[2023] 15 S.C.R. 1081 : 2023 INSC 1066

CASE DETAILS

IN RE: INTERPLAY BETWEEN ARBITRATION AGREEMENTS UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AND THE INDIAN STAMP ACT 1899

(Curative Petition (C) No. 44 of 2023)

In

(Review Petition (C) No. 704 of 2021)

In

(Civil Appeal No. 1599 of 2020)

DECEMBER 13, 2023

[DR. DHANANJAYA Y CHANDRACHUD, CJI, SANJAY KISHAN KAUL, SANJIV KHANNA, B R GAVAI, SURYA KANT, J B PARDIWALA AND MANOJ MISRA, JJ.]

HEADNOTES

Issue for consideration: The issue at hand arose in the context of three statutes; the Arbitration and Conciliation Act 1996, the Indian Stamp Act, 1899, and the Indian Contract Act, 1872. The Stamp Act imposes duty on "instruments". Arbitration agreements are often embedded in underlying instruments or substantive contracts. The primary issue for consideration was whether such arbitration agreements would be non-existent, unenforceable, or invalid if the underlying contract is not stamped. The challenge before the Supreme Court was to harmonize the provisions of the Arbitration and Conciliation Act, 1996 and the Stamp Act, 1899.

Arbitration and Conciliation Act 1996 – ss.8 and 11 – Arbitration agreements embedded in underlying instruments or substantive contracts – Whether such arbitration agreements would be non-existent, unenforceable, or invalid if the underlying contract is not stamped – Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899 – Unstamped or insufficiently stamped instruments – If admissible in evidence – Non-stamping or inadequate stamping – If curable.

Ed. Note. Hon'ble Dr Dhananjaya Y Chandrachud, CJI pronounced the judgment on behalf of himself, Hon'ble Mr Justice Sanjay Kishan Kaul, Hon'ble Mr Justice B R Gavai, Hon'ble Mr Justice Surya Kant, Hon'ble Mr Justice J B Pardiwala and Hon'ble Mr Justice Manoj Misra. Hon'ble Mr Justice Sanjiv Khanna pronounced a separate but concurring judgment.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): Agreements which are not stamped or are inadequately stamped are inadmissible in evidence u/s.35 of the Stamp Act – Such agreements are not rendered void or void *ab initio* or unenforceable – Non-stamping or inadequate stamping is a curable defect – The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it – An objection as to stamping does not fall for determination u/ss.8 or 11 of the Arbitration Act – The concerned court must examine whether the arbitration agreement *prima facie* exists – Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal. [Paras 48 and 224] – **Held (per Sanjiv Khanna, J.) (Concurring):** Unstamped or insufficiently stamped instruments inadmissible in evidence in terms of s.35 of the Indian Stamp Act, 1899, are not rendered void and void *ab initio* – 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 8 or 11 of the Arbitration and Conciliation Act, 1996 – An objection as to insufficient stamping of the underlying agreement can be examined and decided by the arbitral tribunal. [Para 1]

Evidence – Admissibility of documents – Difference between inadmissibility and voidness – Contract Act, 1872 – s.2(g).

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The admissibility of an instrument in evidence is distinct from its validity or enforceability in law – An agreement can be void without its nature as a void agreement having an impact on whether it may be introduced in evidence – Similarly, an agreement can be valid but inadmissible in evidence – When an agreement is void, one is speaking of its enforceability in a court of law – When it is inadmissible, one is referring to whether the court may consider or rely upon it while adjudicating the case – This is the essence of the difference between voidness and admissibility. [Paras 44, 45 and 46]

Indian Stamp Act, 1899 – Purpose of.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.):

The Stamp Act is a fiscal legislation which is intended to raise revenue for the government – It is a mandatory statute. [Para 58]

Arbitration – Principle of arbitral autonomy – Doctrines / Principles.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The principle of arbitral autonomy is an integral element of the ever-evolving domain of arbitration law – Arbitral autonomy means that the parties to an arbitration agreement can exercise their contractual freedom to bestow the arbitral tribunal with the authority to decide disputes that may arise between them – The basis of arbitral autonomy is to give effect to the true intention of parties to distance themselves from the "risk of domestic judicial parochialism. [Para 66]

Doctrines / Principles – Principle of judicial interference in arbitration proceedings – Scope of non-obstante clause contained in s.5 of the Arbitration and Conciliation Act 1996 – Legislative intention.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The principle of judicial non-interference in arbitral proceedings serves to proscribe judicial interference in arbitral proceedings, which would undermine the objective of the parties in agreeing to arbitrate their disputes, their desire for less formal and more flexible procedures, and their desire for neutral and expert arbitral procedures – The principle of judicial non-interference in arbitral proceedings respects the autonomy of the parties to determine the arbitral procedures – This principle has also been incorporated in international instruments – s.5 of the Arbitration Act is of aid in interpreting the extent of judicial interference under ss.8 and 11 of the Arbitration Act – s.5 contains a general rule of judicial non-interference – Therefore, every provision of the Arbitration Act ought to be construed in view of s.5 to give true effect to the legislative intention of minimal judicial intervention. [Paras 69 and 82]

Arbitration and Conciliation Act, 1996 – Is a self-contained code – Provisions of other statutes cannot interfere with the working of the

Arbitration Act, unless specified otherwise. [Para 85 in judgment of Dr. D.Y. Chandrachud, CJI]

Arbitration – Arbitration agreement – Is the foundation of arbitration as it records the consent of the parties to submit their disputes to arbitration. [Para 88 in judgment of Dr. D.Y. Chandrachud, CJI]

Arbitration – Arbitration agreement – Separability of the arbitration agreement from the underlying contract in which it is contained.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): An arbitration agreement is juridically independent from the underlying contract in which it is contained – The concept of separability reflects the presumptive intention of the parties to distinguish the underlying contract, which captures the substantive rights and obligations of the parties, from an arbitration agreement which provides a procedural framework to resolve the disputes arising out of the underlying contract – This presumption has various consequences in theory and practice, the most important being that an arbitration agreement survives the invalidity or termination of the underlying contract – The separability presumption gives effect to the doctrine of competence-competence. [Paras 90 and 112]

Doctrines / Principles – Doctrine of competence-competence – Comparative analysis – Arbitration and Conciliation Act 1996 – s.16.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The doctrine of kompetenz-kompetenz (also known as competence competence), as originally developed in Germany, was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any court – However, many jurisdictions allow an arbitral tribunal to render a decision on its jurisdiction, subject to substantive judicial review – The UK position is that although the arbitral tribunal is empowered to consider whether it has jurisdiction, its determination is subject to the

examination of the courts – The courts in the United States have considered the principle of competence-competence to be intertwined with the separability presumption – The Singapore High Court has given full effect to the doctrine of competence-competence since the arbitral tribunal gets the first priority to determine issues even with respect to the very existence of the arbitration agreement, while the jurisdiction of the courts is limited to a *prima facie* determination – s.16 of the Arbitration Act recognizes the doctrine of competence-competence in Indian arbitration law. [Paras 115, 117, 118, 119, 120]

Doctrines / Principles – Doctrine of competence-competence –Positive and negative aspects of the doctrine – Negative competence-competence – Discussed.

Held (per Dr. D.Y. Chandrachud, CJI) (for himself, Sanjay Kishan Kaul, B.R Gavai, Surya Kant, J B Pardiwala and Manoj Misra, JJ.): The international arbitration law as well as domestic law prioritize the arbitral tribunal by permitting them to initially decide challenges to their authority instead of the courts – The policy consideration behind this approach is twofold: first, to recognize the mutual intention of the parties of choosing the arbitrator to resolve all their disputes about the substantive rights and obligations arising out of contract; and second, to prevent parties from initiating parallel proceedings before courts and delaying the arbitral process – This is the positive aspect of the doctrine of competence-competence – The negative aspect, in contrast, speaks to the national courts – It instructs the courts to limit their interference at the referral stage by deferring to the jurisdiction of the arbitral tribunal in issues pertaining to the existence and validity of an arbitration agreement – Allowing arbitral tribunals to first rule on their own jurisdiction and later allowing the courts to determine if the tribunal exercised its powers properly safeguards both the power and authority of the arbitral tribunal as well as the courts – The negative aspect of the doctrine has been expressly recognized by Indian courts – Considering both the positive and negative facets, the principle can be defined as a rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, which is subject to subsequent review by courts. [Paras 129, 130]

Arbitration and Conciliation Act, 1996 – Arbitration Act is a legislation enacted to *inter alia* consolidate the law relating to arbitration in India – It will have primacy over the Stamp Act and the Contract Act in relation to arbitration agreements. [Para 166 in judgment of Dr. D.Y. Chandrachud, CJI]

Interpretation of Statutes – Harmonious construction – Provisions contained in two statutes must be, if possible, interpreted in a harmonious manner to give full effect to both the statutes – In providing a harmonious interpretation, the Court has to be cognizant of the fact that it does not defeat the purpose of the statutes or render them ineffective. [Para 165 in judgment of Dr. D.Y. Chandrachud, CJI]

Interpretation of Statutes – Non-obstante clause – Held: Although a non-obstante clause must be allowed to operate with full vigour, its effect is limited to the extent intended by the legislature. [Para 77 in judgment of Dr. D.Y. Chandrachud, CJI]

Words and Phrases – "admissible". [Para 44 in judgment of Dr. D.Y. Chandrachud, CJI]

Words and Phrases – Word "shall" – In ss.33 and 35 of the Stamp Act – Meaning and effect of. [Para 189 in judgment of Dr. D.Y. Chandrachud, CJI]

LIST OF CITATIONS AND OTHER REFERENCES

In the judgment of Dr D.Y. Chandrachud, CJI

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Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd. (2019) 9 SCC 209 : [2019] 5 SCR 579 – overruled to an extent.

Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field (2020) 2 SCC 455 – relied on.

Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1 : [2020] 11 SCR 1001 – clarified.

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1092; *Bihar State Mineral Development Corporation v. Encon Builders* (2003) 7 SCC 418: [2003] 2 Suppl. SCR 812; *Union of India v. Kishorilal Gupta,*1959 SCC OnLine SC 6; *Damodar Valley Corporation v. K K Kar* (1974) 1 SCC 141: [1974] 2 SCR 240 ; *Firm Ashok Traders v. Gurumukh Das Saluja*(2004) 3 SCC 155: [2004] 1 SCR 404; *National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Co.* (2007) 5 SCC 692; *P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corp.* (2009) 2 SCC 494: [2008] 17 SCR 1217; *Magma Leasing & Finance Ltd. v. Potluri Madhavilata,* (2009) 10 SCC 103: [2009] 14 SCR 815; *Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.* (2022) 1 SCC 712; *A Ayyasamy v. A Paramsivam,* (2016) 10 SCC 386: [2016] 11 SCR 521; *SPB & Co. v. Patel Engineering Ltd.*(2005) 8 SCC 618: [2005] 4 Suppl. SCR 688; *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*(2009) 1 SCC 267: [2008] 13 SCR 638; *Duro Felguera, S A v. Gangavaram Port Ltd.* (2017) 9 SCC 729: [2017] 10 SCR 285; *Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman* (2019) 8 SCC 714: [2019] 12 SCR 123; *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* (2005) 7 SCC 234: [2005] 2 Suppl. SCR 699; *CIT v. Hindustan Bulk Carriers,* (2003) 3 SCC 57: [2002] 5 Suppl. SCR 387; *Sultana Begum v. Prem Chand Jain* (1997) 1 SCC 373: [1996] 9 Suppl. SCR 707; *Kandla Export Corporation v. OCI Corporation* (2018) 14 SCC 715: [2018] 1 SCR 915; *Silpi Industries v. Kerala State Road Transport Corporation* 2021 SCC OnLine SC 439; *LIC v. D.J. Bahadur* (1981) 1 SCC 315: [1981] 1 SCR 1083; *Sundaram Finance Ltd. v. T. Thankam* (2015) 14 SCC 444: [2015] 2 SCR 228; *CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd.,* (2003) 12 SCC 140; *Empire Jute Co. Ltd. v. Jute Corpn. of India Ltd.,* (2007) 14 SCC 680: [2007] 11 SCR 388; *Associate Builders v. DDA,* (2015) 3 SCC 49: [2014] 13 SCR 895; *Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.,* (2022) 1 SCC 75: [2021] 1 SCR 1 ; *Hameed Joharan v. Abdul Salam* (2001) 7 SCC 573: [2001] 1 Suppl. SCR 469; *A. Ayyasamy v. A. Paramasivam* (2016) 10 SCC 386: [2016] 11 SCR 52; *State of U.P. v. Babu Ram Upadhya* 1960 SCC OnLine SC 5; *Emmar MGF Land Ltd. v. Aftab Singh* (2019) 12 SCC 751; *Intercontinental Hotels Group (India) (P) Ltd v. Waterline Hotels (P) Ltd.*(2022) 7 SCC 662; *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao* (1971) 1 SCC 545; *Hariom Agrawal v. Prakash Chand Malviya* (2007) 8 SCC 514; *United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd.* (2018) 17 SCC 607; *Career Institute Educational Society v. Om Shree Thakurji*

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N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. (2023) 7 SCC 1 – overruled.

