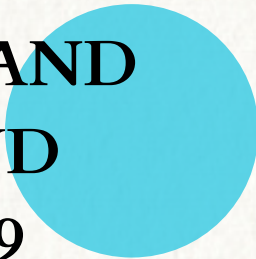




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**INTERPLAY BETWEEN
ARBITRATION AGREEMENTS
UNDER THE ARBITRATION AND
CONCILIATION ACT 1996 AND
THE INDIAN STAMP ACT 1899**



“THE VALIDITY OF AN ARBITRATION AGREEMENT CONTAINED IN AN UNSTAMPED INSTRUMENT”- THE LAW LAID DOWN BY THE HON’BLE SUPREME COURT IN A LANDMARK JUDGMENT.

Recently, on December 13, 2023, a seven-judge bench of the Hon’ble Supreme Court while answering a reference in the matter titled “***In Re: Interplay between Arbitration Agreements under The Arbitration and Conciliation Act 1996 And The Indian Stamp Act 1899***”, has settled the law regarding the validity of an arbitration agreement where the underlying contract is unstamped. The challenge before the seven-judge bench was to harmonize the provisions of the Arbitration and Conciliation act, 1996 (hereinafter referred to as “the Arbitration Act”) and the Indian Stamp Act, 1899 (hereinafter referred to as “the Stamp Act”). The reference was decided by a bench comprising of Chief Justice of India D.Y. Chandrachud, Justice Sanjay Kishan Kaul, Justice B.R. Gavai, Justice Surya Kant, Justice J.B. Pardiwala, Justice Manoj Misra and Justice Sanjiv Khanna. The judgement is a welcome move towards harmonising the provisions of both the legislations in view of the legislative intent and the objectives which these statutes aim to achieve.

Background:

This Court was called upon to answer an imperative question which arose in context of three statutes– the Arbitration and Conciliation Act 1996, the Indian Stamp Act 1899, and the Indian Contract Act 1872. The primary issue before the Court was **whether an Arbitration Agreement would be non-existent, unenforceable, or invalid if the underlying contract is not stamped.** The context in which this question arose has been summarised briefly as follows:

In the case of ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.***², (hereinafter referred to as “**N.N. Global 1**”) a three-judge bench determined the enforceability of an arbitration agreement contained in an unstamped work order. The Bench, speaking through Justice Indu Malhotra, held that an arbitration agreement, being separate and distinct from the underlying commercial contract, would not be rendered invalid, unenforceable, or non-existent. The Court held that the non-payment of stamp-duty would not invalidate even the underlying contract because it is a curable defect. In the process, this Court adopted a view at variance with ***SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd***³ and ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.***⁴

Subsequently, the five-judge bench in ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.***⁵ (hereinafter referred as “**N.N. Global 2**”) answered the reference by a majority of 3:2, wherein a dissenting opinion was given by Justice Ajay Rastogi and Justice Hrishikesh Roy. The majority judgment held that *N.N. Global 1* (supra) does not represent the correct position of law and upheld the view taken in *SMS Tea Estates* (supra) and *Garware Wall Ropes* (supra). Justice Ajay Rastogi and Justice Hrishikesh Roy delivered separate dissenting judgments.

¹ In re, 2023 SCC OnLine SC 1666

² (2021) 4 SCC 379

³ (2011) 14 SCC 66

⁴ (2019) 9 SCC 209

⁵ (2023) 7 SCC 1

N.N. Global 2:

The conclusions of the majority judgment can be summarized in the following terms:

1. An unstamped instrument containing an arbitration agreement is void under Section 2(g) of the Contract Act, 1872 (hereinafter referred to as “the Contract Act”).
2. An unstamped instrument, not being a contract and not enforceable in law, cannot exist in law. The arbitration agreement in such an instrument can be acted upon only after it is duly stamped.
3. The “existence” of an arbitration agreement contemplated under Section 11(6A) of the Arbitration Act is not merely a facial existence or existence in fact, but also “existence in law”.
4. The Court acting under Section 11 of the Arbitration Act cannot disregard the mandate of Sections 33 and 35 of the Stamp Act requiring it to examine and impound an unstamped or insufficiently stamped instrument.
5. The certified copy of an arbitration agreement must clearly indicate the stamp duty paid.

