

Arbitration clause of an unregistered document

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There have been divergent views in legal circles in India as to the legal position with respect to the enforceability of an arbitration clause in a document which requires compulsory registration but is not registered. This issue, which has been a matter of debate for sometime, has now been laid to rest by the recent orders of the Hon'ble Supreme Court of India in the matters between *Naina Thakkar Vs. M/s Annapurna Builders and SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited*.

Before proceeding with a discussion on the subject, a few provisions of the Indian Registration Act, 1908 (Registration Act), the Indian Stamp Act, 1899 (Stamp Act) and the Indian Arbitration and Conciliation Act, 1996 (Arbitration Act) need to be looked at. In terms of the Registration Act, if a document which requires compulsory registration is not registered, the same cannot, *inter-alia*, be received in evidence before any judicial authority (i.e., such document cannot be acted upon in any legal proceeding) unless the same is in a suit for specific performance or it is to be taken as an evidence for a collateral transaction. In terms of the Stamp Act, any document which is not adequately stamped, the same cannot, *inter-alia*, be admitted in evidence by any person having by law or by consent of parties to receive such evidence and such document is liable to be impounded by such authority, unless the deficient stamp duty is paid along with the statutory penalty. Further, in terms of the Arbitration Act, *inter-alia*, an arbitration clause in a document may also be construed as a separate arbitration agreement.

The Apex Court in the aforesaid judgments held that if a compulsorily registrable document is not registered but is adequately stamped, the court may, after considering all other factors/objections, de-link the arbitration clause from the main document and enforce it as a separate and independent arbitra-

tion agreement unless the document itself is voidable under the Indian Contract Act, 1872, e.g., if it is made under undue influence or coercion. However, at the same time, the Apex Court has held that if such arbitration proceedings are commenced pursuant to the aforesaid arbitration clause, the arbitrator shall have no authority to adjudicate on matters forming the subject matter of the main document since it is unregistered. It can only admit the unregistered document in evidence of a contract in a claim for specific performance or as evidence of any collateral transaction which does not require registration, as stated in the Registration Act.

The Apex Court also concluded that if a certain document is not adequately stamped and if an arbitration clause therein is to be enforced, the same cannot be enforced and the document cannot be taken in evidence, unless the deficient stamp duty and the statutory penalty thereon are duly paid in terms of the Stamp Act. Further, it is interesting to note that if a document containing an arbitration clause is inadequately stamped, it cannot be received in evidence and the arbitration clause cannot be enforced, even for the purposes of specific performance or for a collateral transaction, unlike in case of unregistered but adequately stamped document. The Stamp Act does not carve out exceptions to unenforceability and inadmissibility of documents, unlike the Registration Act where specific performance and collateral transactions are excepted.

Therefore, in light of the aforesaid exceptions mentioned in the Registration Act, it is also interesting to consider as to how fruitful would the enforceability of the arbitration clause be since, even if the arbitration proceedings are commenced, the main document itself cannot be acted upon during the arbitration proceedings. Even in the words of the Apex Court, it is observed that in such a case, "arbitration will virtually be a non-starter".

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