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Enforceability, Admissibility and Stamping of an Arbitration Agreement: Unanimous Decision of a 7-judge Bench

INTRODUCTION

The Supreme Court of India in its recent ruling interpreted the law on stamping of arbitration agreements and held that an unstamped or deficiently stamped agreement would not be rendered void or unenforceable but only inadmissible in evidence, until the defect is cured. A Constitution Bench of 7-judges unanimously held so, while adjudicating a reference in respect of *NN Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [(2023) 7 SCC 1] (NN Global 2) in the matter titled In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899, 2023 SCC OnLine SC 1666. In doing so, the Supreme Court adopted a harmonious construction of the Arbitration and Conciliation Act, 1996 (Arbitration Act), the Indian Stamp Act, 1899 (Stamp Act) and the Indian Contract Act, 1872 (Contract Act).

BRIEF BACKGROUND

A 3-judge Bench of the Supreme Court in *NN Global Mercantile (P) Ltd. V. Indo Unique Flame Ltd.* [(2021) 4 SCC 379] (NN Global 1) held that an arbitration agreement being separate and distinct from the underlying commercial contract, would not be rendered invalid, unenforceable or non-existent on account of a stamping defect. [Ergo Link](#). This was a view that was in variance with those taken earlier in *SMS Tea Estates (P) Ltd. V. Chandmari Tea Co. (P) Ltd.* [(2011) 14 SCC 66] (SMS Tea Estates) and *Garware Wall Ropes Ltd. V. Coastal Marine Constructions & Engg. Ltd.* [(2019) 9 SCC 209] (Garware Ropes). Thereafter, in *Vidya Drolia v. Durga Trading Corporation* [(2021) 2 SCC 1] (Vidya Drolia), another 3-judge Bench of the Supreme Court, approving the proposition in *Garware Ropes*, held that an arbitration agreement exists only when it is 'legal' and 'valid'.

In view of the inconsistency, the 3-judge Constitution Bench referred the matter for determination to a 5-judge Constitution Bench, as the correctness of the earlier views was doubted and unclear. The majority view of the 5-judge Constitution Bench in NN Global 2, held that (i) an unstamped arbitration agreement is void under Section

2(g) of the Contract Act; (ii) an unstamped instrument not being a contract, cannot exist in law unless duly stamped; (iii) "existence" of an arbitration agreement under Section 11(6A) of the Arbitration Act also included "existence in law"; and (iv) under Section 11 of the Arbitration Act the Court has to act in consonance with the provisions of Sections 33 and 35 of the Stamp Act. [Ergo Link](#).

Reference to the Constitution Bench comprising 7 judges

Subsequently and as a consequence to the above, a 7-judge Constitution Bench of the Supreme Court was constituted, essentially arising from a reference by a 5-judge Bench, which had issued notice in a curative petition, titled "*M/s Bhaskar Raju and Brothers & Anr. v. M/s Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and Other Charities & Ors.*" (Bhaskar Raju). Alongside the curative, another arbitration petition also came to be listed before the Bench, which raised similar issues. Therefore, considering the larger ramifications and consequences of NN Global 2, the 5-judge Bench referred the issue to a 7-judge Bench.

Issue at hand Before the 7-judge Bench

The primary issue that arose for consideration of the Supreme Court was whether an arbitration agreement would be rendered non-existent, unenforceable or invalid if the underlying contract is unstamped or deficiently stamped.

BRIEF SUBMISSIONS

The submissions on behalf of the Petitioners are summarized below:

- i. Section 11(6A) of the Arbitration Act, confines the Court's power to examine the existence of an arbitration agreement, which does not extend to adequacy of stamping. If the Courts are mandated to examine the adequacy of stamping under Section 33 of the Stamp Act at the referral stage, the same would be exceeding the remit of examination.
- ii. The arbitral tribunal has the competence to rule on its own jurisdiction, which includes issues of stamping.

- iii. Section 5 of the Arbitration Act, being a non-obstante clause, limits the intervention of courts.
- iv. Deficiency of stamp duty is a curable defect. Any deficiency only renders the instrument/agreement inadmissible in evidence and not void.
- v. The doctrine of separability recognizes that an arbitration agreement is a self-contained agreement distinct from the underlying contract. As per Section 5 of the Stamp Act, being a "distinct matter", an arbitration agreement would continue to be valid and enforceable irrespective of inadequate stamping or non-stamping of the underlying contract.
- vi. The object of the Stamp Act is to protect public revenue and not to interfere with the commercial life of trade and commerce by invalidating vital instruments.

Per contra, the submission on behalf of the Respondents, are summarized as under:

- i. The examination under Section 11(6A) of the Arbitration Act is not confined to mere facial existence and the referral court has to examine both the existence and validity of an arbitration agreement.
- ii. Section 33 of the Stamp Act casts a mandatory requirement on the court, including under Section 11 of the Arbitration Act, to impound an unstamped or insufficiently stamped instrument.
- iii. Section 5 of the Arbitration Act does not limit the operation of the mandatory provisions of the Stamp Act.
- iv. The aspect of examination under Section 11(6A) of the Arbitration Act includes determination on the sufficiency of stamping.
- v. An objection was also raised in respect of the constitution of the Bench and the manner in which the reference was made, the same being without jurisdiction on account of the non-maintainability of the curative petition in Bhaskar Raju.