Dissenting opinion:

1. The minority judgment delivered by Justice Ajay Rastogi noted that the scope of the referral court under Section 11 is limited to the examination of the “existence” of an arbitration agreement. Accordingly, all other decisions including the issue of stamping, must be left for the arbitral tribunal to decide as per Section 16 of the Arbitration Act.
2. The separate dissenting opinion given by Justice Hrishikesh Roy relied on the scheme of the Stamp Act to hold that the failure to stamp an instrument is a curable defect and accordingly, an unstamped or insufficiently stamped document is not rendered invalid or *void ab initio*. It was held that Section 11 of the Arbitration Act should be harmonized with Section 35 of the Stamp Act by deferring the issue of stamping to the arbitrator. In conclusion, Justice Roy held that **SMS Tea Estates** (supra) and **Garware Wall Ropes** (supra) do not set out the correct position of law.

Subsequent Developments:

1. Subsequently, in 2020, while delivering the judgement in **Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Brothers**⁶, the Supreme Court relied on **SMS Tea Estates** (supra) and reversed the decision of the High Court which had relied on an insufficiently stamped lease deed to refer the parties to arbitration under Section 11(6) of the Arbitration Act. **Bhaskar Raju** (supra) was decided before **N.N. Global 1** (supra). However, while the reference made by the three-judge bench in **N.N. Global 1** (supra) was pending, review petitions were filed in **Bhaskar Raju** (supra), which was dismissed on the ground of delay as well as on merits. Following that, on 7 December 2022, a curative petition was filed seeking a reconsideration of **Bhaskar Raju** (supra). The Constitution Bench in **N.N. Global 2** (supra) answered the reference and delivered its verdict on 25 April 2023.
2. Thereafter, on 14 August 2023, the Bench in **Seka Dobric v. SA Eonsoftech Private Limited**⁷ observed that one of the objections in that matter pertained to non-stamping of the arbitration agreement. Therefore, the arbitration petition was directed to be listed along with the curative petition in **Bhaskar Raju** (supra). Considering the larger ramifications

⁶ (2020) 4 SCC 612

⁷ Arbitration Petition No. 25 of 2023

and consequences of the decision in *N.N. Global 2* (supra), the five-judge bench referred the proceedings to a seven-judge bench.

It is in this context that the proceedings were listed before a seven-judge bench of the Hon'ble Supreme Court in the present matter, titled: ***"In Re: Interplay Between Arbitration Agreements Under The Arbitration and Conciliation Act 1996 and The Indian Stamp Act 1899."*** Wherein the court examined the correctness of the view adopted in *N.N. Global 2* (supra) as well as other ancillary issues.

Now, the law has been settled by the seven-judge bench of the Hon'ble Supreme Court holding that arbitration clauses in unstamped or inadequately stamped agreements are enforceable. Insufficiency of stamping does not make the agreement void or unenforceable but makes it inadmissible in evidence. However, it is a curable defect as per the Indian Stamp Act, the Court pointed out.

The key highlights of the judgement delivered by the CJI D.Y. Chandrachud, J. have been discussed as follows:

Consequence of non- payment of Stamp Duty:

The Court discussed that the Stamp Act is a legislation which consolidates the laws relating to the payment of stamp-duty on the execution of certain instruments. Section 17 of the Stamp Act provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. However, the Legislature recognised that at times, the parties executing an instrument may attempt to avoid the payment of stamp-duty and may therefore refrain from stamping it. Accordingly, the provisions in Chapter IV were enacted. Section 33 of the Stamp Act provides that every person who is authorized to receive evidence (either by law or by consent of parties) shall impound an instrument which is, in their opinion, chargeable with duty but which appears to be not duly stamped. Further, Section 35 renders instruments which are not duly stamped inadmissible in evidence for any purpose and cannot be acted upon, registered, or authenticated. It ensures that stamp-duty is paid before rights and obligations arising from an agreement are enforced. In terms of Section 42 of the Stamp Act, an instrument is admissible in evidence once the payment of duty and a penalty (if any) is complete.

