

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.24 OF 2017

Coastal Marine Construction and
Engineering Limited

..Petitioner

Vs.

Garware-Wall Ropes Limited

..Respondent

Ms. Ridhi Nyati I/b Ashwin Shanker, for the Petitioner.

Mr.Ashish Kamat a/w Mr. Kunal Mehta, Ms Yasmin Godrej and
Ms. Priyanka Deshmukh I/b Crawford Bayley and Co, for the
Respondent.

CORAM :- B.P.COLABAWALLA, J.

RESERVED ON : FEBRUARY 5, 2018.

PRONOUNCED ON : MARCH 9, 2018.

JUDGMENT :- [Per B. P. COLABAWALLA J]

1. This Arbitration Petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking the appointment of a sole Arbitrator to adjudicate upon the disputes which have been arisen between the Petitioner and the

Respondent under the sub-contract dated 14th June, 2013. There is no dispute that this sub-contract contains an arbitration clause which *inter alia* states that any and all claims, disputes, questions or controversies involving the parties and arising in connection with this Agreement or execution, interpretation, validity, performance, termination and which cannot be finally resolved by such parties through negotiations, shall be resolved by a final and binding arbitration to be held in Pune. The Arbitration Clause further provides that the disputes shall be referred to a Sole Arbitrator to be appointed by the Petitioner and the Respondent jointly. This matter was argued before me on 5th February, 2018 and the parties asked for time till 20th February, 2018 to file written submissions. Accordingly, both parties have also filed written submissions before me. Before I deal with the rival contentions it would be appropriate to refer to a few facts, which are really undisputed. They are as follows:-

- (a) The Petitioner is a company registered under the provisions of the Companies Act, 1956 and is *inter alia* engaged in the business of marine engineering, geophysical and geotechnical survey etc. The

Respondent is also a company registered under the provisions of Companies Act, 1956.

- (b) The Executive Engineer, Aul Embankment Division, Aul, District-Kendrapara floated a tender inviting bids inter alia for the "installation of geo-textile tubes embankment with toe mound' at village Pentha in Odisha for protection against coastal erosion. The said tender was awarded to the Respondent, who in turn, further sub-contracted the work to the Petitioner pursuant to an Agreement dated 14th June, 2013 (Exhibit-A to the Application). As per the terms of the said sub-contract, the Petitioner procured two bank guarantees in favour of the Respondent, both in the sum of Rs.1,18,37,281/- each. The first guarantee was a performance bank guarantee and second one was an advance payment bank guarantee.

- (c) It is the case of the Petitioner that vide their letter dated 2nd January, 2015, the Respondent wrongly terminated the sub-contract and proceeded to encash

the aforementioned bank guarantees. In response thereto, the Petitioner by their letter dated 8th January, 2015 objected to the wrongful termination and encashment and instead considered the said act by the Respondent as a repudiatory breach. Thereafter, by their letter dated 7th October, 2015, the Petitioner called upon the Respondent to make good the losses suffered by the Petitioner on account of the wrongful termination of the sub-contract as well as the wrongful encashment of the bank guarantees.

- (d) As mentioned earlier, Annexure-III of the sub-contract dated 14th June, 2013 (“Commercial Terms and Conditions”) inter alia stipulated for all disputes would be settled by arbitration. The said clauses reads as under:-

“Jurisdiction:-

Each Party irrevocably submits to the non exclusive Jurisdiction of the Court at Pune, Maharashtra State, India.

Arbitration

Any and all claims, disputes, questions or controversies involving the parties and arising in connection with this Agreement or execution, interpretation, validity, performance, termination hereof which cannot be finally resolved by such parties negotiation shall be resolved by final and binding arbitration held

in Pune. The disputes shall be referred to a sole arbitrator to be appointed by GWRL and COMACOE Jointly in agreement”.

- (e) It is the case of the Petitioner that since negotiations failed the Petitioner addressed a letter dated 11th July, 2016 to the Respondent and expressed their desire to proceed to commence arbitration. Thereafter, vide their letter dated 20th July, 2016, the Petitioner inter alia proposed the name of one Mr. Mihir Naniwadekar (Advocate) as the Sole Arbitrator.

