

(2019) 04 BOM CK 0017

In the Bombay High Court

Case No : Arbitration Petition No. 466 Of 2017, 246 Of 2016, 300 Of 2018

Gautam Landscapes Private Limited

APPELLANT

Vs

Shailesh S. Shah And Ors

RESPONDENT

Date of Decision : 04-04-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(b), 2(e), 2(h), 7, 7(1), 7(2), 8, 9, 9(1), 9(2), 9(1)(ii)(a), 9(1)(ii)(b), 9(1)(ii)(c), 9(1)(ii)(d), 9(1)(ii)(e), 11, 11(5), 11(6), 11(6A), 11(7), 11(8), 11(9), 11(12), 11(13), 12(1), 16, 16(1)(a), 17, 34, 36
Maharashtra Stamp Act, 1958 — Section 3, 32A, 32A(3), 33, 34, 34B, 35, 36, 37, 38, 39, 40, 58
Indian Stamp Act, 1899 — Section 2(c), 33, 33(1), 34, 35
Registration Act, 1908 — Section 17, 49
Code Of Civil Procedure, 1908 — Section 9A, 47
Indian Partnership Act, 1932 — Section 69
Constitution Of India, 1950 — Article 136, 141

Citation : (2019) 04 BOM CK 0017

Hon'ble Judges : Naresh H. Patil, CJ; R.D. Dhanuka, J; G.S. Kulkarni, J

Bench : Full Bench

Advocate : Priya Rombade, Aniket Worlikar, Deven Dwarkadas, Ankit Lohia, Dinesh Tiwari, Swapnil Ambure, Mikhail Dey, Varun Nathani, Pooja Batra, P. S. Dani, Tejash Dande, R. D. Suryawanshi, Bharat Gadhavi, Vishal Navale, Shrikrishna R. Ganbavale, Milind Sathe, Aspi Chinoy

Judgement

Naresh H. Patil, CJ

(A) INTRODUCTION:

1. By an order dated 6th September 2018 passed by the learned Single Judge in Arbitration Petition No.466 of 2017 (Gautam Landscapes Pvt. Ltd. Vs. Shailesh S. Shah and anr.), and Arbitration Application No.246 of 2016 (Gautam Landscapes Pvt. Ltd. Vs. Shailesh S. Shah), the learned Single Judge observed in para 25.3 as under :-

"25.3 The question whether this Court under Section 2(e) of the Act can

entertain and grant any interim or ad-interim relief in an application under Section 9 of the Act when the Arbitration Agreement is contained in a document that is unstamped or insufficiently stamped, needs to be referred to a Larger Bench for determination. In my view, the Hon'ble Chief Justice can be requested by this Court to refer the said question / issue to a Larger Bench for consideration. The Registry is therefore directed to place the papers and proceedings before the Hon'ble the Chief Justice to enable the Hon'ble the Chief Justice to refer the aforesaid question / issue to a larger Bench for consideration."

In pursuance of the above order, this Larger Bench has been constituted.

2. By an order dated 25th October, 2018, this Bench has framed following question of law which would arise for consideration:-

"Whether a court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad-interim relief in an application under Section 9 of the said Act when a document containing arbitration clause is unstamped or insufficiently stamped?"

3. In the proceedings of Arbitration Application No. 300 of 2018 in the case of Vijay Sharma vs. Vivek Makhija & anr., the learned Single Judge of this court for reasons as set out in an order dated 20th December 2018 referred the following question of law for consideration of the Larger Bench and the Registry was directed to place the papers and the proceedings before the Chief Justice:

"Whether it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, to await the adjudication by the stamp authorities, in a case where the document objected, is not adequately stamped?"

Accordingly, the issue was referred to a Larger Bench on the similar lines, however, falling under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the ACA").

4. The Chief Justice referred the said issue falling under Section 11 of the ACA to this Larger Bench. By an order dated 26th February, 2019, this Bench framed the following question for its consideration :-

"Whether, inter alia, in view of Section 11 (6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped?

Hence, the above two questions, firstly falling under Section 9 of the ACA and secondly falling under Section 11 of the ACA and having common features, namely, as to what is the effect and consequence of the document being not sufficiently stamped, when the court is called upon to exercise jurisdiction under

the provisions of Section 9 and Section 11 of the ACA, are issues falling for consideration of this Bench.

(B) ISSUE UNDER SECTION 9:

5. We would take up the issue falling under Section 9 of the ACA first.

6. Briefly stated the facts are:-

Arbitration Petition No. 466 of 2017 is filed by the Petitioner - Gautam Landscapes Pvt. Ltd. against Respondent No.1 - Shailesh S. Shah and Respondent No.2 - Gautam Estate, under Section 9 of the ACA, seeking protective reliefs pending the final disposal of the arbitration proceedings and the enforcement and implementation of the Arbitration Award. There is another proceeding being Arbitration Application No.246 of 2016 filed by the said petitioner under Section 11 of the ACA seeking appointment of a sole arbitrator for adjudication of the disputes and differences that have arisen between the parties. The case of the petitioner is that disputes have arisen between the parties under a joint venture agreement dated 27 October 2006. When the learned Single Judge took up the Section 11 application filed by the petitioner, on behalf of the respondent an objection was raised, that the document was not adequately stamped and hence, be impounded and sent to Collector of Stamps for adjudication. This objection was contested on behalf of the petitioner, who contended that the document was adequately stamped. Learned Counsel for the petitioner however offered to hand over original document to the Prothonotary and Senior Master of this Court for being sent to Collector of Stamps for adjudication. On this the learned Single Judge, by an order dated 9 November 2017 impounded the document and directed the Prothonotary and Senior Master, to forward the said document within one week of its receipt to the Superintendent of Stamps/Collector of Stamps, Mumbai, for adjudication of the stamp duty. Upon adjudication the Collector of Stamps by an order dated 15 March 2018 held that the document was inadequately stamped and an amount of Rs.1,12,52,500/- is due and payable as deficit stamp duty. The petitioner did not accept the said order and filed a statutory appeal on 17 April 2018 under Section 34B of Maharashtra Stamp Act. The said appeal was pending.

7. When the matter was listed for hearing on this background before the learned Single Judge on the Section 9 reliefs, the learned counsel appearing for the petitioner relied upon the decision of the Division Bench of this Court in the case "Universal Enterprises vs. Deluxe Laboratories Pvt. Ltd." 2016 (5) Mh.L.J.623 wherein the Division Bench had taken a view that even if an arbitration agreement contained in a document is unstamped or insufficiently stamped and if a case is made out for grant of ad-interim reliefs, the Court cannot refuse the same merely on the ground that the agreement in question needs to be adjudicated on the issue of payment of stamp duty. Responding to this, on behalf of the respondent it was argued that the judgment of the Division Bench in Universal Enterprises (supra) was per incurium and was not good law in view of

the decision of the Supreme Court in "SMS Tea Estates (P) Ltd. vs. Chandmari Tea Co. (P) Ltd" (2011) 4 SCC 66 and the decision of the Division Bench of this Court in Lakdawala Developers Pvt. Ltd. vs. Badal Mittal & Ors. Appeal (L) No.272 of 2013. The learned Single Judge hence posed the following three issues which would arise and on which a reference ought to be made to the Chief Justice to constitute a larger bench to consider the same:-

(i) whether the Judgment of the Division Bench of this Court in the case of Universal Enterprises (supra) is per incurium?

(ii) alternatively whether the Judgment of the Division Bench of this Court in the case of Universal Enterprises (supra) is, on the face of it, bad in law as it is based on a patent misreading of binding precedents? And

(iii) further, if the Judgment of the Division Bench of this Court in Universal Enterprises (supra) is bad in law?

8. The learned Single Judge in an elaborate order discussed the above issues and considered the decision of the Division Bench of this Court in Universal Enterprises vs. Deluxe Laboratories Pvt. Ltd.(supra), the decision of the Supreme Court in SMS Tea Estates (P) Ltd. vs. Chandmari Tea Co. (P) Ltd. (supra) and another the decision of the Division Bench in Lakdawala Developers Pvt. Ltd. vs. Badal Mittal & Ors. (supra) and the provisions of Section 33 of the Maharashtra Stamp Act, and referred the issue as set out in paragraph 25.3 of the order, which we have already quoted above.

9. The order of the Division Bench in Lakdawala Developers Pvt. Ltd.(supra) which referred to the decision of the Supreme Court in "SMS Tea Estates (P) Ltd." (supra), was also followed by the learned Single Judge in the case of "Jayraj Devidas & Ors. Vs. Nilesh Shantilal Tank & Anr." 2014(6) Mh.L.J. 156

10. By our order dated 25 October 2018 we appointed Dr.Milind Sathe, learned Senior Advocate as Amicus Curiae to assist this Court. We have heard the learned Counsel for the petitioner, Mr.Dani,learned Senior Counsel with Mr.Dande, Advocate for the respondent and Dr.Milind Sathe, learned Amicus Curiae.

11. As to some extent the issues are interlinked, Dr.Sathe while making submissions on the issue falling under Section 9 has also touched the facets of Section 11.

(C) 12. Broadly, the submissions of Dr. Sathe, learned Amicus Curiae, are under the following heads:-

(i) SEVERABILITY OF ARBITRATION CLAUSE IN AN AGREEMENT:

13. Dr. Milind Sathe has taken us through the relevant provisions of the ACA Act, particularly provisions of Sections 2(b), 2(e), 2(h), Sections 7, 8, 9, 16 of the said Act and provisions of Sections 32A, 33, 35, 37 and 58 of the Maharashtra Stamp Act, 1958. On the issue of severability of an arbitration clause in an agreement, Dr. Sathe submitted that an arbitration agreement between the

parties can be contained in a standalone independent agreement and it can also be in the form of a clause in the agreement. As per definition of "arbitration agreement" in Section 7 several contingencies and situations have been treated as "arbitration agreement" such as exchange of communications, exchange of pleadings etc., the question of levy of stamp duty on an instrument under which the disputes arise will not arise in all such contingencies. The question of levy of stamp duty therefore concerns only in those cases where arbitration agreement is a part of a contract or an agreement which also contains other terms and conditions. It is undisputed that arbitration agreement by itself is not "an instrument" on which stamp duty is leviable nor such an agreement is required to be compulsorily registered. The levy of stamp duty and registration are thus applicable only to remaining part of the document i.e. excluding the arbitration agreement. Arbitration agreement has been held to be completely severable from the remaining document. For the purpose of Sections 9 and 11, the arbitration clause in an agreement between the parties under which the disputes arise is to be severed from the main contract itself and an arbitration agreement is independent of other terms of the contract. Even if the main contract contained in instrument (which requires stamping) is null and void, it would not mean that the arbitration clause is rendered invalid. This is further strengthened by Section 16(1)(a) of the ACA. The learned counsel, therefore, submitted that an arbitration clause contained in an agreement on the strength of which Section 9 or Section 11 proceedings are filed, if treated as an independent agreement on standalone basis, it does not entail payment of stamp duty as it is not "an instrument" nor does it find mention in Schedule I of the Bombay Stamp Act or the Indian Stamp Act. Therefore, the court in Sections 9 and 11 can treat an arbitration clause contained in an agreement even though it is unstamped as a separate agreement and pass necessary orders. The court under Section 9 is therefore 'acting upon' an arbitration agreement and not on the contract contained in an instrument which requires stamping.

14. Dr. Sathe has referred to the judicial pronouncements in the context of Sections 9 and 11 of the ACA, which we refer below.

15. On the judicial pronouncements in proceedings falling under Sections 9 and 11, the learned senior counsel submitted that insofar as the power of Court under Section 9 to grant interim measures, when Section 9 petition is filed on the basis of an arbitration agreement when it is contained in a document which requires payment of stamp duty and which is insufficiently stamped, following judgments are required to be noted. The only Judgment on Section 9 is of the Division Bench this Court in the case of Universal Enterprises v/s. Deluxe Laboratories Pvt. Ltd. (Supra) is a judgment which takes a view that ad-interim reliefs can be granted by the Section 9 court even if the document is not adequately stamped. This judgment, which gave rise to the reference, referred by the learned Single Judge is in conflict with other Division Bench judgment in the case of Agility Logistic Pvt. Ltd. vs. Jagannath Parmeshwar Mills Appeal No. 479 of 2012 and the order of the Division Bench in Lakdawalla Developers Pvt.

