



## BACKGROUND

In *SMS Tea Estates*<sup>2</sup> (**SMS Tea Estates**), the Supreme Court held that if an arbitration clause is contained in a document which is not duly stamped, such an arbitration clause cannot be acted upon. Further, the Supreme Court held that while hearing an application under section 11 of the Arbitration and Conciliation Act, 1996 (**the Act**) the judge must first impound such document and only once the defect with respect to the stamp duty is cured, the court shall proceed further with the application.

Thereafter, the Arbitration and Conciliation (Amendment) Act, 2015 (**Amendment Act**) introduced section 11 (6-A) in the Act which limited the role of the court while determining an application for appointment of an arbitrator such that the courts shall “*notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement*”.

In the circumstances, the question which arose for determination before the Supreme Court was whether the judge is now precluded from impounding an insufficiently stamped instrument while determining an application under section 11 of the Act in light of section 11 (6-A) of the Act.

## FACTUAL MATRIX

1. Garware Wall Ropes Ltd. (**Appellant**) and Coastal marine Constructions & Engineering Ltd. (**Respondent**) entered into a sub-contract agreement for work in relation to protection against coastal erosion (**Contract**). Disputes arose between the parties and the Appellant terminated the Contract. Through its Notice of Arbitration dated 20 July 2016 (**Notice of Arbitration**), the Respondent invoked the arbitration clause contained in the Contract and proposed its nominee for appointment of the Ld. Sole Arbitrator. The Appellant resisted invocation of arbitration on the basis that the reference to arbitration was premature.
2. Subsequently, the Respondent filed an application under section 11 of the Act before the Bombay High Court (**High Court**) for the appointment of an arbitrator. By an Order dated 9 March 2018, the High Court appointed the Respondent’s nominee (as provided in the Notice of Arbitration) as the Ld. Sole Arbitrator (**Order**). Aggrieved by the Order, the Appellant filed a special leave petition before the Supreme Court.
3. In the proceedings before the Supreme Court (**Court**), the Appellant’s primary ground was that pursuant to sections 33 and 34 of the Maharashtra Stamp Act, 1958 (**Maharashtra Stamp Act**) and the decision of *SMS Tea Estates*, the judicial authority is required to impound instruments which are not stamped and such instruments cannot be admitted as evidence or acted upon until duly stamped.

## FINDINGS OF THE COURT

*An arbitration agreement cannot always be given an independent existence and the Court to apply mandatory provisions of the Stamp Act while constituting the arbitral tribunal*

4. The Court at the outset referred to the 246<sup>th</sup> Law Commission Report (**Report**) and the Statement of Objects and Reasons in the Act, and noted that the scope of section 11 of the Act had been trimmed following the Amendment Act such that the Supreme Court or High Court, as the case may be shall “*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 Court however noted that neither the Statement of Objects and Reasons in the Act nor the Report referred to the decision of *SMS Tea Estates*.
5. The Court perused its ruling in *SMS Tea Estates* wherein it had determined the validity of an arbitration agreement contained in a lease deed which was neither stamped under the Indian Stamp Act, 1899 (**Stamp Act**) nor registered in terms of the Registration Act, 1908 (**Registration Act**) read with the Transfer of Property Act, 1882. The Court held that depending on whether the arbitration agreement is contained in a contract which is unstamped or unregistered, the test of the validity of the arbitration agreement would differ.

<sup>2</sup> *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66

6. With respect to the effect of an arbitration agreement contained in the unstamped lease deed, in *SMS Tea Estates*, the Court therein held that “*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*”. Further, the Court clarified that once the deficit stamp duty and penalty (if any) is paid, and the court is prima facie satisfied that the document is properly stamped, the court can then proceed to act upon the arbitration agreement.
7. The Court held that the provision in section 11(6-A) which states that “*notwithstanding any judgment, decree or order of any court..*” does not in any manner “*deal with or get over*” the basis of *SMS Tea Estates* since the said case has taken into account the mandatory provisions of the Stamp Act and held them applicable to judicial authorities which includes the Court and the High Court acting under section 11 of the Act. The Court further reiterated the principles in *SMS Tea Estates* that the Stamp Act applies to the agreement as a whole and it is not possible to bifurcate the arbitration clause contained in such an agreement to give it an independent existence.

