

Payment of Stamp Duty Inconsequential to Enforceability of a Foreign Arbitral Award in India

July 27, 2019

[Anirban Chanda is a fourth-year B.A., LL.B. (Hons.) student and Anujay Shrivastava a final-year B.A., LL.B. (Hons.) student at Jindal Global Law School]

While the Indian Arbitration and Conciliation Act, 1996, even after the [2015 amendment](#), does not expressly lay down any legal requirement that mandates parties to an arbitration agreement to pay stamp duties on an arbitral award, there has been varying jurisprudence in the cases of domestic arbitration under Part I of the Act as to whether non-payment of stamp duties on arbitral award would render such award invalid or non-enforceable. The Registration Act, 1908 does not expressly lay down a requirement for registration of an arbitral award or include any definition of the term “award”, which has led to an incongruence within the legal community as to whether an arbitral award has to be mandatorily registered.

The Supreme Court in *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.* (2011) declared that courts cannot act upon an instrument (being an “arbitration agreement”) in light of section 35 of the Indian Stamp Act, 1899 which categorically takes away the evidentiary value of any instrument that has not been duly stamped. This position was reinforced by the Court in *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.* (2019), where the instrument concerned was an arbitration agreement. Further, ‘Item 12’ in Schedule I of the Stamp Act prescribes the stamp duty that is required to be paid for an arbitral award (not being an award directing a partition). *SMS Tea* and *Garware*, along with the preceding statement, indicate a legal position that an “arbitral award” being an ‘instrument’ described in Schedule I of the Stamp Act would require registration and payment of stamp duty in order to be treated as a legal instrument and, consequently, acquiring enforceability as well as evidentiary value.

At this juncture, it is important to note that both *SMS Tea* and *Garware* are in light of Part-I arbitrations under the Arbitration Act, i.e. domestic arbitrations. The Delhi High Court in *Naval Gent Maritime Ltd. v. Shivnath Rai Harnarain (I) Ltd.* (2009), a case involving an arbitral award under Part-II[A] of the Arbitration Act (awards made under New York Convention), had for the first time held that a foreign arbitral award would not require registration and can be enforced as a decree. Further, it observed that the issue of non-payment of stamp duty cannot stand in the way of deciding whether the award is enforceable or not.

Reconciling contrary High Court rulings, the Supreme Court decision of September 2018 in *Shriram EPC Ltd. v. Rioglass Solar SA*, raised an interesting legal question as to whether arbitral awards by a “foreign-seated” arbitral tribunal under Part-II[A] of the Act can be deemed unenforceable on account of non-payment of stamp duties. This judgment shall be discussed and analysed in the following sections.

Brief Facts of Shriram EPC

The matter arises in the form of an appeal against the judgment of a single judge of the Madras High Court wherein a petition filed by Rioglass Solar SA to enforce a foreign award made by International Chamber of Commerce in London was allowed. Shriram EPC Ltd. raised a contention that the *award has not been stamped* and, therefore, cannot be enforced under sections 48 and 49 of the Arbitration Act. Another interesting legal question was raised as to whether the term “award” contained in Item 12 to Schedule I of the Stamp Act includes foreign awards.

Legal Contentions

Placing reliance on the Punjab & Haryana High Court decision in *Gujrals Co. v. M.A. Morris* (1961), Shriram contented that according to section 47 of the Arbitration Act, the foreign award cannot be enforced unless it is stamped in accordance with the relevant provisions of the Stamp Act. In response, Rioglass contented that the expression ‘award’ which occurs Schedule I of the Stamp Act applies only to domestic awards and not to foreign awards. The Stamp Act was enacted in 1899, in which “award” has never been enlarged so as to include foreign

awards after the Arbitration (Protocol and Convention) Act, 1937 or the Foreign Awards (Recognition and Enforcement) Act, 1961 were enacted. Therefore, the only requirement for the enforcement of a foreign award is laid down in section 47 of the Arbitration Act, which does not require the award to be stamped.

To respond to Rioglass's contentions, Shriram contended that it should not matter what the provisions of the Stamp Act actually intend to further. Relying on the Supreme Court precedent in *Senior Electric Inspector and Ors. v. Laxminarayan Chopra and Anr.* (1962), Shriram further stated that an Act should be construed as on date, and not as per its original outdated definition. Additionally, placing reliance on the Gujarat High Court decision in *Orient Middle East Lines Ltd., Bombay and Anr. v. Brace Transport Corporation of Monrovia and Ors.* (1985), Shriram stated that Article III of the New York Convention would make it clear that stamp duty, being in the nature of fees or charges for recognition and enforcement of a foreign award, can be enforced in accordance with the rules of procedure of the territory in which the award is sought to be enforced. This being so, the New York Convention itself recognizes that foreign awards may have to bear stamp duty for enforcement in the country in which they are sought to be enforced. Rioglass further submitted without prejudice that, under section 48(2)(b), even if a foreign award were required to be stamped, but is not stamped, enforcement of such award would not be contrary to the fundamental policy of Indian law.