Ltd. (Supra) and per incurium the Supreme Court judgment in SMS Tea Estates (Supra). All the relevant judgments enumerated in the chart below would indicate in what proceedings the issues had arisen:

Sr. No.

Name of Judgment

Citation

Proceedings before the Court

1

Universal Enterprises V/s Deluxe Laboratories Pvt. Ltd.

2016 (5) Mh.L.J.623 (Division Bench)

Section 37 appeal against refusal of adinterim

2

SMS Tea Estates (P) Ltd. V/s. Chandmari Tea Co. (P) Ltd.

(2011) 14 SCC 66 (2 Judges)

S. 11

3

Badal Mittal V/s. Lakadawala Developers Pvt. Ltd.

Arbitration Petition No.221 of 2013 (Single Judge)

Section 9

4

Lakdawala Developers Pvt. Ltd. V/s. Badal Mittal

Appeal (L) No. 272 of 2013 (Division Bench) (Interim Order)

Appeal against Section 9

5

Agility Logistics Pvt. Ltd. V/s. Jagannath Parmeshwar Mills

Appeal No. 479 of 2012

Appeal against Section 11

6

SBP & Co. V/s Patel Engineering Ltd.

(2005) 8 SCC 618 (7 Judges)

Reference about nature of function of Chief Justice under Section 11

7

Jayraj Devidas V/s Nilesh Shantilal Tank

2014 (6) Mh.L.J.156 (Single Judge Bombay High Court)

Appeal against Section 9 order

8

M/s. Duro Felguera V/s. Gangavaram Port Ltd.

(2017) 9 SCC 729

Section 11(6A)

9

Coastal Marine Construction and Engineering Ltd. V/s. Garware Wall Ropes Ltd.

2018(3) Mh.L.J.22 (Single Judge, Bombay High Court)

Section 11 Sub Section (6-A)

10

Mohinder Singh Dua V/s. Kamla Landmarc Construction Pvt. Ltd.

Commercial Arbitration Petition No. 51 of 2016 (Single Judge Bombay High Court)

Section 9 Petition

It is thus clear from the above chart that the judgment of the Supreme Court i.e. SMS Tea Estates, was dealing with Section 11 of the ACA. Similarly, the Division Bench judgments of this Court i.e. Agility Logistic Pvt. Ltd. V/s Jagannath Parmeshwar Mills was also dealing with Section 11 of the ACA.

16. The learned Senior Counsel further submits that, as can be seen from the above chart, there are two Division Bench judgments of this court dealing with Section 9 of the ACA i.e. Lakdawala Developers Pvt. Ltd. vs. Badal Mittal (Supra) and Universal Enterprises vs. Deluxe Laboratories Pvt. Ltd. (Supra). The judgment of this court in Lakdawala Developers Pvt. Ltd. was an interim order passed in an appeal under Section 9 of the ACA and cannot be treated as a precedent. The judgment in Universal Enterprises was dealing with an order refusing ad-interim relief under Section 9 of the ACA. However, the order in the case of Lakdawala Developers was passed as an interim order in the appeal. The Division Bench in Universal Enterprises (Supra) distinguishes the decision of the Supreme Court in SMS Tea Estates as having been passed in the proceedings under Section 11 and not under Section 9 of the ACA.

17. The learned Senior Counsel submits that there are two judgments delivered

by the learned Single Judges of this court dealing with Section 9, i.e. Jayraj Devidas vs. Nilesch Shantilal Tank and Mohinder Singh Dua vs. Kamla Landmarc Construction Pvt. Ltd. Commercial Arbitration Petition No.51 of 2016 The judgment in the case of Jayraj Devidas applies SMS Tea Estates (which was dealing with Section 11) to the proceedings under Section 9 and also follows the interim order passed in Lakdawala Developers Pvt. Ltd. The judgment in the case of Mohinder Singh is passed in the proceedings arising out of Section 9 follows the judgment of the learned Single Judge in Jayraj Devidas (Supra).

18. The learned Senior Counsel submitted that the judgment in the case of SMS Tea Estates only restricts its scope to the proceedings under Section 11. It does not refer to a judgment of the Supreme Court in the case of Firm Ashok Traders vs. Gurumukh Das Saluja (2004) 3 SCC 155 which lays down the scope of powers under Section 9 of the ACA. It was held in that case that in Section 9 proceedings all that the court is concerned with is whether or not there is an arbitration agreement between the parties and it has nothing to do with the main relief which would be sought in the arbitral proceedings or the right which is sought to be canvassed in support of the relief, as what is relevant at that stage is only the arbitration agreement. It is further held that the right which a party exercises by filing a Section 9 petition does not arise out of the main contract, but it arises out of the arbitration agreement.

19. It is submitted that since the judgment in the case of SMS Tea Estates was only dealing with Section 11 proceedings, it does not make reference to the judgment in the case of Firm Ashok Traders (Supra) which continues to be a binding precedent and governing the field insofar as Section 9 is concerned.

(ii) EFFECT OF AMENDMENT IN SECTION 11 IN 2015:

20. On the effect of amendment to Section 11 in the year 2015, the learned Senior Counsel submitted that the Arbitration and Conciliation Act, 2016 and in particular Section 11 was amended and a new clause i.e. sub-section (6A) was introduced in Section 11. It is submitted that after the insertion of this clause, under Section 11, the court can only consider an issue as to the existence of the arbitration agreement. This is apparent from the fact that the wordings used in sub-section (6A) are that the court shall "confine" to the examination of existence of an arbitration agreement. It is therefore clear that after the amendment, Section 11 court cannot examine any other issue except finding out whether the arbitration agreement exists or not. This amendment also will equally apply to the issue arising out of non-payment of stamp duty under the provisions of the Maharashtra Stamp Act and Indian Stamp Act. It is submitted that the judgment in the case of SMS Tea Estates, which was dealing with Section 11. In any case after insertion of sub-section (6A) in Section 11 by amendment in 2015 the court will confine the inquiry limited to the existence of an arbitration agreement notwithstanding any judgment, decree or order of any court.

21. The learned Senior Counsel submitted that the judgment of the Supreme Court in the case of M/s Duro Felguera vs. Gangavaram Port Ltd. (2017) 8 SCC 729 and particularly in para 18 of the judgment of Justice Bhanumati and in paras 48 and 59 of the supplementary judgment of Justice Kurian Joseph, the court has interpreted the provisions of Section 11(6A) and held that the scope of inquiry under Section 11 is therefore very very limited. This judgment has been followed by a learned Single Judge of this court in Coastal Marine Construction & Engineering Ltd. Vs. Garware Wall Ropes Pvt. Ltd. 2018 (3) Mh.L.J. 22 This view by the learned Single Judge, following the Supreme Court judgment, is the correct view, considering amendment to Section 11 by insertion of sub-section (6A).

(iii) STAMP ACT IS A FISCAL STATUTE:

22. Dr. Sathe submits that the Maharashtra Stamp Act, 1958 and the Indian Stamp Act, 1899 are fiscal legislations and these statutes are concerned with the recovery of the revenue of the Government on the contract documents. The judgment in the case of Hindustan Steel Ltd. vs. Dalip Construction Co. (1969) 1 SCC 597 , in paras 6 and 7, has held that a Stamp Act is a fiscal statute and it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent and the stringent provisions of the Act are conceived in the interest of the revenue. It is therefore submitted that in proceedings under Section 9, the issue as to whether the stamp duty is sufficiently paid on an instrument which contains an arbitration clause need not be considered. This is the legal position as the arbitration clause contained in such an instrument (which requires stamping) can be severed from the main contract / transaction and the court under Section 9 can pass an order on the arbitration agreement and not the main contract transaction. In fact, the Rules framed by this Court for filing arbitration petitions specifically provide that these proceedings can be filed by annexing a certified copy of the original instrument and therefore the court under Sections 9 and 11 can impound the document and hand it for adjudication under the provisions of the Stamp Act and still pass necessary orders on the basis of certified copy of the original instrument. This will make both the statutes workable.

(iv) POSITION IN A REGULAR CIVIL SUIT:

23. The learned Senior Counsel submits that the Civil Courts have ample power to grant interim relief under Order XXXIX and XL of the Code of Civil Procedure, 1908 to parties even if the agreement on the strength of which the suit is filed is unstamped. In this context, the following judgments are relied:-

Sr. No.

Name of Judgment

Citation

Proceedings before the Court

1

Morpheus Media Ventrues Pvt. Ltd. V/s Anthony Maharaj of Trinidad and Tobago
2017 (2) Bom.C.R. 459 (DB Bombay High Court)
Appeal against grant of interim relief in suit

2

Mahendra Kumar Modi vs. Gujarat State Fertilizers & Chemicals Ltd.
2018 (2) Bom.C.R. 469 (DB Bombay High Court)
Appeal against grant of interim relief in suit.

3

Marine Container Services (I) Pvt. Ltd. V/s. Rajesh Dhirajlal Vora
2001 (4) Mh.L.J. 353 (Single Judge Bombay High Court)
O.38 R.5 Application

4

Pride Associates Vs. Damodardas Bhaidas Bhuta
2013 (5) ABR 729 (Single Judge Bombay High Court)
O. 40 Application in suit

5

Ashwatha Developers Vs. Shree Vardhaman Stanakvasi Jain Shravak Sangh
2016 (4) ABR 1 (Single Judge Bombay High Court)
Appeal against interim relief in Suit

In the above judgments it has been held that the issue as to insufficiency in payment of stamp duty or non-payment of stamp duty can be considered at the stage of trial or evidence and is not germane at the stage of deciding an application for interim relief. It would therefore be preposterous to apply the provisions as to non-payment of stamp duty at the stage of Section 9 proceedings when the same cannot be applied at the stage of interim relief in the suit. This would in fact deter parties from entering into an arbitration agreement and the purpose of ACA would itself be defeated.

(v) MEANING TO BE GIVEN TO PHRASE "ACTED UPON":

24. The learned Senior Counsel submitted that once the arbitration clause contained in an instrument, which requires stamping and on which no stamp duty is paid, is severed from the main contract, both courts under Sections 9 and 11, would only act on the arbitration agreement and not the main contract. It is

submitted that the words "acted upon" referred in Section 34 of the Bombay Stamp Act and Section 35 of the Indian Stamp Act, therefore, would become relevant and effective when the court is acting upon the instrument contained in the main contract. The court in Sections 9 and 11 in fact only acts upon the clause in the arbitration agreement which is to be construed as an independent and separate agreement from the main contract contained in an instrument which requires payment of stamp duty. Therefore, the words "acted upon" in Section 34 of the Bombay Stamp Act and Section 35 of the Indian Stamp Act will not apply to either under Sections 9 or 11 when the court is acting upon only the arbitration agreement.

25. This interpretation can also be viewed from a different angle. SMS Tea Estates judgment was dealing with the provisions of the Indian Stamp Act. The Maharashtra Stamp Act has a provisions, i.e. Section 32A which in sub-section (3) uses the following language:

"32A(3) If any person referred to in section 33, before whom any such instrument is produced or comes in the performance of his functions, has reason to believe that the market value of the immovable property which is the subject matter of such instrument has not been truly set forth therein, he may, after performing his function, in respect of such instrument, refer the instrument alongwith a true copy of such instrument to the Collector of the District for determination of the true market value of such property and the proper duty payable on the instrument.

Provided that if the person, before whom any such instrument is produced or comes, in performance of his functions, is an officer appointed as the Collector under clause (f) of section 2, and he has reason to believe that the market value of the immovable property which is the subject matter of such instrument has not been truly set-forth therein, he shall, for the purpose of assessing the stamp duty, determine the true market value of such property in the manner laid down in the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995."

It is therefore submitted that the same meaning can be ascribed to the provisions of Section 34 and after the performance of the duty by the court under Sections 9 and 11, the provisions of fiscal statutes, i.e. Indian Stamp Act and Maharashtra Stamp Act, can be taken care of.

