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NPAC's Arbitration Review: Supreme Court on the effect of an Arbitration Clause arising out of an unstamped agreement

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Recently, the Supreme Court of India has opined on the validity of an arbitration clause and the arbitral appointment made under such clause contained in an unstamped agreement.

More specifically, in case of *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*, the decision of the Bombay High Court wherein an arbitrator was appointed pursuant to Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**") was assailed before the Supreme Court, and has been set aside and remitted back to the Bombay High Court for a fresh determination.

In an earlier judgment in *SMS Tea Estates v. Chandmari Tea Co. P. Ltd.*, the Supreme Court had held that if an arbitration clause is contained in an unstamped agreement, the Judge would be required to impound the agreement and ensure that stamp duty and penalty (if any) are paid before proceeding with a Section 11 application.

Subsequent to this judgment, in 2015, Section 11(6A) was introduced to the Act, which states that while appointing an arbitrator, courts should confine themselves to the examination of the *existence* of an arbitration agreement. Relying on the introduction of Section 11(6A), it was contended that the judge appointing an arbitrator should not impound the agreement for being insufficiently stamped, rather the arbitrator appointed pursuant to Section 11 may do so.

The Supreme Court held that under the Indian Stamp Act, 1899 ("**Stamp Act**"), an agreement becomes an enforceable in law only when it is duly stamped. It further observed that an arbitration clause cannot be bifurcated entirely from the agreement it is contained in, as the Stamp Act applies to the entire agreement. Consequently, an arbitration clause would not '*exist*' when the underlying agreement is not enforceable under law. Accordingly, the Court held that under Section 11 of the Act. it can impound an agreement if it is not stamped in accordance with the mandatory provisions of the Stamp Act.

It was argued that such a measure was not practically feasible as the Act prescribes strict timelines for the appointment of arbitrator(s). Under Section 11(13) of the Act, an application for appointment of an arbitrator must be disposed of as expeditiously as possible, and in any event within a period of 60 days from the date of service of notice on the other party. The Supreme Court held that Section 11(13) must be harmoniously construed with Sections 33 and 34 of the Maharashtra Stamp Act, 1958 (which provide for impounding of unstamped instruments) and laid down the following mechanism where the underlying agreement is unstamped:

1. The High Court must impound the agreement upon which stamp duty has not been paid;
2. The agreement should be handed over to the relevant authority under the Maharashtra Stamp Act, 1958, who will decide the issues relating to 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 agreement;
3. As soon as stamp duty and penalty (if any) are paid, the parties can bring the instrument to the notice of the High Court which will proceed to expeditiously hear and dispose of the Section 11 application.

Although this judgment of the Supreme Court attempts to ensure that the dual objectives of expeditious disposal of cases and revenue collection are met, it is unclear if such measures are sustainable. Practically, the procedure to impound an agreement and payment of stamp duty can take much longer than 45 days. Prescribing a 45-day timeline is ambitious but nevertheless, it remains to be seen whether the parties are able to meet this timeline.

It is also pertinent to note the decision of the Supreme Court in *State of West Bengal v. Associated Contractor*, wherein it was held that the decision of the Chief Justice or his designate in a Section 11 application, not being the decision of the Supreme Court or the High Court, has no precedential value, being a decision of a judicial authority, which is not a court of record. Thus, it is unclear how courts approached under the other sections of the Act would deal with arbitration clauses contained in unstamped agreements.

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