

In a landmark judgment, the Supreme Court of India holds that arbitration cannot be invoked when the arbitration agreement or clause is contained in an unstamped or insufficiently stamped agreement or contract.

I. Introduction

On 25th April 2023, 3 (three) (Justice K.M. Joseph, Justice C.T. Ravikumar and Justice Aniruddha Bose) of 5 (five) Judges of the Hon'ble Supreme Court of India (“**Apex Court**”) rendered a judgment (“**Order**”) holding that:

“an instrument which is exigible to stamp duty may contain an arbitration clause and which is not stamped cannot be said to be a contract enforceable in law within the meaning of S. 2(h) of the Contract Act and is not enforceable under S 2(g) of the Contract Act”.

The minority judgment authored by Justice Ajay Rastogi and Justice Hrishikesh Roy answered the reference by overruling the judgments in the case of SMS Tea and Garware Wall Ropes and held that an arbitral agreement which is insufficiently stamped/unstamped is an enforceable document at a pre-referral stage for an appointment of an Arbitrator by the Court under Section 11 (6) (A) of the Arbitration and Conciliation Act, 1996 (“**Act**”). The minority judgment also opines that:

“All the preliminary/debatable issues including insufficiently stamped/unduly stamped or validity of the arbitration agreement etc. are referable to the Arbitrator/Arbitral Tribunal under Section 16 of the Act, 1996 which, by virtue of the Doctrine of Kompetenz - Kompetenz has the power to do so”

The need for this reference arose when a three Judge Bench of the Apex Court in the case of *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited & Ors* had (“**NN Global**”) held as follows:

“56. We are of the considered view that the finding in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] and Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ)] that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and unenforceable, is not the correct position in law.”

“57 the aforesaid issue is required to be authoritatively settled by a Constitution Bench of this Court.” (Emphasis Supplied)

In this news alert we have discussed the key observations of the Order and analysed previous judgments relating to the subject matter.

II. Judicial Developments

Prior to the judgment in the case of NN Global and the subsequent reference, the law as to arbitration agreements contained in an unstamped/insufficiently stamped Contract is best summarised by the decisions of the Apex Court in the following two cases:

i. *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd*¹.

“12. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts—one in regard to the substantive terms of the main contract and the other relating to resolution of disputes—had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

19. Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.

20. The Scheme for Appointment of Arbitrators by the Chief Justice of Gauhati High Court, 1996 requires an application under Section 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every court, that is, a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly

¹ (2011) 14 SCC 66

stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per Section 38 of the Stamp Act.

21. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.”

ii. *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.,*²

“19. ...SMS Tea Estates has taken account of the mandatory provisions contained in the Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11. A close look at Section 11(6-A) would show that when the Supreme Court or the High Court considers an application under Sections 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in SMS Tea Estates when it comes to an unregistered agreement or conveyance.”

“37. One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11

² (2019) 9 SCC 209

application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time-frame provided by Section 29-A of the 1996 Act.

38. *Arguments taken of prejudice, namely, that on the facts of this case, the appellant had to pay the stamp duty and cannot take advantage of his own wrong, are of no avail when it comes to the application of mandatory provisions of law. Even this argument, therefore, must be rejected. (emphasis supplied)”*

The judgment in the case of SMS Tea was pronounced by a Division Bench of the Apex Court and was subsequently followed by another judgment by a Division Bench of the Apex Court in the case of Garware Wall Ropes. A reading of these two judgments makes it clear that the basic consideration and ultimate decision as to the invalidity of an arbitration agreement due to insufficient stamping/non-stamping was on a consideration of the Indian Registration Act, 1908 (“**Registration Act**”) and the Indian Stamp Act, 1899 (“**Stamp Act**”). In the case of Garware Wall Ropes, the Division Bench of the Apex Court whilst adopting the decision of SMS Tea also held that the Court pursuant to the 2015 Amendment to the Act and insertion of Section 11(6) (A) of the Act was also enabled to examine the validity of the arbitration agreement from a stamping perspective. This meant that the Court was within its powers to examine the question of stamping as it related to ascertaining the validity of an arbitration agreement as mandated under Section 11(6) (A) of the Act. The decisions in Garware Wall Ropes was upheld by a 3(three) Judge Bench of the Apex Court in the case of *Vidya Drolia v. Durga Trading Corporation*³.