Shriram had strongly contended against the Delhi High Court decision in *Naval Gent* and the Madhya Pradesh High Court decision in *Narayan Trading Co. v. Abcom Trading Pvt. Ltd.* (2014) upon which Rioglass had strongly relied on to argue that enforceability of a foreign arbitral award is not affected by non-payment of stamp duties. *Naval Gent* refers to the definition of "foreign award" contained in the Arbitration Act, but goes on to rely upon the Supreme Court in *Harendera H. Mehta and Ors. v. Mukesh H. Mehta and Ors.* (1998), stating that such foreign award would not require registration as it can be enforced as a decree.

Holdings

The Supreme Court traced back to the origins of the Stamp Act along with other provisions of the Civil Procedure which dealt with arbitration. In doing so, the judges reached the conclusion that the Stamp Act governed awards made in British India. An "award" under Item 12 of Schedule I of the Stamp Act has remained unchanged till date. In 1899, this "award" would refer only to a decision in writing by an arbitrator or umpire in a reference not made by an order of the court in the course of a suit. This would apply only to such award made at the time in British India and, today, after the amendment of Section 1(2) of the Stamp Act to awards made in the whole of India, except the State of Jammu & Kashmir. Also, the awards made in princely states would have fallen outside the Stamp Act, as they were treated as foreign awards. The position continued even after independence of India from Britain, as only domestic awards are covered by the Stamp Act. Thus, in light of the above circumstances, the expression "award" has never included a "foreign award" from its very inception. Further, the bench overruled the case of *Morris* as this case did not take into account the definition of 'award' in Schedule I of the Stamp Act.

The Court noted that the *Naval Gent* decision placed reliance on the decision of the Supreme Court in *M. Anasuya Devi v. M. Manik Reddy* (2003) to state that the court, while deciding the enforceability of a foreign awards under sections 47 and 48, cannot hold the award non-enforceable on the ground of the award being unstamped. This position is incorrect as *Anasuya* in the context of a 'domestic' award only stated that the question as to whether an award is required to be stamped would be relevant only at the enforcement stage under section 36 of the Arbitration Act and not at the stage of challenge governed by section 34 of the said Act. Considering that there is no challenge stage as far as a foreign award is concerned, the foreign award will be enforceable as a decree as long as none of the grounds in section 48 are attracted. However, the bench still approved the ratio of *Naval Gent*, although it arrived at the same ratio on a different reasoning. Further, the ratio of *Narayan Trading* was approved by the bench.

The bench distinguished the Supreme Court precedent of *Laxminarayan Chopra* cited by Shriram. This case was in the context of applying the Telegraph Act to a modern telecommunication mechanism which was unknown when the Telegraph Act was enacted. This cannot be applied here, as foreign awards were a known concept in 1899. This is also a fiscal statute which requires strict interpretation.

Finally, while dismissing the Appeal in favour of Rioglass, the bench rejected Rioglass's contention that even if section 48(2)(b) of the Act required the award to be stamped and it was not, enforcement of such award would

not be contrary to the fundamental policy of Indian law. The bench said that though existing law does not make foreign award subject to stamp duty, there is no legal impediment in making such a law.

In Conclusion: Conflicting Themes of Pro-arbitration stance vs. Stamp Revenue Collection

The landmark decision in *Shriram EPC* reiterates the rising stance of Indian courts to support arbitration and does away with the requirement of paying stamp duties which would come as an impediment in enforcement of foreign-seated arbitral awards. This prevents parties from unjustly trying to delay or hamper the enforcement of foreign arbitral awards by means of litigation. At the same time, it is pertinent to be reminded that the consequence of this judgment is that there will be loss of revenue to the Government of India as any foreign arbitral award can now be enforced irrespective of whether it has been duly stamped or not. Considering that international commercial arbitrations involve multi-million dollar deals, this would cause a substantial amount of loss to the Government of India.

Therefore, we suggest that the Indian legislature should come up with statutory guidelines or amendments to the Stamp Act which mandate payment of stamp duty on foreign arbitral awards as well as ensure at the same time that such mechanism is instant, efficient and not over-regulatory. This would be supported by the spirit of Article III of the New York Convention which recognizes that states should not impose more onerous conditions or higher fees or charges on recognition or enforcement of arbitral awards than those imposed on domestic awards. As long as foreign arbitral awards are treated equally with domestic awards with regard to stamp duty payment, we believe that this concern can be reconciled by the legislature.

– *Anirban Chanda & Anujay Shrivastava*