The difference between inadmissibility and voidness:

The Court categorically clarified that 'admissibility' and 'enforceability' of an instrument are two distinct concepts. Section 2(g) of the Contract Act declares that an agreement unenforceable by law is said to be void. When an agreement is void, it is concerned with 'enforceability' in a court of law. Whereas the term 'admissibility' of an instrument relates to whether or not it can be introduced into evidence. Inadmissibility refers to whether the court may consider or rely upon an instrument while adjudicating the case. Therefore, 'admissibility' and 'voidness' of an instrument are not at all synonymous.

Section 35 of the Stamp Act renders a document 'inadmissible' and not 'void':

The Court held that the observation made by the majority judgment in *N.N. Global 2* conflates the distinction between enforceability and admissibility by holding that, that an agreement which is unstamped or insufficiently stamped is **not enforceable** and as long as it remains in the said condition, such an instrument would be **void** as being not enforceable. Such interpretation has erroneously combined two distinct terms with distinct meanings.

The Court in the present judgment highlighted Section 35 of the Stamp Act, which clearly stipulates, “No instrument chargeable with duty shall be **admitted in evidence...**” wherein the term “admitted in evidence” refers to the admissibility of the instrument and not voidness. Further, sub-section (2) of Section 42, also states that an instrument in respect of which stamp-duty is paid and which is endorsed as such will be “**admissible** in evidence.” Therefore, the effect of not paying duty or paying an inadequate amount renders an instrument inadmissible and not void.

Further, The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it, clearly implying that the non-payment of stamp-duty is a curable defect whereas, there exists no procedure by which a **void** agreement can be “cured.”

The purpose of the Stamp Act:

The Court noted that the Stamp Act is a fiscal legislation which is intended to raise revenue for the Government. It is a mandatory statute. In *Hindustan Steel Ltd. v. Dilip Construction Co.*⁸, the Court held that the provisions of the Stamp Act clearly provides that once the appropriate duty has been paid and the instrument is endorsed, such instrument could be admitted into evidence as well as acted upon.

Interestingly, in *N.N. Global 2* (supra), it was held that the failure to stamp an arbitration agreement is “not a curable defect.” Relying on the provisions of the Contract Act as well as Section 11(6-A) of the Arbitration Act, the said judgment held that an unstamped arbitration agreement is void in light of **Section 2(j) of the Contract Act which renders a contract which deems a contract that becomes unenforceable to be void.**”. Therefore, it was incorrectly held that an unstamped arbitration agreement also cannot exist in law, and it would be void.

THE ARBITRATION AND CONCILIATION ACT 1996

The Court further discussed other principles which act as important aids to interpret the Arbitration Act.

Arbitral Autonomy:

Arbitral tribunals are constituted to give effect to the mutual intention of the parties to settle their disputes through a neutral and expert authority of their choice. By choosing to settle their disputes through arbitration, parties surrender their right to litigate before the national courts in favour of the arbitral tribunal. By surrendering their right to litigate in national courts, parties also surrender their right to be bound by national procedural laws in favour of expedition, informality, and efficiency of the arbitral process. Further, it was noted that the competence of an arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, also indicates that the arbitral tribunals are autonomous.

⁸ (1969) 1 SCC 597

Principle of minimum judicial interference

The principle of judicial non-interference reflects the autonomy of arbitral tribunals. The principle also respects party autonomy by giving effect to the objective of the parties in agreeing to arbitrate their disputes through a less formal and more flexible arbitral procedure.

