



In a recent landmark ruling by Hon'ble 7 judges' bench of the Hon'ble Supreme Court while establishing a milestone in the legal era in the field of Arbitration and Conciliation Act, 1996 with the consideration of Indian Stamp Act, 1999 and Indian Contract Act, 1872 while overruling the judgement in the case of N N Global Mercantile within (P) ltd vs. Indo Unique flame Ltd. upheld that an arbitration clause in unstamped agreement are enforceable.

**IN THE SUPREME COURT OF INDIA
INHERENT/ CIVIL ORIGINAL JURISDICTION**

Curative Petition (C) No. 44 of 2023

In

Review Petition (C) No. 704 of 2021

In

Civil Appeal No. 1599 of 2020

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

And With Arbitration Petition No. 25 of 2023

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

A seven-judge bench of the Supreme Court on Wednesday (December 13) ruled 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. Held that while unstamped arbitration agreements are inadmissible, they are not rendered *void ab initio* (void from the beginning) on account of the fact that they are unstamped.

Facts

The issue dates back to 2011, when the Supreme Court held that unstamped arbitration agreements could not be enforced. In 2020 the matter was brought to the Supreme Court again by N N Global Mercantile Pvt. Ltd., which had a dispute with Indo Unique Flame Ltd over a bank guarantee. N N Global claimed the agreement was unstamped and thus unenforceable. In January 2021, a three-judge bench disagreed with previous rulings and referred the case to a five-judge Constitution Bench.

On 25 April 2023, the Constitution Bench ruled with a 3:2 majority that unstamped arbitration agreements were void and unenforceable. They said an arbitration agreement could not be separated from the main contract, and if stamp duty was not paid on the main contract, the arbitration clause was also invalid. The ruling raised concerns about potential delays in arbitrator appointments and clashed with India's pro-arbitration stance.

On 26 September the Supreme Court, in response to a curative petition challenging the previous judgment, agreed to reconsider the matter due to its "larger ramifications and consequences". The court formed a seven-judge constitutional bench comprising Chief Justice DY Chandrachud, Justice Sanjay Kishan Kaul, Justice Sanjiv Khanna, Justice B R Gavai, Justice Surya Kant, Justice JB Pardiwala, and Justice Manoj Misra.

The petitioners argued that an improperly stamped agreement should not make an arbitration agreement automatically invalid. They said an arbitration clause was separate from the main contract, and the overall contract's invalidity shouldn't affect it.

The respondents argued that the court shouldn't handle legal questions in this case, and that allowing a curative petition would violate court rules. But the court decided to hear the case, citing the importance of the legal question involved.



What did Supreme court rule in this Judgment ?

The five-judge Constitution Bench in *NN Global* had on April 25 held by a 3:2 opinion that unstamped arbitration agreements are not valid in law.

The conclusions in lead judgment were summarized by **CJI Chandrachud** as follows:

- **Agreement not stamped are inadmissible under Stamp Act but they are not rendered void ab initio;**
- **Aspect of stamping does not fall for determination under Sections 8 or 11 of Arbitration Act;**
- **Stamping or not falls for determination by arbitral tribunal.**
- **Any objection in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal.**

"The corollary of doctrine of competence is that court may only see if an arbitration agreement exists. Whether stamp duty is paid or not would need detail merit of evidence etc. Interpretation accorded to Stamp Act does not allow law to be flouted and it ensures that Arbitration Act does not detract from Stamp Act.

Contentions of parties

Senior Advocates Arvind Datar argued that section 5 of the Arbitration Act discouraged excessive judicial intervention in arbitration matters. The provision states that except for where the Act specifically provides, there must be no judicial intervention in arbitration. More specifically, in this case, it meant the rule under Section 11(6A) of the Act.

Section 11 provides for the appointment of arbitrators. Typically, parties to the arbitration choose the arbitrators themselves. However, if they fail to come to a consensus on an arbitrator, a party may approach the High Court or Supreme Court to appoint one under Sections 11(4) and 11(5). Section 11(6A) says that when considering an application under subsections 4 or 5, the Court "shall confine to the examination of the existence of an arbitration agreement." These words, Datar said, proved that examination powers of the Courts under 11(6A) were confined to determining whether an arbitration agreement exists—not to venture into its validity.



There are two examinations involved here,” he said, “one under Section 11(6A) of the Arbitration Act (existence) and one under Section 33 of the Stamp Act (validity), the second one is excluded from the jurisdiction of the Court.” Moreover, the purpose of the Arbitration Act, Datar said, was to ensure speedy redressal. By venturing into the nitty-gritty of stamping, registration and validity, the Court added hurdles to the arbitration process.