In view thereof the judgment in the case of NN Global in 2021, was passed by a coordinate Bench, which necessitated a reference to a larger Bench of the Apex Court which was ultimately answered vide the Order.

iii. N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.⁴

“31. We overrule the judgment in SMS Tea Estates with respect to the aforesaid two issues as not laying down the correct position in law.

32. The Garware judgment has followed the judgment in SMS Tea Estates. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration clause would be non-existent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract. We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying substantive commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.” (Emphasis Supplied)

³ (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549

⁴ (2021) 4 SCC 379

iv. ***Weatherford Oil Tool Middle East Ltd. v. Baker Hughes Singapore***⁵

Pending the reference to the Larger Bench in the NN Global case, the Apex Court in this case held as follows:

“13. It may further be noted that recently a three-judge Bench of this Court in case of Intercontinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Private Limited⁶ while dealing with an application filed under Section 11(6) read with Section 11(12)(e) of the Arbitration Act for appointment of a sole arbitrator on the basis of an arbitration clause contained in the agreement which was unstamped document, took notice of the earlier decisions as also the issue referred to the Constitution Bench and observed as under:—

“25. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court—until the larger Bench decides on the interplay between Sections 11(6) and 16—should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.”

v. ***B4U Broadband (India) (P) Ltd. v. Affluence Movies (P) Ltd.***⁶

The Hon’ble Bombay High Court in this case, took a view contrary to the Apex Court in the Weatherford case and held that :

“12. (...) The decision of the Supreme Court in Garware Wall Ropes (supra) would continue to hold the field until the Constitution Bench holds such judgment to be no more good law as also observed by their Lordships in N.N. Global Mercantile (P) Ltd. (supra) and in Intercontinental Hotels Group (India) Pvt. Ltd. (supra).

13. For the above reasons, the document in question namely Co-Production Agreement for Television Programme dated 09 July, 2015 would be required to be impounded. The applicant is directed to deposit the original of the said document with the Prothonotary & Senior Master of this Court within one week from the day copy of this order is available, who shall forward the document to the concerned Sub-Registrar of Stamps to adjudicate the appropriate stamp duty payable on such document. The Sub-Registrar to pass an appropriate order and in the event, stamp duty becomes payable, direct the parties by whom the stamp duty is payable on the agreement in question to pay/deposit such deficit stamp duty as per law. Awaiting the decision of the stamp authority, the proceedings are required to be adjourned.

⁵ 2022 SCC OnLine SC 1464

⁶ 2022 SCC OnLine Bom 1021

14. In accordance to the observation of the Supreme Court as made in paragraph 37 in Garware Wall Ropes Ltd., let the appropriate stamp authority take a decision in accordance with law within a period of 45 days from the day the document is received.”

vi. *Honey Bee Multi-trading Pvt. Ltd. v. Ruchi Soya Industries Ltd.*⁷

In contradiction to its earlier decisions, the Hon'ble Bombay High Court directed the appointment of an arbitrator pending payment of stamp duty. The Hon'ble Bombay High Court in this case held as follows:

“96. As regards the objection in respect of insufficient stamp duty is concerned, the issue having been made over to a larger Bench to settle the jurisprudence on the issue of stamping and arbitrability, the specific observation that at a pre-appointment stage, the matters cannot be kept hanging, with a further clarification, being offered in the case of Weatherford Oil Tool Middle East Limited v. Baker Hughes Singapore Pte. in paragraph 16, I see no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract.

97. In the light of the aforesaid discussion, I deem it appropriate to exercise the power conferred under Section 11 for appointment of a sole Arbitrator, since the arbitration clause contained in the Lease Agreement is not in dispute nor is it's invocation.”

