

## **REQUIREMENT OF STAMPING OF ARBITRATION AGREEMENTS**

The law requires arbitration agreement to be in writing to be enforceable and valid. Section 7 of the Act<sup>1</sup> specifies that the Arbitration Agreement shall be in writing, it can be part of a document signed by the parties or it can be by way of exchange of letters, telex, telegrams or other means of tele communication including communication through electronic means etc., It can also be the part of any contract or deed signed between the parties. But when the said contract contains the arbitration agreement, if the said agreement requires stamping or registration, whether the said arbitration agreement is enforceable through a court of law by filing an application under section 11 of the Act, is the point dealt with in the present article.

When a deed or any other instrument which is compulsorily required to be stamped, is relied upon as contained in arbitration agreement the court should consider the outset whether the document is properly stamped. Because any document or deed or contract that is produced in a court of law, as per section 38 of the Stamp Act, it should be impounded and dealt with in the manner specified in the Stamp Act.

Section 16 of the Act makes it clear that an arbitration agreement has an independent existence of its own and must be applied while deciding an application under section 11 of the Act. The above said section specifically states as follows:

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<sup>1</sup> Arbitration and Conciliation Act, 1996

16 (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Hence, the concept of separability of an arbitration agreement from the main contract is recognized by the Act. Hence, one view was that the stamping issue may make the main contract unenforceable by a court of law but the arbitration agreement would not lose its enforceability.

The first land mark Judgment of Supreme Court of India, answering both the above said points was SMS Tea Estates case<sup>2</sup> in which Hon'ble Justice Mr Raveendran held as follows:

1. With regard to deficiency in stamping in view of the bar in the Stamp Act S.35, the court requires to impound the deficiently stamped document and the issue of appointment of Arbitrator has to be decided after curing of the deficiency in the document as provided in S.38.
2. With regard to the document which is compulsorily registrable but it is not registered, having regard to Section 16(1)(a) of the Act, the court can delink the arbitration agreement from the main document, as an agreement independent of the other terms of the contract, even if the document itself cannot in anyway affect the property or cannot be received as evidence of any transaction affecting such property.

Government of India brought in an Amendment to the Act in the year 2015<sup>3</sup> by which S.11(6A) was brought in to get out of the above said SMS Tea case (supra)

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<sup>2</sup> SMS Tea Extates (P) Limited Vs Chandmari Tea Co (P) Limited (2011)14 SCC 66

<sup>3</sup> Arbitration and Conciliation (Amendment) Act,2015

judgment of the Supreme Court of India, by confining the powers of the Courts under S.11, only to the examination of the existence of an arbitration agreement.

Supreme Court of India while deciding Garware Wall Ropes Limited case<sup>4</sup>, in an appeal against the judgement of the Bombay High Court holding that the court need not look into the issue of stamping while exercising its jurisdiction under section 11 of the Act. But Supreme Court of India while reversing the above said judgement of the high court considered section 11(6)A of the act and held that the court while exercising the jurisdiction under the above said section 11, it has to look into the existence of arbitration agreement as provided in the said Section. After relooking into the said SMS Tea case (Supra) the Supreme Court of India reconfirmed the applicability of the said case holding that S.11(6) does not affect the said judgment in any case. It further held that even S.11(6) requires the Court into the existence of the arbitration agreement and the arbitration agreement which is part of a deficiently stamped document cannot be considered as a valid and enforceable arbitration agreement. But by way of 2019 Amendment Act<sup>5</sup> the said S.11(6A) is also deleted and hence the law also remains as it was at the time of SMS Tea case (Supra).

Hence, the stand-alone arbitration agreements do not require any stamping but if they are part of a document that requires stamping under the applicable law or the Stamp act, appointment of arbitrator cannot be done by a Court of law, till the defect is cured by the parties. Now, powers under S.11 are to be delegated to arbitral Institutions recognized by the High Courts but 11(6B) clarifies that those delegated powers are not judicial powers. Hence, whether arbitral institutions

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<sup>4</sup> Garware Wall Ropes Limited Versus Coastal Marine Constructions and Engineering Limited, (2019) 9 SCC 209

<sup>5</sup> Arbitration and Conciliation (Amendment) Act 2019

have the powers to impound the deficient documents or they can appoint arbitrators even though there is a deficiency in the arbitration agreement, should be interpreted by the Courts in future.