The legislative intent behind enacting Section 5 of the Arbitration Act was to minimize the supervisory role of courts in the arbitral process to the bare minimum, and only to the extent “so provided” under the Part I of Arbitration Act. The objective was not to altogether exclude the role of courts or judicial authorities in arbitral proceedings, rather, it was to limit the extent of judicial intervention in respect of matters expressly provided under the Arbitration Act, ensuring that no judicial authority assigns to itself the power that has been expressly and exclusively bestowed upon the arbitral tribunal.

The Court stated that Section 5 is of aid in interpreting the extent of judicial interference under Sections 8 and 11 of the Arbitration Act, as it is Section 5 that provides a general rule of judicial non-interference. Therefore, every provision of the Arbitration Act ought to be construed in view of Section 5 to give true effect to the legislative intent of minimal judicial intervention.

Section 5 begins with the non- obstante clause stating, “*notwithstanding anything contained in any other law for the time being in force.*” This reflects the legislative intent of limiting judicial intervention during the arbitral process. The object of the adding a non-obstante clause is to give such provision overriding effect over other provisions of the law which stand in the way of the operation of the provision incorporating the non-obstante clause. In the context of Section 5, this means that the provisions contained in Part I of the Arbitration Act ought to be given an overriding effect and operation irrespective of any other law for the time being in force.

Furthermore, Section 16 of the Arbitration Act also provides that the arbitral tribunal may rule on its own jurisdiction “*including ruling on any objection with respect to the existence or validity of the arbitration agreement.*” The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the arbitral tribunal.

The Court further clarified that although Sections 8 and 11 allow courts to refer parties to arbitration or appoint arbitrators, Section 5 limits the courts from dealing with substantive objections pertaining to the existence and validity of arbitration agreements at the referral or appointment stage. At the stage of Section 8 or Section 11, a referral court can only enter into a *prima facie* determination. The legislative mandate of *prima facie* determination ensures that the referral courts do not trammel the arbitral tribunal’s authority to rule on its own jurisdiction.

The Arbitration Act is a self-contained code

The Court observed that the Arbitration Act is a complete legislation with regard to the purpose for which it is enacted and provides for a complete machinery to deal with the purpose sought to be achieved by it. Therefore, its dependence on other legislations is either absent or minimal. When a self-contained code sets out a procedure, the applicability of a general legal procedure must be impliedly excluded.

It is not permissible to do what is not mentioned under the Arbitration Act. Therefore, provisions of other statutes cannot interfere with the working of the Arbitration Act, unless specified otherwise.

Separability of the arbitration agreement

The concept of separability or severability of an arbitration agreement from the underlying contract creates a legal fiction which acknowledges the separate nature of an arbitration agreement. An arbitration agreement is juridically independent from the underlying contract in which it is contained. The concept of separability of an arbitration agreement ensures that an arbitration agreement survives a termination, repudiation, or frustration of a contract to give effect to the true intention of the parties and ensure sanctity of the arbitral proceedings.

- **Switzerland** was one of the first jurisdictions to recognize the separability presumption, holding that where an arbitration clause is contained in the same document as the substantive contract to which it relates, it does not constitute a single provision of the main agreement but an independent agreement of a special nature.
- In **U.K.**, the separability presumption developed gradually in English law starting with the decision of the House of Lords in *Heyman v. Darwins*⁹. It was held that an arbitration agreement is collateral to the substantive contract and could survive its termination. The separability presumption was reiterated by the English Courts in *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd*¹⁰ and *Premium Nafta Products Limited v. Fili Shipping Co. Ltd*¹¹. It was held that an arbitration agreement in terms of Section 7 of the UK Arbitration Act is a “distinct agreement” from the underlying contract.
- In **United States of America**, the separability presumption has been recognised and discussed by the US Courts in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*¹² and subsequently reiterated by the Supreme Court of the United States in *Buckeye Check Cashing Inc v. Cardegna*¹³ and *Rent-A-Center, West, Inc. v. Jackson*¹⁴.
- In **Singapore**, the separability presumption has been explained by the Singapore High Court in *BNA v. BNB*, wherein it was held that the purpose of the separability presumption is to insulate an arbitration agreement from invalidity arising from a challenge to the substantive contract.