- (f) The Respondent vide its letter dated 17th August, 2016 objected to the invocation of the arbitration and the appointment of said Mr. Naniwadekar as the Sole Arbitrator. It is in these circumstances that the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 have been invoked for appointment of a Sole Arbitrator to decide the disputes and differences that have arisen between the Petitioner and the Respondent under the sub-contract dated 14th June, 2013 and which admittedly contains an arbitration clause. It is also not in dispute before

me that the arbitration clause has been invoked by the Petitioner. Since the Respondent has failed to agree to a Sole Arbitrator as suggested by the Petitioner, and neither has the Respondent proposed the name of any other arbitrator, the present Petition has been filed.

2. In this factual backdrop, Ms. Nyati, the learned counsel appearing on behalf of the Petitioner, submitted that there was no reason why this Court ought not to appoint an arbitrator as contemplated under Section 11 of the Arbitration and Conciliation Act, 1996. She submitted that in the facts of the present case, admittedly there was an arbitration clause that was contained in the sub-contract dated 14th June, 2013. Pursuant to this clause, the Petitioner had invoked arbitration and had called upon the Respondent to agree to the appointment of the Sole Arbitrator as suggested by the Petitioner. As the Respondent had failed to do so, the present application was filed. She therefore submitted that there was no impediment on this Court in invoking the provisions of Section 11 and referring the disputes and differences arising out of the sub-contract dated 14th June, 2013 to a Sole Arbitrator as contemplated under the contract.

3. On the other hand, Mr. Kamat, the learned counsel appearing on behalf of the Respondent, submitted that in the facts of the present case, the relief of appointing the Arbitrator cannot be granted on two grounds. They are:-

- (i) the contract is undisputedly unstamped and by appointing an Arbitrator, this Court would be acting upon an unstamped document which would be in violation of the provisions of Sections 33 and 34 of the Maharashtra Stamp Act, 1958. He submitted that it is common ground that the present contract is a 'works contract' as defined by Article 63 of the Maharashtra Stamp Act, 1958 and as per Section 30 (f) (a) thereof, the obligation to pay stamp duty on works contract is on the person who has received the contract, namely the Petitioner in the present case; and
- (ii) the invocation of arbitration in the present case is premature as the Petitioner has not followed the mandatory pre-arbitral agreed procedure prescribed by the arbitration agreement.

4. On the first issue (of stamping), Mr. Kamat submitted that though an arbitration agreement, in law, is a separate contract and is independent from the underlying contract, the same required stamping before the parties could be referred to

arbitration. In support of this proposition, Mr. Kamat relied upon following decisions:-

- (i) SMS Tea Estates Pvt Ltd v/s Chandmari Tea Company Pvt Ltd reported in (2011) 14 SCC. 66.**
- (ii) Chenbasapa and Another v/s Lakshman Ramchandra reported in 18 Bom LR 370.**
- (iii) Yasodammal and Another v/s Janaki Ammal reported in 1967 (81) LW 2 (Madras High Court)**
- (iv) Sohan Lal Nihal Chand v Raghu Nath Singh and Others reported in AIR 1934 Lahor 606.**
- (v) Maung Po Chein v/s CRVVV Chettyar Firm reported in AIR 1935 Rangoon 282.**
- (vi) Deepak Corporation, Bombay v/s Puspha Prahlad Nanderjog reported in (1995) 1 Mh.L.J. 489.**
- (vii) Lakdawala Developers Pvt Ltd v/s Badal Mittal and Others; Appeal (L) No.272 of 2013 in Arbitration Petition No.221 of 2013 decided on 25th June, 2013.**

5. As far as the second issue is concerned, namely that the arbitration was premature and therefore the pre-arbitral procedure of amicably settling the matter was not resorted to, Mr. Kamat relied upon the decision of the Supreme Court in the case of **Iron and Steel Co Ltd v/s Tiwari Road Lines reported in (2007) 5 SCC 703.**