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OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

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.

From the Judgment and Order dated 20.07.2021 in RP (C) No.704 of 2021 and dated 14.02.2020 in CA No.1599 of 2020 of the Supreme Court of India.

With

Arbitration Petition No. 25 of 2023.

Appearances:

Arvind P Datar, Nikhil Sakhardande, Jayant Mehta, Sr. Advs., Debesh Panda, Ms. Amrita Panda, Naman Maheshwari, Ms. Snehal Maheshwari, Rameshwar Totala, Rahul Totala, Udbhav Gady, Ashish Venugopal, Ms. Sonali Mathur, Siddharth Sijoria, Garv Malhotra, Eshan A Chaturvedi, Arijit Sanyal, Ms. Arundhati Kale, Omar Ahmad, Pratyush Miglani, Pranav Mago, Kanishk Aggrawal, Sri Aditya Kumar, Sooraj Sharma, Ms. Payal Chawla, Ms. Hina Shaheen, Ms. Yamini Daga, Shubhra Swami Paranjpe, Raghav Bhatia, Soayib Qureshi, Advs. for the Petitioners.

Shyam Divan, Nikhil Nayyar, Sr. Advs., Ms. Pritha Srikumar Iyer, Sulabh Rewari, Divyanshu Rai, Rongon Choudhary, Ms. Mansvini Jain, Atharv Gupta, Ravi Raghunath, Ms. Aakashi Lodha, Dhanaram Ramachandran, Advs. for the Respondents.

Gourab Banerji, Sr. Adv., T S Sundaram, Subhro Prokas Mukherjee, Venkata Supreeth, Mohit Pandey, Rakesh Talukdar, Shashank Garg, Shivank Dideli, (Amicus in NN Global)

Darius J Khambata, Nakul Dewan, Ms. Malvika Trivedi, K Ramakanth Reddy, Arvind Verma, Prashanto Chandra Sen, Sr. Advs., Vijayendra Pratap Singh, Abhijnan Jha, Ms. Shreya Choudhary, Ankitesh Ojha, Tushar Hathiramani, Ms. Shreenandini Mukhopadhyay, Ms. Vidhi Shah, Pradhuman Gohil, Mrs. Taruna Singh Gohil, Ms. Ranu Purohit, Alapati Sahithya Krishna, Rushabh N Kapadia, Ms. Nidhi Mittal, Neil Chatterjee, Ms. Nooreen Sarna, Ms. Tansi Fotedar, Soumil Jhanwar, Satyender Saharan, Rohan Naik, Sathvik Chandrashekar, Rahul Arya, Premlal Krishnan, Vivek Singh, Ms. Bani Dixit, Madhav Bhatia, Shailendra Slaria, Yogesh Sharma, Mukesh Sharma, Ms. Sujal, Himanshu Kapoor, Alok Tripathi, Shivam Singh, Ms. Mugdha Pande, Jaideep Khanna, Sahil Bhatia, Suyash Vyas, Ms. Shaswati Parhi, Nishant Singh, Abir Phukan, Kuriakose Varghese, V Shyamohan, Ms. Eshita Baruah, Vedant Goel, Arjun Chopra for M/s Kmnp Law, Kartik Seth, Siddharth Seth, Mrs. Shriya Gilhotra, Prashanth Dixit, Arushi Singh Rathore, Saurav Chaturvedi, Ankit Gupta, Mahesh Bhati for M/s Chambers of Kartik Seth, Dr Vivek Sharma, Sameer Rohtagi, Ms. Simran Brar, Ms. Apoorva Neral, Ms. Sanya Dua, Swastik Dalai, M/s. Karanjawala & Co, Rahul G Tanwani, Anantha Narayana MG, Shubhendu Anand, Ayush Anand, Sudipto Sircar, Aditya Shekhar, VC Shukla, Mrs Sindoora Vnl, Ms. Aditi Tripathi, Ms. Vidhi Thakar, Aman Shukla, Prastut Dalvi, Alabhya Dhamija, Manan Shanghai, Siddharth Relan, Ms. Charu Ambwani, Ms. Komal Agarwal, Ms. Kavya Vijay, Ashutosh Srivastava, Umesh Chandra Srivastava, Ms. Manisha Ambwani, Rajul Srivastav, Ms. Roohe Hina Dua, Harshit Khanduja, Randeep Sachdeva, Arun Pandit, Ms. Dhanakshi Gandhi, Sahib Kochhar, Pratham Mehrotra, Ms. Shreya Arora, Tejas Karia, Ms. Shruti Sabharwal, Ms. Vrinda Pareek, Dr. Rishab Gupta, Sanyat Lodha for Shardul S Shroff, George Pothan Poothicote, Ms. Jyoti Singh, Ms. Somya Yadava, Ms. Khyati Jain, Gauhar Mirza, Ms. Hiral Gupta, Ms. Sukanya Singh, Ms. Nilakshi Srivastava, Abhinav Chahar, Rohit Rahar, Kunal Vajani, Shubhang Tandon, Guneet Sidhu, Ms. Manisha Singh, Ashu Pathak, Siddhant Buxy, Ms. Priyanka Vora, Debanshu Khettry, Varun K Chopra, Mehul Sharma, Abhishek Kandwal for M/s VKC Law Offices, PV Amarnadha Prasad, Ms. Vijayshree Pattnaik, Debesh Panda, Ms. Diya Kapur, Raghav Kumar, Aditya Ladha, Ms. Gahena Gambani, Ms. Liz Mathew, Ankur Kashyap, Ajith S Ranganathan, Rohit Rajershi, Abhay Singh, Aman Bajaj, Advs. for the Intervenors.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

DR. DHANANJAYA Y CHANDRACHUD, CJI

*** Ed Note: Pagination is as per the original judgment.**

A*. Reference

1. This Court has been called upon to resolve an issue which arose in the context of three statutes – the Arbitration and Conciliation Act 1996[1], the Indian Stamp Act 1899[2], and the Indian Contract Act 1872.[3] The Stamp Act imposes duty on "instruments". An instrument which is unstamped or insufficiently stamped is inadmissible in evidence and cannot be acted upon in terms of its provisions. Arbitration agreements are often embedded in underlying instruments or substantive contracts. When an application is made for the appointment of an arbitrator, an objection is raised on the ground that the arbitration agreement is inadmissible because it is in an instrument which is unstamped or inadequately stamped. The primary issue that arises is whether such arbitration agreements would be non-existent, unenforceable, or invalid if the underlying contract is not stamped. A brief description of the context in which this question arises follows.

2. In **N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.,**[4] (hereinafter referred to as "N N Global 1") a Bench of three Judges of this Court was called upon in a Special Leave Petition to determine the enforceability of an arbitration agreement contained in an unstamped work order. The Bench, speaking through Justice Indu Malhotra, held that

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* Ed. Note: PART A

1 "Arbitration Act"

2 "Stamp Act"

3 "Contract Act"

4 (2021) 4 SCC 379

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**[5] and **Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.**[6] In **SMS Tea Estates** (supra), a two-Judge Bench of this Court held that an arbitration agreement in an unstamped contract could not be acted upon. A two-Judge Bench of this Court in **Garware Wall Ropes** (supra) relied on **SMS Tea Estates** (supra) to hold that an arbitration agreement in an unstamped commercial contract would not "exist" as a matter of law and could not be acted upon until the underlying contract was duly stamped:

> "22. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6-A), when read with Section 7(2) of the 1996 Act and Section 2(*h*) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.,* (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] has, in no manner, been touched by the amendment of Section 11(6-A).
>
> […]
>
> 29. This judgment in *Hyundai Engg. case* [*United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd.,* (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration

5 (2011) 14 SCC 66
6 (2019) 9 SCC 209

clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in *Hyundai Engg. case* [*United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd.,* (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530], as followed by us."

Thereafter, a three-Judge Bench of this Court in **Vidya Drolia v. Durga Trading Corporation,**[7] cited paragraph 29 of **Garware Wall Ropes** (supra) (extracted above) with approval for the proposition that an arbitration agreement exists only when it is valid and legal:

"146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal

7 (2021) 2 SCC 1

> norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.
>
> 147. We would proceed to elaborate and give further reasons:
>
> 147.1. (*i*) In *Garware Wall Ropes Ltd.* [*Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238)
>
> […]
>
> Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement."

3. **N N Global 1** (supra) noted the decision of the co-ordinate Bench in **Vidya Drolia** (supra) and doubted the correctness of the view adopted in paragraphs 22 and 29 of **Garware Wall Ropes** (supra) and in paragraphs 146 and 147 of **Vidya Drolia** (supra) (extracted above). It referred the following issue to a Bench of five Judges:

> "58. […] Whether the statutory bar contained in Section 35 of the Stamp Act, 1899 applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the 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?"

4. The Constitution Bench in **N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.**[8] (hereinafter referred as "N N Global 2") answered the reference. By a majority of 3:2, it was held that **NN Global 1** (supra) does not represent the correct position of law. The majority judgment (authored by Justice K. M. Joseph for himself and Justice Aniruddha Bose with a concurring judgment by Justice C. T. Ravikumar) upheld the view taken by this Court in **SMS Tea Estates** (supra) and **Garware Wall Ropes** (supra). Justice Ajay Rastogi and Justice Hrishikesh Roy delivered separate dissenting judgments. The conclusions of the majority can be summarized in the following terms:

a. An unstamped instrument containing an arbitration agreement is void under Section 2(g) of the Contract Act;

b. 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;

c. 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";

d. 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; and

e. The certified copy of an arbitration agreement must clearly indicate the stamp duty paid.

5. The minority judgment adopted a different legal approach. 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. He held that all the other debatable issues, including the issue of stamping,

8 (2023) 7 SCC 1

must be left for the arbitral tribunal to decide in view of Section 16 of the Arbitration Act.

6. Justice Hrishikesh Roy relied on the scheme of the Stamp Act to hold that an unstamped or insufficiently stamped document is not rendered invalid or *void ab initio* because the failure to stamp an instrument is a curable defect. Further, Justice Roy traced the evolution of the Arbitration Act to observe that it promotes minimum judicial interference in the arbitral process. He 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.

7. On 14 February 2020, a three-Judge Bench of this Court in **Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Brothers**[9] cited **SMS Tea Estates** (supra) with approval. In **Bhaskar Raju** (supra), this Court 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). On 20 July 2021, the review petition was dismissed on the ground of delay as well as on merits.[10] 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.

8. On 8 May 2023, a three-Judge Bench of this Court issued notice in a petition for the appointment of an arbitrator in **Seka Dobric v. SA Eonsoftech Private Limited.**[11] In the meantime, on 18 July 2023, a five-Judge Bench of this Court issued notice in the curative petition in **Bhaskar Raju** (supra) and listed the matter for hearing in open court on 24 August

9 (2020) 4 SCC 612
10 Review Petition (Civil) No. 704/2021 in CA No. 1599/2020.
11 Arbitration Petition No. 25 of 2023

2023.[12] On 14 August 2023, the Bench in **Seka Dobric** (supra) 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). The relevant part of the order is extracted below:

> "1. One of the objections which has been raised on behalf of the respondent in response to the petition under Section 11(6) and 11(9) of the Arbitration and Conciliation Act, 1996, is that the arbitration agreement is not stamped.
>
> 2. Notice has already been issued by this Court on Curative Petition (Civil) No 44 of 2023 which has been directed to be listed in the open Court on 24 August 2023.
>
> 3. These proceedings shall be accordingly listed on 24 August 2023 together with the Curative Petition.
>
> 4. Counter affidavit, if any, be filed in the meantime."

9. On 26 September 2023, a Bench of five Judges took up the arbitration petition along with the curative petition. Considering the larger ramifications and consequences of the decision in **N N Global 2** (supra), the Court referred the proceedings to a seven-Judge Bench. The relevant portion of the order is extracted below:

> "2. Having regard to the larger ramifications and consequences of the view of the majority in N N Global Mercantile Private Limited vs Indo Unique Flame Limited and Others, we are of the considered view that the proceedings should be placed before a seven-Judge Bench to reconsider the correctness of the view of the five-Judge Bench."

10. It is in this context that the proceedings were listed before this Bench of seven Judges on 11 October 2023, when this Court directed the cause title to be changed to: "In Re: Interplay between the arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899." We are not reproducing the factual matrix of the case(s)

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12 Curative Petition (Civil) No. 44 of 2023 in Review Petition (Civil) No. 704 of 2021 in Civil Appeal No. 1599 of 2020.

in question as we have been called upon to determine the question of law. In the process, we will consider the correctness of the view adopted in **N N Global 2** (supra) as well as other ancillary issues.

B*. Submissions

11. The petitioners broadly contend that **N N Global 2** (supra) does not lay down the correct position of law. The submissions of the learned counsel on behalf of the petitioners and the intervenors are summarized below.