KEY FINDINGS AND OBSERVATIONS

At the outset, the Supreme Court addressed the Respondents' objection on jurisdiction and maintainability. After discussing various

precedents on the issue, the Court unanimously held that the category of "other proceeding" under Order VI Rule 2 of the SC Rules, 2013, will include curative petitions. Further, the reference arose not just from the curative petition but also from an arbitration petition. Notwithstanding, it was held that the 5-judge Bench raised questions of seminal importance, which needed to be addressed. The issue of maintainability of the respective cases, including Bhaskar Raju, was left open to be decided by the concerned Bench.

The Supreme Court discussed in great details the ambit, aspects and implications of the provisions of the Arbitration Act and Stamp Act, the doctrine of competence-competence and separability coupled with an analysis on the various previous judgments and findings arrived at by the Supreme Court.

The Supreme Court went on to then hold that:

1. The Stamp Act is a fiscal legislation which is intended to raise revenue for the government and must be interpreted with due regard to its purpose. The Supreme Court observed that an agreement can be void without the same having an impact on it being introduced in evidence, likewise, an agreement can be valid but inadmissible in evidence. It further noted that Section 2(j) of the Contract Act is not attracted when an instrument is rendered inadmissible under Section 35 of the Stamp Act, and the agreement would not be rendered void or unenforceable. The Stamp Act sets out the procedure for payment of stamp duty and any deficiency thereof, making the latter a curable defect. The usage of "confine" in Section 11(6A) of the Arbitration Act indicates the intent of the legislature to limit the jurisdiction of the courts at the stage of appointment of an arbitrator.
2. The principle of arbitral autonomy is an integral element of the domain of arbitration law, which is ever evolving. The principle of non-interference reflects the autonomy of arbitral tribunals, which is fundamental to both domestic and international commercial arbitration. The non-obstante clause in the Arbitration Act sets forth the

legislative intent of limiting the judicial intervention during the arbitral process.

3. On account of the Arbitration Act being a self-contained code and a special legislation, juxtaposed with the Stamp Act and Contract Act being general legislation, the general procedure set out in the latter would be impliedly excluded. The separability presumption, as also contained in the Arbitration Act through Section 16, ensures that an arbitration agreement survives, as separate from the underlying contract, to give effect to the true intent of the parties and ensure sanctity of the arbitral proceedings.
4. An arbitral tribunal is competent to adjudicate the issue of stamping on account of Section 33 and 35 of the Stamp Act, as the arbitral tribunal is a person having authority "by consent of parties" to receive evidence.
5. The parameters for judicial review under Section 8 of the Arbitration Act requires a Court to look into the prima facie existence of a valid arbitration agreement, while under Section 11 the same pertains to examination of the existence of an arbitration agreement. The scope of "examination" under Section 11(6A) does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 of the Arbitration Act provides that an arbitral tribunal can "rule on its jurisdiction". The ambit of "ruling" includes adjudication of disputes after admitting evidence from parties. Thus, the inquiry as to sufficiency of stamping is within the domain of the arbitral tribunal and not the referral court. This is in line with the principle of competence-competence which vests the arbitral tribunal with the power and authority to determine the existence and validity of an arbitration agreement.
6. Section 11(6A) of the Arbitration Act legislatively altered the basis of SMS Tea

Estates to the extent that it dealt with judicial intervention at the stage of Section 11. Further, Garware Ropes to the extent that it had held an arbitration agreement contained in an unstamped or insufficiently stamped contract would be non-existent in law, does not set forth the correct position of law. Accordingly, these as reiterated in NN Global 2 are no longer valid in law.

In view of the foregoing, the following conclusions were arrived at:

- Agreements that are unstamped or deficiently stamped are inadmissible in evidence and not rendered void or void ab initio or unenforceable.
- Non-stamping or insufficient stamping is a curable defect.
- An objection in respect of stamping is not within the scope of inquiry under Section 8 or Section 11 of the Arbitration Act, which will fall within the ambit of the arbitral tribunal.
- The decisions in NN Global 2, SMS Tea Estates and Garware Ropes are overruled in terms of the above.

COMMENT

The Supreme Court by way of the judgment addressed a long-debated issue, which had far reaching consequences, especially in view of the findings in NN Global 2. The Supreme Court addressed these concerns through a harmonious construction of the various statutes involved, in particular their intent and purpose. In doing so, the position of law has been clarified through a careful interpretation of the legislative intent. The judgment also defines the scope of inquiry to be carried out at the relevant stage, and in turn has upheld the basic principles of minimum judicial interference, the doctrine of competence-competence and the spirit of the doctrine of separability.

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