6. In rejoinder, Ms. Nyati, the learned counsel for the Petitioner, submitted that the reliance placed by the Respondent on the aforesaid decisions and more particularly in the case of ***SMS Tea Estates Pvt Ltd (supra)***, was wholly misplaced. Ms. Nyati was at pains to point that after all these decisions were passed, the Arbitration and Conciliation Act, 1996 has been amended and Section 11(6-A) has been inserted which categorically contemplates that this Court, whilst appointing an arbitrator, must confine itself to the examination of the existence of an arbitration agreement. In the facts of the present case, she submitted that the Respondent had not denied the existence of the arbitration agreement and even assuming for the sake of argument that the document required stamping, the same did not affect the existence of the arbitration agreement or even the agreement as a whole. She was at pains to point out that this Court must not go into the issue of enforceability or validity of the agreement after the amendment to Section 11 in 2015. She submitted that the Legislature has consciously restricted judicial intervention under Section 11 in the clearest words possible to only the examination of the existence of the arbitration agreement

and nothing more. She submitted that no case was made out to expand the scope of judicial intervention under Section 11 (6-A) to include the issue of validity, enforceability etc. According to Ms. Nyati, this was further emphasized by virtue of Section 11 (13) which was inserted again by the 2015 amendment. In this regard, she also placed reliance on the report of the Law Commission of India (Report No. 246) which was for the amendment to the Arbitration and Conciliation Act, 1996. She laid great stress on paragraphs 28 to 33 of this report which deals with the Scope and Nature of Pre-Arbitral Judicial Intervention to point out all that the Court has to look at is whether there exists an arbitration agreement between the parties and nothing more or nothing less. All other issues are to be left to be decided by the arbitrator, once appointed under Section 11. She therefore submitted that the reliance placed by Mr. Kamat on the judgment of the Supreme Court in the case of ***SMS Tea Estates Pvt Ltd (supra)***, was wholly misplaced.

7. Without prejudice to the aforesaid argument, Ms. Niyati submitted that in the facts of the present case the clause titled as “*Royalties, Licenses, Mining Permits and other statutory*

requirements etc” clearly envisages that it was the Respondent who had to pay all the necessary levies / fees / taxes / duties / royalties and hence the Respondent could not defeat the arbitration agreement by taking a dishonest defence that the document was insufficiently stamped, when the liability to pay the stamp duty, if any, was clearly on the Respondent.

8. As far as invocation of the arbitration being premature is concerned, Ms. Nyati submitted that the facts of the present case would clearly establish that there was no scope for any amicable settlement. According to her, both parties had taken a rigid stand by making allegations and counter allegations as well as raising counter claims against each other. This, according to Ms. Nyati, was clear from a bare perusal of the letters dated 7th October, 2015 (Exhibit-D) and 24th October, 2015 (Exhibit-E) to the application. Over and above this, she submitted that notwithstanding the above, after the dispute had arisen and the contract was terminated, Mr. Vivek Bansal (the Petitioner's Group CEO) addressed numerous requests between 24th March, 2015 to 11th May, 2015 to Mr. Tiru Kulkarni, (Respondent's Vice President) to schedule a meeting for negotiation. Despite this, there was no response forthcoming. In these circumstances, Ms.

Nyati submitted that in any event the said requests are in sufficient compliance with the Arbitration Clause and therefore it was incorrect to contend that invocation of the arbitration was premature. In support of this submission, Ms. Nyati relied upon a decision of the Supreme Court in the case of **Visa International Limited v/s Continental Resources (USA) Ltd. reported in AIR 2009 SC 1366.**

9. I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the present matter. I shall first deal with the argument of the Respondent that the invocation of the arbitration was premature. In this regard, I find considerable force in the argument canvassed by Ms. Nyati. The Arbitration Clause which has been invoked in the facts of the present case (and which has been reproduced above) states that any and all claims, disputes etc which cannot be finally resolved by such parties through negotiation, shall be resolved by a final and binding arbitration to be held in Pune. In the affidavit in rejoinder filed on behalf of the Petitioner, in paragraph 4, it is categorically denied that the Petitioner never initiated any settlement, negotiation and/or resolution process. It has been further stated that the Petitioner acting through Mr.