26. The learned Senior Counsel submits that even if the instrument containing the main contract / transaction between the parties is impounded, it can never amount to impounding of an arbitration agreement. This is for the reason that arbitration clause contained in such an instrument is a separate and independent contract and it can still be acted upon by courts under Sections 9 and 11 even though the main instrument is impounded and sent for adjudication under the Stamp Act. This interpretation is further strengthened by the fact that in arbitration proceedings on an application for interim relief made under Section

17, without intervention of the court, will have no such fetter on the powers to grant interim relief. The learned counsel submits that the two judgments of the Supreme Court in *Naina Thakker vs. Annapurna Builders* (2013) 14 SCC 354 and *M. Anasuya Devi vs. M. Manik Reddy* (2003) 8 SCC 565 have already held that *SMS Tea Estates* judgment does not apply to proceedings under Sections 8 and 34 as it was only dealing with Section 11 and therefore same logic cannot apply to the proceedings under Section 9.

27. To summarize, Dr. Sathe, the learned Senior Counsel submitted that,

(i) the judgment in *SMS Tea Estates* was dealing with only Section 11 proceedings and the same logic cannot be made applicable to Section 9 proceedings;

(ii) the arbitration clause contained in an instrument requiring stamp duty is a separate and independent agreement which can be severed from the main instrument;

(iii) the judgment in *SMS Tea Estates* is not relevant for the determination of issue in question after the insertion of 2015 amendment and the question as to stamping / registration cannot be decided in Section 11 proceedings;

(iv) the judgment in the case of *SMS Tea Estates* cannot be extended in its application to Section 9 proceedings. The scope of proceedings under Section 9 and that in such proceedings court is only acting upon an arbitration agreement is conclusively held in the case of *Firm Ashok* and that legal position continues to subsist;

(v) Section 9 court, while passing an order for interim measure, is only "acting upon" the arbitration agreement and not the instrument requiring stamp duty and therefore these words in Section 34 of the Bombay Stamp Act will not apply to Sections 9 proceedings and Section 11 proceedings after insertion of clause 6A by amendment in 2015. The court in Section 9 proceedings can therefore pass ad-interim as well as final order unfettered by non-payment of stamp duty on the instrument;

(vi) the argument that because Section 9 Court is also required to enter into merits of the main transaction contained in the instrument requiring payment of stamp duty, while passing order, is misconceived. This is for the reason that although Section 9 court, while passing an order of interim relief, may be required to get into the merits of the transaction, but it is still acting on the basis of an arbitration agreement and the order is passed not on the main instrument, but on the arbitration agreement. If entering into merits of the matter amounts to acting upon the instrument, the court under Section 34 of ACA also would be required to enter into the merits of the award, however, it can still pass an order under Section 34 without entering into the question of stamp duty and the question of stamp duty is left to be decided at the stage of enforcing the award under Section 36 (Ref:- *Anasuya Devi* (Supra));

(vii) the court while entertaining an application under Section 9 can pass orders by acting upon the arbitration agreement to preserve the substance of arbitration proceedings, which may be either pending, contemplated or concluded.

(viii) this would be an appropriate course of action in view of the fact that in several cases of arbitration agreements as defined and falling under Section 7 or in civil suits, there is no fetter on the court in passing interim orders and if such fetter becomes applicable only when arbitration agreement is contained in an instrument requiring levy of stamp duty, this would be clearly unfair and inequitable and virtually a deterrent on arbitration proceedings. Besides, in law also it is not warranted;

(ix) in view of the amendment to Section 9, sub-section (2) now requiring commencement of arbitral proceedings within specified time, also takes care of the issue that the arbitration proceedings are commenced expeditiously after obtaining interim orders which would also expedite collection of revenue on such documents.

(x) The learned Senior Counsel therefore submitted that the answer to the question under reference is that the court as defined in Section 2(e) of the ACA can entertain and grant any interim or ad-interim relief on an application under Section 9 when an arbitration agreement is contained in a document, i.e. unstamped or insufficiently stamped. The court's power to grant interim / ad-interim relief under Section 9 is not fettered by the provisions of the Maharashtra Stamp Act, 1958 and the Indian Stamp Act, 1899. The revenue of the State also can be protected by the court after passing order under Section 9 directing the "document" severed from Arbitration Agreement to be impounded and sent for further action in accordance with law.

(D) SUBMISSIONS OF MR. P.S. DANI, LEARNED SENIOR COUNSEL FOR THE RESPONDENT IN SECTION 9 PETITION:

28. On the other hand Mr. Dani learned Senior Counsel for the respondents has made the following submissions :

i) It is contended that when the Court exercises jurisdiction under section 9, it exercises judicial powers and restricted to arbitration proceedings. According to Mr.Dani, this can be clearly seen from the following words in sub-section (1) of section 9 :

"The Court shall have the same powers for making orders as it has for the purpose of and in relation to, in any proceedings before it."

(ii) If a document is not sufficiently stamped then necessarily, the Court exercising jurisdiction under section 9 under the mandate of the law, as laid down in SMS Tea Estates is under an obligation to impound a document and only after payment of the stamp duty, the Court can proceed to pass orders on the section 9 application which would be either ad-interim or interim and not before it is sufficiently stamped.

(iii) The decision of the Supreme Court in SMS Tea Estates (supra), in para 21 clearly holds, that the Court should consider at the outset, whether an objection in that behalf is raised or not and as to whether the document is properly stamped. If it is not properly stamped, then it should be impounded and dealt in a manner as specified under the Maharashtra Stamp Act, 1958. Till that time, the Court cannot act upon the document and also arbitration agreement contained therein, and only after deficit stamp duty is paid or the document is sufficiently stamped, the Court can act upon the said document or document can be admitted in evidence.

(iv) The decision in SMS Tea Estates, (supra) is not in any manner diluted by the amendment as incorporated, by Arbitration Amendment Act (Act 3 of 2016 with effect from 23.10.2015) and or by incorporation of sub section (6A) in Section 11 as Section 9 has remained untouched by any incorporation of the nature as brought about by sub-section (6A) in Section 11.

(v) Referring to section 33 of the Maharashtra Stamp Act, 1958 it is submitted that, it is a restriction on the power of the Court exercising jurisdiction even under Section 9, as unless there is compliance of payment of deficit stamp duty, or document to be sufficiently stamped, the Court necessarily has to impound the document as Section 33 of the Stamp Act would postulate, and only thereafter proceed to pass any orders on a Section 9 Petition. Referring to the decision of the Supreme Court in Commissioner of Customs (Import) Mumbai vs Dilip Kumar & Company and others (2018) 9 SCC 1, it is submitted that the duty of the Court would be to act upon the true intention of the legislation, as reflected by Section 33 of the Maharashtra Stamp Act, 1958 as it is a fiscal statute and therefore, it is required to be strictly construed.

(vi) It is contended that before a document is acted upon, the document is required to be sufficiently stamped, is further confirmed in the decision of the Supreme Court in Black Pearls Hotels Private Limited vs Planet M.Retail Limited (2017) 4 SCC 498 wherein, the Supreme Court referring to the decision in SMS Tea Estates (supra) has held that the Court would be obliged to consider the nature of the document and whether the document is required to be stamped or not and whether requisite stamp duty has been paid on the same.

29. Learned Senior Counsel placed reliance on paragraphs 9 to 22, 29 and 31 of the judgment of the Supreme Court in the case of SMS Tea Estates (Supra) and submits that the said judgment is not restricted to Section 11 of the ACA, but was also dealing with the powers of the Court under section 9 of the said Act and had specifically dealt with the issue as to whether the arbitration agreement in an agreement compulsorily required to be stamped which is unregistered and/or which is not duly stamped, is valid and enforceable or not? He submits that while dealing with the said issue, the Supreme Court held that if the Court comes to the conclusion that the document containing the arbitration agreement is not sufficiently stamped, it should be impounded and dealt with in the manner specified in section 38 of the Stamp Act. The Court cannot act upon the said

document or the arbitration clause therein. He also invited our attention to the questions formulated by the Supreme Court in the said judgment and more particularly paragraph 9(ii) thereof.

30. It is submitted by the learned senior counsel that the questions framed by the Supreme Court in paragraphs 9(i) and 9(ii) have been separately considered and decided in the said judgment.

31. Insofar as reliance placed by Dr. Sathe, on section 16 of the ACA in support of the submission that the arbitration agreement can be severed from the main agreement, he submits that the said situation would arise only under section 16(1)(a) of the Act and that also only when the parties refer the dispute to arbitration without intervention of the Court. He submits that though the proviso to section 49 of the Registration Act, 1908 provides that unregistered document affecting the immovable property is required by the Registration Act or Transfer of Property Act, 1882 to be registered, it may still be received in evidence in a contract for specific performance or evidence of any collateral evidence, as there is no similar proviso to Section 35 of the Maharashtra Stamp Act. He submits that though while considering the application under section 11 of the ACA, Court can sever the arbitration agreement from the main agreement, the principles of severability permitted under section 11, if any, cannot be mixed up with the powers of Court while dealing with the application under section 9 of the said Act.

32. Learned Senior Counsel placed reliance on the judgment of the Supreme Court in case of Black Pearl Hotel Private Limited (Supra) and more particularly paragraphs 6, 8, 9 and 10 and would submit that the Supreme Court in the said judgment delivered by three Judges of the Supreme Court has reiterated the principles laid down by the two Judges of the Supreme Court in case of SMS Tea Estates (supra) and more particularly the principles laid down in paragraph 22 of the said judgment. He submits that the judgment of the Supreme Court in case of SMS Tea Estates (supra) and in case of Black Pearl Hotel Private Limited (supra) applies to the proceedings under section 9 of the Act and thus the applicant in the said application not having paid the stamp duty as required in law, could not claim any interim measures under section 9 of the Act till such document is sufficiently stamped.

33. All powers of Court under different provisions of law, including the fetters created under the provisions of the Maharashtra Stamp Act stand attracted to the proceedings under section 9 of the act also. He submits that even if the arbitration agreement is severed, for the purpose of granting interim measures, the Court will have to arrive at a prima-facie conclusion that whether the main agreement is enforceable in law or not. While considering the application for interim measures under section 9 of the Act, the Court has to consider the validity of the main agreement and has to act upon the said agreement. He submits that for the purpose of touching upon the merits of the matter, the Court has to consider the validity of the agreement on merits.

34. It is submitted by the learned senior counsel that a document required to be stamped if is not duly stamped is inadmissible in evidence. Such consequence is specifically provided under section 34 of the Maharashtra Stamp Act, 1988. He submits that once the fiscal statute determines a particular thing to be done in a particular manner, such provisions have to be strictly followed.

35. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Commissioner of Customs (Import), Mumbai (Supra), and in particular paragraphs 20 to 23 and would submit that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. He submits that the petitioner thus cannot seek interim measures under section 9 based on the argument that though the document is not sufficiently stamped, if interim measures are not granted immediately, it would lead to a serious hardship or consequences. He submits that the hardship and inconvenience cannot be the basis to alter the meaning and language implied by legislation under section 34 of the Maharashtra Stamp Act.

36. It is submitted by the learned senior counsel that though the legislature had chosen to bring the amendment to section 11 by inserting sub section (6-A), thereby providing that the power of the Court is confined to see the existence of the arbitration agreement, such amendment is not brought to section 9 of ACA. He submits that it is thus clear that the scheme of section 11 and 9 and the principles applicable to both these proceedings are different.

37. Insofar as the submission of Dr. Sathe, learned senior counsel that the photocopy cannot be impounded or no stamp duty is required to be paid on a copy is concerned, Mr.Dani, learned senior counsel placed reliance on section 3 of the Maharashtra Stamp Act and more particularly proviso thereto and would submit that if the original document is not stamped, copy if relied upon will have to be stamped.

38. Learned senior counsel distinguished the judgment of the Supreme Court in case of Firm Ashok Traders & Anr. (Supra) and more particularly paragraph 13 of the said judgment and would submit that the Supreme Court in the said judgment held that a person who is not a party to the arbitration agreement cannot enter the Court for protection under section 9. He submits that the said judgment of the Supreme Court would not assist the case of the petitioner.

39. Learned Senior Counsel submits that in view of the proviso to section 9-A of the Code of Civil Procedure, 1908, the Court is empowered to grant ad-interim relief even during the pendency of adjudication of issue of jurisdiction raised by the defendant. There is no such proviso under section 9 of the Act empowering the Court to grant even ad-interim relief when an issue of insufficiency of payment of stamp duty on the document being under consideration is raised.

