



WWW.LIVELAW.IN

Arun

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JUDGMENT
ARBITRATION APPLICATION NO. 261 OF 2018**

S SATYANARAYANA & CO,

A partnership firm registered under the
Indian Partnership Act, 1932 having its
principal place of business at D No. 11-8-
25/1, Plot No. 21, Madhya Nilayam,
Daspalla Hills,
Vishakhapatnam – 530 003.

... APPLICANT

~ VERSUS ~

**WEST QUAY MULTIPOINT PRIVATE
LIMITED,**

3C, 2nd floor, Amarchand Mansion,
16 Madame Cama Road,
Colaba, Mumbai – 400 039.

... RESPONDENT

APPEARANCES

FOR THE APPLICANT

**Mr Ketan Chotani, *i/b* Pinky
Bhansali.**

FOR RESPONDENT

**Ankita Singhania, *with* Ranjit Shetty,
Jonathan Jose and Avina
Karnad, *i/b* Argus Partners.**

CORAM : G.S. PATEL, J.

ORAL JUDGMENT : 22nd November 2019

1. A contract is executed outside this State. It pertains to work to be done outside the State. It contains an arbitration clause. That clause, and the jurisdiction clause, reference Mumbai. The arbitration is to be in Mumbai. Nothing else is to be done in Mumbai or Maharashtra. Disputes arise. Arbitration is invoked. The agreement is 'brought into' this State — on the agreement, an application under Section 11 of the Arbitration Act is filed. Is the agreement liable to stamp in this state, where the only thing to be done is arbitration? Is arbitration a 'thing done or to be done' in this state? That is the short, yet interesting, question of interpretation of one portion of Section 3 of the Maharashtra Stamp Act 1958 that arises in this application.

2. The applicant, S Satyanarayana & Co, is a partnership firm based in Vishakhapatnam. The respondent, West Quay Multiport Private Limited ("West Quay") is based in Mumbai. West Quay develops berths at various ports in India. The Vishakhapatnam Port Trust, constituted under the Major Port Trust Act, awarded the respondent a works contract for the development of a berth at their WQ-6 Jetty at Vishakhapatnam. The respondent appointed the applicant as a subcontractor under two agreements/work orders both dated 5th December 2012. These were for material supply and labour for construction of a compound wall for a stack yard at this WQ-6 Jetty berth at the West of Essar Pallet Plant in Vishakhapatnam port.



3. The two work orders are themselves not in dispute. The first of these is at Exhibit “A1” from page 20. The total consideration is Rs. 1.85 crores. There are contractual provisions and the relevant clause for our purposes is 55.2 at page 79 which read thus:

“55.2 All disputes of differences of any kind whatsoever which shall any time arise between the parties hereto touching or concerning the works or the execution of this Contract or effect thereof or to the rights of liabilities of the parties or arising out of or in relation thereto whether during or after termination forced closure or breach of the Contract (other than those in respect of which the decision of any person is expressed to be final and binding by the Contract) shall, after written notice by either of the Parties to the Contract to the other Party, be referred to arbitration as per the provision of the Arbitration and Conciliation Act 1996. The Arbitral Tribunal shall comprise of 3 (three) Arbitrators. The Award of the Arbitral Tribunal shall be final and binding upon the Parties hereto. The Arbitral Tribunal shall have summary powers and shall be entitled to give interim directions and awards from time to time. The Arbitration shall be held in Mumbai. The language of the Arbitration shall be English.”

4. The second contract at Exhibit “A2” from page 115 was for a contract value of Rs. 3.4 crores. It has an identical arbitration clause 55.2 at page 175.

5. There is no dispute that the contract were signed by the applicant in Vishakhapatnam and by the respondent in Mumbai.



The later signature was that of the applicant. There is also no dispute that all the contract works were to be done in Vishakhapatnam outside Maharashtra. The only thing contemplated within Maharashtra was arbitration under the clause 55.2 of each agreement, reproduced above. There is also no dispute about whether or not the documents was stamped in accordance with the local statute in Vishakhapatnam.