Vivek Bansal, the Group-CEO, addressed numerous requests to Mr. Tiru Kulkarni, Vice President of the Respondent to schedule a meeting for negotiation. Despite these requests, the Respondent was not forthcoming. To substantiate this contention, the Petitioner has annexed at Exhibit A to the said affidavit, text messages exchanged between the Petitioner and the Respondent between 24th March, 2015 to 11th May, 2015. These messages were sent on Whatsapp. On going through Exhibit-A and which has not been denied by the Respondent, I find that the Petitioner had made several requests for a meeting to resolve the matter without any success. This being the case, I do not find any substance in the argument on behalf of the Respondent that since there was no negotiation between the parties before invoking the arbitration, the same was premature. From these text messages (sent on Whatsapp), it is quite clear that on several occasions, a request was made for a meeting to which there was no positive response. This being the case, I find that the Petitioner was fully justified in invoking the arbitration clause as contained in Annexure-III to the sub-contract dated 14th June, 2013 (the commercial terms and conditions).

10. Having said this, I shall now turn my attention to the

main issue, namely whether I can refer the parties to arbitration on the basis of what the Respondent alleges is an unstamped document. Section 11 of the Arbitration and Conciliation Act, 1996 deals with appointment of arbitrators. The entire procedure has been laid down under the said section as to how the arbitrator / arbitrators are to be appointed by the Court when the parties fail to agree on the appointment of the arbitrator / arbitrators. What is really relevant for my purpose are the amendments that are carried out to Section 11 by Act 3 of 2016 w.r.e.f. 23rd October, 2015 (amendment of 2015). By virtue of the amendment of 2015, sub-section 6-A was inserted in Section 11 which reads thus:-

“(6-A) 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.”

11. What can be seen from a plain reading of this sub-section is that 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) of Section 11 shall, notwithstanding any judgment, decree or order of any Court,

confine itself to the examination of the existence of an arbitration agreement. The purpose for bringing this provision into force can be seen from the 246th Report of the Commission on **‘Amendment to the Arbitration and Conciliation Act, 1996’**. Paragraphs 28 to 33 deal with ‘scope and nature of pre-arbitral judicial intervention.’ After referring to certain decisions of the Supreme Court and more particularly under Section 11 of the Act, the Commission in paragraph 33 has stated thus:-

“33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court / Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration,

or refusal to appoint an arbitrator.”

(emphasis supplied)

12. What can be seen from this paragraph is that the scope of judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. The only reason why I refer to paragraph 33 is to ascertain the intention of the Legislature for the purposes of inserting sub-section 6-A to Section 11 of the Arbitration and Conciliation Act, 1996. Another important and telling factor can also be found in the Statement of Objects and Reasons. This clearly states that India has been ranked at 178 out of 189 nations in the world in contract enforcement. It is therefore high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered, and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity. It is in these circumstances that clause 6 of the Amendment Bill states that sub-section 6-A is inserted to provide that the Supreme Court or the High Court, while considering the application under sub-sections 4 to 6, shall confine

itself to the examination of the existence of the arbitration agreement. When one looks at the intention of the Legislature for bringing about this amendment, I find considerable force in the argument of Ms Nyati that what has to be looked into is only about the existence of the arbitration agreement and nothing more or nothing less.

13. In the facts of the present case, and as rightly submitted by Ms. Nyati, the existence of the arbitration agreement is not disputed. Even assuming for the sake of argument that the document is insufficiently stamped, that would not by itself affect the existence of the arbitration agreement that was contained in the sub-contract awarded by the Respondent to the Petitioner dated 14th June, 2013. In fact, Mr. Kamat, the learned counsel appearing for the Respondent, fairly conceded before me that there was no dispute about the existence of the arbitration agreement. This being the case, I find that the reliance placed by Ms. Nyati on sub-section 6-A of Section 11 is clearly well founded. In the view that I take, I am supported by a decision of the Supreme Court in the case of **Duro Felguera, S. A. v/s Gangavaram Port Limited reported in (2017) 9 SCC 729**. The

Supreme Court after considering Section 11 prior to its amendment and also after its amendment, at paragraph 19 observed thus:-

“19. The effect of the Arbitration and Conciliation (Amendment) Act, 2015 in Section 11 of the Act has been succinctly elucidated in the textbook “Law Relating to Arbitration and Conciliation” by Dr P.C. Markanda, which reads as under:

“The changes made by the amending Act are as follows:

1. The words ‘Chief Justice or any person or institution designated by him’ shall be substituted by the words ‘the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court’. Thus, now it is not only the Chief Justice who can hear applications under Section 11, the power can be delegated to any Judge as well.