40. The learned Senior Counsel distinguished the judgment of the Division Bench of this Court in the case of Universal Enterprises (supra) on the ground that the

Division Bench in the said Judgment failed to notice paragraph 19 of the Judgment of the Supreme Court in the case of S.B.P. & Co. vs. Patel Engineering Ltd. AIR 2006 SC 450 . He submits that the Supreme Court in the said Judgment had specifically held that under Section 9 of the Act, if the opposite party disputes the existence of arbitration agreement or raises a plea that the dispute involved was not covered by the arbitration clause or that the Court which was approached, had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law, and whether the dispute sought to be raised is covered by that agreement or not.

41. It is submitted that unless the Court while considering the application under Section 9 of the Act considers the main agreement containing an arbitration agreement, the Court cannot grant any interim measures under Section 9 and without acting upon the said agreement. He strongly placed reliance on Section 35 of Indian Stamp Act in support of his submission that the Courts are barred from acting upon the documents which are unstamped or under stamped and the Court, while deciding an application under Section 9 of the Act, is bound to go into the factual aspects and find out the prima facie case or balance of convenience, or other to grant or refuse any relief. He submits that such scrutiny and examination of the actual contract would ultimately require acting upon the said documents.

42. It is submitted that to examine the actual merits of the case, the Court has to act upon the principal document, as the Court cannot sever the arbitration clause from the main agreement and grant injunction. Without acting upon the main document, the Court cannot pass any injunction order.

(E) Discussion

43. To examine the controversy, the relevant provisions of the ACA and Maharashtra Stamp Act, 1958 are required to be noted:

Arbitration and Conciliation Act 1996

Section 2. Definitions.-(1) In this Part, unless the context otherwise requires,-

(a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;

(b) "arbitration agreement" means an agreement referred to in section 7;

2[(e) "Court" means-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;]

(h) "party" means a party to an arbitration agreement.

5. Extent of judicial intervention. -Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

ARBITRATION AGREEMENT

7. Arbitration agreement.-(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in--

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement;

or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 9. Interim measures etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-

matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

[(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under subsection

(i), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]

11. Appointment of Arbitrators.-(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and -

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a

sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[(6A) 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.

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

JURISDICTION OF ARBITRAL TRIBUNAL

Section 16. Competence of arbitral tribunal to rule on its jurisdiction- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3) and where the arbitral tribunal takes a decision rejecting the plea continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

Maharashtra Stamps Act

INSTRUMENTS NOT DULY STAMPED:

33. (1) Subject to the provisions of section 32A, every person having by law or consent of parties authority to receive evidence, and every person in charge of public office, except an officer of police (or any other Officer, empowered by law to investigate offences under any law for the time being in force) before whom any instrument, chargeable in his opinion, with duty is produced or comes in the performance of his functions shall, if it appears to him that such instrument is not duly stamped, impound the same (irrespective whether the instrument is or is not valid in law).

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed:

Provided that -

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of Criminal Court to examine or impound if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under (Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973).

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such Officer as the Court may appoint in this behalf.

(3) For the purpose of this section, in cases of doubt-

(a) the State Government may determine what offices shall be deemed to be public offices; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices.

34: No instrument chargeable with duty ***** shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped (or if the instrument is written on sheet of paper with impressed stamp (such stamp paper

is purchased in the name of one of the parties to the instrument);

Provided that,-

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of -

(i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and

(ii) any penalty at the rate of 2 per cent, of the deficient portion of the stamp duty;

Provided that, in no case, the amount of the penalty shall exceed (four times) the deficient portion of the stamp duty;

(b) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and may one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(c) nothing therein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding (under Chapter IX of Part D of Chapter X of the Code of Criminal Procedure, 1973);

(d) Nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by section 32 or any other provisions of this Act;

(e) Nothing herein contained shall prevent the admission of a copy of any instrument or of any oral admission of the contents of any instrument, if the stamp duty or a deficient portion of the stamp duty and penalty as specified in clauses

(a) is paid.

35. Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

36. The State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

58. (1) When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding (under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973) makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty

and a penalty under section 34, the Court to which appeals lie from, or reference are made by, such first mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration.

(2) If such Court after such consideration is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 34, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect and determine the amount of duty with which such instrument is chargeable (and may require,-

(i) the party or person concerned to make the payment of the property duty or the amount required to make up the payment of the proper duty or the amount required to make up the same, together with a penalty, under section 34, or payment of a higher duty and penalty than those paid, to itself or to the Collector; and

(ii) any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and where the instrument to which it relates has been impounded or is otherwise in the possession of such Court shall also send him such instrument.

(3A) When the duty and penalty leviable in respect of any instrument in accordance with the declaration made under sub-section (3) and required to be paid thereunder are paid to the Court or to the Collector, then the Court or, as the case may be, the Collector shall certify by endorsement thereon that the property duty and penalty, stating the amount of each, have been levied in respect of such instrument, and the name and residence of the person paying the same.

(3B). Every instrument so endorsed shall thereupon be delivered, on an application in this behalf, to the person from whose possession the instrument came in the possession of such Court, or as such person may direct to any other person authorized by him.)

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under section 41, or in section 42, prosecute any person for any offence against the stamp law which the Collector considers him to have committed in respect of such instrument'

Provided that-

(a) no such prosecution shall be instituted where the amount including duty and penalty, which according to the determination of such Court, was payable in respect of the instrument under section 34, (is paid to the Court or the Collector, unless the Collector thinks) that the offence was committed with an intention of

evading payment of the property duty

(b) except for the purposes of such prosecution no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate, granted under section 41."

(F) DISCUSSION / LEGAL POSITION AS TO WHAT IS THE SCOPE AND JURISDICTION OF THE COURT UNDER SECTION 9:

44. As noted above, the issue which would fall for consideration is whether, "the Court under ACA can entertain and grant any interim and/or ad-interim relief in an application under Section 9 of the ACA when a document contained arbitration clause is unstamped or insufficiently stamped?" Section 9 of the ACA can be invoked by a party only as an interim measure pending commencement of the proceeding or in the course of the proceeding or at any time after making of the arbitration award before its enforcement in accordance with Section 36 of the ACA. Any order which would be passed by the Court is intended to protect the subject matter of the proceeding and secure the interest of the parties. We are concerned with a situation of an interim or ad-interim order pending the arbitral proceedings. The relief which would be granted by the Court under Section 9 is not a substantive final relief, for the reason that a final relief can be granted only by an arbitral award.

45. For presetting the scope of Section 9 of the ACA, we may refer to the following judgments :

(a) In the case of M/s Sundaram Finance Ltd. vs. M/s NEPC India Ltd. AIR 1999 SC 565 , in para 15, the Supreme Court observed as under :

"15. Section 9 of the said Act corresponds to Article 9 of the UNCITRAL Model Law which is as follows:

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure".

This article recognises, just like Section 9 of the 1996 Act, a request being made before a Court for an interim measure of protection before arbitral proceedings. It is possible that in some countries if a party went to the Court seeking interim measure of protection that might be construed under the local law as meaning that the said party had waived its right to take recourse to arbitration. Article 9 of the UNCITRAL Model Law seeks to clarify that merely because a party to an arbitration agreement requests the Court for an interim measure "before or during arbitral proceedings" such recourse would not be regarded as being incompatible with an arbitration agreement. To put it differently the arbitration proceedings can commence and continue notwithstanding a party to the arbitration agreement having approached the Court for an order for interim protection. The language of Section 9 of the 1996 Act is not identical to Article 9

of the UNCITRAL Model Law but the expression "before or during arbitral proceedings" used in Section 9 of the 1996 Act seems to have been inserted with a view to give it the same meaning as those words have in Article 9 of the UNCITRAL Model Law. It is clear, therefore, that a party to an arbitration agreement can approach the Court for interim relief not only during the arbitral proceedings but even before the arbitral proceedings. To that extent Section 9 of the 1996 Act is similar to Article 9 of the UNCITRAL Model Law.

(emphasis added)

It can be derived from the provisions of Section 9 of ACA and the observations of the Supreme Court that under Section 9 the court has jurisdiction to pass orders before commencement of the arbitration proceedings and appointment of an Arbitrator. Before exercising jurisdiction under Section 9, the court has to be satisfied that there is an arbitration agreement between the parties and the applicant will take effective steps for commencement of arbitral proceedings. On the court being satisfied, jurisdiction can be exercised under Section 9 of the ACA to pass such interim orders by giving protection to the parties in the facts and circumstances warrant in a given case.

(b) In the Constitution Bench judgment of the Supreme Court in the case of *M/s. S. B. P. & Co. vs. M/s. Patel Engineering Ltd.* (Supra), Justice P. K. Balasubramanyan for the majority observed as under :

"18. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, " the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication [See *R.M.A.R.A. Adaikappa Chettiar and Anr. v. R. Chandrasekhara Thevar* (AIR 1948 P.C.12)].

(Emphasis Supplied)

(c) In the case of *Firm Ashok Traders & Anr.* (Supra), in para 13, the Supreme Court observed as under :

"13. The A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of A & C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of sub- Section (1) of Section 2 of A & C Act to mean 'a party to an arbitration agreement'. So, the right conferred by Section 9 is on 'a party to an arbitration agreement'. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceeding, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in *M/s Sundarum Finance Ltd. v. M/s NEPC India Ltd.*, AIR (1999) SC 565 the doubts stand cleared and set at rest and it is not necessary that arbitral proceeding must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a party to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the arbitral tribunal. Under the scheme of A & C Act, the arbitration clause is separable from other clauses of the Partnership Deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for in an application under Section 9 of A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral tribunal; the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of A & C Act."

(Emphasis Supplied)

46. The legal position which emerges from the reading of the provisions of the ACA and the authoritative pronouncements on the powers of the court exercising jurisdiction under Section 9, can be summarized as under :

(a) Section 9 enables the party to approach the court before commencement of arbitral proceedings to seek interim / ad-relief on the basis that there exists an arbitration agreement between the parties.

(b) On party approaching the court under the said provisions, the court will have jurisdiction to pass orders of interim / ad-interim nature protecting the party in a given facts and circumstances.

(c) The right conferred under Section 9 to a party to approach the court would not be of a nature of a right under a contract. For invoking jurisdiction under Section 9, the party must establish that there was an arbitration agreement and he was party to the same.

(d) The basic requirement, therefore, for invoking jurisdiction of the court under Section 9 would be that there exists an "arbitration agreement" between the parties.

The concern of the court in the present case is of a arbitration clause which is contained in an agreement, which is not sufficiently stamped. It is quite clear that under the scheme of the ACA, an arbitration clause is severable from other clauses of the contract and an arbitration agreement is not required to be stamped or required to be registered. There can also be a separate / independent arbitration agreement between the parties which would be distinct from the principal contract (see Section 7).

47. The doctrine of severability is, thus, applicable and the following consequences would follow :-

(a) An arbitration agreement between the parties is required to be severed from the principle contract and is required to be given effect independently by a principal contract between the parties.

(b) As seen from Sub section 2 of Section 7 an arbitration agreement may be in the form of arbitration clause in any contract or in the form of separate agreement. Further sub section 1 (a) of Section 16 of the ACA provides that arbitration clause which form part of the contract shall be treated as agreement independently or the other terms of the contract.

(c) The doctrine of severability of arbitration agreement, therefore, can be clearly seen from the cumulative reading of sub section 2 of Section 7 and sub section (1)(a) of Section 16 of the ACA.

(G) SCOPE AND OBJECT OF THE STAMP ACT:

48. The Stamp Act admittedly is a fiscal enactment. The primary object of which

is to ensure payment of stamp duty on the documents on which stamp duty is required to be paid.

49. In the case of J.M.A. Raju vs. K. Bhatt AIR 1976 Gujarat 72 FB, Full Bench of the Gujarat High Court held that the court has to consider the provisions of the Stamp Act as a fiscal measure, the principal object of which is to secure revenue for the State. The object of the enactment is not to enable parties to raise technical objections to meet the case of their opponent.

50. In the case of Jagdish Narain vs. Chief Controlling Revenue AIR 1994 All 371, the Allahabad High Court held, in the context of Indian Stamp Act which is an enactment *pari materia* to the Maharashtra Stamp Act, that the sole object of the Indian Stamp Act is to increase revenue and its provisions must be construed as having in view only the protection of revenue.

51. In the case of Javer Chand and ors. vs. Pukhraj Surana AIR 1961 SC 1655, the Supreme Court in para 4 considers a situation when a document, which was not stamped, came to be admitted in evidence and what would be the consequence. It was observed as under:

" That section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. The only exception recognised by the section is the class of cases contemplated by S.61, which is not material to the present controversy. Section 36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the document is tendered in evidence. Once the Court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. The record in this case discloses the fact that the hundis were marked as Exs. P. 1 and P. 2 and bore the endorsement 'admitted in evidence' under the signature of the Court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the Court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, S. 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of Appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the

same Court or a Court of superior jurisdiction."