12. Mr Arvind Datar, learned senior counsel, made the following submissions:

a. Section 11(6A) of the Arbitration Act expressly confines the referral court's power to the examination of the existence of an arbitration agreement. Such examination does not extend to the adequacy of the stamping under Section 33 of the Stamp Act;

b. The majority in **N N Global 2** (supra) has effectively nullified Section 11(6A) which confined the jurisdiction of this Court and High Court to the examination of the existence of an arbitration agreement;

c. Mandating the courts at the referral stage to follow the prescriptions contained under Section 33 of the Stamp Act would amount to exceeding the remit of examination. The Arbitration Act confines the authority of referral court to the examination of an arbitration agreement and not the instrument;

d. The arbitral tribunal has the competence to rule on its own jurisdiction, including on issues pertaining to stamping;

e. The inclusion of the non-obstante clause in Section 5 of the Arbitration Act limits the judicial intervention of courts in the arbitral process and must be read harmoniously with the provisions of the Stamp Act; and

f. The requirement of stamping does not render an instrument void. It only makes the instrument inadmissible in evidence until the defect is cured in accordance with the provisions of the Stamp Act.

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* Ed. Note: PART B

13. Mr Nikhil Sakhardande, learned senior counsel, made the following submissions:

a. The deficiency in stamping is a curable defect, the effect of which ceases to operate as soon as the revenue interest of the state is secured;

b. The non-payment of stamp duty, being a temporary affliction, cannot affect the validity of an arbitration agreement; and

c. Mandating the courts at the Section 8 or Section 11 stage of the Arbitration Act to examine the issue of stamping will defeat the legislative purpose of minimal judicial interference enshrined in Section 5 of the Arbitration Act.

14. Mr Darius J Khambata, learned senior counsel, made the following submissions:

a. The doctrine of separability recognizes that an arbitration agreement is a self-contained agreement, distinct from the underlying contract;

b. An arbitration agreement contained within an underlying contract would be a "distinct matter" in terms of Section 5 of the Stamp Act, and would therefore continue to remain valid and enforceable notwithstanding the non-stamping or inadequate stamping of the contract;

c. The majority in **N N Global 2** (supra) failed to give full effect to the doctrine of separability by incorrectly holding that non-stamping of the underlying contract would *ipso facto* invalidate the arbitration agreement contained in such contract;

d. The inadmissibility of a document on account of non-stamping or insufficient stamping does not result in the document being void, invalid, or non-existent in law;

e. The majority in **N N Global 2** (supra) disregarded the principle of competence-competence by mandating the referral court under Section 11 to examine an instrument for stamping;

f. At the pre-arbitral stage, the referral courts should leave all issues pertaining to the stamping for the decision of the arbitral tribunal; and

g. Section 33 of the Stamp Act provides that a person can have authority by "consent of parties" to determine issues of stamping. Such authority necessarily includes an arbitral tribunal which is constituted by the consent of parties through an arbitration agreement.

15. Mr Gourab Banerjee, learned senior counsel, made the following submissions:

a. The object of the legislature in enacting the Stamp Act is to protect public revenue and not to interfere with commercial life by invalidating instruments vital to the smooth flow of trade and commerce;

b. Non-stamping does not render an instrument null and void. Such instrument, even if unstamped, exists in fact and law;

c. Investigation into the aspects of stamping at the referral stage under Section 11(6A) of the Arbitration Act is contrary to the plain language and legislative intent of the said provision; and

d. The adjudication of stamp duty is a time-consuming process. Mandating the court under Section 11 of the Arbitration Act to adjudicate on the issue of stamp duty would be against the goal of expeditious appointment of arbitrators contained under Section 11(13) of the Arbitration Act.

16. Mr Jayant Mehta, learner senior counsel, made the following submissions:

a. Although compliance with the provisions of the Stamp Act is imperative, its non-compliance is curable and does not render an unstamped or insufficiently stamped instrument void or invalid;

b. The majority view in **N N Global 2** (supra) does not deal with Section 9 of the Arbitration Act creating a serious difficulty in seeking interim measures of protection in both domestic as well as international arbitrations seated in India; and

c. A fiscal statute does not bar the entertainability of a *lis*, except where the statute specifically so prescribes. The Stamp Act does not prescribe a bar on the entertainability of a *lis*.

17. The respondents largely contend that **N N Global 2** (supra) is correct and is in line with the consistent position adopted by this Court in **SMS Tea Estates** (supra) and **Garware Wall Ropes** (supra), which ought not to be disturbed. The submissions of the learned counsel for the respondents and intervenors are summarized below.

18. Mr Shyam Divan, learned senior counsel, made the following submissions:

a. The curative petition is not maintainable because none of the pleaded grounds meet the requirements set out in **Rupa Ashok Hurra v. Ashok Hurra.**[13] Since the curative petition is not maintainable, the reference to a seven-Judge Bench is without jurisdiction;

b. The examination by the court under Section 11(6A) of the Arbitration Act is not confined to mere facial existence of an arbitration agreement. The referral court has to *prima facie* examine both the existence and validity of an arbitration agreement;

c. Section 33 of the Stamp Act casts a mandatory legal requirement on courts under Section 11 proceedings to impound an unstamped or insufficiently stamped instrument. Such an instrument cannot be admitted in evidence or otherwise acted upon until the stamp duty and requisite penalty is paid; and

d. Section 5 of the Arbitration Act does not limit the operation of the mandatory provisions of the Stamp Act.

19. Mr. Nikhil Nayyar, learned senior counsel, made the following submissions:

a. The expression "examination" used in Section 11(6A) contemplates the examination of the validity of an arbitration

13 (2002) 4 SCC 388

agreement, including the examination of sufficiency of stamping; and

b. The inclusion of Section 11(6A) in the Arbitration Act was not intended to overcome the effect of **SMS Tea Estates** (supra).

20. Mr Nakul Dewan, learned senior counsel, made the following submissions:

a. The principle of separability contained in Section 16 of the Arbitration Act implies that an arbitration agreement can be treated as a distinct agreement only for the purpose of determining its validity or enforceability;

b. The court exercising powers under Section 11 is not designated by the parties to receive evidence for the purpose of substantive adjudication of the rights and obligations of the parties; and

c. Even if an instrument containing an arbitration agreement is unstamped or insufficiently stamped, such inadequacy or insufficiency should not derail the appointment of an arbitrator at the referral stage under Section 11(6A) of the Arbitration Act.

21. Ms Madhavi Divan, Mr Prashanto Chandra Sen, Mr Arvind Varma, Mr Ramesh Singh, Mr K Ramakant Reddy, Mr Rahul G. Tanwani, Mr Abir Phukan, Mr Tejas Karia, Mr Pallav Mongia, Mr Kunal Vajani, Ms Apporva Neral, Mr Varun K Chopra, Dr. P. V. Amamadha Prasad, Mr Gauhar Mirza, Ms Hiral Gupta, Mr George Poothan Poothicote, Ms Manisha Singh, Mr Shadan Farasat, Mr Saurav Agarwal, Mr Siddhant Buxy, Ms Priyanka Vora, Mr Debanshu Khettry, Mr Shivam Singh, Ms Diya Kapur and Mr Jatinder Kumar Sethi supplemented these submissions.

C*. Maintainability

22. We address the preliminary issue of the maintainability of the present proceedings in this segment. The record of proceedings indicates that notice was issued in the curative petition on 18 July 2023. Subsequently, in **Seka Dobric** (supra), a three-Judge Bench of this Court while hearing a Section 11 application for the appointment of arbitrators, directed the proceedings to be listed along with the curative petition. On 26 September 2023, the five-Judge Bench differed with the view taken in **N N Global 2**

* Ed. Note: PART C

(supra) and referred the issue to a seven-Judge Bench. Thus, it is important to note that along with the curative petition, a Section 11 petition is also listed before this Court in the present proceedings.

23. The maintenance of judicial discipline is important for ensuring consistency and certainty in the development of law. The rule of judicial discipline demands that a Bench of lower strength is bound by the decision of a larger Bench.[14] Judicial discipline also dictates that generally, a Bench of the same strength can question the correctness of a decision rendered by a co-ordinate Bench. In such a situation, the matter is placed before a Bench of larger strength.[15]

24. However, there have been situations where a Bench of lower strength has differed with the decision rendered by a Bench of larger strength. In **Union of India v. Hansoli Devi,**[16] a Bench of two Judges of this Court differed with a three-Judge Bench in matter pertaining to the interpretation of the Land Acquisition Act 1894 and referred the matter to a Constitution Bench. The Constitution Bench observed that the reference made by the two-Judge Bench was "*improper*". Nevertheless, the Constitution Bench decided to answer the reference "*since the questions involved are pending in many cases in different High Courts and certain doubts have arisen with regard to the interpretation to the provisions of Section 28-A of the Act.*" In **Central Board of Dawoodi Bohra Community v. State of Maharashtra,**[17] a Constitution Bench of this Court held that the judicial course adopted in **Hansoli Devi** (supra) was by way of exception rather than a rule. Therefore, the rule of judicial discipline also has certain well-defined exceptions.

25. The respondent has relied on the Constitution Bench decision of this Court in **Shilpa Sailesh v. Varun Sreenivasan,**[18] to submit that there is no live cause or matter to justify the invocation of this Court's jurisdiction. The issue before the three-Judge Bench in **Seka Dobric** (supra) pertains to the appointment of an arbitrator at Section 11 stage when the underlying contract is unstamped or insufficiently stamped. The Bench directed the

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14 **Bharat Petroleum Corporation v. Mumbai Shramik Sangha, (2001) 4 SCC 448**
15 **Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1**
16 (2002) 7 SCC 273
17 (2005) 2 SCC 673
18 2023 SCC OnLine SC 544

Section 11 application to be listed along with the curative petition in view of the wider legal ramifications flowing from **N N Global 2** (supra). Therefore, the respondent's argument is misplaced because **Seka Dobric** (supra), which is a live cause or matter, is also listed along with the curative petition.

26. The respondent has also argued that it was improper for the Constitution Bench to exercise its curative jurisdiction to refer the matter to this Bench of seven Judges. Order VI Rule 2 of the Supreme Court Rules 2013 provide that if a Bench in the course of hearing any cause, appeal or "other proceedings" considers that the matter be dealt with by a larger bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of the matter. In **Kantaru Rajeevaru v. Indian Young Lawyers Association,**[19] a nine-Judge Bench of this Court held that the term "other proceeding" used in Order VI Rule 2 of the Supreme Court Rules, 2013 is a comprehensive term giving widest freedom to a court of law to do justice to the parties in the case. Accordingly, it was held that review petitions also fall within the purview of the expression "other proceeding." In view of the decision in **Kantaru Rajeevaru** (supra), the term "other proceeding" under Order VI Rule 2 of the Supreme Court Rules, 2013 will also include curative petitions. Therefore, we find no impropriety in the reference made to this Bench.

27. Moreover, the reference raises important issues on points of law, which require immediate consideration. In **Central Board of Dawoodi Bohra Community** (supra), this Court laid down two exceptions to the rules mentioned above:

> "12. (3) The above rules are subject to two exceptions: (*i*) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (*ii*) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by

19 (2020) 9 SCC 121

it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh* [(1989) 2 SCC 754] and *Hansoli Devi* [(2002) 7 SCC 273]."

28. The two exceptional situations laid down in **Central Board of Dawoodi Bohra community** (supra) have to be invoked cautiously, and in situations involving wide ramifications for the law. In **Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh**,[20] Justice V R Krishna Iyer speaking for the Constitution Bench observed that the "*legislative policy in the country must accept as final the pronouncements of this Court by a Constitution Bench unless the subject be of such fundamental importance to national life or the reasoning is so plainly erroneous in light of the later thought that it is wiser to be ultimately right than to be consistently wrong.*" We are of the opinion that the reference by the five-Judge Bench raises question of seminal importance with regard to the interpretation and application of the arbitration law in India, which in turn has implications for business and commerce in the country. Accordingly, we will answer the reference without delving into the facts of the individual cases. The issue of maintainability of the curative petition is left open and could be raised by the respondent before an appropriate Bench.

D*. The Indian Stamp Act 1899

i. Overview

29. As the title suggests, the Stamp Act is a legislation which consolidates the laws relating to the payment of stamp-duty on the execution of certain instruments in the manner specified in the statute. Section 2(14) defines "instrument" as follows:

"(14) "instrument" includes—

(a) every document, by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;

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* Ed. Note: PART D

20 (1980) 1 SCC 223

(b) a document, electronic or otherwise, created for a transaction in a stock exchange or depository by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded; and

(c) any other document mentioned in Schedule I, but does not include such instruments as may be specified by the Government, by notification in the Official Gazette"

30. The term "instrument" is defined broadly, in an inclusive sense. It includes electronic documents. Schedule I to the Stamp Act contains descriptions of various instruments along with the stamp duty payable on each of them. Stamp-duty is liable to be paid under Section 3, which provides as follows:

"3. Instrument chargeable with duty.—Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore, respectively, that is to say—

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;

(b) every bill of exchange payable otherwise than on demand, or promissory note drawn or made out of India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in India; and

(c) every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in India and is received in India:

Provided that no duty shall be chargeable in respect of—

(1) any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act, 19 of 1838, or the India Registration of Ships Act, 1841, as amended by subsequent Acts.