2. As per sub-section (6-A), the power of the Court has now been restricted only to examination of the existence of an arbitration agreement. Earlier, the Chief Justice had been given the power to examine other aspects as well i.e. limitation, whether the claims were referable for arbitration, etc. in terms of the judgments of the Supreme Court in SBP and Co. v. Patel Engg. Ltd. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] Now all preliminary issues have been left for the Arbitral Tribunal to decide in terms of Section 16 of the Act.

3. The amending Act has categorically provided in sub-section (6-B) that designation of any person or institution by the Supreme Court or High Court would not be construed as delegation of judicial power. The order passed by a designated person or institution would continue to be regarded as a judicial order.

4. It has been provided in sub-section (7) that the order passed under this section shall not be appealable. This change means that finality is attached to the order passed under this section and it would not be subject to further examination by an appellate court.

5. Sub-section (8) has been amended to bring it in conformity with amended Section 12 with regard to ensuring independence and impartiality of the arbitrator. Before appointing any arbitrator, a disclosure in writing has to be obtained in terms of Section 12(1) of the Act. This is to ensure that the appointed

arbitrator shall be independent and impartial and also harmonizes the provisions of Sections 11 and 12 of the Act.

6. The amending Act has introduced sub-section (13) which provides that the disposal of the application under this section has to be expeditious and endeavour shall be made to dispose of the application within a period of 60 days from the date of service of notice on the opposite party. This sub-section would ensure speedy disposal of applications under this section and all contentious issues have been left to be decided by the Arbitral Tribunal.

7. For determining the fee structure of the Arbitral Tribunal, it has been recommended that the High Courts may frame the necessary rules and for that purpose, a model fee structure has been provided in the Fourth Schedule of the amending Act. However, this sub-section would not be applicable for the fee structure in case of international commercial arbitrations and domestic arbitrations where the parties have agreed for determination of fee as per rules of an arbitral institution. This sub-section has been inserted to ensure a reasonable fee structure since the cost of arbitration has increased manifold due to high charges being levied on the parties by the Arbitral Tribunal and other incidental expenses.”

[Reference: Law Relating to Arbitration and Conciliation by Dr P.C. Markanda; Lexis Nexis, 9th Edn., p. 460]”

14. Thereafter in paragraph 47, the Supreme Court has discussed what is the effect of the change introduced by Arbitration and Conciliation (Amendment Act), 2015 and with particular reference to Section 11 (6) and the newly added Section 11 (6-A). In this regard at paragraphs 47 and 48 read as under:-

“47. What is the effect of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as “the 2015 Amendment”) with particular reference to Section 11(6) and the newly added Section 11(6-A) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) is the crucial question arising for consideration in this case.

48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) 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.*”

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”

(emphasis supplied)

15. On a plain reading of this decision, it is ex-facie clear that the Supreme Court has opined that the intention of the Legislature is crystal clear i.e. the court should and need only look into one aspect, namely the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement, the Supreme Court has clearly stated that it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. That would suffice.

16. In the facts of the present case, there is no dispute with reference to the existence of the arbitration agreement. This being the case, I find that Mr. Kamat is not correct in submitting that the dispute cannot be referred to arbitration merely because the sub-contract dated 14th June, 2013 (and in which the arbitration clause is contained), is an unstamped document.

17. There is yet another reason for taking this view. It is now well settled that the provisions of the Stamp Act are enacted for the purposes of securing the revenue for the Government and not to arm a dishonest litigant with a technical defence. If one needs to refer to any decision on this aspect, the observations of the Supreme Court in the case of **Hindustan Steel Ltd v/s Messrs Dilip Construction Company reported in (1969) 1 SCC 597** are apposite. The relevant paragraph reads thus:-

“7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped,

and sub-section (2) of Section 42 enacts the consequences resulting from such certification.”