6. The petition recites that disputes and differences having arisen, the applicant invoked arbitration by its letters dated 2nd and 3rd November 2015 (Exhibit “C1” and “C2”) and made a nomination. The respondent opposed this saying *inter alia* in its letter of 24th November 2015 that the applicants had not clarified which agreement they were raising disputes under. There was some controversy about the nomination and acceptance of arbitration by a former retired Judge of the High Court, but I need not dwell on that as nothing turns on it. The applicant called upon the respondent to nominate its own arbitrator and since the respondent failed to do so, the petitioner filed this petition under Section 11.

7. Ms Singhania for the respondent does not for a minute dispute the existence of the arbitration clause. She however maintains that his agreement is liable to be subjected to an assessment as to stamp under the Maharashtra Stamp Act 1958. Even if the works under the contract were to be done outside Maharashtra, if the agreement is brought into Maharashtra for any purpose at all, it would be liable to stamp.



8. The construct of her argument is in two parts. First, and as a starting point, she submits that the question of whether an arbitration agreement can be acted upon for the purposes of Section 11 without stamp where an agreement requires stamp is no longer *res integra* in view of the decision of the Supreme Court in *Garware Wall Ropes Limited vs Coastal Marine Constructions & Engineering Ltd.*¹ This submission is entirely correct and I do not think that a more detailed examination of that judgment is necessary. It is sufficient to note that RF Nariman J while discussing various facets returned two findings that are of immediate relevance to us today. The first is that unless there is stamp paid on a document that is liable to stamp, that document cannot be acted upon for any purpose. For the purposes of a Section 11 application, such an unstamped document (being one that needs stamping but on which no stamp duty is paid) is simply not in existence or, might as well not be in existence. It can (and must) be acted upon only once it has been adjudicated as to stamp, and that stamp has been paid with all penalty etc.

9. The other observation that is again immediately material is that the arbitration clause found in such a document cannot be severed or segregated so as to allow a Section 11 order to be made on an unstamped document that is indeed liable to stamp duty.

1 (2019) 9 SCC 209.



10. Ms Singhanian also cited the earlier decision of the Supreme Court in *Black Pearl Hotels Private Limited vs Planet M Retail Limited*² but for the limited purpose of saying that the words 'duly stamped' must mean stamped in accordance with law. Unless full and proper stamp duty is paid, it might as well be a document on which no stamp is paid. The second purpose for relying on *Black Pearl Hotels* is that it reaffirms, as does *Garware Wall Ropes*, the decision of Supreme Court in *SMS Tea Estates Private Limited v Chandmari Tea Company Private Limited (P)*.³ In that decision three questions were framed for determination in paragraph 9. The second of these was whether an arbitration agreement in an unregistered instrument *which is not duly stamped is valid and enforceable*. The *SMS Tea Estate* Court dealt with this question in paragraph 17 in the context of the Indian Stamp Act, the provisions of which are in pari materia with the Maharashtra Stamp Act. It said in paragraph 19 that unless stamp duty and the penalty dues in respect of the instrument is paid the Court cannot act upon on that instrument, which means that it cannot act upon the arbitration agreement which is part of the instrument either. This again is an observation or a finding that speaks directly to severability, or, more accurately non-severability. Finally, it is important to note that one recent authority that addressed the question of severability namely the Full Bench decision of this Court in *Gautam Landscapes v Shailesh S Shah*⁴ was specifically held by the Supreme Court in *Garware Wall Ropes* not to be good law at least on the question of

2 (2017) 4 SCC 498.

3 (2011) 14 SCC 66.

4 (2019) 3 Mah LJ 231 (FB).



the pre-requisite of stamp duty being paid for a Section 11 application. The result of this discussion is that the payment of full duty and penalty on an instrument properly chargeable to stamp is essential and is a precondition or prerequisite to any order being made under Section 11.

11. Both sides accept this. They also accept that an arbitration clause cannot be plucked out of the agreement in which it is embodied or embedded and treated as a stand-alone agreement immune to or exempt from stamp duty.