52. In the case of M/s. K. I. Suratwala and Co. vs. Mahmud Bidi Works Sholapur and ors. AIR 1972 BOMBAY 238, this court in para 22 observed as under :

"22. The learned trial Judge held that the agreement, Ex.42 was a bond, within the meaning of Section 2(c) of the Indian Stamp Act and was liable to be stamped with an ad valorem stamp duty due under Art.15. We, however, find that the document had already been exhibited and used at the trial. Under Section 35 of the Indian Stamp Act once a document is so admitted in evidence and used it cannot be thereafter questioned at any stage of the same proceedings or even in appeal. We cannot, therefore, hold that it was open to the learned Judge to hold in the judgment that the instrument was inadmissible in evidence once it had been marked as an exhibit and admitted in evidence. The Supreme Court has also so held in the case of Javer Chand and Ors. v. Pukhraj Surana, AIR 1961 SC 1655."

(Emphasis Supplied)

53. In the case of Radhakisan Tijulal Agrawal vs. Jayantilal Hargovindas and anr. 1980 Mh.L.J. 120, the learned Single Judge of this court observed as under:

"6. The main contention of the appellant is that the plaintiff, after having obtained an insufficiently stamped pro-note (Ex.31) in connection with the suit transaction, cannot base his suit on the original consideration i.e. the loan transaction. My attention was drawn to section 34 of the Indian Stamp Act, 1899. The relevant part of that section reads as follows:

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped."

There is no dispute that the payment of stamp duty and penalty is not permissible if the case is of an insufficiently stamped negotiable instrument or a promissory note. Along with the above provision, Mr. Mehadia relied upon the provisions of section 35 of the Evidence Act which lays down that when the terms of a contract have been reduced to writing, no evidence except the document itself (of the secondary evidence) is admissible. On the basis of these two provisions, it was contended that as the pro note (Ex. 31) is in writing, no other evidence will be permissible except that writing. Secondly the said writing itself is inadmissible as it is insufficiently stamped. With this hypothesis a contention is raised that the plaintiff cannot base his claim on the pro-note. It should not, however, be forgotten that the plaintiff has in fact not based the suit claim on the pro- note. He has specifically alleged in paragraph 6 of the plaint that he was filing the suit on the original transaction.

9. What will be the effect of the execution of a pro-note or a bill in connection with the advancement of money is considered in Halsbury's Law of England,

Volume VII page 243 in the following words:

"If a bill of exchange or note be taken on account of a debt, and nothing be said at the time, the legal effect of the transaction is that the original debt remains, but the remedy for it is suspended till the maturity of the instrument in the hands of the creditor. If the security is paid when it becomes due, this is equivalent to payment of the original debt, & if it is paid in part, the original debt is discharged 'pro tanto'. If the instrument is dishonoured, payment of the original debt may be enforced as if no security had been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the hands of a third party, in which case the creditor's remedy continue to be suspended."

10. The result, therefore, is that in the present case the pleadings and the evidence make it abundantly clear that the plaintiff mainly alleged that he advanced the amount of loan to defendant No. 2. In such a case, mere execution of a pro note would not mean that the transaction of loan has incited into that of loan. The loan transaction still continues to exist and there is nothing illegal if in these circumstances the plaintiff bases his claim on the original consideration. This is more so when, as discussed above, the pro-note has not been taken in absolute discharge of the loan or as in accord of full satisfaction of the loan transaction. Here the loan and the pro note are not consideration for each other. The result is that the appeal fails. The appeal is accordingly dismissed with costs."

(emphasis supplied)

54. In the case of Morpheus Media Ventures Pvt. Ltd. vs. Anthony Maharaj of Trinidad and Tobago 2017(2) Bom.C.R. 459, the Division Bench of this court in paras 22, 23, 24, 26 and 27 observed as under :

22. Prior thereto and extensively until paragraph 20 of the impugned judgment and order, the learned Judge sets out the pleadings and deals with the arguments of all the defendants that the document, particularly the promissory note, cannot be relied upon. The learned Judge expressed an opinion that the defect is a curable one. The learned Judge then referred to all the provisions contained in the Indian Stamp Act, 1958. He then concluded that the Indian Stamp Act is a fiscal measure. It is enacted to secure revenue for the State on certain class of instruments and 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. (See Hindustan Steel Ltd. Vs. Dilip Construction MANU/SC/0474/1969 MANU/SC/0474/1969 : AIR 1969 SC 1238). This judgment is followed by this Court and particularly by a single Judge in the case referred to in paragraph 16 of the impugned judgment.

23. Mr. Chinoy would submit that this principle could not have been evoked and applied in the facts and circumstances of the present case. We do not agree. We find that all the stipulations, provisions and conditions contained in Order XXXVII of the Code of Civil Procedure are complied with. There is no dispute that the

promissory note and the two documents which have been referred extensively by the learned single Judge can be the basis for institution of a Summary Suit. The Summary Suit having been based thereon could have been instituted and tried as such. There is no substance in the defence and contentions of the appellants on merit. Mr. Chinoy would submit that the learned single Judge has accepted the legal position that these instruments cannot be received in evidence or acted upon. He has, therefore, proceeded to impound each of them. Having so impounded them, he was not empowered to pass a conditional order.

24. We do not agree with Mr. Chinoy further. We must not forget that the Stamp Act envisages a duty on the instrument. The Stamp Act is concerned with the instrument and not the transaction embodied or contained in it. The underlying transaction, therefore, does not enter into consideration while determining the proper stamp duty, adjudicating it and pass an order for ensuring payment of the same. Thus, the above matters are not with which the Court is concerned and it can in appropriate cases such as the one before us proceed with the merits of the matter by ensuring that the proper stamp duty is adjudicated and paid. The learned single Judge has precisely ensured that. He has not allowed the appellants to rely on a technical plea and of the nature referred above. The course adopted by him, in the facts and circumstances of the case, cannot be faulted. We have found that in all the instruments based on which the suit has been laid and particularly those required by Order XXXVII there is 'an admission of' the liability. There is no denial on the execution of these documents. None of the defendants have ever questioned the contents thereof nor is there any interpretation other than the one placed by the plaintiffs on the contents thereof and which can be deduced from the defences raised. In such circumstances, allowing a just and legitimate claim to be defeated and frustrated by taking recourse to the fiscal measure was not permitted by the learned single Judge.

25....

26. This Judgment was followed in a later judgment in the case of Dr. Chiranji Lal (D) by L. Rs. V/s. Hari Das (D) by L. Rs. reported in MANU/SC/0396/2005 MANU/SC/0396/2005 : AIR 2005 SC 2564. Pertinently, Mr. Chinoy's extreme argument that once impounded the instruments as above cannot be relied upon to pass a conditional order is not borne out by the legal provisions noted in Hindustan Steel and analysed therein. That they are acted upon without adherence to the Indian Stamp Act therefore is not a sound argument to canvas in the facts of our case.

27. Beyond this contention and based on the applicability of the Stamp Act nothing really is argued before us on merits. Even otherwise we do not find that the defences raised have any merit or can be termed as substantial. We also do not find that the reliance placed on the SMS Tea Estates Pvt. Ltd. (supra) to be appropriate in the facts of our case. Any larger or wider question based on the provisions of law, the power of the court or the authority to receive unstamped instruments in evidence need not be considered in further details or gone into

conclusively in this case. Purely going by the facts and circumstances of the present case and the conduct of the appellants, we do not think that the learned single Judge can be faulted in the exercise that he undertook. He was not obliged to postpone the adjudication until the proper stamp duty was adjudicated and paid. He was not obliged to reject the request of the respondent No. 1-plaintiff or defer the hearing of the Summons for Judgment or dismiss it. Purely in the facts and circumstances of the present case and when he found that all that the defendants are doing is to defeat and frustrate a just, legitimate and bona fide claim, the learned Judge, by relying on the principle enunciated in the Supreme Court Judgment, granted conditional leave to defend. Such an order can neither be termed as perverse or vitiated by any error law apparent on the face of the record. It does not require any interference in our appellate jurisdiction. The appeals are devoid of merits and are dismissed."

(Emphasis Supplied)

(H) DISCUSSION ON APPLICABILITY OF SMS TEA ESTATE

(P) LTD. TO PROCEEDINGS UNDER SECTION 9 OF THE ACA :

55. The decision of the Supreme Court in SMS Tea Estates (Supra) was rendered in the context of Section 11 of the ACA. The learned Chief Justice of the Gauhati High Court had passed an order rejecting an application under Section 11 of ACA on the ground that the arbitration agreement was contained in lease deed which was not sufficiently stamped and thus was inadmissible in evidence and unenforceable and not binding. Having regard to Section 35 of the Stamp Act, 1899 and Clause 35 being arbitration clause, therefore, was also invalid and unenforceable. The Supreme Court framed the following questions for determination as referred in paragraph 9 of the decision:-

"9. On the contention urged the following questions arise for consideration:

(I) whether the arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?

(II) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable? And

(III) Whether there is an arbitration agreement between the appellant and the respondent and whether an arbitrator should be appointed?"

In paras 11 and 16, the Supreme Court observed as under:

"11. Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but

a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to Section 49 of the Registration Act.

16. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to Section 49 of Registration Act read with Section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration."

56. In regard to the second question namely if an arbitration agreement contained in an unregistered (but compulsorily registerable) instrument which is not duly stamped, the Court referring to the provisions of Section 33 and 35 of the Indian Stamp Act observed that unless stamp duty and penalty due on the instrument is paid, the Court cannot act upon the instrument, which means it cannot act upon the arbitration agreement also which is part of the instrument. It was held that Section 35 of the Indian Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Indian Stamp Act does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction. Considering the scheme for appointment of arbitrators as framed by the Chief Justice of Gauhati High Court, 1996 it was observed that an application under Section 11 of the Act was required to be accompanied by the original arbitration agreement or a duly certified copy thereof.

The Supreme Court accordingly in paragraphs 21 and 22.6 observed as under:-

"21. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.

22.6 Where the document is compulsorily registerable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance, and (b) as evidence of any collateral

transaction which does not require registration.

In paragraphs 29 to 32 the court observed as under:

"29. An Arbitrator can no doubt be appointed in regard to any disputes relating to the lease deed. But as noticed above, as the lease deed was not registered, the Arbitrator can not rely upon the lease deed or any term thereof and the lease deed cannot affect the immovable property which is the subject matter of the lease nor be received as evidence of any transaction affecting such property. Therefore, the Arbitrator will not be able to entertain any claim for enforcement of the lease.

30. Lastly we may consider the claim for recovery of the amounts allegedly spent towards the tea estates, as a consequence of Respondents not selling the estates or not permitting the Appellant to enjoy the lease for 30 years. If this claim is treated as a claim for damages for breach in not granting the lease for 30 years then it would be for enforcement of the terms of the lease deed which is impermissible under Section 49 of the Registration Act. If it is treated as claim dehors the lease deed then the arbitrator may not have jurisdiction to decide the dispute as the arbitration agreement (clause 35) is available only to settle any dispute or difference arising between the parties in relation to or in any manner touching upon the lease deed and not in regard to disputes in general.

31. In paras 29 and 30 above, we have considered and stated the general legal position for guidance in arbitrations, even though the same does not directly arise for consideration within the limited scope of the proceedings under Section 11 of the Act.

Conclusion

32. In view of the above this appeal is allowed, the order of the High Court is set aside and the matter is remitted to the learned Chief Justice of Guwahati High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law."

57. Applying the well settled principles of law on the 'doctrine of precedents' on a careful reading of the decision in SMS Tea Estates it becomes quite clear that the principles as laid down therein were required to be applied when the court considered an application under section 11 of the ACA. This decision is not an authority as to what section 9 of the ACA envisages and is not a decision which was rendered in the context of Section 9 of the ACA. There is certainly a difference in the ambit and scope of jurisdiction the court would exercise under these provisions. In saying so we may refer to the decision of the Constitution Bench of the Supreme Court in "Union of India Vs. Chajju Ram" (2003) 5 SCC 568 wherein the Supreme Court in paragraph 23 has observed thus:-

"23. It is now well settled that a decision is an authority for what it decides and not what can logically be deducted therefrom. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion."