***A valid arbitration clause cannot be contained in a contract which is not enforceable by law***

8. The Court clarified that under the Stamp Act, an agreement which is not duly stamped, does not become a valid contract since it is not enforceable in law. Upon reading section 11 (6-A) of the Act with section 7(2) of the Act and section 2(h)<sup>3</sup> of the Indian Contract Act, 1872 (**Contract Act**), the Court held that an arbitration clause is contained “*in a contract*” and an agreement can only become a “*contract*” if it is enforceable by law. Hence, if the contract is not adequately stamped, the contract would be unenforceable, and the arbitration clause in the contract would not “*exist*”.

***Court overrules decisions of high courts***

9. The Court referred to the judgments of *JMD Ltd.*<sup>4</sup>, *B.D. Sharma*<sup>5</sup>, *Sandeep Soni*<sup>6</sup>, *N.D Developers*<sup>7</sup>, and held that the foregoing decisions incorrectly declared the law on the issue at hand. Therefore, the Court overruled the said judgments.
10. Further, the Court overruled the Full Bench decision of the Bombay High Court in *Gautam Landscapes*<sup>8</sup> to the extent that it declared that before proceeding to pass final order in an application under section 11 of the Act, the court need not await the adjudication of the stamp authorities when the document objected to is insufficiently stamped in light of section 11(6-A) of the Act.

***Impounding of unstamped contract under the Maharashtra Stamp Act could have a knock-on effect on time limits under the Act – Court lays down measures to ensure compliance of time limits***

11. The Court observed that the Maharashtra Stamp Act mandated the impounding of any instrument that is unstamped to ensure that the stamp duty and penalty (if any) is paid on such instrument before it is acted upon. At the same time, the Court observed that the Amendment Act had introduced a time limit of 60 days to dispose of an application under section 11 of the Act.
12. In the interest of giving effect to the provisions in both statutes, the Court applied the principles of harmonious construction and laid out the below procedure to be followed by the high courts while dealing with an arbitration agreement contained in an unstamped document:
  - a. While proceeding with an application under section 11 of the Act, the high court must impound the unstamped instrument and hand it over to the authority under the Maharashtra Stamp Act;

<sup>3</sup> Contract Act, “2. Interpretation clause – In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context: - ... (h) An agreement enforceable by law is a contract;”

<sup>4</sup> *JMD Ltd. v. Celebrity Fitness India Pvt. Ltd.*, (2019) SCC OnLine Del 6483,

<sup>5</sup> *B.D. Sharma v. Swastik Infra Estate Pvt. Ltd. & Ors.*, (2018) SCC OnLine Del 13279,

<sup>6</sup> *Sandeep Soni v. Sanjay Roy*, (2018) SCC OnLine Del 11169

<sup>7</sup> *N.D. Developers Pvt. Ltd. v. Bharathi & Ors.*, (2018) SCC OnLine Kar 2938.

<sup>8</sup> *Gautam Landscapes Pvt. Ltd. v. Shailesh Shah and Ors.*, Arb. Pet. No. 466 of 2017, decided on 4 April, 2019.

- b. Thereafter, the authority shall adjudicate the payment of stamp duty and penalty (if any) expeditiously and preferably within the period of 45 days from the date on which the authority receives the instrument;
- c. Once the stamp duty and penalty (if applicable) is paid on the instrument, any of the parties can bring the instrument to the notice of the high court; and
- d. The high court will then proceed to expeditiously hear and dispose of the application under section 11 of the Act.

The court noted that the above measures will assist in complying with the statutory time limit provided under section 29-A of the Act for making of an arbitral award.

### CONCLUSION AND ANALYSIS

Based on the above findings, the Supreme Court held in favor of the Appellant, and set aside the Order. In view of its judgment, the Court remitted the matter to the Bombay High Court to dispose the same.

It is pertinent to note that the Arbitration and Conciliation (Amendment) Bill, 2018 (**Bill**) proposes to have the courts designate arbitral institutions for appointing arbitrators and proposes the omission of section 11 (6-A) of the Act. If the Bill does come into effect, it is unclear as to the procedure that an appointing authority would follow in case of an arbitration agreement contained in an unstamped contract.

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