12. But Mr Chotani for the applicant places his case somewhat differently. His case is that the agreement is not chargeable to stamp duty in Maharashtra at all under the Maharashtra Stamp Act. The reason, he says, is to be found in Section 3 of the Maharashtra Stamp Act and particularly Section 3(b). That Section in its entirety read thus:

“3. Instrument chargeable with duty

Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in Schedule I as the proper duty therefor respectively, that is to say—

(a) every instrument mentioned in Schedule I, which not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act;

(b) every instrument mentioned in Schedule I, which not having been previously executed by any



person, **is executed out of the State** on or after the said date, relates to any property situate, **or to any matter of thing done or to be done in this State and is received in this State:**

Provided that a copy or extract, whether certified to be a true copy or not and whether a facsimile image or otherwise of the original instrument on which stamp duty is chargeable under the provisions of this section, shall be chargeable with full stamp duty indicated in the Schedule I if the proper duty payable on such original instrument is not paid.

Provided further that no duty shall be chargeable in respect of —

- (1) any instrument executed by or on behalf of, or in favour of, the Government in cases, where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument or where the Government has undertaken to bear the expenses towards the payment of the duty;
- (2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Bombay Coasting Vessels Act, 1838, or Merchant Shipping Act, 1958.”

(Emphasis added)



13. Now this Section is in Chapter II under the caption ‘Stamp Duties’ and in the subsidiary caption or part ‘(A) *Of the liability of instruments to duty*’.

14. Section 3 has to be analysed in the following manner. The Stamp Act has a Schedule. It lists instruments of various descriptions and various types and provides for the different stamp duty that is payable on each. Section 3 tells us that subject to the provisions of the Act and any exemptions in Schedule I, it is the instruments mentioned in Section 3 that are chargeable in accordance with the schedule of duties set out in Schedule I. It then deals with two broad classes of instruments. The first in sub-clause (a) is every instrument being of one of the kind mentioned in Schedule I but which is executed in the State on or after the date of commencement of the Maharashtra Stamp Act. We are not concerned with this. Sub-clause (b) then speaks of every instrument executed outside Maharashtra after the date on which the Act came into force. But it relates to any property situate (again we are not concerned with this) “*or to any matter or thing done or to be done in this State*” and is received in the State. That the two agreements received in the State is not disputed. But do they relate to “*or to any matter or thing done or to be done in this State in this State*”? Ms Singhania contends that given the state of the law and the fact that an arbitration agreement, at least for the purposes of Stamp Act — and we are now only concerned with the Stamp Act — is clearly non-severable, there is no reason to hold, whether as a matter of law, language or logic that arbitration is *not* a matter or thing done or



to be done in the State. It very clearly is. Otherwise no petition was at all required here.

15. Mr Chotani's argument on the other hand is that, correctly read, sub-clause (b) must be restricted or read down to mean only those *contract* works that were required to be done by the contractor. Arbitration, he submits, is a dispute redressal mechanism, not a thing "*done or to be done*" under the agreement. It is only when there is a dispute *about* a thing "*done or to be done*" under the agreement that the arbitration clause begins to operate and therefore arbitration per se is not under the contract. Therefore it necessarily follows that if an arbitration contract provides for a seat or venue to be in Mumbai, then that arbitration is not a thing done or to be done under the contract to bring it within the meaning of Section 3(b) to make the instrument chargeable under the Maharashtra Stamp Act.

16. Before I go further. I must note that the controversy though interesting is about a relatively minor amount of Rs.40,000/- to 50,000/-. However Mr Chotani has no instructions to make a statement one way or the other and his only instructions are to press the point that the instrument is not chargeable to any stamp duty in Maharashtra at all because nothing has to be done in Maharashtra.

17. To complete this discussion one must look at Section 19 of the Maharashtra Stamp Act also. This how it reads:



19. Payment of duty on certain instruments or copies thereof liable to increased duty in Maharashtra State

Where any instrument of the nature described in any article in Schedule I and relating to any property situate or to any matter or thing done or to be done in this State is executed out of the State and subsequently such instrument or a copy of the instrument is received in the State,—

(a) the amount of duty chargeable on such instrument or a copy of the instrument shall be the amount of duty chargeable under Schedule I on a document of the like description executed in this State less the amount of duty, if any, already paid under any law in force in India excluding the State of Jammu and Kashmir on such instrument when it was executed;