58. We may also refer to the decision of the Supreme Court in "Regional Manager Vs. Pawan Kumar Dubey" (1976)3 SCC 334 wherein the Supreme Court in paragraph 7 observed thus:

"7. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

59. The decision of the Supreme Court in the case "Union Of India & Ors vs Dhanwanti Devi & Ors" 1996(6) SCC 44 has observed in paragraph 9 thus:-

9. Before advertng to and considering whether solatium and interest would be payable under the Act, at the outset, we will dispose of the objection raised by Shri Vaidyanathan that Hari Kishan Khosla's case is not a binding precedent nor does it operate as ratio decidendi to be followed as a precedent and per se per incuriam.

It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a judge decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well settled theory of precedents, every decision contains three basic postulates - (i) findings of material facts direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence is decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts provided, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution.

A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter

for what reason, and the precedent by long recognition may mature into rule of Stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi."

60. From the bare reading of the provisions of Section 9 and Section 11 of the ACA and the law on scope and ambit of provisions of Sections 9 and 11 of ACA, we would observe that not only the scope and ambit of said provisions, but also the consequences as falling under these provisions are entirely different. Section 11 pertains to appointment of arbitrator and and Section 9 is a power of the court to grant a relief to protect the subject matter of the arbitration and/or substance of the arbitration.

61. In the case of Black Pearl Hotels Private Limited (Supra), the Supreme Court in paras 4 and 8 observed as under:-

"4. As the respondent failed to concur in the appointment proposed by the appellant or to appoint an arbitrator as required under the contract, the appellant filed a petition under Section 11 of the 1996 Act. The Judge designated by the Chief Justice took up the matter and issued notice on CMP No.122 of 2012. On 11-1-2013 the learned Judge prima facie was of the view that the "concluding agreement" may be a lease of the immovable property. The learned counsel for the appellant, as the impugned order would reflect, contended that it was not so and sought time to canvas argument that it was a licence. Thereafter, the learned Judge passed the following order" :

" Therefore the matter shall be placed before the Registrar (Judicial) who shall determine whether the transaction is in the nature of lease or licence and stamp duty that is attracted, since whether it is lease or licence, the agreement is apparently not duly stamped. Therefore, he after determining whether lease or licence, recover the duty and penalty and take further steps and thereafter remit the matter for further consideration."

8. At the outset, we think it appropriate to make it clear that we are not determining whether the agreement in question is a lease or licence or an agreement simpliciter as put forth by the learned counsel for the appellant. That is required to be dwelt upon and addressed by the High Court while dealing with an application under Section 11 of the Act. It is well settled in law that while delving into the appointment of an arbitrator under Section 11, regard being had to the nature of agreement as stipulated under Section 7 of the 1996 Act, the Judge designated by the learned Chief Justice is obliged to consider the nature of agreement and whether the document requires to be stamped or not, and if so, whether requisite stamp duty has been duly paid on the same. We are so stating as in the instant case there is a written instrument and there is dispute as regards the nature and character of the document. "

62. We may, therefore, observe that the consequence of not granting ad-interim or interim reliefs in an application under Section 9 of the ACA pending the arbitral proceedings may be, at times, drastic and would cause severe hardship

to the parties who, in the facts of the case, deserve protection under Section 9. If we accept the argument advanced on behalf of the respondents that the court shall wait till the document is stamped and not to act upon the document for granting relief under Section 9, may lead to severe consequences which may cause irreparable damage, prejudice to the cause brought before the court. The issue relating to stamping of the document could further be dragged on before the revenue authority, which may take considerable time for its final decision or conclusion and by that time the party may suffer damage and would be without any remedy in respect of seeking protection under Section 9. While interpreting the provisions and analyzing the effect of the provisions qua the judgments of the courts cited above we keep in mind this facet of the legal position which we are called upon to address.

63. Under the Stamp Act defect of non payment of stamp duty is not an incurable defect. It can be cured at any stage before it admitted in evidence. Once the document is admitted in evidence, Section 35 provides that such an admission shall not, except as provided under Section 58, be called in question at any stage of the suit or proceeding on the ground that the instrument has not been duly stamped. The cumulative reading of Section 35 and Section 58 of the Maharashtra Stamp Act show that the Stamp Act is fiscal measure enacted to secure revenue for the State on certain classes of instruments. We are, therefore, of the view that the respondents cannot insist applying decision of the Supreme Court in the Case of SMS Tea Estates (supra) in proceedings under Section 9 and contend that the document needs to be adequately stamped before the court considering the application under Section 9 to grant interim or ad-interim reliefs.

(I) WHETHER THE COURT CAN ENTERTAIN AND GRANT INTERIM OR AD-INTERIM RELIEF IN AN APPLICATION UNDER SECTION 9 :

64. The learned counsel for the respondents placed heavy reliance on the judgment of the Supreme Court in the case of SMS Tea Estates. In our view, considering the facts of the case, the view adopted by the Supreme Court, emerging from Guhati High Court in the observation of the Supreme Court the provisions of the ACA and Stamp Act, we are of the considered opinion that the judgment of the Supreme Court in SMS Tea Estates was not delivered arising out of an application under Section 9 of the ACA but was delivered arising out of an order passed under Section 11 of the ACA.

65. In the case of Firm Ashok Traders and anr. (Supra), the Supreme Court has held that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the court under Section 9 must possess, is of being a party to an arbitration agreement. This is nothing to do with the relief which is sought for from the court or the right which is sought to be canvassed in support of the relief. The arbitration clause constitutes an agreement by itself.

66. It is, therefore, held that the arbitration clause being a separate agreement from the main contract and accordingly it is only the arbitration agreement which would have relevancy for the purpose of an application under Section 9 of the ACA. In our view, the judgment of the Supreme Court in the case of Firm Ashok Traders and anr.(supra) would squarely apply to the facts and situation at hand.

67. The respondents pressed into service the bar under Section 34 of the Maharashtra Stamp Act while entertaining an application under Section 9 of the ACA. We are inclined to accept the submission of Dr. Sathe, the learned Senior Counsel, that for the purpose of granting interim measures, whether by way of interim or ad-interim, under Section 9, the said relief is not arising out of a contract containing an arbitration agreement. We are, therefore, of the view that even if the main agreement containing arbitration agreement is not stamped or insufficiently stamped, there could not be any bar against the court hearing the application under Section 9 of the ACA for interim measures to grant ad-interim or interim relief to a party.

68. We are not inclined to accept the submission of Mr. Dani, learned Senior Counsel appearing for respondent in Arbitration Application No.246 of 2016 that for the purpose of interim measures, the court has to act upon the main agreement containing arbitration agreement and, thus till such time, such an agreement is stamped in accordance with the provisions of the Maharashtra Stamp Act, 1958, irrespective of the urgency and though case is made out for grant of ad-interim or interim relief, the court does not have power to grant any such relief. This clearly for the reason that the court in considering a relief under Section 9 is acting upon the arbitration agreement only, and not the main contract. An arbitration agreement would not require any stamping.

69. In our view, the argument of Mr. Dani, if accepted, would be in conflict with the scheme of the legislation and intent of the provisions of Section 9 of the ACA. Under the scheme of the ACA and in view of the judgments cited above and considering the submissions advanced, we are of the considered view that the legislative intent and purpose would be served by providing the efficacious and expeditious relief to a party to an arbitration agreement and that is prescribed under Section 9 of the ACA. In case the submissions of Mr. Dani is accepted, the exercise of jurisdiction under Section 9 of the ACA would be completely eclipsed and party would be deprived to approach a forum for any urgent relief of ad-interim or interim nature. This obviously cannot be implication and intent of the statutory interpretation.

70. The entire purpose of granting interim measures is to protect the matters set out specifically under Section 9 (1) (ii)(a) to (e) during the pendency of the arbitral proceedings and even after making of the arbitral award before it is enforced in accordance with Section 36 of the Act, would be defeated if we accept the interpretation placed on the provisions by the learned Senior Counsel Mr. Dani. If an objection about insufficiency of stamp is entertained and accepted at the stage of hearing of the application under Section 9 for interim measures, a

party who has good chances of succeeding in the arbitral proceedings finally and if not granted interim measures to protect the subject-matter of such proceedings, there would be gross injustice to such party.

71. The Supreme Court in *Naina Thakkar* (supra), has held that the Judgment of the Supreme Court in the case of *SMS Tea Estates* (supra), would not be applicable to the proceedings under Section 8 of the Act where party making such an application does not express willingness to pay the deficit stamp duty and the penalty. In our view, the principles laid down by the Supreme Court in the said Judgment can be extended even to an application under Section 11 of the Act for appointment of an arbitrator. An application under Section 8 is filed in a pending suit before a judicial authority to refer the parties to arbitration.

72. The Supreme Court in *M. Anasuya Devi and another* (supra), has held that the question as to whether an arbitral award is required to be stamped and registered would be relevant only when the parties would file the award for its enforcement under Section 36 of the Act. It is at that stage the parties can raise objections regarding its maintainability on account of non-registration and non-stamping under Section 17 of the Registration Act. It is held that the question whether an award requires stamping and registration is within the ambit of Section 47 of the Code of Civil Procedure and not covered by Section 34 of the Act. In our view, the principles laid down by the Supreme Court can be extended to the applications under Section 9 of the Act. The issue of insufficiency of stamp duty, if any, can be raised by the other party at the stage when the instrument containing an arbitration agreement is tendered in evidence before the Arbitral Tribunal.

73. In the light of the above deliberation, we are of the considered opinion that the decision of the Division Bench in *Universal Enterprises* (Supra) takes a correct view that the court can grant an ad-interim reliefs in exercise of its jurisdiction under Section 9 of the ACA even if the document containing the arbitration agreement is not sufficiently stamped. We may thus further observe that the court under Section 9 of the ACA would be empowered to grant ad-interim and interim reliefs even if the document, containing arbitration agreement, is not adequately stamped.

74. Thus, in our view, the question of law i.e. whether a Court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad interim relief in an application under Section 9 of the said Act when a document containing arbitration clause is unstamped or insufficiently stamped, is required to be answered in the affirmative.

(J) DISCUSSION ON THE QUESTION ON SECTION 11 OF THE ACA :

75. Mr. Aspi Chinoy, learned Amicus Curiae, has made submissions on the scheme of Section 11 of the ACA, the legislative intention and the broad principles which would be required to be taken into consideration in adjudication of an application falling under Section 11 of the ACA. Mr. Chinoy, referring to the

provisions of sub-section (6A) of Section 11 and the decision in Duro Felguera (Supra) submits that the existence of arbitration agreement between the parties would now be the primary consideration for the court in adjudication of Section 11(6) applications. Mr. Chinoy has taken us through the judgment of the Supreme Court in Durgu Felguera (Supra) as also the decision of the learned Single Judge in Coastal Marine Construction & Engineering Ltd. (Supra). Mr. Chinoy would also contend that the intention of the legislature is clearly an expeditious appointment of an arbitral tribunal so that the efficacy of the dispute resolution mechanism as envisaged under the provisions of the Act becomes a reality. Mr. Chinoy would also submit that the intention of the legislature can be clearly seen from the provisions of the amending Act of 2016.

76. Mr. Lohia, learned counsel appearing for the applicant in Arbitration Application No. 300 of 2018 submits that there is an arbitration clause in the agreement for sale dated 2nd June 2009. Issue was raised before the learned Single Judge that the agreement was not stamped and thus was required to be impounded and forwarded to the Stamp Authorities. The learned Single Judge of this court (one of us G. S. Kulkarni,J.) formulated a question and referred the issue for consideration by a Larger Bench.

77. The learned counsel placed reliance on the judgment of the Supreme Court in the case of S.B.P. & Company vs. Patel Engineering Ltd. (Supra) and National Insurance Co. Ltd. vs. Boghra Polyfab Pvt. Ltd. (2009) 1 SCC 267 In the submission of the learned counsel these two judgments were delivered prior to insertion of sub-section (6A) in Section 11 of ACA with effect from 23rd October 2015.

78. The learned counsel placed reliance on paras 21 and 22 of the judgment of the Supreme Court in the case of SMS Tea Estates (Supra) to submit that the scheme of inquiry under Section 11(6) was expanded to include suo-motu inquiry into the aspect of payment of stamp duty. The arbitration agreement can be separated from the main agreement.