(3) any instrument executed, by, or, on behalf of, or, in favour of, the Developer, or Unit or in connection with the carrying out of purposes of the Special Economic Zone.

Explanation.—For the purposes of this clause, the expressions "Developer", "Special Economic Zone" and "Unit" shall have meanings respectively assigned to them in clauses (g), (za) and (zc) of Section 2 of the Special Economic Zones Act, 2005."

31. Section 3 provides that the three categories of instruments in clauses (a), (b) and (c) shall be chargeable with duty of the amount indicated in Schedule I. The proviso to Section 3 indicates three other categories in respect of which no duty shall be chargeable. In terms of Section 5 of the Stamp Act, the duty chargeable on any instrument which comprises or relates to several distinct matters is the aggregate amount of the duties with which separate instruments (each comprising or relating to one of the many matters) would be chargeable under the same statute. Section 6 governs situations where the same instrument falls within two or more of the descriptions in Schedule I. In such a situation, if the duties chargeable under the different descriptions are different, the instrument shall be chargeable with the highest of them. The rule in Section 6 is subject to the provisions of Section 5. As a consequence, Section 6 cannot be relied on to avoid the payment of stamp-duty if an instrument relates to several distinct matters with each such matter covered by a distinct entry in Schedule I. Section 6 is applicable only when an instrument relates to a single matter which is covered by two or more descriptions in Schedule I, or when a single matter in an instrument relating to several distinct matters is covered by two or more descriptions in that schedule.

32. Sections 13 and 14 indicate the mode of stamping. In terms of Section 13, every instrument written upon paper stamped with an impressed

stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument. Section 14 stipulates that no second instrument chargeable with duty shall be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written.[21] Section 15 is significant because it indicates the effect of non-compliance with Sections 13 and 14: instruments written in contravention of Section 13 or Section 14 shall be deemed to be unstamped.[22]

33. Chapter II of the Stamp Act provides for various other contingencies or situations, including *inter alia* policies of sea-insurance,[23] bonds, debentures, and securities,[24] transactions in stock exchanges and depositories,[25] and instruments executed outside India.[26] Chapter II also provides for the valuation of stamp-duty, including for the conversion of amounts expressed in foreign currencies,[27] how to value stock and marketable securities,[28] the effect of statement of rate of exchange or average price,[29] instruments reserving interest,[30] instruments connected with mortgages of marketable securities,[31] how the transfer and consideration of debt etc. is to be charged,[32] valuation in case of annuity,[33] stamp where value of subject-matter is indeterminate.[34]

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21 The proviso to Section 14 provides as follows *"Provided that nothing in this section shall prevent any endorsement which is duly stamped or is not chargeable with duty being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of acknowledging the receipt of any money or goods the payment or delivery of which is secured thereby."*

22 Section 15, Stamp Act

23 Section 7, Stamp Act

24 Sections 8 to 8F, Stamp Act

25 Section 9A, Stamp Act

26 Sections 18, 19, Stamp Act

27 Section 20, Stamp Act

28 Section 21, Stamp Act

29 Section 22, Stamp Act

30 Section 23, Stamp Act

31 Section 23A, Stamp Act

32 Section 24, Stamp Act

33 Section 25, Stamp Act

34 Section 26, Stamp Act

34. Section 29 indicates who the stamp duty is to be borne by (in the absence of an agreement to the contrary) and Section 30 stipulates that a receipt must be given in certain cases.

35. A person may also apply to the Collector for his opinion as to the duty (if any) which is payable on a particular instrument, under Section 31 of the Stamp Act. The instrument given to the Collector for his opinion may be executed or previously stamped, but there is no requirement that it must be either executed or previously stamped.[35] If an instrument brought to the Collector under Section 31 is in their opinion chargeable with duty, and they determine that it is already fully stamped, or that the duty determined by them under Section 31 has already been paid, then they shall certify by endorsement on such instrument that the full duty with which it is chargeable has been paid.[36] If the Collector is of the opinion that the instrument is not chargeable with duty, they shall certify that it is not so chargeable.[37] Any instrument upon which an endorsement has been made under Section 32 shall be deemed to be duly stamped or not chargeable with duty, as the case may be.[38] The proviso to Section 32 lists three categories of instruments which the Collector is not authorised to endorse under the same section.

36. Chapter IV of the Stamp Act details with the procedure to be followed by various authorities if instruments which are liable to be stamped are not duly stamped. The provisions of this Chapter are examined in detail in the subsequent segment. Chapter V provides for allowances for stamps (such as spoiled or misused stamps) in certain cases and Chapter VI provides for reference of cases arising under the enactment to authorities including the High Courts as well as for the revision of certain decisions of courts regarding the sufficiency of stamps. Chapter VII of the Stamp Act indicates the penalties for non-compliance with its provisions and finally, Chapter VIII contains certain supplementary provisions in relation to the statute.

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35 Section 31(1), Stamp Act
36 Section 32(1), Stamp Act
37 Section 32(2), Stamp Act
38 Section 32(3), Stamp Act

ii. The consequences of the failure to stamp an instrument

a. The procedure under the Stamp Act

37. 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. Section 62 *inter alia* penalises a failure to comply with Section 17. However, despite the mandate that all instruments chargeable with duty must be stamped, many instruments are not stamped or are insufficiently stamped. The parties executing an instrument may, contrary to the mandate of law, attempt to avoid the payment of stamp duty and may therefore refrain from stamping it. Besides this situation, there are other ways in which an instrument may not be properly stamped, including the following:

a. The duty may have been paid under an incorrect description under Schedule I;

b. The duty paid may be of a sufficient amount but of improper description;

c. The provisions of Section 5 which govern instruments relating to several distinct matters may not have been complied with; or

d. The instrument may be written in contravention of Sections 13 and 14, and thereby deemed to be unstamped in terms of Section 15.

38. The legislature recognized that the mandate of the Stamp Act may not be complied with because of the reasons listed in the preceding paragraph or otherwise. It was in recognition of this fact that the provisions in Chapter IV were enacted. Section 33 provides that every person who has authority 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. The power under Section 33 may be exercised when an instrument is produced before the authority or when they come across it in the performance of their functions. Persons in charge of public office except police officers are similarly empowered under Section 33, which is reproduced below:

"33. Examination and impounding of instruments.—(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed:

Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,—

(a) the State Government may determine what offices shall be deemed to be public offices; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices."

39. Section 35 is of particular significance to the issue before this Court – it renders instruments which are not duly stamped inadmissible in evidence. Section 35 reads as follows:

"35. Instruments not duly stamped inadmissible in evidence, etc.—

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or

authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that—

(a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act."

(emphasis supplied)

In terms of Section 35, an instrument which is not duly stamped is inadmissible in evidence for any purpose and it shall not be acted upon, registered, or authenticated.[39] Clause (a) of the proviso to Section 35

39 Subject to the proviso to Section 35.

stipulates that the bar contained in the provision is removed upon the payment of duty and the penalty (if any). The party or parties may pay the duty chargeable to the person who has the authority to receive evidence by law or by consent of parties. Section 35 is significant because it gives teeth to the Stamp Act by ensuring that stamp-duty is paid before rights and obligations arising from an agreement are enforced.

40. Section 38(1) indicates how an instrument which is impounded is to be dealt with:

> "38. Instruments impounded how dealt with.—
>
> (1) Where the person impounding an instrument under Section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by Section 35 or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.
>
> (2) In every other case, the person so impounding an instrument shall send it in original to the Collector."

41. The Collector is conferred with the power to impound an instrument under Section 33. If any other person or authority impounds an instrument, it must be forwarded to the Collector under clause (2) of Section 38. Once the Collector receives an instrument, he has the power to stamp it under Section 40, if it is not a bill of exchange, a promissory note, or an instrument that is chargeable with a duty that exceeds ten naye paise. The Collector may:

a. Certify by endorsement that the instrument is duly stamped, if they are of such an opinion;[40]

b. Certify by endorsement that the instrument is not chargeable with duty, if they are of such an opinion;[41] and

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40 Section 40(1)(a), Stamp Act

41 ibid

c. Require the payment of the proper duty or the amount required to make up the proper duty, if they are of the opinion that the instrument is chargeable with duty and is not duly stamped.[42]

The Collector may also levy a penalty, as provided by Section 40. If the instrument has been sent to the Collector under Section 38, it must be returned to the impounding officer after it is dealt with as described above.[43]

42. 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. It stipulates that either the person admitting the instrument in evidence or the Collector, as the case may be, shall certify by endorsement that the proper duty has been paid.

43. The procedure contemplated by the Stamp Act facilitates the collection of revenue. It permits instruments to be impounded not only by persons in charge of a public office or those who are empowered by law to receive evidence but also by any person who is empowered to receive evidence by consent of parties. The statute then sets out the procedure to be followed upon impounding a document. This procedure ensures that stamp-duty is paid. After the payment of the appropriate amount under the appropriate description in Schedule I and the penalty (if any), the Stamp Act provides for the certification of such payment by an endorsement by the appropriate authority. Once an instrument has been endorsed, it may be admitted into evidence, registered, acted upon or authenticated as if it had been duly stamped.

b. The difference between inadmissibility and voidness

44. The admissibility of an instrument in evidence is distinct from its validity or enforceability in law. Section 2(g) of the Contract Act provides that an agreement not enforceable by law is said to be void. The admissibility of a particular document or oral testimony, on the other hand, refers to whether or not it can be introduced into evidence. P Ramanatha Aiyar's *The Law Lexicon* defines 'admissible' thus:

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42 Section 40(1)(b), Stamp Act
43 Section 40(3), Stamp Act

> "Admissible
>
> Proper to be received, capable and worthy of being admitted. As applied to evidence, the term means that it is of such a character that the court or judge is bound to receive it, that is, allow it to be introduced in evidence"[44]

Many statutes have rules on the admissibility of documents, with the Indian Evidence Act 1872[45] being one of them.

45. An agreement can be void without its nature as a void agreement having an impact on whether it may be introduced in evidence. Similarly, an agreement can be valid but inadmissible in evidence. For instance, A and B may enter into an agreement by which B is restrained from undertaking a particular trade. This agreement would be void under Section 27 of the Contract Act[46] but this does not impact its admissibility in evidence should A attempt to enforce it against B. The court will not enforce the agreement between the parties because it is void but the agreement is nonetheless admissible in evidence.

46. When an agreement is void, we are speaking of its enforceability in a court of law. When it is inadmissible, we are referring to whether the court may consider or rely upon it while adjudicating the case. This is the essence of the difference between voidness and admissibility.

c. Section 35 of the Stamp Act renders a document inadmissible and not void

47. The majority judgment in **N N Global 2** (supra) summed up its holding in the following terms:

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44 P Ramanatha Aiyar, *The Law Lexicon* (Second edition, 1997)

45 "Evidence Act"

46 "27. Agreement in restraint of trade void.— Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1.—Saving of agreement not to carry on business of which goodwill is sold.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

> "109. … An agreement which is unstamped or insufficiently stamped is not enforceable, as long as it remains in the said condition. Such an instrument would be void as being not enforceable [see Section 2(g) of the Contract Act]."

The above observation conflates the distinction between enforceability and admissibility.

48. Section 35 of the Stamp Act is unambiguous. It stipulates, "*No instrument chargeable with duty shall be* ***admitted in evidence****...*" The term "admitted in evidence" refers to the admissibility of the instrument. Sub-section (2) of Section 42, too, states that an instrument in respect of which stamp-duty is paid and which is endorsed as such will be "***admissible*** *in evidence*." The effect of not paying duty or paying an inadequate amount renders an instrument inadmissible and not void. Non-stamping or improper stamping does not result in the instrument becoming invalid. The Stamp Act does not render such an instrument void. The non-payment of stamp duty is accurately characterised as a curable defect. The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it. It bears mentioning that there is no procedure by which a void agreement can be "cured."

49. In **Thiruvengadam Pillai v. Navaneethammal,**[47] this Court noted that the trial court and the High Court had doubted the authenticity of an agreement for the sale of certain immoveable property because it was written on two stamp papers purchased on different dates. This Court held that this by itself would not invalidate the agreement. It noticed the distinction between the legal validity of the agreement and its admissibility:

> "13. The Stamp Act is a fiscal enactment intended to secure revenue for the State. In the absence of any rule requiring consecutively numbered stamp papers purchased on the same day, being used for an instrument which is not intended to be registered, **a document cannot be termed as invalid merely because it is written on two stamp papers purchased by the same person on different dates. Even assuming that use of such stamp papers is an irregularity,**

47 (2008) 4 SCC 530

> **the court can only deem the document to be not properly stamped, but cannot, only on that ground, hold the document to be invalid. Even if an agreement is not executed on requisite stamp paper, it is admissible in evidence on payment of duty and penalty under Sections 35 or 37 of the Stamp Act, 1899.** If an agreement executed on a plain paper could be admitted in evidence by paying duty and penalty, there is no reason why an agreement executed on two stamp papers, even assuming that they were defective, cannot be accepted on payment of duty and penalty. **But admissibility of a document into evidence and proof of genuineness of such document are different issues."**
>
> (emphasis supplied)

50. This has long been the position of law in India with respect to the Stamp Act. In **Gulzari Lal Marwari v. Ram Gopal,**[48] one of the parties contended that the agreement was invalid because it was not properly stamped. The portion of Section 35 which bars the admissibility of unstamped instruments was the same then as it is now. The Calcutta High Court held:

> "…The effect of the section is to make such an unstamped document inadmissible in evidence, and unable to be acted upon by persons having authority to receive evidence or by any public officer. It does not affect the validity of the document.
>
> There is a clear distinction to be drawn between invalidity and inadmissibility of documents. Certain statutes and sections render documents invalid if they are not stamped. No section of the Indian Stamp Act has this effect…"

The position of law has also been noticed by the High Courts in other cases including the Andhra Pradesh High Court in **Boottam Pitchiah v. Boyapati Koteswara Rao**[49].