(emphasis supplied)

18. In view of the foregoing discussion and with specific reference to section 11(6-A) of the Act, I am unable to agree with the submission of Mr. Kamat that this Court cannot refer the disputes to arbitration because the arbitration clause is contained in an unstamped document. It is not as if once the Arbitrator is appointed, the Respondent is precluded from raising the issue of stamping before the Arbitrator. The Arbitrator, if found that the document is insufficiently stamped, can always impound the same and send it to the necessary authorities under the Maharashtra Stamp Act, 1958 for adjudication. This view of mine would also be in line with the decision of the Supreme Court in the case of **Hindustan Steel Ltd (supra)**, which would ensure that the revenue is secured for the State and at the same time would not arm the litigant with the weapon of technicality to meet the case of the opponent. I do not think that by accepting this technical defence, the Respondent can be allowed to frustrate and delay the arbitration proceedings. This would clearly be contrary to the objects and reasons for which the amendments were brought about to Arbitration and Conciliation Act, 1996 in 2015.

19. Having said this, I shall now deal with the judgments relied upon by Mr. Kamat. The first decision relied upon by Mr. Kamat was in the case of **SMS Tea Estates Private Limited (supra)**. In this case, the facts would reveal that the Appellant before the Supreme Court requested the Respondent therein to grant a long term lease in respect of two tea estates. Accordingly, a lease deed was executed under which the respondent granted a lease to the Appellant for a term of 30 years. Clause 35 of the said lease deed provided for settlement of disputes between the parties by arbitration. As the dispute arose between the parties, as per Clause 35 of the lease deed, the Appellant issued a notice calling upon the Respondent to refer the matter to arbitration. This application was opposed by the Respondent who contended that the unregistered lease deed was invalid, unenforceable and not binding upon the parties. The further contention was that the said lease deed was not duly stamped and therefore invalid, unenforceable and not binding, having regard to Section 35 of the Stamp Act, 1899. In these facts, the matter went to the Supreme Court. Before the Supreme Court, three questions were raised, namely (i) Whether an arbitration agreement contained in an

unregistered (but compulsorily registrable) instrument is valid and enforceable? (ii) Whether an arbitration agreement is an unregistered instrument which is not duly stamped, is valid and enforceable? (iii) Whether there is an arbitration agreement between the appellant and the respondent and whether an arbitrator should be appointed?

20. Whilst answering the first question, the Supreme Court *inter alia* held that when the contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts; one in regard to the substantive terms of the main contract and the other relating to resolution of disputes had been rolled into one, for the purposes of convenience. The Supreme Court held that therefore an arbitration clause is an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. Similarly, when an instrument or deed of transfer or a document affecting immovable property

contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two documents, one affecting the immovable property requiring registration, and the other relating to resolution of disputes which is not compulsorily registrable, are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or unenforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer. The Supreme Court further went on to hold that having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. As far as the stamping issue is concerned, I find that this decision does support Mr. Kamat's contention. However, I find that this decision has lost its efficacy after the amendment to Section 11 and more particularly Section 11 (6-A). What I must note is that **SMS Tea Estates Private Limited (supra)** was decided on 20th July, 2011 whereas the amendments to the Arbitration and Conciliation Act, 1996 came

into effect from 23rd October, 2015. Now, after the amendment and as held by the Supreme Court in the case of **Duro Felguera, S. A. (supra)**, under sub-section 6-A of Section 11 the power of the Court has now been restricted only to examination of the existence of the agreement and nothing more and nothing less. As stated earlier, the existence of the arbitration agreement has never been disputed, and in my view correctly so. This being the case, I find that the reliance placed by Mr. Kamat on the decision of the Supreme Court in the case of **SMS Tea Estates Private Limited (supra)**, is wholly misconceived. 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. It is not as if the arbitrator is powerless to impound the document if found insufficiently stamped and thereafter forward to the appropriate authority for adjudication and recovery of stamp duty. Taking into consideration the purpose for which the amendments were brought about and especially the finding given in the 246th report of the Law Commission of India that India has been ranked at 178 out of 189 nations in the world for enforcement of contracts, I think this is exactly what the Legislature intended. In any event, the wording of Section 11(6-

A) are clear and unambiguous and leave no real scope for judicial interpretation.