Separability Presumption in the Indian scenario:

The Arbitration Act also incorporates the separability presumption in Section 16(1) along the lines of the Model Law. Initially, the Indian Courts recognised an arbitration agreement as an integral part of the underlying contract without any existence beyond such contract. This view was taken in the decisions in *Union of India v. Kishorilal Gupta*¹⁵ and *Damodar Valley Corporation v. K K Kar*¹⁶.

However, the enactment of the Arbitration Act in 1996 enabled the Indian Courts to give effect to the separability presumption with greater impetus. Section 16(1)(b), which provides that a

⁹ [1942] AC 356

¹⁰ [1993] Q.B. 701

¹¹ [2007] UKHL 40

¹² 388 US 395 (1967)

¹³ 546 U.S. 440, 440 (2006)

¹⁴ 2 561 U.S. 63 (2010)

¹⁵ 1959 SCC OnLine SC 6

¹⁶ (1974) 1 SCC 141

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

In *National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Co.*¹⁷ the Court observed that even if the underlying contract comes to an end, the arbitration agreement contained in such contract survives for the purpose of the resolution of disputes between the parties. A similar view was taken by the decisions in *P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corp*¹⁸ and in *Magma Leasing & Finance Ltd. v. Potluri Madhavalata*¹⁹.

FINDINGS OF THE COURT IN THE PRESENT JUDGMENT:

In light of the above discussion, **it was observed that the view taken by the court in the *N.N. Global 2* was contrary to the separability presumption** which requires the arbitration agreement to be treated as separate from the underlying contract. The Court further observed that in *N.N. Global 2*, the Constitution Bench acknowledged the separability presumption, yet failed to apply it in the context of Sections 33 and 35 of the Stamp Act.

First, the separability presumption contained in Section 16 encapsulates the general rule on the substantive independence of an arbitration agreement.

Second, parties to an arbitration agreement mutually intend to confer jurisdiction on the arbitral tribunal to determine questions as to jurisdiction as well as substantive contractual disputes between them. The separability presumption gives effect to this by ensuring the validity of an arbitration agreement contained in an underlying contract, notwithstanding the invalidity, illegality, or termination of such contract.

Third, when the parties append their signatures to a contract containing an arbitration agreement, they are regarded in effect as independently appending their signatures to the arbitration agreement. The reason is that the parties intend to treat an arbitration agreement contained in an underlying contract as distinct from the other terms of the contract, and;

Fourth, the validity of an arbitration agreement, in the face of the invalidity of the underlying contract, allows the arbitral tribunal to assume jurisdiction and decide on its own jurisdiction by determining the existence and validity of the arbitration agreement. In the process, **the separability presumption gives effect to the doctrine of *kompetenz-kompetenz*.**

DOCTRINE OF KOMPETENZ-KOMPETENZ

The Court then proceeded to discuss the doctrine of *kompetenz-kompetenz* (also known as competence-competence) and its applicability in India as well as other jurisdictions. It is a general rule of international arbitration law that an arbitral tribunal is empowered to determine its own

¹⁷ (2007) 5 SCC 692

¹⁸ (2009) 2 SCC 494

¹⁹ (2009) 10 SCC 103

jurisdiction. It allows the tribunal to decide on all substantive issues arising out of the underlying contract, including the existence and validity of the arbitration agreement. It also gives effect to the separability presumption which insulates the arbitration agreement from the defects of the underlying contract.