51. In **N N Global 2** (supra), this Court held that the failure to stamp an arbitration agreement is not a "curable defect." Relying on the provisions

48 1936 SCC OnLine Cal 275
49 1964 SCC OnLine AP 5

of the Contract Act as well as Section 11(6-A) of the Arbitration Act, it held that an unstamped arbitration agreement is void. The relevant paragraphs of the judgment of the majority are extracted below:

> "103. … It may not be apposite to merely describe an unstamped arbitration agreement as a "curable defect". As long it remains an unstamped instrument, it cannot be taken notice of for any purpose, as contemplated in Section 35 of the Stamp Act. It remains unenforceable. … It is "not enforceable in law". **In the said sense, it also cannot exist in law. It would be void. Our view in this regard that voidness is conflated to unenforceability receives fortification from Section 2(j) of the Contract Act which renders a contract which ceases to be enforceable void."**
>
> (emphasis in original)

52. The above observation of this Court is incorrect. Section 2(j) of the Contract Act provides as follows:

> "(*j*) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."

53. Section 2(j) is not attracted when an instrument is rendered inadmissible under Section 35 of the Stamp Act. The effect of the latter is not to render an unstamped agreement unenforceable. If it was unenforceable, it would imply that it was void. We have already discussed why an unstamped or inadequately stamped agreement is not void in the preceding paragraphs. Indeed, the approach of the majority in **N N Global 2** (supra) to the Contract Act would render unstamped agreements *void ab initio* and not void.

54. In **N N Global 2** (supra), this Court also relied on Section 11(6A) of the Arbitration Act to reach its conclusion:

> "104. What Section 11(6-A) contemplates is a contract and it is not an agreement which cannot be treated as a contract. This is despite the use of the words "arbitration agreement" in Section 11(6-A). In other words, contract must conform to Section 7 of the Act. **It must also, needless to say, fulfil the requirements of the Contract Act."**
>
> (emphasis supplied)

55. Section 11(6-A)[50] of the Arbitration Act is extracted below:

> "(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, **confine** to the examination of the existence of an arbitration **agreement**."
>
> (emphasis supplied)

56. A plain reading of Section 11(6A) makes it evident that it is referring to an arbitration **agreement**. Section 11(6A) provides that courts must **confine** themselves to an examination of the existence of the arbitration agreement. The word "confine" indicates the intention of the legislature to limit the jurisdiction of the courts at the stage of the appointment of an arbitrator.

57. In **Vidya Drolia** (supra), this Court held:

> "21. The term "agreement" is not defined in the Arbitration Act, albeit it is defined in Section 10 of the Contract Act, 1872 (for short "the Contract Act"), … as contracts made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void. Section 10 of the Contract Act also stipulates that aforesaid requirements shall not affect any law in force in India (and not expressly repealed) by which a contract is required to be made in writing, in presence of witnesses or any law relating to registration of documents. Thus, an arbitration agreement should satisfy the mandate of Section 10 of the Contract Act, in addition to satisfying other requirements stipulated in Section 7 of the Arbitration Act."

58. The above observations are correct insofar as the arbitration agreement must satisfy the requirements of the Contract Act. However, the authority empowered to adjudicate whether the requirements of the Contract Act are satisfied is the arbitral tribunal, under Section 16 of the Arbitration Act. This is addressed in greater detail in the following segments.

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50 Omitted by Act 33 of 2019. The omission is yet to be notified / take effect.

iii. The purpose of the Stamp Act

59. 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.,**[51] this Court dealt with the import of Sections 35, 36 and 42 of the Stamp Act. One of the parties relied on the difference in the phraseology between Sections 35 and 36 to argue that an instrument which was insufficiently stamped or not stamped could be admitted in evidence upon the payment of duty and a penalty (if any) but that it could not be acted upon, once admitted. It was argued that Section 35 operates as a bar in two respects, namely, the admission of an instrument into evidence as well as acting upon that instrument. It was argued that Section 36, in contrast to Section 35, removed the bar in one respect alone – the admissibility of the instrument into evidence. This Court rejected this argument and held that the provisions of the Stamp Act clearly provide that an instrument could be admitted into evidence as well as acted upon once the appropriate duty has been paid and the instrument is endorsed:

> "6. … The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and may be **acted upon** as if it has been duly stamped."
>
> (emphasis in original)

60. In so holding, this Court made a significant observation about the purpose of the Stamp Act and the manner in which it is to be interpreted by courts:

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51 (1969) 1 SCC 597

> "7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: **It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent.** The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear."
>
> (emphasis supplied)

The Stamp Act is a legislation which is enacted in the interest of the revenue. The statute must be interpreted with due regard to its purpose.

E*. The Arbitration and Conciliation Act 1996

61. Arbitration is a method of alternative dispute resolution where parties agree to refer their disputes to a neutral third party known as an arbitrator. The aim of arbitration is to provide speedy, efficient, and binding resolution of disputes that have arisen between the parties in regard to their substantive obligations. The thrust of arbitration law is succinctly encapsulated in Redfern and Hunter: "*It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.*"[52]

62. Before the enactment of the Arbitration Act, the law on arbitration was contained in the Arbitration Act 1940,[53] the Arbitration (Protocol and Convention) Act 1937, and Foreign Awards (Recognition and Enforcement) Act 1961. In 1978, the Law Commission of India suggested substantial amendments to the 1940 Act to make it more responsive to the contemporary legal and economic requirements. In the meanwhile, the United Nations Commission on International Trade Law[54] adopted the Model Law in 1985 to foster the development of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial arbitration.

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* Ed. Note: PART E

52 Redfern and Hunter on International Arbitration (7th edn, Oxford University Press, 2023) 3.

53 "1940 Act"

54 "UNCITRAL"

The General Assembly of the United Nations recommended to all states to give due consideration to the Model Law in view of the desirability of achieving uniformity of the law of arbitral procedure and the specific needs of international commercial arbitration practice.[55]

63. The Arbitration Act was enacted to "consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to the conciliation and for matters connected therewith or incidental thereto." In the process, the Arbitration Act repealed the 1940 Act, the Arbitration (Protocol and Convention) Act 1937, and the Foreign Awards (Recognition and Enforcement) Act 1961. It also brought domestic as well as international commercial arbitration in consonance with the Model Law, the New York Convention, and the Geneva Convention. The Arbitration Act is divided into four parts: (i) Part I deals with domestic and international arbitration that takes place in India; (ii) Part II deals with the enforcement of foreign arbitral awards under the New York Convention and the Geneva Convention; (iii) Part III deals with conciliation; and (iv) Part IV contains supplementary provisions. In the present reference, we are largely concerned with Part I of the Arbitration Act. The important principles which animate the law on arbitration as indeed the Arbitration Act are discussed in the following segment. These principles act as important aids to interpret the Arbitration Act.

i. Arbitral autonomy

64. In medieval England, recourse to arbitration was commonplace among merchants and traders. During the seventeenth and the eighteenth century, settlement of commercial disputes by arbitration was encouraged by both Chancery and the courts.[56] In light of the widespread use of arbitration, coupled with a rapid decline in court litigation, the English courts began to actively discourage arbitration as a dispute resolution mechanism.[57] Judicial

55 General Assembly of the United Nations, 'Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law' 40/72 112th Plenary Session, 11 December 1985.

56 Henry Horwitz and James Oldham, 'John Locke, John Mansfield, and Arbitration during the Eighteenth Century' (1993) 36(1) The Historical Journal 137, 139.

57 Earl Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 University of Pennsylvania Law Review 132, 142.

scepticism towards arbitration proceedings mainly stemmed from the attitude of judges that "*every activity that occurred within a jurisdiction should be within the purview of state law and court.*"[58]

65. As cross-border commerce and transactions proliferated, companies and businesses sought different ways to resolve their commercial disputes. The formality, customs, and legal traditions of national courts were at variance with the intention of the parties to achieve a speedy and efficient resolution of their disputes. The internationalization of trade and commerce in the middle of the nineteenth century necessitated the regulation and institutionalization of arbitration. In the process, arbitration was also detached from the national legal systems, with the growth of arbitral institutions such as the London Chamber of Arbitration and International Chamber of Commerce. This new regime of arbitration law paved the way for greater recognition of the mutual intention of parties and the authority of arbitral tribunals to resolve disputes without being bogged down by the intricacies of national legal systems. This was commended and reflected in various international instruments such as the New York Convention and the UNCITRAL Model Law. Accordingly, national laws were changed to reflect the principle of judicial non-interference in arbitration proceedings. The demands of commerce and business efficiency meant that control by national courts became subordinate to the intention of the parties and the authority of the arbitral tribunal.[59]

66. The principle of arbitral autonomy is an integral element of the ever-evolving domain of arbitration law. Arbitral autonomy means that the parties to an arbitration agreement can exercise their contractual freedom to bestow the arbitral tribunal with the authority to decide disputes that may arise between them. The basis of arbitral autonomy is to give effect to the true intention of parties to distance themselves from the "*risk of domestic judicial parochialism.*"[60]

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58 Julian D M Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arbitration International 179, 183.

59 Ibid, at 185

60 Redfern and Hunter on International Arbitration (7th edn, Oxford University Press, 2023) 388

67. The principle of judicial non-interference reflects the autonomy of arbitral tribunals. Arbitral tribunals are autonomous in the sense that they 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. Moreover, 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 tribunal enjoys sufficient autonomy from the national courts.

68. Section 9 of the Code of Civil Procedure 1908 provides that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. Section 28 of the Contract Act states that agreements that restrict a party to a contract absolutely from enforcing their rights under or in respect of any contract by way of usual legal proceedings are void. However, the provision expressly saves contracts by which two or more persons agree to refer to arbitration any dispute which may arise between them in respect of any subject or class of subjects. 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. The arbitral tribunal is not subject to the procedural laws of a country. For instance, Section 19 of the Arbitration Act expressly provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure 1908 or the Indian Evidence Act 1872. Moreover, it stipulates that an arbitral tribunal may conduct the proceedings in any manner it deems appropriate if the parties fail to agree on the procedure to be followed by the tribunal. Although arbitral tribunals have autonomy in the procedural and substantive sense, they are not completely independent of the law of the country in which the arbitral tribunal has its juridical seat, as discussed in the following segments.

ii. Principle of minimum judicial interference

69. The principle of judicial non-interference in arbitral proceedings is fundamental to both domestic as well as international commercial arbitration. The principle entails that the arbitral proceedings are carried out pursuant to the agreement of the parties or under the direction of the

tribunal without unnecessary interference by the national courts.[61] This principle serves to proscribe judicial interference in arbitral proceedings, which would undermine the objective of the parties in agreeing to arbitrate their disputes, their desire for less formal and more flexible procedures, and their desire for neutral and expert arbitral procedures.[62] The principle of judicial non-interference in arbitral proceedings respects the autonomy of the parties to determine the arbitral procedures. This principle has also been incorporated in international instruments, including the New York Convention[63] and the Model Law.

70. Article 5 of the Model Law deals with the extent of court intervention. It states that *"[i]n matters governed by this Law, no court shall intervene except where so provided in this Law." The drafters of the Model Law deemed it important to incorporate this article to provide "certainty to the parties and the arbitrators about the instances in which court supervision or assistance was to be expected."*[64] By including the introductory words *"in matters governed by this law"*, the scope of the provision was limited only to matters which were governed by or regulated in the Model Law. The purpose was to ensure that no judicial authority assigns to itself the power that has been expressly and exclusively bestowed upon the arbitral tribunal. For instance, Article 16 of the Model Law confers upon the arbitral tribunal an exclusive power to rule on its jurisdiction including dealing with objections pertaining to the existence and validity of an arbitration agreement.

71. The Model Law does not regulate or govern *all* matters related to international commercial arbitration as well as the arbitral process.[65] Similarly, Article 5 does not bar the national courts from intervening in

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61 Gary Born, The Principle of Judicial Non-Interference in International Arbitration Proceedings' (2009) 30 University of Pennsylvania Journal of International Law 999, 1002.

62 Gary Born, International Arbitration Law and Practice (3rd ed, 2021) 2361

63 Article II(3), New York Convention

64 Report of the Working Group on International Contract Practices on the work of its seventh session, A/CN.9/246 (New York, 23 January-3 February 1984) 45.

