

Update

03 April 2020, Friday

Party asserting that arbitration agreement is not sufficiently stamped must establish insufficiency (Bombay High Court)

by

Nirman Panchvati Developers Pvt. Ltd. and another v. Wellcity Real Estate Pvt. Ltd. and others

Court: Bombay High Court | **Case Number:** Comm. Arb. Petition 300 of 2019 | **Citation:** 2020 (4) ABR 539 | **Bench:** GS Patel J | **Date:** 02 March 2020

A. Preface

On 10 April 2019, in *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*, (2019) 9 SCC 209 (“*Garware*”), a 2-judge bench of the Supreme Court (R.F. Nariman and Vineet Saran JJ) decided in the specific context of an application under Section 11 of the Arbitration and Conciliation Act, 1996 (“ACA”) (for the appointment of an arbitrator) that an arbitration agreement does not exist as a matter of law unless there is sufficient stamping of the document which contains it.

They held, following *SMS Teas Estates (P) Ltd. v. Chandmari Tea Co (P) Ltd.*, (2011) 14 SCC 66, that the stamp laws require the court to impound the unstamped agreement and appoint an arbitrator only after the payment of necessary stamp duty. The court also suggested, in paragraph 37, a mechanism to harmonise the stamp laws and the speedy-resolution object behind arbitration. Remitting the matter back to the High Court, the court held that the “High Court must impound the instrument which has not borne stamp duty and hand it over to the authority ... 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. 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.”

The finding on existence of an agreement (or not) was crucial for the decision in *Garware* because Section 11(6A) ACA provides that the court dealing with an application for appointment of an arbitrator shall confine to the *existence* of an arbitration agreement.

Garware has been followed in several cases across the country, including the

Bombay High Court, in matters of appointment of an arbitrator. The question of whether *Garware* also applies to an application for an interim measure under Section 9 ACA is pending consideration in the Supreme Court in Special Leave Petition (C) No(s). 10232-10233/2019.^[1] [1] To get a detailed background of the decision in *Garware*, and the matter pending in the Supreme Court on the applicability of *Garware*'s rule in an application under Section 9 ACA, see NFRAL's update on *IREP Credit Capital Pvt. Ltd. v. Tapaswi Mercantile Pvt. Ltd. and another*, 2019 SCC OnLine Bom 5719 ("IREP"), published on 09 January 2020 at <http://www.nfral.in/court-can-grant-relief-under-section-9-of-the-arbitration-and-conciliation-act-1996-aca-if-the-document-is-insufficiently-stamped-bombay-high-court-note-the-issue-is-pending-in/>. Also, see Chapter II of the digital version of the NFRAL Yearbook 2019 at <http://www.nfral.in/wp-content/uploads/2020/03/NFRAL-Yearbook-2019.pdf>, in particular the Introduction of that chapter and the description of *Garware* and IREP cases. Show More

B. Nirman Panchvati

A Section 11 application was before GS Patel J in the High Court of Bombay for the appointment of an arbitrator. The respondent objected to the application on the ground, based on *Garware*, that the agreement which contained the arbitration clause was insufficiently stamped.

Patel J said that he would examine if the objection as to insufficient stamping was valid. He first said that "little is achieved by directing this to be sent to the adjudicatory authority". That will considerably delay matters. If absolutely necessary, that can and should be done". He then observed that "neither the law nor the decision ... in *Garware* ... mean that a Court to which a Section 11 Application is presented cannot look into the agreement itself to see what it is that the agreement intends."

Then examining the issue, Patel J concluded that the provision cited did not apply. A different provision applied under which the stamp was sufficient, nay, over stamped. [2] [2] The respondents had argued that the instrument, a memorandum of understanding, was chargeable under Article 5(h)(a)(iv) & (b) of (presumably) the Maharashtra Stamp Act. Patel J found that the requirements of this provision, firstly, creation of 'obligation, right or interest' and, secondly, such obligation, right or interest 'having some monetary value' were not fulfilled. He concluded that the residuary provision Article 5(h)(B) applied, under which the stamp duty was INR 100, whereas the document already had a stamping of INR 500. Show More

He held, "as I have said previously, even following *Garware* ..., it is not enough for a Respondent merely to raise this argument in every single case, thus delaying the arbitration. Speed of arbitral decision making is equally critical. When an objection is raised like this, the objecting party must be able to sustain the objection by pointing clearly to the Article in question and also how the ingredients of that Article are in fact satisfied on a fair reading of the contract in question."

An arbitrator was appointed.

C. Comments

The agreement in the case was stamped. The question was, was it sufficient? GS Patel J decided a self-evident proposition. One who says the arbitration agreement is not sufficiently stamped must establish, with reference to the rule, the basis of the insufficiency. It is not clear if an examination of the issue was invited by the party arguing that the court cannot 'look' at the agreement at all for any purpose since, under the *Garware* rule, that putative agreement does not exist unless sufficiently stamped. The question of whether the argument of insufficiency of the stamp is valid or not is a primordial question which the court has to look into necessarily to test the argument.

Categories: Appointment of Arbitrators | Arbitration Agreement | Garware | Global Mercantile | Section 11 ACA | Stamp Duty | Stamping of Arbitration Agreement | Stamping of Main Agreement