(b) and in addition to the stamps, if any, already affixed thereto such instrument or a copy of the instrument shall be stamped with the stamps necessary for the payment of the duty chargeable on it under clause (a) of this section, in the same manner and at the same time and by the same persons as though such instrument or a copy of the instrument were an instrument received in this State for the first time at the time when it became chargeable with the higher duty; and

(c) the provisions contained in clause (b) of the proviso to sub-section (3) of section 32 shall apply to such instrument or a copy of such instrument as if such were an instrument executed or first executed out of this State and first received in this State when it became chargeable to the higher duty aforesaid, but the



provisions contained in clause (a) of the said proviso shall not apply thereto.

(Emphasis added)

18. Now this tells us to what Section 19 applies. Section 19 is included in part (C) which relates to the time of stamping instruments. Section 17 deals with instruments executed in the State. Section 18 deals with instruments chargeable with duty executed entirely out of the State. They are to be stamped within three months after they are first received in the State. Section 19 however echoes the words of Section 3(b) and speaks of an instrument which relates to property situate or to any matter or thing to be done in this State but which is executed outside the State and subsequently such instrument is received within the State. Sub-clause (a) provides effectively for a rebate from Maharashtra Stamp Duty of any stamp duty paid in the originating State. Sub-clause (b) provides for additional stamp duty and then sub-clause (c) makes a reference to Section 32 obviously for the purposes of adjudication, penalty and the like.

19. We are not concerned with the operational parts of sub-clauses (a), (b) and (c) but it is clear that Section 19 must be read with Section 3. It is not an exception to Section 3. Both relate to the same subject matter, i.e. an agreement executed outside the State but which is said to relate to any matter or thing to be done in the State. Both raise the same question, whether arbitration, and only arbitration, can be said to be a thing done or to be done in the State.



20. I believe I should have the greatest difficulty in accepting Mr Chotani's argument without running seriously afoul of the Supreme Court decisions in *Garware Wall Ropes and SMS Tea Estates Private Limited*. To accept that argument would necessarily involved a severance of the arbitration clause from the rest of the contract. That in turn would require me to return a finding that while the rest of the contract may be required to be stamped, since that portion of the agreement is not being 'brought into the State' and nothing is being done under the remaining portion, and further since arbitration agreements are themselves not assessable to stamp, therefore no stamp is payable. Of necessity, this would involve segregating or severing the arbitration clause from the rest of the agreement. That I think is now clearly impermissible and cannot be done. If the applicant has paid stamp duty in the local State and of course there will be an adjustment and credit given for the amount already paid, that will however not exempt the document from payment to stamp duty under the Maharashtra Stamp Act.

21. The other reason that militates against an acceptance of Mr Chotani's submission is purely linguistic. To hold in his favour, I should necessarily have to conclude that an arbitration is not a thing done or to be done at all. It is difficult, without doing some very serious violence to the language, to arrive at any such conclusion.

22. Finally I believe the applicant's argument overlooks a cardinal principle of arbitration and arbitration law. Arbitration is founded in contract and *Garware Wall Ropes* now tells us that



such a contract is one and indivisible at least to the extent of its arbitration agreement. There is party autonomy in what they may decide between themselves and this must be respected by the Court. The arbitrator himself is a creature of contract. Arbitration is impossible without agreement.

23. In my view therefore it is not possible to accept the submission by the applicant that this document, only because the in-State part of it is limited to arbitration, falls outside the purview of the Maharashtra Stamp Act.

24. What stamp is payable is clearly a matter for the Collector of Stamps to adjudicate. However following the decision in *Garware Wall Ropes*, I would ordinarily have had to impound the document and send it to the Collector of Stamps for adjudication. Mr Chotani has instructions to say that subject to his taking this decision higher in appeal his client will submit the document, or a copy of it, for adjudication and proceed further accordingly. That statement is accepted. I note that the original of the agreement is with the respondent. Ms Singhania on instructions makes a statement that they have no objection to the applicant proceeding for adjudication on the basis of certified or authenticated copy.

25. The petition is kept pending in view of the adjudication. List on 4th February 2020. Liberty to apply.

(G.S. PATEL, J.)