65 Manuel A Gomez, 'Article 5: Extent of Court Intervention' in Ilias Bantekas (eds) UNCITRAL Model Law on International Commercial Arbitration: A Commentary 89 (2020)

matters not governed by the Model Law.[66] The UNCITRAL Working Group itself identified certain situations not dealt with under the Model Law where the national courts could intervene:

> "Article 5 would, for example, not exclude court control or assistance in those matters which the Working Group had decided not to deal with in the law (e.g., capacity of parties to conclude arbitration agreement; impact of state immunity; competence of arbitral tribunal to adapt contracts; enforcement by courts of interim measures of protection ordered by arbitral tribunal; fixing of fees or request for deposit**,** including security for fees or costs; time-limit for enforcement of awards)."

72. This indicates that Article 5 of the Model Law emphasizes on arbitral tribunal being the first instance to determine all issues relating to matters of law or construction as well as issues of jurisdiction and scope of authority.[67] It exclusively determines the manner and form of judicial intervention in the arbitration process. National courts can intervene with respect to matters not expressly governed by the Model Law.[68]

73. Section 5 of the Arbitration Act is based on Article 5 of the Model Law. However, Section 5 also incorporates a non-obstante clause setting out the scope of judicial intervention. It reads as follows:

> "5. Extent of judicial intervention.- **Notwithstanding anything contained in any other law for the time being in force**, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

Two aspects become clear from a comparison of Section 5 of the Arbitration Act with Article 5 of the Model Law: first, Section 5 begins with a non-obstante clause unlike Article 5; and second, it limits the scope of judicial intervention to the extent "so provided" in Part I.

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66 Digest of Case Law on the Model Law on International Commercial Arbitration (2012) 21

67 Rio Algam v. Sammi Steel Co., Ontario Court of Justice, Canada, 1 March 1991, [1991] O.J. No. 268

68 Richard Garnett, 'Article 5 of the Model Law: Protector of the Arbitral Process?' (2021) 38(2) Journal of International Arbitration 127-146.

74. One of the main objectives of the Arbitration Act is to minimize the supervisory role of courts in the arbitral process. Party autonomy and settlement of disputes by an arbitral tribunal are the hallmarks of arbitration law. Section 5 gives effect to the true intention of the parties to have their disputes resolved through arbitration in a quick, efficient, and effective manner by minimizing judicial interference in the arbitral proceedings.[69] Parliament enacted Section 5 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. In doing so, the legislature did not altogether exclude the role of courts or judicial authorities in arbitral proceedings, but limited it to circumstances where the support of judicial authorities is required for the successful implementation and enforcement of the arbitral process.[70] The Arbitration Act envisages the role of courts to "*support arbitration process*"[71] by providing necessary aid and assistance when required by law in certain situations.

75. Section 5 begins with the expression "*notwithstanding anything contained in any other law for the time being in force.*" The non-obstante clause is Parliament's addition to the Article 5 of the Model Law. It is of a wide amplitude and sets forth the legislative intent of limiting judicial intervention during the arbitral process. In the context of Section 5, this means that the provisions contained in Part I of the Arbitration Act ought to be given full effect and operation irrespective of any other law for the time being in force. It is now an established proposition of law that the legislature uses non-obstante clauses to remove all obstructions which might arise out of the provisions of any other law, which stand in the way of the operation of the legislation which incorporates the non-obstante clause.[72]

76. A non-obstante clause is appended in a provision to give such provision overriding effect over other provisions of the law.[73] In

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69 Food Corporation of India v. Indian Council of Arbitration, (2003) 6 SCC 564

70 **Union of India v. Popular Construction Co., (2001) 8 SCC 470; P Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539**

71 **Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677**

72 **State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh, (2005) 9 SCC 129**

73 **Owners and Parties Interested in the Vessel M.V. Polaris Galaxy v. Banque Cantonale De Geneva, 2022 SCC OnLine SC 1293**

Chandavarkar Sita Ratna Rao v. Ashalata S. Guram,[74] Justice Sabyasachi Mukharji explained the purport of non-obstante clause in the following terms:

> "67. A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provisions of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment."

77. Although a non-obstante clause must be allowed to operate with full vigour, its effect is limited to the extent intended by the legislature. In **ICICI Bank Ltd v. SIDCO Leathers Ltd,**[75] a two-Judge Bench of this Court held that a non-obstante clause must be interpreted by confining it to the legislative policy. Thus, even if a non-obstante clause has wide amplitude, the extent of its impact has to be measured in view of the legislative intention and legislative policy.[76] In view of this settled legal position, the issue that arises for our consideration is the scope of the non-obstante clause contained in Section 5 of the Arbitration Act.

78. In **Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd.,**[77] the issue before the two-Judge Bench was whether the provisions of the Arbitration Act would prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.[78] While noting the non-obstante clause contained in Section 5 of the Arbitration Act, this Court held that the non-obstante clause has "*limited application aiming at the extent of judicial*

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74 (1986) 4 SCC 447
75 (2006) 10 SCC 452
76 **JIK Industries Ltd. v. Amarlal V. Jumani, (2012) 3 SCC 255**
77 (2006) 12 SCC 642
78 "SICA"

intervention." It was held that the Arbitration Act would not prevail over SICA since the latter enactment seeks to "*achieve a higher goal*." In other words, the scope of the non-obstante clause is limited to prohibiting the intervention of judicial authorities, unless it has been expressly provided for under Part I of the Arbitration Act.

79. Similar to Article 5 of the Model Law, Section 5 uses the expression "*in matters governed by this Part.*" The use of this expression circumscribes the scope of judicial intervention to matters expressly governed by Part I of the Arbitration Act. The matters governed by Part I *inter alia* include (i) Section 8 which mandates judicial authorities to refer parties to arbitration when *prima facie* there is a valid arbitration agreement; (ii) Section 9 which allows courts to issue interim measures on an application made by a party to an arbitration agreement; (iii) Section 11 which empowers the Supreme Court or the High Courts to appoint arbitrators on an application made by parties to an arbitration agreement; (iv) Section 27 which allows the arbitral tribunal to request the court for assistance in taking evidence; and (v) Section 34 which empowers the court to set aside an arbitral award on the basis of the limited grounds mentioned therein.

80. Section 5 has two facets – positive and negative. The positive facet vests judicial authorities with jurisdiction over arbitral proceedings in matters expressly allowed in or dealt with under Part I of the Arbitration Act. The flip side to this approach is that judicial authorities are prohibited from intervening in arbitral proceedings in situations where the arbitral tribunal has been bestowed with exclusive jurisdiction. This is the negative facet of Section 5. The non-obstante clause limits the extent of judicial intervention in respect of matters expressly provided under the Arbitration Act.[79] In **Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd,**[80] a Bench of three Judges of this Court observed that the "*non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.*"

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79 **Secur Industries Ltd v. Godrej & Boyce Mfg. Co. Ltd, (2004) 3 SCC 447**
80 (2022) 1 SCC 75

81. One of the main objectives behind the enactment of the Arbitration Act was to minimize the supervisory role of courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act 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. 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. A referral court at Section 8 or Section 11 stage 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.

82. Section 5 is of aid in interpreting the extent of judicial interference under Sections 8 and 11 of the Arbitration Act. Section 5 contains 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 intention of minimal judicial intervention.

iii. The Arbitration Act is a self-contained code

83. In **Girnar Traders v. State of Maharashtra,**[81] a Constitution Bench of this Court observed that a self-contained code is a complete legislation with regard to the purpose for which it is enacted. Such a self-contained code provides for a complete machinery to deal with the purpose sought to be achieved by that law and its dependence on other legislations is either absent or minimal.

84. A two-Judge Bench of this Court, in **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd,**[82] explained the nature of the Arbitration Act in the following terms:

81 (2011) 3 SCC 1
82 (2011) 8 SCC 333

> "89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in *P.S. Sathappan* [(2004) 11 SCC 672]) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the Uncitral Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

85. The Arbitration Act is a self-contained code *inter alia* with respect to matters dealing with appointment of arbitrators, commencement of arbitration, making of an award and challenges to the arbitral award, as well as execution of such awards.[83] When a self-contained code sets out a procedure, the applicability of a general legal procedure would be impliedly excluded.[84] Being a self-contained and exhaustive code on arbitration law, the Arbitration Act carries the imperative that what is permissible under the law ought to be performed only in the manner indicated, and not otherwise. Accordingly, matters governed by the Arbitration Act such as the arbitration agreement, appointment of arbitrators and competence of the arbitral tribunal to rule on its jurisdiction have to be assessed in the manner specified under the law. The corollary is that 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.

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83 **Pasl Wind Solutions (P) Ltd v. GE Power Conversion (India) (P) Ltd., (2021) 7 SCC 1; Kandla Export Corporation v. OCI Corporation, (2018) 14 SCC 715**

84 **Subal Paul v. Malina Paul, (2003) 10 SCC 361**

iv. Principles of modern arbitration

86. The Stamp Act and the Indian Arbitration Act, 1899 came into force on the same day, that is, 1 July 1899. The Arbitration Act, 1899, which was enacted more than a century ago, did not have minimum judicial interference as its avowed object. However, the law on arbitration has undergone a sea change over the course of a century.

87. The Arbitration Act represents the principles of modern arbitration, which seeks to give effect to the mutual intention of the parties to resolve their disputes by a neutral third-party arbitral tribunal, whose decision is final and binding on all the parties. Arbitration law allows the parties to design arbitral procedures, which ensures efficiency and expediency of the arbitration process. One of the reasons that business and commercial entities prefer arbitration is because it obviates cumbersome judicial processes, which can often prove expensive, complex, and interminable. Most legal jurisdictions have also recognized and adopted legal approaches that favor arbitration at both the domestic and international level. In the process, national courts have given effect to principles such as the separability presumption and jurisdictional competence of the arbitral tribunal. Modern arbitration law does not completely restrict the role of national courts in the arbitration process, but gives priority to the arbitral tribunal to decide on disputes and issues pertaining to arbitration agreements as well as the substantive rights of the parties. The Arbitration Act reflects these aspects of modern arbitration law. It is the duty of this Court to interpret the Arbitration Act in a manner which gives life to the principles of modern arbitration in India.

F*. The law on the arbitration agreement

88. An arbitration agreement is the foundation of arbitration as it records the consent of the parties to submit their disputes to arbitration.[85] In **Bihar State Mineral Development Corporation v. Encon Builders,**[86] this Court enlisted the essential elements of an arbitration agreement as follows:

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* Ed. Note: PART F

85 Redfern and Hunter on International Arbitration (7th edn, Oxford University Press, 2023) 49

86 (2003) 7 SCC 418

a. There must be a present or future difference in connection with some contemplated affair;

b. There must be the intention of the parties to settle such disputes by a private tribunal;

c. The parties must agree in writing to be bound by the decision of such tribunal; and

d. The parties must be *ad idem.*

89. Section 2(b) of the Arbitration Act defines an "arbitration agreement" to mean an agreement referred to in Section 7. Section 7 defines an "arbitration agreement" to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It provides that an arbitration agreement could be in the form of an arbitration clause in a contract or in the form of a separate agreement. Further, Section 7 mandates that an arbitration agreement shall be in writing. According to Section 7(4), an arbitration agreement is in writing if it is contained in: (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Section 7(5) provides that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

i. Separability of the arbitration agreement

90. The concept of separability or severability of an arbitration agreement from the underlying contract is a legal fiction which acknowledges the separate nature of an arbitration agreement. The separate nature of the arbitration agreement from the underlying contract is one of the cornerstones of arbitration law. As Redfern and Hunter explain, an arbitration agreement is juridically independent from the underlying contract in which it is contained.[87]

87 Redfern and Hunter on International Arbitration (7th edn, Oxford University Press, 2023) 81

The concept of separability reflects the presumptive intention of the parties to distinguish the underlying contract, which captures the substantive rights and obligations of the parties, from an arbitration agreement which provides a procedural framework to resolve the disputes arising out of the underlying contract. This presumption has various consequences in theory and practice, the most important being that an arbitration agreement survives the invalidity or termination of the underlying contract.

91. Schwebel, Sobota and Manton explain in a book on International Arbitration that the separability presumption[88] is based on four factors: first, the intention of the parties to require arbitration of any dispute arising between them, including disputes over the validity of the contract; second, preventing an unwilling party from avoiding its earlier commitment by alleging the invalidity of the underlying contract; third, since the arbitration agreement and the underlying contract are considered as two separate agreements, the insufficiency in fulfilling formalities in the underlying contract would not result in the invalidity of the arbitration agreement; and fourth, if the separability presumption is discarded, courts will have to rule on the merits of the disputes instead of the arbitral tribunals.

92. The rationale for the separability presumption lies in the contractual freedom of the parties to an arbitration agreement to settle their disputes by proceedings before an arbitral tribunal to the exclusion of courts. According to the common grain of business understanding and expectation, the parties intend all their disputes over substantive rights and obligations under the underlying contract to be resolved by the arbitral tribunal.[89] Therefore, the separability presumption 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.

