



**SUPREME COURT ON THE COURT'S POWER TO
APPOINT AN ARBITRATOR WHEN THE UNDERLYING
CONTRACT IS DEFICIENTLY STAMPED**

CASE NOTE

Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.

On 10th April 2019, Division Bench of the Hon'ble Supreme Court of India (comprising the Hon'ble Mr. Justice R. F. Nariman and the Hon'ble Mr. Justice Vineet Saran) in ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.***,¹ has reiterated the dictum of *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*² ("**SMS Tea**") holding that where an arbitration clause is contained in an unstamped agreement, the provisions of the Indian Stamp Act, 1899 or Maharashtra Stamp Act 2016 as the case may be, require the Court hearing the Section 11 application under the Arbitration & Conciliation Act, 1996 ("**the Act**") for appointment of arbitrator, to impound the agreement and ensure that stamp duty and penalty (if any) are paid thereon before proceeding with the Section 11 application. It was further held that Section 11(6A), which has been introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**"), has not affected the ratio of *SMS Tea*.

Background of Appeal

The appeal filed by *Garware Wall Ropes* impugned the judgment³ passed by the Hon'ble Bombay High Court allowing the Section 11 application filed by *Coastal Marine* and appointing a Sole Arbitrator to adjudicate upon disputes and differences which arose between the parties in relation to the sub-contract dated 14th June 2013 for installation of a geotextile tubes embankment in Odisha.

Issue before the Apex Court

Whether Section 11(6A) of the Act as amended has removed the basis of *SMS Tea* so that the stage at which the instrument is to be impounded is not by the Judge hearing the Section 11 Application, but by an Arbitrator who is appointed

¹ 2019 SCC Online SC 515

² (2011) 14 SCC 66

³ (2018) 3 Mah LJ 22

under Section 11, as has been held in the Impugned Judgment of the Hon'ble Bombay High Court?

Ratio of SMS Tea

The procedure to be adopted where the arbitration is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped was summed up by the Apex Court as follows:

“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.

.....

32. In view of the above this Appeal is allowed, the Order of the High Court is set aside and the matter is remitted to the Ld. Chief Justice of the Gauhati High Court to first decide the issue of stamp duty and if the document is duly stamped then appoint an arbitrator in accordance with law.”

Analysis of the Law Commission Report

The Apex Court at the outset analysed the recommendations in the 246th Law Commission Report which led to the introduction of Section 11(6A) alongside the Statement of Objects and Reasons of the Amendment Act. It was observed that the Law Commission Report indicated that the earlier judgments in *SBP &*

*Co.*⁴ and *Boghara Polyfab*⁵ which expanded the powers of a Court under Section 11 required a relook and therefore the Law Commission recommended that the Court while considering any application under Section 11 should *confine itself to the examination of the existence of an arbitration agreement* and leave all other preliminary issues to be decided by the arbitrator.

The Apex Court observed that the Law Commission Report as well as the Statement of Objects and Reasons of the Amendment Act did not refer to *SMS Tea* as the Supreme Court and the High Court acting under Section 11 of the Act do not decide any preliminary question between the parties and only gives effect to the mandatory provisions contained in the Indian Stamp Act.

Arbitration clause would not exist unless underlying contract is duly stamped

To further reinforce that the ratio in *SMS Tea* has not been affected by the insertion of Section 11(6A) by the Amendment Act, the Apex Court analysed Section 7(2) of the Act and Section 2(h) of the Contract Act. It was observed that an agreement becomes a contract only if it is enforceable by law, and under the Indian Stamp Act, an agreement does not become a contract unless it is duly stamped. Therefore, an arbitration clause in an agreement would not exist when it is not enforceable by law.

Doctrine of harmonious construction applied

In response to the contention that if the ratio of *SMS Tea* is applied post amendment of the Act, the 60 day period provided under Section 11(13) of the Act would be breached, the Hon'ble Supreme Court applied the doctrine of harmonious construction and declared that while proceeding with the Section 11 application, the Hon'ble High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. Furthermore, any

⁴ (2005) 8 SCC 618

⁵ (2009) 1 SCC 267

of the parties can bring the instrument to the notice of the High Court as soon as stamp duty and penalty are paid on the instrument, which will then proceed to expeditiously hear and dispose of the Section 11 application.

Held

After analysing Section 11(6A), the Apex Court opined that when the Supreme Court or the High Court considers an application under Section 11(4) to 11(6) of the Act, and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. The Court further opined that the Indian Stamp Act applies to the agreement or conveyance as a whole, and therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Act and the Registration Act, 1908 has been referred to in *SMS Tea* when it comes to an unregistered agreement or conveyance. However, the Indian Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by *SMS Tea* to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. The Court therefore held that the introduction of Section 11(6A) does not, in any manner, deal with or get over the basis of the judgment in *SMS Tea*, which continues to apply even after the insertion of Section 11(6A) by the Amendment Act.

In light of the aforesaid, the Court allowed the Appeal, set aside the impugned judgment and remitted the matter back to the Hon'ble Bombay High Court for disposal.

***Gautam Landscapes* and other High Court judgments overruled**

The Apex Court at paragraph 39 of the judgment has overruled the Full Bench Judgment of the Hon'ble Bombay High Court in *Gautam Landscapes*⁶ (pronounced on 4th April 2019) to the extent that it held that in view of Section 11(6A) of the Act, deficiency in stamping of the underlying contract would not prevent the Court from appointing an arbitrator in an application under Section 11 of the Act.

The following High Court judgments which were relied upon in the context of stamp duty, are overruled:

- JMD Ltd. v. Celebrity Fitness India Pvt. Ltd.⁷
- B.D. Sharma v. Swastik Infra Estate Pvt. Ltd.⁸
- Sandeep Soni v. Sanjay Roy⁹
- N.D. Developers Pvt. Ltd. v. Bharathi¹⁰

Our Views

It is to be noted that the Full Bench in *Gautam Landscapes* also held that a Court can grant interim relief to a party under Section 9 of the Act even when the document containing an arbitration clause is unstamped or insufficiently stamped. Although there is no observation by the Apex Court on the powers of a Court to grant interim relief under Section 9 of the Act when the underlying contract is unstamped or insufficiently stamped, we are of the view that the dictum laid down for Section 11 proceedings would also apply to all Section 9 proceedings, that is to say, Courts will be wary in granting any interim relief to a party under Section 9 of the Act unless the deficiency in stamping of the contract containing the arbitration clause is cured.

⁶ 2019 SCC OnLine Bom 563

⁷ 2019 SCC OnLine Del 6483

⁸ 2018 SCC OnLine Del 13279

⁹ 2018 SCC OnLine Del 11169


¹⁰ 2018 SCC OnLine Kar 2938

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