79. While placing reliance on Section 11(6A) of the ACA and 246th Report of Law Commission on Amendment to the ACA, it is submitted that the scope and power of the court is to examine the existence of the arbitration agreement. It is submitted that none of the judgments, including the judgment in the case of SMS Tea Estates (Supra) would apply to the arbitral proceedings commenced after 23rd October, 2015. While placing reliance on the judgment in the case of M/s. Duro Felguera (Supra), it is submitted that the Supreme Court, after considering the provisions of Section 11(6A) held that the powers of the court are curtailed for dealing with the application under Section 11(6). The issue of insufficiency of stamp duty of the document cannot be gone into by the court. It has to be decided by the arbitral tribunal. Section 5 of the Act will have to be read with Section 11(6A), according to the learned counsel, which would be in consonance with the intention of the legislature in minimizing the judicial intervention.

80. While referring to Section 33(1) of the Indian Stamp Act 1889, the learned counsel submits that the expression "other person" prescribed in the said provision would also include an arbitrator. The arbitral tribunal, during the proceedings, within its power can impound the document and send it for adjudication, if such document is found insufficiently stamped.

81. Mr. Ganbavale, learned counsel appearing for the respondents submits that while deciding an application under Section 11, it was the duty of the court to see whether any statutory requirement is to be met, including the requirement of stamp duty in case of document being insufficiently stamped. A dispute can only thereafter be referred to arbitration. According to the learned counsel, Section 11(6A) be read with Section 7(1) of ACA.

82. The learned counsel further submitted that the court while deciding an application under Section 11 exercises judicial powers and, therefore, it is necessary for the court to examine as to whether there is any bar prescribed under any provisions of law from appointing an arbitrator. The learned counsel placed reliance on Section 33 of the Stamp Act in support of his submission.

83. After closure of the arguments, the learned counsel submitted a written note wherein reliance is placed on the order passed by the Supreme Court on 28th February 2019 in the case of Vidya Drolia and ors. Vs. Durga Trading Corporation Civil Appeal No.2402 of 2019. It is submitted that two Judge Bench in the said order, after referring to the judgments in the case of Himangi Enterprises vs. Kamaljeet Singh Ahluwalia (2017) 10 SCC 706 and in the case of Durgo Felguera (Supra), referred the issue to the Larger Bench.

(K) REASONS AND CONCLUSIONS ON THE QUESTION FALLING UNDER SECTION 11 OF THE ACA :

84. The question as required to be answered by us is, "Whether, inter alia, in view of Section 11 (6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped?

85. The parties did not dispute that an arbitration agreement exists in the main agreement entered into between the parties. During the course of hearing, the respondents raised an issue of insufficiency of stamp duty in the main agreement and prayed for impounding of the said document while an application filed under Section 11(6) of the ACA was being heard. A request was made to refer the document for adjudication to the stamp authority.

86. Section 11(6) and (6A) of the ACA read thus :-

"11. Appointment of arbitrators.- (1)

(2)

(3)

(4)

(5)

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) 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.

87. In the case of S.B.P. & Co. vs. Patel Engineering Ltd.(Supra), the Supreme Court held that the order passed by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act was not an administrative order. It is passed in exercise of a judicial power.

The Supreme Court in para 47 of the said judgment observed thus:-

"47. We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the

arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in *Konkan Rly. Corpn. Ltd. vs. Rani Construction (P) Ltd.* is overruled.

The judgment in the case of *S.B.P. & Co. Vs. Patel Engineering Ltd.* (Supra) was delivered by the Supreme Court on 26th October, 2005.

88. We may also refer to the relevant part of the Statement of Objects and

Reasons of the Arbitration Bill 2015, which would indicate that the intention of the legislature in bringing about the Arbitration Amendment Act (Act 3 of 2016) was to provide for speedy disposal of cases relating to arbitration with least court intervention and a matter of concern on the delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. It would be imperative to extract the Statement of Objects and Reasons, which read thus:-

"STATEMENT OF OBJECTS AND REASONS

The general law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act). The Act, which is based on the UNCITRAL Model Law on International Commercial Arbitrations, as adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL), applies to both international as well as domestic arbitration.

2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report.....

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is 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.

5.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:-

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

- (ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;
- (iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;
- (iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;
- (v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;
- (vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of section 11 of the Act;
- (vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;
- (viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;
- (ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

(Emphasis Supplied)

The Notes on Clauses on Section 11 are also required to be noted. In regard to the proposed amendment to Section 11, Clause 6 of the Notes on Clauses reads thus:-

"Clause 6 of the Bill seeks to amend section 11 of the principal Act to provide that appointment of arbitrator shall be made by the Supreme Court or the High Court, as the case may be, instead of the Chief Justice of India or the Chief Justice of the High Court. Sub-section (6A) is inserted to provide that the Supreme Court or the High Court while considering application under sub-section (4) to (6) shall confine to the examination of an arbitration agreement. In sub-section (7), it is clarified that a decision on a matter entrusted under sub-section (4) to (6) shall be final and no appeal including Letters Patent Appeal shall lie against such decision. A new sub-section (13) is inserted to provide that an application for appointment of arbitrator(s) shall be disposed of as expeditiously as possible and an endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party. A new sub-section (14) is inserted to empower the High Court to frame rules for

the purpose of determination of fees of the arbitral tribunal and the manner of such payment. The High Court while framing rules shall take into account the rates of fee specified in the Fourth Schedule.

(Emphasis Supplied)

89. We may observe that the Parliament accordingly amended the ACA by Amending Act No. 3 of 2016 (with effect from 23/10/2015) and incorporated amendments to the various provisions of the ACA. In the context of the present discussion, the relevant amendment is the incorporation of sub-section (6A), as noted above, which provides 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), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement. The scope of the inquiry in adjudication of such applications falling under Section 11 is now confined to the examination of existence of an arbitration agreement. The use of the words "notwithstanding any judgment, decree or order of any court" in the said provision would also indicate that any other facet or issue which would impede or inhibit the requirement of examination of the existence of an arbitration agreement even if contained in any judgment, decree or order of any court, stands discarded, when the court is called upon to exercise jurisdiction under Section 11.

90. By the same amendment, sub-section (13) was also inserted in Section 11 by which it was provided that an application made under Section 11 for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court, or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

91. Such an interpretation, as noted by us above, can also be noticed in the recent decisions of the Supreme Court.

92. We may thus profitably refer to the decision of the Supreme Court in *Wexford Financial Inc. Panama Vs. Bharat Heavy Electricals Ltd.* (2016) 8 SCC 267 which is a decision after the Arbitration Amendment Act was brought into force. In paragraph 9, the Supreme Court observed thus:-

".. There is, in that view, no gainsaying that the present petition under Sections 11(5) and 11(12) shall have to be allowed with appropriate directions, particularly when this Court is concerned primarily with the question whether an arbitration agreement exists between the parties and if so whether the disputes falling within the scope of the agreement have arisen for determination."

93. We also refer to the decision of the Supreme Court in *TRF Limited vs. Energo Engineering Projects Limited*, (2017) 8 SCC 377 wherein a three Judge Bench of the Supreme Court, while examining Section 11(6A) held as under:-

42. We are referring to the same as learned counsel for the parties have argued at length with regard to the disclosure made by the arbitrator and that has also been referred to by the designated Judge. In this context, we may profitably refer to sub-section (6A) of Section 11 of the Act which reads as follows:

"11.(6A). 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."

43. The purpose of referring to the said provision is that the amended law requires the Court to confine the examination of the existence of an arbitration agreement notwithstanding any judgment of the Supreme Court or the High Court while considering an application under Section 11(6) of the Act. As the impugned order would indicate, the learned Judge has opined that there had been no failure of procedure, for there was a request for appointment of an arbitrator and an arbitrator has been appointed. It is apt to state here that the present factual score projects a different picture altogether and we have to carefully analyse the same."

94. In the case of Duro Felguera (Supra), the Supreme Court had referred to the position prior to Amendment Act 3 of 2016. Paras 15 and 16 of the said judgment read as under :

"15. Under Section 11(6) of the Arbitration and Conciliation Act, 1996, as it stood prior to Amendment Act 3 of 2016, on an application made by any of the parties, the Chief Justice of the High Court appoints an arbitrator for adjudication. Initially, the line of decisions ruled that the appointment of arbitrator is an administrative order passed by the Chief Justice. In Konkan Railway Corpn. Ltd. v. Mehul Construction Co., it was held that the powers of the Chief Justice under Section 11(6) of the Arbitration and Conciliation Act, 1996 are of administrative nature and that the Chief Justice or his designates does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in the subsequent judgment of this Court in Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.

16. However, in the year 2005, a Constitution Bench of seven Judges in SBP and Co. v. Patel Engg. Ltd. made a departure from the previous judgments and held that the order passed by the Chief Justice is not administrative but judicial in nature and hence the same is subject to appeal under Article 136 of the Constitution of India. The Court further held that in deciding the appointment of an arbitrator, the Chief Justice could first by way of a preliminary decision decide the court's own jurisdiction of that matter to entertain the arbitration petition, the existence of a valid arbitration agreement, the subsistence of a "live claim i.e. the claim that is not barred by limitation".

In regard to the changes effected by the Amendment Act 3 of 2016, the Supreme Court in para 18 of the said judgment observed as under :-

"18. The language in Section 11(6) of the Act "the Chief Justice or any person or institution designated by him" has been substituted by "Supreme Court or as the case may be the High Court or any person or institution designated by such Court". Now, as per sub-section (6-A) of Section 11, the power of the Court has now been restricted only to see whether there exists an arbitration agreement. The amended provision in sub-section (7) of Section 11 provides that the order passed under Section 11(6) shall not be appealable and thus finality is attached to the order passed under this section.....

In para 19, the Supreme Court has referred as under:

"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. vs. Patel Engg. Ltd.* and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* 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."

In para 22, the Supreme Court observed as under:-

22. On behalf of GPL, it was repeatedly urged that the works are intrinsically connected, inseparable, integrated, interlinked and that they are one composite contract and that they were split up only on the request and representations given by Duro Felguera and FGI. As discussed earlier, as per amended provision Section 11 (6A), the power of the Supreme Court or the High Court is only to examine the existence of an arbitration agreement. From the record, all that we could see are five separate Letters of Award; five separate Contracts; separate subject matters; separate and distinct work; each containing separate arbitration clause signed by the respective parties to the contract."

(Emphasis Supplied)

95. In the concurring Judgment of Mr. Justice Kurian Joseph (as His Lordship then was), in paragraphs 47, 48, 58 and 59 it was observed thus:-

"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(6A) 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(6A) added by the 2015 Amendment, reads as follows:

"11(6A) 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."

From a reading of Section 11(6A), 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.

58. This position was further clarified in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* To quote: (2009) 1 SCC 267

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22. 1 The issues (first category) which the Chief Justice / his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2 The issues (second category) which the Chief Justice / his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract / transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3 The issues (third category) which the Chief Justice / his designate should leave exclusively to the Arbitral Tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co.* and *Boghara Polyfab*. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is

essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.

(Emphasis Supplied)

96. The scope of power of the Court under Section 11(6-A) thus came to be considered, in great detail, in the judgment of the Supreme Court in the case of *Duro Felguera, S.A. (supra)*. The Supreme Court held that as per sub-section (6-A), the power of the Court has now been restricted only to examine the existence of the 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 & CO. vs. Patel Engineering Ltd. and anr. (supra)*, and *National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (Supra)*. It is held that all preliminary issues have been left for the Arbitral Tribunal in terms of Section 16 of the Act. The Supreme Court also considered sub-section (13) of Section 11 inserted by Amending Act of 2015 providing for disposal of the application within a period of sixty days from the date of service of notice on the opposite party.

