



December 2023

## **7 (seven) judge bench of the Supreme Court holds that unstamped or insufficiently stamped arbitration agreements are not rendered void or void ab initio**

A 7 (seven) judge bench of the Hon'ble Supreme Court of India ("**Supreme Court**") has observed in the case re: *Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*<sup>1</sup>, that non-stamping of the arbitration agreement does not make the agreement void or unenforceable but makes it inadmissible in evidence. However, the same is a curable defect as per the Indian Stamp Act, 1899 ("**Stamp Act**"). The Supreme Court whilst overruling a constitution bench decision of the Supreme Court in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*<sup>2</sup> ("**N.N. Global**") and a 2 (two) judge bench decision of the Supreme Court in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*<sup>3</sup> ("**SMS Tea**") held that the unstamped agreement is inadmissible under the Stamp Act but cannot be rendered *void ab initio*. The Supreme Court therefore held that arbitration clauses in unstamped or inadequately stamped agreements are enforceable.

### **Brief Facts**

The present judgment arose out of a curative petition filed against the ruling of a 3 (three) judge bench of the Supreme Court in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Brothers*<sup>4</sup> ("**Bhaskar Raju**"). The Supreme Court in *Bhaskar Raju* observed that an arbitration clause in an agreement which is required to be duly stamped, if not sufficiently stamped, cannot be acted upon by the court.

In *Bhaskar Raju*, one of the parties to the agreement filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") before the High Court of Karnataka ("**Karnataka HC**"). The other party contended that the lease deed being insufficiently stamped had to be mandatorily impounded under Section 33 of the Karnataka Stamp Act, 1957 and it could not be relied upon unless appropriate stamp duty and penalty was paid. However, the Karnataka HC invoked the power under Section 11(6) of the Arbitration Act and appointed an arbitrator to adjudicate the dispute between the parties. In appeal, the Supreme Court noted that admittedly both the lease deeds are neither registered nor sufficiently stamped as required under the Karnataka Stamp Act, 1957. The constitution bench of the Supreme Court relied upon *SMS Tea* and by a 3:2 majority decision reversed the decision of the Karnataka HC and held that the arbitration agreement in an unstamped contract is unenforceable.

Earlier decisions of the Hon'ble Supreme Court in *SMS Tea* and *Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited* ("**Garware**")<sup>5</sup>, separate 2 (two) judge benches had held that arbitration

<sup>1</sup> Curative Petition (C) No.44 of 2023

<sup>2</sup> (2023) 7 SCC 1

<sup>3</sup> (2011) 14 SCC 66

<sup>4</sup> (2020) 4 SCC 612

<sup>5</sup> (2019) 9 SCC 209

agreement in an unstamped contract could not be acted upon since an unstamped commercial contract would not exist.

Subsequently, a 3 (three) judge bench in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*<sup>6</sup>, took a different view that an arbitration agreement being separate and distinct from the underlying contract would not be rendered invalid, unenforceable or non-existent; non-payment of stamp duty would not even invalidate the underlying contract, being a curable defect. However, keeping in mind another decision of a 3 (three) judge bench in *Vidya Drolia v. Durga Trading Corporation*<sup>7</sup> ("**Vidya Drolia**"), had followed the view taken in Garware that arbitration agreement exists only when it is valid and legal, the 3 (three) judge bench in N.N. Global referred the issue to a 5 (five) judge bench.

This reference was answered in N.N. Global to hold that an arbitration agreement contained in an unstamped agreement is void and cannot be said to exist in law within the meaning of Section 2(h) of the Indian Contract Act, 1872 ("**Contract Act**"); Court under Section 11 of the Arbitration Act is required to examine and impound an unstamped instrument.

After the passing of the 5 (five) judge bench decision in N.N. Global, while considering the curative petition in Bhaskar Raju, a 5 (five) judge bench of the Supreme Court referred the question of unstamped arbitration agreement to a 7 (seven) judge bench. This was necessitated taking into account the larger ramifications of the 5 (five) judge bench decision in N.N. Global and due to the divergent views taken in various decisions.

## Issues

The issue for consideration before the Supreme Court was whether an arbitration agreement would be deemed to be non-existent, unenforceable or invalid if the underlying contract is insufficiently stamped / not stamped.

## Key Findings of Supreme Court

After appreciating the submissions advanced by the parties, the Supreme Court harmoniously interpreted the provisions of the Arbitration Act, Stamp Act and Contract Act and held as follows:

1. 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.
2. Non-stamping or inadequate stamping is a curable defect.
3. 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.
4. The observations in *Vidya Drolia* pertaining to the existence of an arbitration agreement were not in the context of stamping. Therefore, it cannot be said that *Vidya Drolia* in any manner determined the effect of an unstamped / insufficiently stamped underlying contract on an arbitration agreement contained therein.
5. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal.
6. The decision in N.N. Global and SMS Tea and paragraphs 22 and 29 of Garware are overruled.

## Conclusion

This judgment is a welcome decision to ensure that steps which are being taken to make India a hub for international and institutional arbitrations, are given further impetus. By way of the present judgment, the Supreme Court has settled the law to hold that arbitration agreements contained in agreements which are not stamped or are

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<sup>6</sup> (2021) 4 SCC 379

<sup>7</sup> (2021) 2 SCC 1

inadequately stamped, are not rendered void or void ab initio or unenforceable. This conclusion is premised on the separability of an arbitration agreement from the underlying agreement.

The Supreme Court further empowers arbitral tribunals to adjudicate on issues emanating from insufficiently stamped arbitration agreements by facilitating a liberal interpretation of Sections 33 and 35 of the Stamp Act.

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