Competence- Competence in other jurisdictions:

- Section 30 of the **UK** Arbitration Act provides that the arbitral tribunal may rule on its own substantive jurisdiction with respect to:
 - a) Existence of a valid arbitration agreement;
 - b) Proper constitution of an arbitral tribunal
 - c) The matters submitted to arbitration in accordance with the arbitration agreement.
- **USA:** In *Buckeye Check Cashing* (supra), the United States Supreme Court reiterated *Prima Paint* (supra) by holding that the courts should only check if any invalidity is directed at the arbitration agreement, leaving all the other issues, including that of the validity of the underlying contract, to the arbitral tribunal.
- **Singapore:** Under Singaporean law, Article 21(1) of the Arbitration Act, 2001 incorporates the doctrine of *competence-competence* in so far as domestic arbitration is concerned. It provides that an arbitral tribunal may rule on its own jurisdiction, including a plea that it has no jurisdiction and any objections to the existence or validity of the arbitration agreement at any stage of the arbitral proceedings.

Doctrine of Competence- Competence in India

Section 16 of the Arbitration Act, which is based on Article 16 of the Model Law, recognizes the doctrine of *competence-competence* in Indian arbitration law. Section 16 empowers the arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreement. Upon the passing of an award, Section 16(6) allows the aggrieved party to make an application for setting aside of the award under Section 34. Therefore, even though an arbitral tribunal is given priority to determine all its issues, such decision is subject to judicial review at the stage when an award is challenged.

The Court then proceeded to discuss whether under Section 16 of the Arbitration Act, a tribunal can effectively exercise its jurisdiction to settle the claims between the parties until stamp-duty is paid on the underlying instrument. The Court referred to *Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field*²⁰, wherein it was observed that the scope of an arbitral tribunal's authority is wide enough as to comprehend all preliminary issues affecting its jurisdiction, including the issue of sufficiency of stamping.

The Court also clarified that the burden of proving the existence of an arbitration agreement generally lies on the party seeking to rely on such an agreement.

Further, the referral court must abstain from conducting a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The

²⁰ (2020) 2 SCC 455

determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal.

Parliament was aware of the Stamp Act when it enacted the Arbitration Act.

It was further noted that the courts must bear in mind that the Parliament was aware of the Stamp Act when it enacted the Arbitration Act. Yet, the latter does not specify stamping as a pre-condition to the existence of a valid arbitration agreement. Further, Section 11(6-A) of the Arbitration Act requires the court to confine itself to the examination of the existence of the arbitration agreement.

Doctrine of Harmonious construction:

If a statute is susceptible to two interpretations, the court must interpret the ambiguous clause in light of the legislative intent regarding the entirety of the statute. The legislature often enacts a statute to give effect to legislative policy. Though the legislature endeavours to avoid contradictions and inconsistencies between the provisions of one statute and another, yet inconsistencies or contradictions may nonetheless arise between statutes. In such situations, the court must preserve the workability and efficacy of both such statutes, by interpreting them harmoniously and giving full effect to the object of both statutes.

Harmonious construction of the three statutes under consideration: ICA, Stamps Act and Arbitration and Conciliation Act, 1996.

It was observed that the view taken by the Court in *N.N. Global 2* (supra) was contrary to the separability presumption which requires the arbitration agreement to be treated as separate from the underlying contract. The Court further observed that in *N.N. Global 2* (supra), the Constitution Bench acknowledged the separability presumption, yet failed to harmonise and apply it in the context of Sections 33 and 35 of the Stamp Act.

The Court observed that the decision of the majority in *N.N. Global 2* (supra) did not make a distinction between enforceability and admissibility, and erroneously held that the inadmissibility of the document in evidence renders it unenforceable. Further, it was also in conflict with the effect of the principle of *competence-competence*, which states that the arbitral tribunal is vested with the power and authority to determine its enforceability. By appointing a tribunal or its members, the Court is merely giving effect to the principle enshrined in Section 16. The appointment of an arbitral tribunal does not necessarily mean that the agreement in which the arbitration clause is contained as well as the arbitration agreement itself are enforceable. Rather, it is for the arbitral tribunal to determine these issues.