97. It is held that the sub-section (13) would ensure speedy disposal of the applications under that section and all contentious issues have been left to be decided by the Arbitral Tribunal. The Supreme Court, in the said Judgment held that since the dispute between the parties arose in 2016, the amended provision of sub-section (6-A) of Section 11 shall govern the issue as per which the power of Court is confined only to examine the existence of the arbitration agreement. The Hon'ble Supreme Court considered the Judgment in *National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra)*, which had laid down three categories of issues i.e. (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the arbitral Tribunal. The Hon'ble Supreme Court in the said judgment of *National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra)* had held that the issues which the Chief Justice or his designate must choose to decide or leave them to the decision of the Arbitral Tribunal are; (a) whether the claim is a dead (long-barred) claim or a live claim; (b) whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

98. It is further held in the said Judgment that the issues which Chief Justice or his designate should leave exclusively to the Arbitral Tribunal are, (1) whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration); and (2) merits of any claim involved in the arbitration. After considering the categories carved out by the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra)* and after considering Section 11(6-A), the Hon'ble Supreme Court in the case of *Duro*

Felguera, S.A. (supra), held that the legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected. It was also held that the position of law in the cases of SBP and Co. vs. Patel Engineering Ltd. (supra) and National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra) continued till the amendment brought in 2015. The Judgment of the Supreme Court in the case of Duro Felguera, S.A. (supra), has been followed thereafter in the later judgment of the Hon'ble Supreme Court and also by this Court in several matters.

99. We have noticed that in view of the categories carved out in the Judgment of the Supreme Court in the case of National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra) several contentious issues used to be raised by the Respondents in the application under Section 11(6) of the Act, thereby delaying the disposal of applications for appointment of arbitrators, though are required to be disposed of expeditiously. The legislative wisdom thus prevailed and sub-section (6-A) was inserted in Section 11 to minimise the intervention of Court at the stage of appointing an arbitrator. The Supreme Court in the said Judgment also made specifically clear that the position of law laid down in SBP and Co. vs. Patel Engineering Ltd. (supra) and National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra) continued till the amendment was brought about in 2015. In our opinion, reliance placed on the principles laid down by the Supreme Court in the case of SBP and Co. vs. Patel Engineering Ltd. (supra) and National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra) by the respondents is thus misplaced.

100. It is thus clear that when the court adjudicates an application under Section 11(6) of the ACA, the ambit of the inquiry is now confined only to the examination of the existence of an arbitration agreement between the parties and if such an agreement exists, the disputes which are falling within the scope of the agreement would be required to be referred for adjudication by appointing an arbitral tribunal.

101. In Vidya Drolia and ors. (Supra), as relied upon by Mr. Ganbavale, the learned counsel appearing for the respondents, the issue before the Supreme Court was arising out of a tenancy agreement in an application filed under Section 11(6) of the Act. The Supreme Court referred the issue as to whether the word "existence" would include weeding out arbitration clauses in agreement which indicates that the subject matter is incapable of arbitration. In our view, till such issue is decided by the Larger Bench, the principle of law laid down by the Supreme Court in the case of Duro Felguera (Supra) holds the field. Now the question arises for consideration of this court is, whether in view of Section 11(6A), as per the Supreme Court judgment in the case of Duro Felguera (Supra), the issue of insufficiency of stamp duty on the agreement containing arbitration clause is required to be decided while deciding the application under Section 11(6A) of the ACA by the court itself at the threshold or such an issue

can be decided by arbitral tribunal upon constitution of such tribunal by the court under Section 11(6) of the Act. In the case of Duro Felguera, the Supreme Court has held that after amendment to Section 11(6) by sub-section (6A) all that the court has to see is whether an arbitration agreement exists - nothing more, nothing less. The Supreme Court, by referring to provisions of Section 5 of the Act and the legislative policy, further observed that the purpose of the provision is to ensure speedy disposal of application and all contentious issues are to be left to be decided by the arbitral tribunal. This is to minimize the court's intervention at the stage of appointing an arbitrator.

102. After considering the judgments cited before us and in view of the legislative intent of the amended provisions, we are of the view that the import of the provisions of Section 11(6A) indicates that the power of the Supreme Court or, as the case may be, the High Court, while considering the application under Section 11(6) shall notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement. The issue as to whether sufficiency or otherwise of the stamp duty on the said agreement can be left to the decision of the arbitral tribunal. Section 7 of the ACA defines arbitration agreement. Section 7(4) of the ACA reads as under :-

"7. Arbitration agreement. - (1)

(2)

(3)

(4) An arbitration agreement is in writing if it is contained in -

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

103. It is not a case of the respondents that arbitration agreement, if a standalone agreement recorded under Section 7(4)(b) or (c) requires payment of any stamp duty under the provisions of Maharashtra Stamp Act. It is clear that the arbitration agreement, even if part of the main agreement, is severed from the main agreement, would not stand invalidated even if the main agreement is declared as null and void by the arbitral tribunal.

104. In our view, there is no substance in the submission of Mr. Dani, learned Senior Counsel for the Respondents (in Arbitration Application No. 246/2016) that the principle of severability is confined only to application under Section 16 of the Act before the arbitral Tribunal and not at the stage of hearing of the application under Section 9, as well as under Section 11 of the Act. In our view, the Judgment of the Hon'ble Supreme Court in the case of Reliance Industries

Ltd. & anr. (supra), relied upon by Dr. Sathe, learned Senior Advocate would be an answer to this submission made by Mr. Dani, learned Counsel for the Respondents.

105. The learned Counsel appearing for the parties have invited our attention to various paragraphs of the Judgment of the Hon'ble Supreme Court in the case of SMS Tea Estates (supra) in support of their rival contentions as to whether the said Judgment was delivered by the Hon'ble Supreme Court under Section 11 only or would also apply to the applications under Section 9 of the Act or not?

106. We may refer to some of the paragraphs of the judgment in SMS Tea Estates (Supra):-

"12. When a 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 purposes of convenience. An arbitration clause is therefore 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.

22.2 If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3 If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or 40 Section of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

107. It is thus clear that even the said Judgment of the Supreme Court in case of SMS Tea Estates (P) Ltd. (supra), in so far as application under Section 11 is concerned, makes it clear that the arbitration agreement can be severed from the main agreement.

108. In so far as the Judgment of the Supreme Court Black Pearls Hotels Private Limited (supra) relied upon by Mr. Dani, learned Senior Counsel for the Respondent is concerned, a perusal of the said Judgment also clearly indicates that the said Judgment was also delivered by the Supreme Court while considering an appeal arising out of an order passed by the Karnataka High Court under Section 11 of the Act and not under Section 9 of the Act. The said Judgment, thus, would not advance the case of the Respondent in so far as

insufficiency of stamp, if any, on the main agreement, including arbitration agreement is concerned.

109. In so far as the submission of Mr Ganbavale, learned Counsel for the Respondent in Arbitration Application No.300/2018 that it is the duty of the Court to see whether any further statutory requirement is to be made under Section 11(6) is concerned, in our view, there is no merit in this submission of the learned Counsel in view of the limited power that vests in the Court under Section 11(6) read with sub-section (6A) of the Act. Similarly, the contention in respect of the statutory requirement has already been rejected by the Supreme Court in the case of Duro Felguera (supra).

110. We are inclined to accept the submission made by Dr. Sathe, learned Senior Counsel and Mr. Lohia, learned Counsel for the Applicant in Arbitration Application No.300/2018 that in view of insertion of sub-section (6-A) in Section 11 with effect from 23.10.2015, the principles laid down by the Hon'ble Supreme Court in the case of SBP and Co. vs. Patel Engineering Ltd. (supra) and National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (supra) and even for this purpose the decision in SMS Tea Estates (Supra) cannot be made applicable to the applications filed after 23.10.2015.

111. The learned Single Judge of this Court in Coastal Marine Construction and Engineering Ltd. (supra), considering the legislative regime on incorporation of sub-section (6A) in Section 11, has distinguished the Judgment of the Hon'ble Supreme Court in the case of SMS Tea Estates (P) Ltd., (supra) and also the judgment of the Division Bench of this Court in the case of Lakdawala Developers Pvt. Ltd. (supra) and following the principles of law laid down by the Supreme Court in Duro Felguera (supra) has reached to a conclusion that the Judgment of the Supreme Court in the case of SMS Tea Estates (P) Ltd., (supra) which was not rendered under Section 11 of the Act would not be applicable. This also recognizes the principle that the provisions of the Stamp Act are enacted for the purpose of securing revenue for the Government and not to arm a litigant with a technical defence. The learned Single Judge rightly applied the principles of law laid down by the Hon'ble Supreme Court in Hindustan Steel Ltd. (supra) holding that the Stamp Act is a fiscal statute and it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent.

112. We have considered the provisions of Sections 32A to 39 of the Maharashtra Stamp Act 1958. In our view, even if an instrument is required to be stamped, which is not otherwise stamped at all or insufficiently stamped, such defect is curable which can be cured on payment of requisite amount of penalty under the Act of 1958.

113. Under the scheme of provisions of the Maharashtra Stamp Act it is prescribed that an order passed by the adjudicating authority is appealable one. A remedy of revision is also prescribed. It is our experience that in large number of matters the stamping authorities take substantial time to take a decision and

even after the decision is taken, said orders are amenable to challenge in higher forums. The question is whether a party should be made to wait till the issue under the Stamp Act is finally determined, depriving the parties for seeking remedy under Section 11 or Section 9 of the ACA. There is all the possibility that a litigant may raise an issue under the Stamp Act which would deny a party urgent interim reliefs if the party so deserves. If the court will have no jurisdiction to deal with such an application of interim nature and there is no certainty that the issue under the Stamp Act would be determined expeditiously in a time bound manner, it would substrate out the genuine application where timely intervention is required by the court under the provisions of the ACA.

114. Thus postponing application for consideration, filed under Section 11 or Section 9, to indefinite period till the final decision of the issue raised under the Stamp Act, would also not be in conformity of the legislative policy and intent to provide speedy remedy under Section 11 or Section 9 of the ACA.

115. The basic principles guiding judicial decision making, in the context of arbitration matters, the court would surely be concerned with the efficacy of the arbitral process. The recognition of the legislative intent can also be clearly seen from the decision of the Supreme Court in *A. Ayyasamy vs. A. Paramasivam and ors.* (2016) 10 SCC 386, wherein Dr. Justice D. Y. Chandrachud concurring with the judgment of Mr. Justice A. K. Sikri (as His Lordship then was), observed that The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy.

116. We may thus observe that the Stamp Act is a fiscal statute and its purpose is collection of revenue. The said purpose will be achieved by impounding the document and sending it to the stamp authorities if it is found to be insufficiently stamped. At the same time, the court need not wait for outcome of the said adjudication. It would not be appropriate to put restrictions on the court's powers to exercise its such jurisdiction under the provisions of ACA, if the party deserves such intervention by the court.

117. We have also considered the provisions of law under which the Civil Court functions, even if a document is not sufficiently stamped.

118. Taking a overall view of the scheme of the ACA, judgments delivered by the Supreme Court, we are of the view that the party need not be put to a disadvantage merely because an objection has been raised in respect of insufficiency of the stamp on the agreement presented before the court. Neither a contesting party could deprive legitimate rights of a litigant in praying for

timely intervention of the court by praying for appointment of an arbitral tribunal nor for interim reliefs in the fact situation of a case. That would be rendering a party without any forum and in a given situation the outcome would be, at times, catastrophic and disastrous and the damage could be irreparable one. A balanced approach, keeping in view the legislative intent and the view adopted by the Supreme Court, needs to be adopted, so that the purpose of enacting the provisions of Sections 11 and 9 of the ACA as amended by the Amendment Act is not defeated.

119. If an application under Section 11 or under Section 9 is required to be postponed till the order of adjudication is passed by the learned Collector of Stamps with such uncertainty of the time it would take to decide and the hierarchy of remedies after such order, as it would be subject to an appeal or a revision, as the case may be and till such time no order either under Section 11 or under Section 9 should be passed, then the Legislature would not have provided for speedy disposal of the applications under Section 11 or under Section 9 of the Act by inserting sub-Section (13) in Section 11 and sub-Section (2) in Section 9 of the Act.

(L) ANSWERS TO THE QUESTIONS FRAMED :

120. In view of the above deliberation, we answer the questions as framed by us as follows :-

Sr. No.

Question

Answer

1

Whether a court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad-interim relief in an application under Section 9 of the said Act when a document containing arbitration clause is unstamped or insufficiently stamped

In the Affirmative

2

Whether, inter alia, in view of Section 11 (6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped ?

In the Negative

121. We heartily appreciate the valuable assistance rendered to the Court by the

learned Senior Counsel Dr. Milind R. Sathe and Mr. Aspi Chinoy, who appeared as Amicus Curiae.

122. Office shall now place these matters before the learned Single Judge for their disposal.