93. Switzerland was one of the first jurisdictions to recognize the separability presumption. In a decision rendered by the Swiss Federal Tribunal in 1933, it was observed that "*[e]ven where the arbitration clause is contained in the same document as the substantive contract to which it relates*

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88 Stephen Schwebel, Luke Sobota, and Ryan Manton, International Arbitration: Three Salient Problems (Cambridge University Press, 2nd edn, 2020) 4.

89 **Mulheim Pipecoatings GmbH v. Welspun Fintrade Ltd., 2013 SCC OnLine Bom 1048**

and therefore from the outside appears as a part of the main agreement, it still does not constitute a single provision of the main agreement but an independent agreement of a special nature."[90] However, Gary Born points out that although an arbitration agreement could be separated from the underlying contract, it can never be independent or autonomous from such contract.[91] This is largely due to the fact that in certain situations, the defects in the underlying contract could also invalidate the arbitration agreement.

94. To properly understand the contours of the separability presumption, it is necessary to understand its origin and development in the international context. Such an analysis is important because any ruling by this Court on the separability presumption ought to be with the aid of international best practices.

d. United Kingdom

95. The separability presumption developed gradually in English law starting with the decision of the House of Lords in **Heyman v. Darwins.**[92] The issue before the House of Lords was whether an arbitration agreement contained in an underlying contract could survive the termination of such contract for a repudiatory breach. It was held that an arbitration agreement is collateral to the substantive contract and could survive its termination. Lord Macmillan observed that an arbitration agreement is materially different from other ordinary contracts, the reason being that breach of obligations under ordinary contracts cannot (in general) be specifically enforced and breach of them results only in damages, but an arbitration agreement can be specifically enforced by the machinery of the arbitration Acts. Lord Macmillan concluded that repudiation or breach of a contract does not extinguish the arbitration agreement, because it survives for the purpose of resolving the outstanding claims arising out of the breach:

> "I am, accordingly, of the opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may

90 Judgment of 7 October 1933, Tobler v. Justizkommission des Kantons Schwyz, DFT 59 | 177 (1933)
91 Gary Born (n 62) 377
92 [1942] AC 356

> relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

96. In subsequent decisions, the English courts reiterated the separability presumption. In **Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.**[93], the Court of Appeal held that an arbitration agreement is "*a self-contained contract collateral to the containing contract.*" The separability presumption is also enshrined in Section 7 of the UK Arbitration Act 1996[94] in the following terms:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

97. Chitty on Contracts states that Section 7 of the UK Arbitration Act maintains the established common law principle which treats an arbitration agreement as distinct from the contract of which it forms part.[95] According to Chitty, treating an arbitration agreement distinct and separate from the underlying contract has two consequences: first, an arbitration agreement can be void or voidable only on the grounds which directly relate to it; and second, if the arbitration agreement is valid and binding and is sufficiently wide in its terms, issues relating to the validity, existence, or effectiveness of the underlying contract are within the substantive jurisdiction of the arbitral tribunal.[96]

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93 [1993] Q.B. 701
94 "UKG Arbitration Act"
95 Chitty on Contracts, Hugh Beale (ed), (32nd edn, Sweet and Maxwell, 2015) para 32-028
96 ibid

98. In **Premium Nafta Products Limited v. Fili Shipping Co. Ltd.,**[97] the House of Lords further explained the separability presumption in Section 7 of the UK Arbitration Act. In that case, the issue was whether a party was bound by an arbitration agreement contained in an underlying contract which was allegedly procured by fraud and bribery. Lord Hoffman, writing for the House of Lords, held that it could be enforced in view of the separability presumption. The Law Lord held that an arbitration agreement in terms of Section 7 of the UK Arbitration Act is a "distinct agreement" from the underlying contract and, therefore, can be void or voidable only on grounds which relate directly to the arbitration agreement. Lord Hoffman, built on his past decision in **Harbour Assurance** (supra), by holding that Section 7 protects an arbitration agreement from any indirect challenge.

e. United States of America

99. The US Federal Arbitration Act presupposes that an arbitration agreement can be separate and distinct from the underlying contract.[98] The separability presumption was subsequently reiterated by US courts with respect to both international and domestic arbitration. In **Prima Paint Corporation v. Flood & Conklin Mfg. Co.,**[99] the Supreme Court of the United States affirmed the separability presumption by observing that *"arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded."* In reaching this conclusion, the court emphasized upon the presumptive desire of the parties to insulate the arbitration agreement from challenges directed at the underlying contract. The position of law which was laid down in **Prima Paint** (supra) was reiterated by the Supreme Court of the United States in **Buckeye Check Cashing Inc v. Cardegna**[100] and **Rent-A-Center, West, Inc. v. Jackson.**[101] In **Rent-A-Center** (supra), it was held that application of the severability rule does not depend on the substance of the remainder of the contract.

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97 [2007] UKHL 40
98 Gary Born (n 62) 382
99 388 US 395 (1967)
100 546 U.S. 440, 440 (2006)
101 2 561 U.S. 63 (2010)

f. Singapore

100. The doctrine of separability has been statutorily recognized under the domestic arbitration regime in Singapore through Section 21 of the Singaporean Arbitration Act, 2001.[102] The provision is that *"an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."* The separability presumption has been further explained by the Singapore High Court in **BNA v. BNB.** The High Court observed that the *"parties intend their arbitration agreement to remain effective if a provision of the substantive contract into which it is integrated could, in certain circumstances of fact or law, operate to render their arbitration agreement invalid*."[103] Thus, the Singapore High Court held that the purpose of the separability presumption is to insulate an arbitration agreement from invalidity that may arise from a challenge to the substantive contract.

g. International Conventions

101. The New York Convention does not expressly provide for the separability presumption. Article II of the Convention defines an arbitration agreement as including *"an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."* Moreover, Article V(1)(a) provides that the recognition and enforcement of an arbitral award may be refused where the arbitration agreement *"is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."* The provision rests on the premise that international arbitration agreements could be subjected to different national laws and legal rules than the underlying contract, and, therefore, an arbitration agreement is presumptively separate from the underlying contract. According to Gary Born, Article II and Article V(1)(a) of the New York Convention indicate that the Convention treats an arbitration agreement as being different from the underlying contract.[104]

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102 Arbitration Act 2001 (No. 37 of 2001)
103 [2019] SGHC 142
104 Gary Born (n 62) 378

102. Article 16 of the Model Law deals with the competence of an arbitral tribunal to rule on its own jurisdiction. Article 16(1) provides:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. **For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall entail ipso jure the invalidity of the arbitration clause."**
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> **(emphasis supplied)**

103. Rule 23 of the UNCITRAL Arbitration Rules, 2021 also provides that "an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract." In contrast to the New York Convention, the Model Law expressly recognizes the separability presumption.

104. According to the UNCITRAL Working Group, the separability presumption is incorporated under Article 16(1) to complement the principle of competence-competence. The separability presumption further ensures that the invalidity of the underlying contract does not affect the jurisdiction of the arbitral tribunal to decide on the nullity of the contract or any other issues submitted to its jurisdiction by the parties *"unless it finds that the defect which causes the nullity of the contract affects also the arbitration clause itself."*[105] The last sentence of Article 16(1) (extracted above) states the general principle of contractual validity of arbitration clauses.[106] It connotes that the invalidity of the underlying contract will not necessarily entail the invalidity of an arbitration agreement contained in the contract. Accordingly, the arbitral tribunal's jurisdiction will be affected only when the defect causing invalidity is directed at the arbitration agreement.[107]

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105 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, A/CN.9/264 (25 March 1985) 38.

106 Gary Born (n 62) 403

107 Digest of Case Law on the Model Law on International Commercial Arbitration (2012) 76.

h. India

105. The Arbitration Act also incorporates the separability presumption in Section 16(1) along the lines of the Model Law. Section 16(1) reads as follows:

> "16. Competence of arbitral tribunal to rule on its jurisdiction – (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -
>
> (a) an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

106. The separability presumption, as incorporated under Article 16(1) of the Model Law, as well as Section 16 of the Arbitration Act, is qualified by the expression "for that purpose." A plain reading may suggest that Section 16 has incorporated the separability presumption only for the particular purpose of allocation of competence over jurisdictional disputes. However, the Digest of Case Laws on UNCITRAL Model Law states that "*the language used in the second sentence does not prevent the application of the separability presumption when a jurisdictional question is raised before a court.*"[108] Gary Born suggests that the better view is that the separability presumption contained in Article 16(1) states a general rule of contractual validity "*which is applicable for all purposes.*"[109] The judicial view that emerges from the Indian courts also seems to suggest that an arbitration agreement is treated as distinct and separate from the underlying contract as a general rule of substantive validity.

107. The separability presumption has undergone a significant evolution in India. Initially, the Indian courts viewed an arbitration agreement as an integral part of the underlying contract without any existence beyond

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108 Ibid.

109 Gary Born (n 62) 403

such contract. For instance, in **Union of India v. Kishorilal Gupta,**[110] the issue before this Court was whether an arbitration clause in the original contract survived after the enactment of a subsequent contract. Justice K Subba Rao (as the learned Chief Justice then was) considered **Heyman** (supra) but distinguished it on the ground that it only dealt with repudiation, where rights and obligations of parties survive the termination of contract. It was held that in situations where the original contract is superseded by a subsequent contract, the arbitration clause in the original contract will also cease to exist. Justice K Subba Rao, speaking for the majority, held that first, an arbitration clause is a collateral term of a contract as distinguished from its substantive terms, but nonetheless it is an integral part of it; second, the existence of the underlying contract is a necessary condition for the operation of an arbitration clause; third, if the underlying contract was non-est in the sense that it never came legally into existence or was void-ab-initio, the arbitration clause also cannot operate; fourth, if the parties put an end to a validly executed contract and substitute it with a new contract, the arbitration clause of the original contract also perishes with it; and fifth, in situations such as repudiation, frustration, or breach of contract, only the performance of the contract comes to an end, the arbitration clause persists because the contract continues to exist for the purposes of disputes arising under it.

108. In **Damodar Valley Corporation v. K K Kar,**[111] a two-Judge Bench of this Court held that the plea that a contract is void, illegal, or fraudulent affects the entire contract along with the arbitration clause. 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 decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause, renders the decisions in **Kishorilal Gupta** (supra) and **Damodar Valley Corporation** (supra) redundant. Consequently, even if the underlying contract is declared null and void, it will not *ipso jure* result in the invalidity of the arbitration agreement.

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110 1959 SCC OnLine SC 6
111 (1974) 1 SCC 141

109. In **Firm Ashok Traders v. Gurumukh Das Saluja,**[112] the issue before this Court was whether an application under Section 9 of the Arbitration Act moved by a partner of a non-registered firm or by a person not shown as a partner in the Register of Firms was maintainable in view of Section 69(3) of the Indian Partnership Act, 1932. Section 69(3) creates a bar against the institution of a suit to enforce a right arising from a contract unless the firm is registered and the person suing is or has been shown in the Register of Firms as partner. This Court considered the overall scheme of the Arbitration Act to hold that an "*arbitration clause is separable from the other clauses of the partnership deed" and "constitutes an agreement by itself.*"

110. In **National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Co.,**[113] the issue before this Court in an application under Section 11 was whether an arbitration clause comes to an end if the contract containing such clause is repudiated. While answering this in negative, this 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. Similarly, in **P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corp.,**[114] this Court referred to **Buckeye Check Cashing Inc.** (supra) to observe that an arbitration agreement contained in an underlying contract is a collateral term which may survive the termination of the contract.

111. In **Magma Leasing & Finance Ltd. v. Potluri Madhavilata,**[115] this Court cited **Heyman** (supra) with approval to hold that the termination of the underlying contract does not render an arbitration agreement inoperative. It was further observed that the arbitration agreement survives for the purpose of resolution of disputes arising "in respect of", "with regard to", or "under" the underlying contract. The emphasis on the expressions "in respect of", "with regard to" or "under" in **Magma Leasing & Finance Ltd.** (supra) indicates that the purpose of an arbitration agreement is to embody the mutual intention of the parties to settle any disputes that may arise "in

112 (2004) 3 SCC 155
113 (2007) 5 SCC 692
114 (2009) 2 SCC 494
115 (2009) 10 SCC 103

respect of" the substantive obligations under the underlying contract. It is, therefore, a logical conclusion that the parties mutually intend to make an arbitration agreement distinct and separate from the underlying contract, so that even if the underlying contract comes to an end, the arbitration agreement survives to resolve any outstanding disputes that may arise out the substantive obligations under the contract.

112. In view of the above discussion, we formulate our conclusions on this aspect. First, the separability presumption contained in Section 16 is applicable not only for the purpose of determining the jurisdiction of the arbitral tribunal. It 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 competence-competence.

113. In view of the legal position, we now proceed to analyze the correctness of the decision in **N N Global 2** (supra). The Constitution Bench acknowledged the separability presumption, but refused to apply it in the context of Sections 33 and 35 of the Stamp Act. The relevant observation of the Court is as follows:

> "157. […] The evolution of the principle that an arbitration is a separate and distinct agreement from the contract, would indicate that it would have no play in the context of the duty of a Court, within the meaning of Sections 33 and 35 of the Stamp Act, to act in consonance therewith."

