

GARWARE WALL ROPES LIMITED V. COASTAL MARINE CONSTRUCTIONS AND ENGINEERING LIMITED
(2019) 9 SCC 209

Supreme Court of India; 2-judge bench, **R. F. Nariman** and Vineet Saran JJ; decided on 10 April 2019

Unstamped or insufficiently stamped arbitration agreement
does not exist as a matter of law

(A) PREFACE

Can a court appoint an arbitrator under Section 11 of the ACA if the agreement containing the arbitration clause is not duly stamped?

On 20 July 2011, this question was decided by the Supreme Court in *SMS Teas Estates (P) Ltd v. Chandmari Tea Co (P) Ltd*, (2011) 14 SCC 66. It was held that the provisions of the Indian Stamp Act, 1899 require the court to impound the unstamped agreement and proceed with the appointment of an arbitrator only after the necessary stamp duty is paid.

Later, in 2015, Section 11 (6A) was inserted in the ACA, which states as follows:

The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(B) THE GARWARE CASE

1. The Decision of the Bombay High Court

Dispute arose between Garware Wall Ropes and Coastal Marine Constructions concerning a sub-contract for installation of geotextile pipes. Coastal Marine Constructions filed an application under Section 11 of the ACA seeking appointment of an arbitrator before the Bombay High Court.

Garware Ropes challenged the Section 11 application, among other things, based on the decision in *SMS Tea Estates*. It contended that the sub-contract was unstamped, and by appointing an arbitrator, the court would be acting

in violation of Sections 33 and 34 of the Maharashtra Stamp Act, 1958 (“Maharashtra Stamp Act”).

The Bombay High Court, however, proceeded with the appointment of an arbitrator. It rejected Garware’s challenge for the following reasons:

- (i) *SMS Tea Estates* had lost its efficacy after the 2015 Amendment, which inserted Section 11 (6A) ACA.
- (ii) Section 11 (6A) makes it clear that while appointing an arbitrator, the court must restrict itself to examination of the existence of the agreement.
- (iii) The provisions of the Stamp Act are a fiscal measure intended merely to collect revenue. Non-stamping of the document, if at all, will go, to affect the *validity* of the agreement and not its *existence*.
- (iv) The arbitration agreement is independent of the agreement in which it is contained. So long as it is in writing, and therefore, exists in fact, the court hearing Section 11 application is to appoint an arbitrator.
- (v) Whether the document is properly stamped or not is an issue that can certainly be decided by the arbitrator once the matter is referred to arbitration.
- (vi) Further, Section 11 (13) makes it clear that a Section 11 application must be disposed within 60 days from the date of the notice, and this would not be possible if questions relating to Stamp Act were to be decided at the Section 11 stage.

Garware Ropes appealed.

2. The Question Before the Supreme Court

Whether the introduction of Section 11 (6A) had removed the basis of the judgment in *SMS Tea Estates* so that the stage at which the unstamped instrument was to be impounded was not the court hearing the Section 11 application, but the arbitrator appointed?

3. Supreme Court’s Decision and Reasoning

The court held that the decision in *SMS Tea* would continue to apply even after the 2015 Amendments. Section 11 (6A) of the ACA did not, in any manner, deal with or remove the basis of *SMS Tea*. Its reasons:

- (i) The 246th Law Commission Report shows that Section 11 (6A) was introduced in the ACA because of judgments in *SBP & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618 and *National Insurance Co. Ltd. v. Bophara Polyfab (P) Ltd.*, (2009) 1 SCC 267. These two decisions had opened the door, under Section 11, too wide. Therefore, a large number of preliminary issues that would otherwise be left to be decided by the arbitrator under Section 16, were being decided by the court hearing the Section 11 application.
- (ii) Neither the Statement of Objects and Reasons appended to the 2015 Amendments nor the 246th Law Commission Report mention *SMS Tea Estates*. This is for the “very good reason” that the Supreme Court or the High Court, in examining if an agreement is stamped or not, does not decide any preliminary question that arises between the parties. They only give effect to the provisions of Stamp Law, a mandatory enactment to protect revenue.
- (iii) *SMS Tea Estates* has taken account of mandatory provisions contained in the Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and High Court acting under Section 11. When the Supreme Court or High Court considers an application under Section 11 and come across an arbitration clause in an unstamped document, it is enjoined by the provisions of the Stamp Act to first impound the document and see that stamp duty and penalty is paid before the agreement, as a whole, can be acted upon.
- (iv) The Stamp Act applies to the agreements as a whole. It is not possible to bifurcate the arbitration clause contained in an agreement which must be compulsorily stamped.
- (v) The first part of Section 7(2) ACA provides that the arbitration agreement may be in the form of an arbitration clause in a contract. According to Section 2(h) of the Indian Contract Act, 1872, an agreement becomes a contract only if it is enforceable by law. Under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law unless it is duly stamped. Therefore, a plain reading of these provisions makes it clear that an arbitration clause in an agreement would not *exist* when it is not enforceable by law.

- (vi) The argument that Section 11 (6A) deals with “existence,” as opposed to Section 8, Section 16 and Section 45, which deal with the validity of an arbitration agreement is answered by the court’s understanding of the expression “existence” in *United India Insurance Co. Ltd v. Hyundai Constructions. Ltd.* 2018 (10) SCALE 72. In this judgment, what was specifically under consideration was an arbitration clause that would get activated only if an insurer admits or accepts liability. Since on the facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist” so to speak, in the policy, it did not exist in law, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability.
- (vii) Bombay High Court’s decision in *Gautam Landscapes Pvt. Ltd. v. Shailesh Shah and Ors.*, Arb. Pet. No. 466 of 2017 in so far as it held that, because of Section 11 (6A) courts need not await adjudication by stamp authorities before the appointment of arbitrator, was incorrect.
- (viii) A harmonious construction needs to be given to the provisions of the Maharashtra Stamp Act which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) ACA, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously. A reasonable way of harmonizing the provisions is as follows:
- a. The High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act.
 - b. The stamp authority will then decide on the payment of stamp duty and penalty (if any) as expeditiously as possible and preferably within 45 days from the date on which it receives the instrument.
 - c. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which 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, the arbitrator can then proceed to decide the dispute within the time frame provided by Section 29A ACA.