

An unstamped arbitration agreement exigible to stamp duty, is not enforceable: Supreme Court

In a recent decision, the Constitution Bench of the Supreme Court of India (“**Supreme Court**”) answered issues referred to it in the case of *M/s N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Ltd. & Ors.*¹ on the requirement of stamping of an arbitration agreement.

In a nutshell, the Supreme Court has held that:

1. An unstamped instrument cannot be a contract and is not enforceable.
2. If an unstamped instrument containing an arbitration clause is presented before the Court in a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”), the Court is duly bound to impound the unstamped instrument.
3. It is only following impounding, payment of requisite stamp duty and provision of endorsement under Section 42 of the Indian Stamp Act, 1899 (“**Stamp Act**”) that the Court can consider the Section 11 petition.
4. Till the time the unstamped instrument is stamped, the arbitration agreement contained therein will be non-existent in law.

By this decision, the Supreme Court has overruled the prior decision of the Division Bench in the same proceedings² and upheld the view taken in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*³ and *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*⁴

Facts

1. The Petitioner (M/s N.N. Global Mercantile Private Limited (“**NN Global**”)) and the Respondent (M/s Indo Unique Flame Ltd. (“**Indo Unique**”)) entered into a sub-contract which contained an arbitration clause. Due to certain disputes under the agreement, NN Global invoked the Bank Guarantee.
2. NN Global filed a suit against the encashment of the bank guarantee. Indo Unique filed an application under Section 8 of the Arbitration Act seeking reference to arbitration, before the Commercial Court. The Commercial Court rejected NN Global’s application.
3. NN Global filed a writ petition before the Bombay High Court (after withdrawing the revision petition that NN Global had originally filed). In the writ petition, the Bombay High Court held that NN Global’s application under

¹ Civil Appeal Nos. 3802-3803 of 2020.

² (2021) 4 SCC 379.

³ (2011) 14 SCC 66.

⁴ (2019) 9 SCC 209.

Section 8 of the Act was maintainable. One of the issues which fell for consideration before the Bombay High Court was the unenforceability of the sub-contract on account of being unstamped and unregistered.

4. The special leave petition was decided by the Supreme Court by way of a judgment in *N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Ltd. & Ors.*⁵ holding that an arbitration agreement is a distinct and separate agreement which is independent from the substantive commercial contract. The non-payment of stamp duty on the Work Order did not invalidate the main contract. However, the Supreme Court noted the observations made by the Court in *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*⁶ upheld by the Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*⁷ and referred the following issue to a Constitution Bench.

Issue referred to the Constitution Bench

Whether the statutory bar contained in Section 35 of the Stamp Act would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?

Contentions of the Appellant

1. Section 35 of the Stamp Act bars admission of an instrument into evidence without it being stamped, even for a collateral purpose.
2. An arbitration agreement even if contained in a clause of a work order cannot have a separate existence.
3. The doctrine of an arbitration agreement having a separate existence has been understood wrongly in the context of the provisions of the Stamp Act. The Courts are bound to consider Sections 33 and 35 of the Stamp Act while appointing an arbitrator under Section 11 of the Arbitration Act, as Section 11(6A) cannot authorise the Court to overlook the provisions of Stamp Act.

Contentions of the Respondent

1. Mr. Gourab Banerji, Sr. Adv. (appointed as Amicus Curiae) submitted that there were parts of verdicts in *Garware*, *Vidya Drolia*, and *NN Global*, which did not lay down the law correctly. In *NN Global*, the bench was not correct in proceeding on the basis that an arbitration agreement was not required to be stamped.
2. The existence and validity of an arbitration agreement is not affected by the provisions of the Stamp Act. Non-payment of stamp duty is a curable defect and will not invalidate the instrument or make it void. An unstamped document can be acted upon after payment of stamp duty and penalty. Till the time it is stamped, it is inadmissible in evidence.
3. Section 11(6A) of the Arbitration Act compels the court to confine its examination to the question of existence of arbitration agreement. The impounding of an instrument while appointing an arbitrator is to be done by the arbitrator appointed by the court, and not the court. Arbitrator is fully competent by virtue of the principle of Kompetenz-Kompetenz to entertain all kinds of objections.
4. In keeping with the purpose of Section 11(6A) and the need for minimal interference, as contemplated in Section 5 of the Act, on a *prima facie* examination as to existence of an Arbitration Agreement, a reference must be made.
5. In a Section 8 Application, the Court should not undertake the exercise of examining of the issues relating to the stamp duty.

