

“Verification of Stamp Duty and Registration of Arbitral Awards: Need for Legislative Amendment”

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Section I

Preliminary

Arbitration is a form of Alternative Dispute Resolution - specifically, a legal alternative to litigation, whereby the Parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third Party called the Arbitrator(s) or Arbiter(s) for resolution.

After the Parties have defined their dispute, they are afforded an opportunity of addressing their respective arguments and presenting evidence and witnesses without formal rules of evidence used in court litigation being applicable. After the evidence has been presented, the Arbitrator(s) reaches a decision and communicates a written reasoned opinion (an award). The award passed by the Arbitrator(s) is binding on the Parties to the Arbitration proceedings and carries the same force as an order passed by the Court.

The pronouncement of an award by the Arbitral Tribunal however, does not necessarily connote the end of the adjudicatory process for the parties. The Parties are thereafter, entitled to file applications for setting aside the award under Section 34(1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “1996 Act”) or for enforcement of the award under Section 36, as the case may be.

However, while challenging the award passed by the Arbitral Tribunal or seeking its execution, the question arises whether the original arbitral award passed by the Arbitral Tribunal under the 1996 Act has been duly stamped and whether the arbitral award where it creates and / or extinguishes rights in immoveable property in favour of the parties, requires compulsory registration?

The question has arisen because the 1996 Act does not require the original award to be filed in the Court as a condition precedent to its execution. Section 31(5) of the 1996 Act states that the Arbitral Tribunal shall communicate a 'signed' copy of the original arbitral award to the parties. The expression 'signed copy' of the award however, does not reveal whether or not the original arbitral award is duly stamped or registered. If only a copy of the award is to be appended along with the applications filed under Section 34(1) or Section 36 of the 1996 Act, the Court will not be in a position to ascertain whether the original award is duly stamped. Further difficulty also arises with in context of ascertaining whether the award, if it relates to an immoveable property, is compulsorily registrable and whether it is duly registered with the competent registration authority.

Further, the 1996 Act is silent about what the arbitral tribunal is supposed to do with the original award passed by it. Several Arbitrators appointed under the 1996 Act, have raised the question as to –

- (a) How long they should keep the original award with them, particularly, if no party files an application under Section 34 or Section 36 of the 1996 Act?
- (b) How long they should preserve the records of the arbitration proceedings, the pleading, evidence, etc., with them?
- (c) As to the point of time at which they could return the documents to the respective parties who had filed them. The parties may require the original title deeds and documents filed with the arbitral tribunal for various purposes – e.g. raising loan against collateral security or to mortgage the property or for the sale thereof.

Section II

Position under the Arbitration Act, 1940

There was no such difficulty under the Arbitration Act, 1940 (hereinafter referred to as the "1940 Act") (since repealed) inasmuch as the original award had to be filed in Court under Section 14(2) of the 1940 Act so that a decree could be passed on the basis of the award and the Court was able to verify whether the original award was duly stamped or was duly registered.

However, under the 1996 Act, the award becomes enforceable as a decree straightaway after the period for filing an application to set aside the award has expired. Thus, while there was no difficulty for the Court to look into and verify the original award under the 1940 Act, the difficulty has arisen in regard to awards passed under the 1996 Act inter – alia for the reason that under the 1996 Act, an Arbitral Tribunal is required to send only signed copies of the award to the parties.

Section III

Payment of Stamp Duty on Arbitral Awards: The Legal Issue

Insofar as payment of stamp duty is concerned, the Indian Stamp Act, 1899 applies in respect of arbitral awards throughout India, but some states have passed separate Stamp Acts to regulate the stamp duties payable in these states.

The Schedule to the Indian Stamp Act, 1899 contains a specific provision in Article 12 relating to the stamp duty payable on 'arbitration awards'. Sections 33 and 35 of the Indian Stamp Act, 1899 are attracted if the award is not stamped or is insufficiently stamped.

Section 35 of the Indian Stamp Act, 1899 (and corresponding provision in the State Acts) provides that documents which are required to be stamped, if they are not stamped, or are inadequately stamped, will not be admissible in evidence 'for any purpose'. Section 33 deals with impounding of documents presented before a public authority who is entitled to record evidence. Stamp duty that is leviable and penalties for non-payment or insufficient payment of stamp duties can be collected in the manner as provided in Section 35.

In **M. Venkataratnam v. M. Chelamayya** [AIR 1967 AP 257 (FB)], a Full Bench of the Andhra Pradesh High Court held that if the original award was unstamped and a copy of the award written on stamp papers was filed along with the original award, though the original award could not be regarded as duly stamped, the stamps on the copy of the award might be treated as intended to serve as payment of stamp duty so as to enable the original award to be admitted in evidence under Section 35 of the Stamp Act. It treated the original award and copy thereof as a single document. The above view of the Andhra Pradesh High Court was accepted by the Supreme Court in **M. Chelamayya v. M. Venkataratnam** [AIR 1972 SC 1121].

