and-conciliation/applications-for-interim-reliefs-and-appointment-of-arbitrator-are-maintainable-even-if-arbitration-agreement-is-insufficiently-stamped/>