Datar highlighted the interplay of the Contracts Act in the case. He argued that the Court was wrong to declare an unstamped arbitration agreement “void” under Section 2 of the Act.

Section 2(g) of the Contract Act stipulates that an agreement not enforceable by law is void. However, Datar argued, this must be read along with Sections 10 and 23 of the Act.

Under Section 10 of the Act, all agreements are contracts if they are not expressly declared void. According to Section 23, every contract with an unlawful object or consideration is void. The lack of stamp duty, Datar argued, did not constitute such unlawful consideration. Therefore, while an unstamped arbitration agreement may be unenforceable under the Stamp Act, it is not void under the Contract Act. Ensuring that an agreement is stamped is not an inherent precondition for a valid contract—it is an incidental part that can easily be rectified, he said.

Senior Advocate Nikhil Sakhardande, appearing next, reiterated Datar’s arguments and submitted that the lack of a stamp was “rectifiable and curable”. Therefore, it could not be used to invalidate an arbitration agreement.

Mehta followed and argued that under the Stamp Act, the time taken for various procedures was uncertain. By making the validity of an arbitration agreement dependent on the provisions of the Stamp Act, the majority judgment in *NN Global* paved the way for unnecessary delays in the process of arbitration.

Further, he asserted that by vesting the “entertain ability” of a petition on fiscal legislation (the Stamp Act), the decision on *NN Global* played foul on public policy. This requirement was not an inalienable precondition to an agreement that without it, it was invalid. If that was the case, the legislature would have indicated it in clear written words.

Jayanth Mehta then drew a parallel to the Civil Procedure Code, 1908. Under Section 149 of the code, when a party has not been able to pay the requisite Court fee in the given time frame, the Court has the discretion to allow the payment of the fee at a later time. Therefore, a plaintiff under the Code was on a higher pedestal than a petitioner under arbitration law,



whose agreement was rendered invalid because of the lack of stamp duty. Mehta argued that this was impermissible and that the majority of *NN Global* was wrong in its decision.

Gourab Banerjee appeared next and suggested that the majority in *NN Global* were wrong to rely on *Garware Wall Ropes Ltd. v Coastal Marina Constructions and Engineering. Ltd* (2019). In *Garware Wall Ropes*, the SC held that contracts (including agreements) are only enforceable under Section 11(6A) of the Arbitration Act if they are duly stamped. The purpose of Section 11, Banerjee said, was for the Court to appoint an arbitrator and leave questions of validity to the arbitral tribunal under Section 16. He claimed that this view was in tune with international arbitration laws as well.

Moreover, Banerjee urged, that being a fiscal legislation, the object of the Stamp Act is “to protect public revenue, and not to hinder commercial life.” Therefore, a curable defect cannot invalidate an agreement altogether.

Darius Khambata said, is meant to provide the State with a stream of income through trade and commerce—arbitration was a means to further this. Therefore, using a technicality in the former to invalidate the latter was impractical. , He also stated that the doctrine of separability played an important role in the present case. He argued that even if the main contract between two parties was invalid, the doctrine of separability ensured that the arbitration clause remained on a separate foot.

The Court’s limited role, he said, was to determine if an arbitration agreement existed in the main contract and if yes, refer the case to an arbitral tribunal. The tribunal could then determine its own jurisdiction and competence and examine the validity of the arbitration agreement.

In support of his arguments, he cited the Court’s decisions in *A. Ayyasamy v. A. Paramasivam*, (2016) and *Vidya Drolia v Durga Trading Corp.*, (2019). These decisions, Khambata argued, established key principles which make it clear that the issues of validity and enforceability of an arbitration agreement must be left to the arbitral tribunal.

First, the doctrine of separability ensured that the arbitration clause remained irrespective of the main contract. Second, Section 16 of the Arbitration Act incorporates within it, the principle of *Kompetenz-kompetenz*. This principle establishes that the tribunal was empowered to determine its own jurisdiction. Third, the Court was limited by the *prima facie test*. According to this test, the only aspect the Court had to decide was whether, on the face of it, there was an arbitration agreement. If the answer was in the affirmative, the case had to be referred to arbitration.

Lastly, Khambata contended, arbitration was meant to be “a one-stop adjudication” where party autonomy was paramount. It is meant to reduce



the delays of litigation so the Court's intervention in these cases must be limited.

Conclusion

- Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable.
- None stamping or inadequate stamping is a curable defect.
- An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned court must examine whether the arbitration agreement prima facie exists.
- Any objection in relation to the stamping of the agreement fall within the ambit of the tribunal
- The decision in N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. is overruled to that extent.

.....CJI.
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