The Madras High Court in **M/s Wilson & Company Private Limited Vs. K.S. Loka Vinayagam** [AIR 1992 Madras 100] (a case decided under the 1940 Act), had held that in view of Section 35 of the Stamp Act, 1899, the award could not have been admitted in evidence and it gave a direction for impounding the award as prescribed in Section 33 of the Stamp Act.

Subsequently, a different view was taken by the Madras High Court in cases decided under the 1996 Act (D.No.25215/2001 and D.No.6108/2002) that inasmuch as the 1996 Act does not compel the parties to file the original award in the Court, the above principle of M/s Wilson & Company Private Limited did not apply.

The conflict in judgments led to a reference to a Division Bench for resolving the difference. The Division Bench in its judgment dated 17.12.2003 rendered in the matter of **Commissioner Corporation of Chennai Vs. K. Ramdass and Company** (O.P.D. No.27597/02) has held that

a signed copy of the award was not the same thing as the original award. The Court was of the opinion that in view of Section 31(5), the copy of the award signed by the arbitrators could be treated as a counterpart within the meaning of Section 62 of the Evidence Act, 1872 and that the copy does not fall within the ambit of Section 63 of the Evidence Act and hence a copy is chargeable to stamp duty under Article 25 of Schedule I of the Stamp Act. The Division Bench observed that in view of Article 25, if a counterpart of any instrument is sought to be produced in evidence, it is open to the Court to require the original to be produced unless it bears an endorsement showing that requisite stamp duty has been paid on the original. The Madras High Court pointed out that likewise, when an application is filed under Section 36 of the 1996 Act (without there being an application under Section 34 by the losing party), the losing party may contend that the award is inexecutable because only a signed copy of the award is filed and that either the original award be filed or there must be proof that the original award is properly stamped and duly registered.

The Madras High Court, therefore, gave an interim working solution that the applicant under Section 34(1) or Section 36 of the 1996 Act will have to deposit the requisite stamp papers or equivalent value in cash in the Court, with a right to obtain refund thereof, after the original award in case the original award when produced, is found by the Court to have been duly stamped.

Section IV

The Madras High Court Judgment: Interim Working Solution

In its initial judgment dated 17.12.2003, the Division Bench held that it will be open to the Registry, when an application to set aside the arbitral award is filed under Section 34(1) of the 1996 Act or when an application is filed to enforce the arbitral award under Section 36 of the 1996 Act, to examine whether the copy of the award produced by the applicant contains an endorsement to the effect that the Arbitral Tribunal had collected the necessary stamp duty and the award had been engrossed on non-judicial stamp papers and when such an endorsement by the Arbitral Tribunal appears on the award, it will be open to the Registry to act on such an endorsement and process the application filed under Section 34(1) or Section 36 of the 1996 Act.

The High Court further held that where there is no such endorsement on the copy of the award filed along with the said application(s), then the Registry will be entitled to direct the party moving the application to pay - the necessary stamp duty (i.e. file the non judicial stamp papers of requisite value) payable on the award and take the application on file subject to the condition that the applicant, whether he has filed the application to set aside the award or to enforce the

award, should satisfy the Court before the first date of hearing fixed for the appearance of the other side, that necessary stamp duty has been paid on the award and the original award has been engrossed on stamp papers. If the party is able to establish that the stamp duty has been paid and the original award has been engrossed on necessary stamp papers, then the stamp duty, if any, paid on the copy produced before the Court, shall be refunded to the party who paid the stamp duty (i.e. the stamp papers filed will be returned). If the party is not able to establish before the first date of hearing for appearance of the other side that the award is duly stamped, the applicant will have to face necessary consequences of payment of stamp duty and penalty and impounding of the document.

If the party does not pay the stamp duty and penalty within the time stipulated by the Court, the award shall be impounded and consequently, the copy of the award cannot be taken on record resulting in dismissal of the application.

By a subsequent Order dated 30.1.2004, the High Court held that the earlier directions given by it for deposit of the stamp duty (i.e. filing of stamp papers and later returning them back) may create hardship and result in problems in granting refund if required stamp papers are deposited in the Court. This problem arises because there is a separate procedure provided under the Stamp Act, 1899 in Section 54 thereof, for seeking refund if stamp papers which are already purchased for a purpose are not used. The High Court, therefore, modified its earlier order dated 17.12.2003 to the following effect, by instead permitting cash deposit:

"We, therefore, make it clear that it is open to the party either to pay necessary stamp duty or to deposit the sum of money equivalent to the value of the stamp duty, in the Registry and it is also open to the Registry to recover the amount in cash".