The Court clarified that the corollary of the doctrine of *competence-competence* is that courts may only examine whether an arbitration agreement exists on *prima facie* basis. However, the objections as to the jurisdiction of an arbitral tribunal on the basis of inadequate stamp-duty or non-payment of stamp-duty cannot be decided on a *prima facie* basis and it rather requires a detailed consideration of evidence and submissions and a finding as to the law as well as the facts. Therefore, obligating the court to decide issues of stamping at the Section 8 or Section 11 stage will defeat the legislative intent underlying the Arbitration Act.

The Court also discussed the effect of the word “shall” in sections 33 and 35 of the Stamp Act. Sections 33 and 35 of the Stamp Act uses the word “shall.” The Court clarified that while the word

“shall” ordinarily indicates that the provision is mandatory, yet, if the context or the intention requires, it may be read as directory in nature, as held in *Sainik Motors v. State of Rajasthan*²¹.

THE OBJECT OF THE STAMP ACT IS PRESERVED:

The majority judgment in *N.N. Global 2* (supra), while interpreting Section 17 of the Stamp Act, had observed that the Stamp Act is a fiscal enactment, intended to raise revenue and should be interpreted in a manner that results in enforcement of the law rather than allowing the law to be flouted with impunity. It is pertinent to note that the interpretation of the law in the present reference by the seven-judge bench ensures that the provisions of the Arbitration Act are given effect to while not detracting from the purpose of the Stamp Act, thereby ensuring that the workability of both legislations is preserved.

The interpretation of the law must give effect to the purpose of the Arbitration Act in addition to the Stamp Act:

The Court further observed that the decision of the Constitution Bench in *N.N. Global 2* (supra) gives effect exclusively to the purpose of Stamp Act and prioritises the objective of the Stamp Act, i.e., to collect revenue at the cost of the Arbitration Act. This results in jeopardizing the object sought to be achieved by the Arbitration Act, i.e., to provide a speedy and efficacious remedy to the parties to a dispute. The impounding of an agreement which contains an arbitration clause at the stage of the appointment of an arbitrator under Section 11 (or Section 8 as the case may be) of the Arbitration Act would delay the commencement of the arbitration. Accordingly, it would inevitably result in delaying the speed at which the resolution of disputes would take place. Whereas, if an agreement is impounded by an arbitral tribunal, it is far likelier that the process of payment of stamp duty would be completed at a quicker pace than before courts as the arbitral tribunals have lesser burden in comparison to the courts.

The approach taken by the seven-judge bench in the present case clarifies that there is no question as to ‘whether or not’ the agreement should be impounded, rather the question is ‘at which stage’ the agreement would be impounded.

N.N. Global 2, SMS Tea Estates and Garware Wall Ropes were wrongly decided:

The court categorically held that the judgment delivered in the cases of *SMS Tea Estate* (supra), **as reiterated in *N.N. Global 2* (supra), is no longer valid in law.** The court held that Section 5 is effectively rendered otiose by the interpretation given to it in *N.N. Global 2* (supra) as the judgment failed to provide a reason for holding that Section 5 of the Arbitration Act does not have an overriding effect on Sections 33 and 35 of the Stamp Act in proceedings under Section 11 of the Arbitration Act. Additionally, it was observed that the referral court at Section 11 stage ought not to examine or impound an unstamped or insufficiently stamped instrument, but rather leave it for the determination by the arbitral tribunal. Accordingly, the decision in *N.N. Global 2* was overruled by the majority judgment in the present reference before the seven-judge bench.

The court also highlighted that an effect must be given to:

- a) The principle of minimal judicial intervention in Section 5 of the Arbitration Act;

²¹ 1961 SCC OnLine SC 15

- b) The *prima facie* standard applicable to Sections 8 and 11 of the Arbitration Act; and
- c) The purpose of the Stamp Act which is to protect the interests of revenue and not arm litigants with a weapon of technicality by which they can cause unnecessary delay in adjudication of disputes.