III. Rationale in the Order

Vide the Order, the majority decision upheld the rationale in SMS Tea Estates and Garware Wall Ropes. In doing so, the 3 (three) Judge majority considered the relevant provisions of the Stamp Act, the Registration Act and the Indian Contract Act, 1872 and the Act to reach the following conclusions:

- a) That whilst the Stamp Act was a fiscal enactment, the Court are duty bound to take an interpretation which concludes in enforcement of the law in question and not its breach.*
- b) An unstamped or insufficiently stamped agreement would not be enforceable till it is ‘validated’ which is permissible only in the manner provided in the Stamp Act and till then it would not exist ‘in law’.*
- c) Section 11(6A) cannot be understood as merely predicating for an arbitration agreement existing literally. This means that the mere existence of the arbitration agreement for all intents and purposes on the exterior, purporting to project a*

⁷ 2023 SCC OnLine Bom 652

contract duly executed, may in certain situations, be insufficient under Section 11. If for reasons such as it being unstamped when it is clearly required to be stamped, then it cannot be said to be a case where the agreement exists for it would be no existence in law.

- d) The Court once presented with an unstamped/insufficiently stamped instrument containing the arbitration agreement ought to impound the agreement in accordance with Section 33 of the Stamp Act*

On the contrary the minority dissenting judgment authored by 2 (two) judges of the Hon'ble Apex Court on a consideration of the above case law and statutes held as follows:

- a) The objective behind the enactment of the Arbitration Act, 1996 was to inter alia, avoid procedural complexity and the delay in litigation before Courts. Impounding and stamping at the Section 11 stage would frustrate the very purpose of the amended Arbitration Act, 1996 as the enforcement of arbitration agreements would be stalled on an issue, which is capable of being resolved at a later stage.*
- b) Non-stamping/insufficient stamping of the substantive contract/instrument would not render the arbitration agreement non-existent in law and unenforceable/void, for the purpose of referring a matter for arbitration.*

IV. Conclusion

The Act was introduced with a view to ensure that procedural complexities were avoided and parties could move an arbitral tribunal of their choice for speedy adjudication and resolution of disputes. This was also the intended effect of the 2015 Amendment to the Act, which led to the introduction of Section 11(6) (A). A perusal of the objects and reasons of the 2015 Act makes it evident that this introduction was to ensure minimal judicial intervention. The judgment in the case of SMS Tea estates was prior to the 2015 Amendment. However, Garware Wall Ropes held that the rationale in SMS Tea Estates was applicable even to the amended Section 11 of the Act.

Ultimately, vide the Order, the majority has held that an unstamped/insufficiently stamped arbitration agreement is not valid in law and the Courts seized of such instrument are bound to impound it at the pre-reference stage in accordance with the provisions of the Stamp Act. It is only pursuant to adjudication, payment of stamp duty and penalties (as applicable) can the Court appoint the Arbitral Tribunal.

Interestingly, the dissenting judgment of Justice Roy makes an appeal to the Legislature

to amend the provisions of the Stamp Act in so far as they relate to the applicability of the Act. This is to ensure that a revenue and procedural law such as the Stamp Act does not hinder the effective implementation of the Act.

In view of the Order and the vast ramifications of stamping on intended proceedings, litigants intending to invoke arbitration ought to examine their agreements to ensure that the agreements are sufficiently stamped. This would avoid delays which they are likely to face in the event that an application under Section 11 for appointment of arbitrator(s) is filed basis such unstamped/insufficiently stamped agreement.

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MUMBAI

4th Floor, Express Towers, Ramnath Goenka Marg, Nariman Point, Mumbai – 400 021

Tel : +91 22 4241 0000

NEW DELHI

Flat No. 14(II), 2nd Floor, Front Block, Sagar Apartments, 6, Tilak Marg, New Delhi – 110 011.

Tel : +91 11 4610 2548

PUNE

2nd Floor, Kundan Chambers, Thube Park, Next to Sancheti Hospital, Pune – 411 005

Tel : +91 20 2553 0711

WWW.PARINAMLAW.COM