SECTION V

Registration of Arbitral Awards

The debate regarding registration of arbitral awards revolves around two core issues. **Firstly**, whether an arbitral award which affects immoveable property is compulsorily registrable; and **Secondly**, what would be the place for registration of an arbitral award which creates rights in immoveable property in favour of the parties.

Let us first deal with the issue of compulsory registration of arbitral awards affecting immoveable property. Every non-testamentary document is required to be registered compulsorily under Section 17 of the Registration Act, 1908, if the value of the immovable property is one hundred rupees or more and if the document "purports or operates to create, declare, assign, limit or

extinguish, whether in the present or in future, any right, title or interest, whether vested or contingent". This is provided in Section 17(1)(b) of the Registration Act, 1908.

Section 17(2) deals with exemptions and specifically excludes a decree or order of a Court from the ambit of compulsory registration under Section 17(1).

In **M. Venkataratnam v. M. Chelamayya** [AIR 1967 AP 257 (FB)] (a case decided under the 1940 Act) the Andhra Pradesh High Court held that an award, if it affects immovable property, must be registered in the manner provided under Section 17(1)(b) of the Registration Act, 1908 otherwise it will be invalid. The Court also held that both the Registration Act, 1908 and the Arbitration Act, 1940 have to be read together.

The above view of the Andhra Pradesh High Court was upheld by the Supreme Court in **M. Chelamayya v. M. Venkataratnam** [AIR 1972 SC 1121] (a case decided under the 1940 Act). The above judgments seem to suggest that an arbitral award is a non testamentary instrument within the meaning of Section 17(1) (b) of the Registration Act, 1908. The necessary consequence is that when an application is filed for enforcement of an award on the basis of a signed copy thereof, it was open to the opposite party to contend that, on facts, the original award is required to be registered as the provisions of the section 17(1)(b) of the Registration Act, 1908 are applicable and unless it is established that the original award is registered, the application for execution of award is not maintainable.

However, the above stated legal position regarding the registration of an arbitral award seems to have undergone a modification as a result of the provisions incorporated in the 1996 Act. Section 36 of the 1996 Act seeks to put an arbitral award on the same pedestal as that of a decree of the Court, by providing that an arbitral award shall be enforced under the Civil procedure Code, 1908 in the same manner as if it were a decree of the Court. Thus an Award made in accordance with the 1996 Act is immediately executable as a decree of the Court, whereas, an award made under the Arbitration Act, 1940 could not be enforced until it was made a rule of the Court. It has been argued that once an award is put on the same pedestal as a decree of the Court, the necessary consequences will follow and the award would fall under the expression 'any decree or order of a court' provided in Section 17(2)(vi) and would therefore, no longer remain compulsorily registrable under Section 17(1)(b) of the Registration Act, 1908.

The High Court of Gujarat in the matter of **Ishwardas Purshotambhai Patel vs. Chandrakantbhai Purshotambhai Patel** [Civil Revision Application No.235 of 2004] has also taken the view that once an award is put on the same pedestal as a decree of the Court, the necessary consequence is that it does not remain compulsorily registrable. The issue of

compulsory registration of arbitral awards is however, yet to be settled by way of a clear judicial pronouncement by the Apex Court.

The next difficulty lies in ascertaining the place of registration of an award which creates rights in immoveable property in favour of the parties.

Part V of the Registration Act deals with Place of Registration of documents. Section 28 provides that every document referred to in Section 17, Sub Section (2) insofar as such document affects immoveable property *shall* be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.

Whereas, Section 29(2) provides that a copy of decree or order of a court where it affects immoveable property *may* be presented for registration in the office of a Sub-Registrar in whose sub-district the original decree or order was made.

It has been argued that there seems to be an apparent conflict between the two Sections insofar both the Sections prescribe different places for registration of a decree or order of court within the meaning of Section 17(2)(vi). It has also been argued that Section 28 uses the expression 'shall' and is therefore, intended to be mandatory, while Section 29(2) uses the expression 'may' and is therefore, a directory provision.