⁵ (2021) 4 SCC 379.

⁶ (2019) 9 SCC 209.

⁷ (2021) 2 SCC 1.

6. Under the scheme of the Arbitration Act, an applicant under Section 11 is only required to produce a certified copy of the arbitration agreement. Certified copy of an instrument cannot be impounded. Thus, it is the arbitrator who should impound the document.
7. Section 5 of the Arbitration Act contains a non-obstante clause and as such, the Court should not be deterred by Sections 33 and 35 of the Stamp Act.

Findings and Rationale

The Supreme Court considered the provisions of the Arbitration Act, the Stamp Act, and the Contract Act to conclude that an unstamped arbitration agreement is unenforceable, for the following reasons:

a) Provisions of Arbitration Act:

- 1) The Court, and not the arbitral tribunal, ought to decide the issue on stamp duty at the stage of Section 11. The mandate of the Stamp Act does not conflict with the legislative command contained in Section 11(6A), viz., to examine whether an Arbitration Agreement existed.
- 2) Section 11(6A) contemplates a contract and not an agreement which cannot be treated as contract.
- 3) The contract containing the arbitration clause must conform to Section 7 of the Arbitration Act and fulfil the requirements of the Contract Act.
- 4) The purport of the non-obstante provision in Section 5 is not to exclude the operation of Sections 33 and 35 of the Stamp Act. The Court under Section 11 purporting to give effect to Sections 33 and 35 cannot be accused of judicial interference contrary to Section 5.
- 5) If a certified copy of an agreement is produced under Section 11, it should disclose that the stamp duty has been paid on the original. In case a certified copy of an original agreement, which is insufficiently stamped, is presented, the Court cannot impound the same under Section 33 of the Stamp Act, however, it can also not act upon it under Section 35 of the Stamp Act.
- 6) An unstamped agreement with a stamped arbitration clause cannot be allowed to be used as it would allow the instrument to be used to establish a collateral transaction.

b) Provisions of Stamp Act and Contract Act:

- 1) Section 17 of the Stamp Act declares the time at which an instrument, executed in India, must be stamped. The said provision contemplates that stamping of such an instrument must take place before or at the time of the execution of document.
- 2) An unstamped instrument is compulsorily impoundable under Section 33 of the Stamp Act. After the procedure for stamping of the instrument is followed and the duty and the penalty are paid, the instrument would come to be visited with the endorsement under Section 42(2). Only thereafter, the document becomes enforceable, and it can be acted upon.
- 3) Under Section 33 of the Stamp Act, every person which has the authority to receive evidence (by law or consent of parties), is duty bound to impound an instrument upon forming an opinion that it is not duly stamped.
- 4) Under Section 35 of the Stamp Act, an instrument which is not stamped or insufficiently stamped cannot be admitted into evidence, even for a collateral purpose.
- 5) Section 2(h) of the Contract Act provides that an agreement which is enforceable in law is a contract. Section 2(g) of the Contract Act provides that an agreement not enforceable in law is void. These provisions, when read with Sections 33 and 35 of the Stamp Act, lead to a conclusion that an unstamped agreement which is not enforceable in law (which cannot be used as evidence in a court of law or before a public authority) is void/non-existent in law.

- 6) An unstamped or insufficiently stamped agreement would not be enforceable in law till it is validated as per the Stamp Act. It would not exist 'in law' till it is validated.

JSA Comment

The present judgment has finally put to rest the long-standing issue of enforceability of an unstamped agreement and the arbitration clause contained therein. However, this decision of the Supreme Court deviates from the pro-arbitration and minimum-judicial intervention approach by adding an additional layer of scrutiny by Courts causing (even more) delay in the appointment of arbitrators. The Supreme Court missed the opportunity to lay down guidelines for courts so that the Courts do not embark on a mini trial at the pre-reference stage on the sufficiency of stamping.

While this judgement is forward-looking and lays down a helpful benchmark for future arbitration agreements, this judgement is likely to have serious implications on ongoing arbitration proceedings in India where the preliminary issue of unenforceability on account of insufficient stamping is under consideration.

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