21. All the other decisions relied upon by Mr. Kamat with the exception of (Lakdawala Developers Pvt Ltd's case), were under the Stamp Act and were not with reference to any of the provisions of the Arbitration and Conciliation Act, 1996. I, therefore, find that the reliance placed on these decisions is wholly misconceived.

22. As far as the reliance placed by Mr. Kamat on a Division Bench Judgment in the case of **Lakdawala Developers Pvt Ltd (supra)** is concerned, I find that this judgment also was passed on 25th June, 2013 which was much prior to the amendment of the Arbitration and Conciliation Act, 1996 in 2015. Furthermore, this judgment follows the decision of the Supreme Court in the case of **SMS Tea Estates Private Limited (supra)**. What is also important to note is that this decision was not rendered with reference to Section 11 of the Arbitration and Conciliation Act, 1996 but was rendered under Section 9 of the said Act. The facts of this case would reveal that the Respondent before the Division Bench had filed an application under Section 9

for certain interim reliefs. In that application, the appellant before the Division Bench took up the contention that the MOU was insufficiently stamped and that in consequence, the document could not be acted upon unless the stamp duty and penalty, if any, payable thereon was adjudicated upon. The learned Single Judge held that whether the MOU was insufficiently stamped or not, could be decided in the arbitral proceedings before the arbitrator and the arbitration agreement could be delinked from the other provisions of the MOU so as to enable the Court to grant interim measures. It is in these circumstances that the Division Bench held that the view taken by the learned Single Judge was prima facie contrary to the decision of the Supreme Court in the case of **SMS Tea Estates Private Limited (supra)**. Apart from what I have stated with reference to the decision in the case of **SMS Tea Estates Private Limited (supra)**, I find that this decision is wholly distinguishable on facts as different considerations would apply when a party applies for interim measures under section 9 and when it applies for appointment of the arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. I, therefore, find that the reliance placed on this decision also is wholly misplaced.

23. Before parting, I must also mention that prima facie I find the argument made by Ms. Nyati that the liability to pay stamp duty was on the Respondent herein, well founded. The clause which was relied upon by Ms. Nyati reads thus:-

"ROYALTIES / LICENSES/ MINING PERMITS / OTHER STATUTORY REQUIREMENTS ETC

It will be GWRL responsibility to obtain all requisite statutory Licenses/Permits from various Government State/Local Bodies/Authorities (apart from MoEF, CRZ and state pollution control board permissions which are in scope of ICZMP, State Project Management Unit-Odisha being owner), and to pay necessary levies/fees/taxes/duties/royalties (if applicable to GWRL scope of work), costs thereof at their own cost. COMACOE's responsibility will be limited to labour license and maintenance of proper record of such payments and submit the royalty receipts along with each invoice to GWRL."

24. On going through this clause carefully, I am prima facie satisfied that the liability to pay stamp duty was that of the Respondent. If the stamp duty, if any, has not been paid by the Respondent, the Respondent cannot take advantage of its own wrong and frustrate the arbitration agreement between the parties. If I was to do that, it would be only adding premium to dishonesty. Having said this, I must make it clear that these observations are only prima facie and if the arbitrator finds that the document is in fact insufficiently stamped, and directs further

action on the same, it will be for the appropriate authorities to adjudicate the stamp duty as well as who is liable to pay the same.

For all the foregoing reasons, the following order is passed:-

- (a) The Arbitration Petition is allowed.
- (b) Mr. Mihir Naniwadekar (Advocate) is appointed as a Sole Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 to adjudicate upon the disputes which have been arisen between the Petitioner and the Respondent herein under or in relation to and/or connected with the sub-contract dated 14th June, 2013.
- (c) The Petitioner herein shall file the disclosures of by the Sole Arbitrator in the Registry as contemplated under Section 11 (8) r/w Section 12 (1) of the Arbitration and Conciliation Act, 1996 within a period of two weeks from today.
- (d) The Sole Arbitrator shall give all further

directions with reference to the fees of the arbitrator and how they are to be paid. All further directions regarding the filing of the Statement of Claim and Statement of Defence and /or counter claim shall be given by the arbitrator.

The Arbitration Petition is disposed of in the aforesaid terms. However, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)