Conclusion of the judgment delivered by the Hon'ble Chief Justice of India, DY Chandrachud:

The findings and conclusions of the judgment delivered by The Hon'ble CJI are as follows:

1. Arbitration agreements contained in an unstamped or insufficiently stamped instrument are not void ab initio or unenforceable, rather, they are inadmissible in evidence.
2. Non-stamping or inadequate stamping of an instrument is a curable defect.
3. The court must refrain from determining an objection pertaining to non-stamping at the stage of Sections 8 or 11 of the Arbitration Act. At that stage, the court should rather determine the *prima facie* existence of an arbitration agreement.
4. In light of the doctrine of *competence-competence* contained in section 16 of the Arbitration Act, the objection as to non-stamping of the agreement must be determined by the arbitral tribunal.
5. The decisions in *N.N. Global 2* and *SMS Tea Estates* have been accordingly overruled.

Concurring opinion by Hon'ble Sanjiv Khanna, J.:

While concurring with the other findings and ratio in the majority judgment, Justice Sanjiv Khanna wrote a **separate concurring opinion** highlighting the following observations:

- Unstamped or insufficiently stamped instruments are inadmissible in evidence in terms of Section 35 of the Indian Stamp Act, 1891.
- A “*void ab initio*” instrument has no corporeality in the eyes of law and cannot confer or give rights or create obligations. However, an instrument which is “inadmissible” exists in law, although it cannot be admitted in evidence by such person, or be registered, authenticated or be acted upon by such person or a public officer till it is duly stamped.
- An objection as to the under-stamping or non-stamping of the underlying contract will not have any bearing when the *prima facie* test, “the **existence** of arbitration agreement”, is applied by the courts while deciding applications under Sections 82 or 113 of the Arbitration and Conciliation Act, 1996.
- The existence of an arbitration agreement is to be ascertained with reference to the requirements of Section 7 of the Arbitration Act.
- A five-judges’ bench in *The State of Bihar v. M/s Karam Chand Thapar and Brothers Ltd.*²², has held that under Section 35, only the original instrument can be validated, when it is unstamped or insufficiently stamped. A copy cannot be validated and acted upon.

²² AIR 1962 SC 110

- Though the provisions of the Stamp Act are meant to be construed strictly, yet, they cannot have an overriding effect on another statute operating in a completely different sphere. To hold that insufficiently stamped instrument does not exist in law, will cause disarray and disruption.
- An unstamped or under-stamped contract or agreement cannot be impounded, except when it is produced for being received in evidence before a person authorised to do so or a public officer in terms of Section 33 of the Stamp Act.
- Section 33 does not authorise a police officer to examine and impound an instrument, even when insufficiently stamped. A Magistrate or a Judge of a criminal court may not examine or impound an instrument coming before him, and can admit an insufficiently stamped instrument in evidence, other than in the proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (Chapter X(D) and Chapter IX of the Code of Criminal Procedure, 1973). Thus, the same instrument may be admissible and acted upon before a criminal court, while being inadmissible before a civil court, public officer etc.
- It was observed that an objection as to insufficient stamping of the underlying agreement should be examined and decided by the arbitral tribunal. **Accordingly, the majority decision of the Constitution Bench in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*** was overruled by the court.

CONCLUSION:

The law settled by the seven-judge bench has adequately clarified the position of law pertaining to the validity of arbitration agreements where the underlying instrument/ contract is unstamped. The Court employed the doctrine of harmonious construction and rule of purposive interpretation, keeping in view the object of the Arbitration Act, i.e., to ensure an efficacious remedy with minimum supervisory role of courts in the arbitral process along with the object of the Stamp Act, i.e., to secure revenue for State. The judgment has effectively preserved the workability of both statutes giving effect to the legislative intent behind their enactment. The judgment is a welcome move in ensuring speedy dispute resolution through arbitration by restricting the judicial interference only to the circumstances stipulated by the legislature. Such interpretation would also give effect to the doctrine of *competence-competence* as well as the principles of minimum judicial interference and party autonomy, which are fundamental principles concerning the law relating to arbitration in India.