However, the seeming contradiction and any ambiguity as to the place of registration of an arbitral award affecting immoveable property can be easily removed by a conjoint reading of both the Sections. Further, a commonly accepted rule of statutory interpretation is that a specific provision in the statute prevails over more general provision appearing in the statute. Section 28 begins with the words 'Save as in this part otherwise provided' and therefore, is intended to cover only those cases which are not expressly provided for in the other Sections of Part V. Section 29 on the other hand specifically deals with the place of registration of a decree or order of Court and hence is intended to operate to the complete exclusion of Section 28. From a conjoint reading of both the Sections a safe inference can be drawn that the place of registration of an arbitral award dealing with immoveable property is to be ascertained with reference to Section 29(2) and not Section 28 and therefore, the award should be presented for registration in the office of a Sub-Registrar in whose sub-district the original award was made.

Section VI

Possible Solutions and Their Merits

In light of the above discussion it would be pertinent to examine the various possible solutions and the comparative merits thereof. We may point out various possible solutions and may refer to the advantages or shortcomings of each of these solutions.

We shall first deal with the interim solution given by the Madras High Court.

- (1) Firstly, the proposal of the Madras High Court deals only with the question whether the original award is 'duly stamped' and not whether the award is 'duly registered'.
- (2) Secondly, the Madras High Court judgment does not require that the signed copy of the award which is sent to the parties should contain an endorsement of the arbitrator, under their signature, that the original award has been duly stamped.
- (3) Thirdly, the view of the Madras High Court as to deposit of the requisite stamp papers or payment of cash equivalent of the stamp duty payable on the original award, can cause serious hardship in several cases. If the parties had already provided the necessary stamp papers to the arbitrator for engrossing the award on stamp papers, to ask them to deposit fresh stamp papers or cash equivalent would amount to an unnecessary burden.

Let us now proceed to examine the other possible solutions put forth to deal with the issue of stamping of arbitral awards:

- I. A possible solution which has been mooted is the signing of more than one original award so that each party can be given one original award. There may be a situation where the stamp duty payable on the award may not be large and parties may be prepared to deposit the requisite stamp papers for more than one original award, so that one can file a Section 34 application and the other, a Section 36 application. Or where the award is partly in favour of one party and partly in favour of another party, and each party feels aggrieved, they may indeed file separate applications annexing the stamped originals. However, the problem would still remain since once the first of the original awards is signed on stamp papers, it may be said that the arbitrators have become 'functus officio' and that the second original award signed by them is invalid. It may indeed be difficult to find out which of the two awards was signed first.
- II. An amendment be made in 1996 Act introducing a new provision that after the award is passed, the original award should be filed in the Court, within whose jurisdiction the award is passed, i.e. just as it was being done under the 1940 Act. The Court will then have in its possession, the original award itself and it can verify whether or not the requirements of stamp duty and registration have been complied with by the arbitrators. But then, it has been argued that this would tantamount to unduly burdening the Court

to receive the original award and other documents. An immediate answer to this argument could be that there is no additional burden on the Courts arising out of such an amendment to the 1996 Act because this was the position under the 1940 Act under Section 14(2) whereof the original award was required to be filed in Court. If it is further provided that the records could also be filed before the said Court, the Arbitral Tribunal could be relieved of the burden of keeping them.

- III. Yet another solution can be that the Arbitral Tribunal should be specifically entrusted with the duty of requiring the parties to procure stamp papers of appropriate value and getting the award duly stamped. It should also be provided that while signing the copy(ies) of the original award, the Arbitral Tribunal should make an endorsement thereon that the original award is duly stamped and the signed copies of the original award may then be sent to the Parties in accordance with Section 31(5). The above would also ensure compliance of Section 17 of the Indian Stamp Act, 1899 which mandates that all instrument chargeable with duty and executed by any person in India shall be stamped *before or at the time of execution*. The same would also obviate any ambiguity before the Court (while dealing with an application under Section 34 or 36 of the 1996 Act) as to whether the original award has been duly stamped.

Section VII

Recommendations for Legislative Amendment

First Alternative:

The first alternative will be for filing the original arbitral award in the Court within whose jurisdiction the award is passed so that the Court can verify whether the award is duly stamped.

This amendment can be made in Section 31(1) of the 1996 Act leaving existing Section 31(5) of the 1996 Act as it is, so that parties will still get signed copies of the award.

Second Alternative:

A second alternative solution could be to amend Section 31(1) to state that the Arbitral Tribunal shall have to get the award duly stamped. Further, Section 31(5) will have to be amended by stating that the Arbitral Tribunal shall send signed photocopies of the award, after making an endorsement on the copy of the award that the original award is duly stamped. However, the word 'duly stamped' can create some doubts and it will be difficult for the Court in which the copy is filed by the parties with such an endorsement, to find out if the stamp papers on which the original is engrossed are sufficient in value according to the law applicable. Therefore, the

new provision must further require that the Arbitral Tribunal should specify in that endorsement, the value of the stamp duty paid on the original award.

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