114. The above position of law is contrary to the separability presumption which treats an arbitration agreement as separate from the underlying contract.

G*. The doctrine of competence-competence

115. The doctrine of kompetenz-kompetenz (also known as competence-competence), as originally developed in Germany, was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any court.[116] However, many jurisdictions allow an arbitral tribunal to render a decision on its jurisdiction, subject to substantive judicial review.[117]

116. It is a well-recognized principle of public international law that a legal authority possessing adjudicatory powers has the right to decide its own jurisdiction.[118] Similarly, it is a general rule of international arbitration law that an arbitral tribunal has the power to determine its own jurisdiction. The ability of an arbitral tribunal to determine its own jurisdiction is an important facet of arbitration jurisprudence because it gives effect to the separability presumption. The separability presumption insulates the arbitration agreement from the defects of the underlying contract, and thereby ensures the sustenance of the tribunal's jurisdiction over the substantive rights and obligations of the parties under the underlying contract even after such a contract is put to an end. The doctrine of competence-competence allows the tribunal to decide on all substantive issues arising out of the underlying contract, including the existence and validity of the arbitration agreement.

i. Comparative analysis

117. The doctrine of competence-competence is now a part of all major jurisdictions. Section 30 of the UK Arbitration Act provides that the arbitral tribunal may rule on its own substantive jurisdiction with respect to: first, whether there is a valid arbitration agreement; second, whether the

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* Ed. Note: PART G

116 Fouchard, Gaillard, Goldman on International Commercial Arbitration (edited by Emmanuel Gaillard and John Savage, 1999) 396

117 Gary Born (n 62) 1143

118 Interpretation of Greco-Turkish Agreement of December 1st, 1926, Advisory Opinion, Series B – No. 16 (August 28, 1928).

tribunal is properly constituted; and third, what matters have been submitted to arbitration in accordance with the arbitration agreement. The basis for the jurisdictional competence of an arbitral tribunal can be evinced from the following observation of Lord Hoffman in **Fili Shipping Company Limited** (supra): *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute rising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal."* In **Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan,**[119] the United Kingdom Supreme Court held that the tribunal's own view of its jurisdiction has no legal or evidential value when the issue pertains to the exercise of legitimate authority by the tribunal. Thus, the UK position is that although the arbitral tribunal is empowered to consider whether it has jurisdiction, its determination is subject to the examination of the courts.

118. The courts in the United States have considered the principle of competence-competence to be intertwined with the separability presumption. In **Prima Paint** (supra), the United States Supreme Court held that if a claim is made to the effect that the underlying contract was induced fraudulently, then the issue should be determined by the courts. The Supreme Court concluded that all the other issues should be left for the determination of the arbitral tribunal to *"not only honor the plain meaning of the statute, but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy, and not subject to delay and obstruction in the courts."* In **Buckeye Check Cashing** (supra), the United States Supreme Court reiterated **Prima Paint** (supra) by holding that the arbitral tribunal should consider the issue of the validity of underlying contract in the first instance. Thus, the position in the US is 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.

119. Under Singaporean law, Article 21(1) of the Arbitration Act, 2001 incorporates the doctrine of competence-competence in so far as domestic

119 [2010] UKSC 46

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. The conduct of international commercial arbitrations in Singapore is governed by the International Arbitration Act, 1994.[120] Section 3 of the IIA states that the Model Law has the force of law in Singapore. In **Malini Ventura v. Knight Capital Pte Ltd,**[121] the issue before the Singapore High Court was whether the arbitral tribunal has primacy to determine the existence of an arbitration agreement in the context of international commercial arbitration. The Court analysed the scope and purpose of Article 16(1) of the Model Law to hold that an arbitral tribunal has first priority in determining whether an arbitration agreement exists and the court's consideration must come after the tribunal's own examination of the issue. It was further observed that *"the tribunal's powers in relation to the issue are wide because it can consider not only validity but also the very existence of the arbitration agreement."* Thus, the Singapore High Court has given full effect to the doctrine of competence-competence since the arbitral tribunal gets the first priority to determine issues even with respect to the very existence of the arbitration agreement, while the jurisdiction of the courts is limited to a prima facie determination.

ii. India

120. Under the previous arbitration regime in India, that is the 1940 Act, the issue of determining the existence or validity of arbitration agreement was exclusively within the domain of the courts. To that effect, Section 33 of the 1940 Act allowed any party to the arbitration agreement to file an application before the courts challenging the existence or validity of an arbitration agreement. In view of this, this Court consistently held that the question as to the existence or validity of an arbitration agreement was to be decided only by application to courts and not by the arbitral tribunal.[122] This position has now undergone a complete metamorphosis in the present

120 "IIA"

121 [2015] SGHC 225

122 **Dhanrajamal Gobindram v. Shamji Kalidas & Co., 1961 SCC OnLine SC 28; Khardah Co. Ltd. v. Raymon & Co. (India) Private Ltd., 1962 SCC OnLine SC 28.**

legislation. 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. Importantly, the parties have a right under Section 16(2) and 16(3) to challenge the jurisdiction of the arbitral tribunal on grounds such as the non-existence or invalidity of the arbitration agreement. The arbitral tribunal is obligated to decide on the challenge to its jurisdiction, and where it rejects the challenge, it can proceed with the arbitral proceedings and make an arbitral award. It is the principle of procedural competence-competence which recognizes the power of an arbitral tribunal to hear and decide challenges to its jurisdiction. Once the arbitral tribunal makes an arbitral award, Section 16(6) allows the aggrieved party to make an application for setting aside the award under Section 34. Sections 16(5) and 16(6) further show that Parliament has completely ousted the jurisdiction of courts to interfere during the arbitral proceedings - courts can intervene only after the tribunal has made an award. Thus, Section 16 is intended to give full effect to the procedural and substantive aspects of the doctrine of competence-competence.

121. Section 34 of the Arbitration Act deals with applications for setting aside arbitral awards. Section 34(2) provides that an arbitral award may be set aside by the Court only if the party making the application establishes, on the basis of the record of the arbitral tribunal, any of the following five grounds:

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making an application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission

to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Part I from which the parties cannot derogate, or, failing such agreement, was not in accordance with Part I.

Moreover, the court can set aside an arbitral award if it finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

122. Under Section 34, the grounds for setting aside an arbitral award are specific. The provision requires a party challenging an award to plead and prove the existence of one or more such grounds.[123] The scheme of the Arbitration Act shows that although an arbitral tribunal is given priority to determine all issues pertaining to its jurisdiction based on the principle of competence-competence, the tribunal's decision is subject to judicial review at the stage when an award is challenged. Moreover, one of the grounds on which an arbitral award can be set aside is that the arbitration agreement is not valid under law. This indicates that the Arbitration Act does not contemplate the court determining the validity of an arbitration agreement at a pre-arbitral stage.

123. In **Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products,**[124] one of the issues before this Court was whether a decision on the issue of limitation would go to the root of the jurisdiction of the arbitral tribunal, and therefore be covered by Section 16 of the Arbitration Act. This Court referred to Section 16(1) to observe that *"the Arbitral Tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the Arbitral Tribunal may embark upon an inquiry into the issues raised by*

123 **Fiza Developers and Inter-Trade (P) Ltd. v. Amci (I) (P) Ltd., (2009) 17 SCC 796**
124 (2018) 2 SCC 534

the parties to the dispute." In **Bhadra Products** (supra), it was held that the issue of limitation concerns the jurisdiction of the tribunal which tries the proceedings.

124. In **Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field,**[125] the issue before this Court was whether a referral court at the stage of appointment of arbitrators would be required to decide the issue of limitation or leave it to the arbitral tribunal. A Bench of two Judges of this Court held that the doctrine of competence-competence is *"intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties."* Moreover, this Court held that Section 16 is an inclusive provision of very wide ambit:

> "7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. **Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal.** The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator."
>
> (emphasis supplied)

125. In view of the above discussion, the issue that comes up for our consideration is whether an issue of stamping is a jurisdictional issue. Jurisdiction is generally defined as the power of a court or tribunal to hear and determine a cause, and to adjudicate or exercise any judicial power in relation to such cause.[126] Jurisdiction refers to the authority of a court or

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125 (2020) 2 SCC 455

126 **Sukh Lal Sheikh v. Tara Chand Ta, 1905 SCC OnLine Cal 164**

tribunal to decide matters that are litigated before it or to take cognizance of matters presented before it in a formal way for its decision. In **Official Trustee, West Bengal v. Sachindra Nath Chatterjee,**[127] this Court held that for a court to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought. In **NTPC v. Siemens Atkeingesllchaft,**[128] this Court observed that any refusal to go into the merits of a claim may be in the realm of jurisdiction. Accordingly, it was observed that the issue of limitation goes to jurisdiction because if a claim is barred by limitation, a tribunal can refuse to exercise its jurisdiction.

126. Section 35 of the Stamp Act mandates that an unstamped instrument cannot be acted upon unless it is duly stamped. The question is whether a tribunal can effectively exercise its jurisdiction to settle the claims between the parties until stamp duty is paid on the underlying instrument. In view of the decision of this Court in **Uttarakhand Purv Sainik Kalyan Nigam Ltd** (supra), 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.

127. In case the issue of stamping is raised before an arbitral tribunal, Sections 33 and 35 of the Stamp Act make it evident that a person having authority by "consent of parties" to receive evidence is empowered to impound and examine an instrument. A person having authority "by consent of parties" to receive evidence includes an arbitral tribunal which is constituted by consent of parties.

iii. Negative competence-competence

128. The international arbitration law as well as domestic law prioritize the arbitral tribunal by permitting them to initially decide challenges to their authority instead of the courts. The policy consideration behind this approach is two-fold: first, to recognize the mutual intention of the parties of choosing the arbitrator to resolve all their disputes about the substantive rights and obligations arising out of contract; and second, to prevent parties from

127 (1969) 3 SCR
128 (2007) 4 SCC 451

initiating parallel proceedings before courts and delaying the arbitral process. This is the positive aspect of the doctrine of competence-competence.

129. The negative aspect, in contrast, speaks to the national courts. It instructs the courts to limit their interference at the referral stage by deferring to the jurisdiction of the arbitral tribunal in issues pertaining to the existence and validity of an arbitration agreement. Thus, the negative aspect of the doctrine of competence-competence suggests that the courts should refrain from entertaining challenge to the jurisdiction of the arbitral tribunal before the arbitrators themselves have had an opportunity to do so.[129] Allowing arbitral tribunals to first rule on their own jurisdiction and later allowing the courts to determine if the tribunal exercised its powers properly safeguards both the power and authority of the arbitral tribunal as well as the courts. The negative aspect of the doctrine has been expressly recognized by Indian courts. Considering both the positive and negative facets, the principle can be defined as a rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, which is subject to subsequent review by courts.[130]

130. In **Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.,**[131] one of the issues before this Court was whether the court at the referral stage under Section 45 is required to determine the validity of an arbitration agreement. This Court recognized that the doctrine of competence-competence has both the positive and the negative aspects. It was observed that while the positive aspect enables the arbitrator to rule on its own jurisdiction, the negative aspect deprives the courts of their jurisdiction. However, this Court noted the absence of a provision similar to Section 16 in Part II to conclude that the referral court is required to test for the ingredients of Section 45 at the threshold stage itself.

131. Thereafter, this Court in **Vidya Drolia** (supra) held that the doctrine of competence-competence has both negative and positive connotations. The relevant extract from the decision is set out below:

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129 George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 Yale Journal of International Law 1, 16.

130 Fouchard (n 116) 401

131 (2013) 1 SCC 641

> "129. Principles of competence-competence have positive and negative connotations. As a positive implication, the Arbitral Tribunals are declared competent and authorised by law to rule as to their jurisdiction and decide non-arbitrability questions. In case of expressed negative effect, the statute would govern and should be followed. Implied negative effect curtails and constrains interference by the court at the referral stage by necessary implication in order to allow the Arbitral Tribunal to rule as to their jurisdiction and decide non-arbitrability questions. As per the negative effect, courts at the referral stage are not to decide on merits, except when permitted by the legislation either expressly or by necessary implication, such questions of non-arbitrability. Such prioritisation of the Arbitral Tribunal over the courts can be partial and limited when the legislation provides for some or restricted scrutiny at the "first look" referral stage. We would, therefore, examine the principles of competence-competence with reference to the legislation, that is, the Arbitration Act."

132. In **Arcelormittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.,**[132] this Court held that negative competence-competence prohibits courts from hearing disputes which the parties have mutually intended to submit to the jurisdiction of arbitral tribunal. As held in the preceding sections, the issue of stamping is a jurisdictional issue. The principle of negative competence-competence requires the courts to leave the issue of stamping to be decided by the arbitral tribunal in the first instance.

H*. Judicial interference under the Arbitration Act

133. When parties enter into an arbitration agreement, it is their mutual and unequivocal intention to submit their disputes to an arbitral tribunal. The arbitration law recognizes this aspect by granting autonomy to the parties to adopt a procedural mechanism for the appointment of arbitrators. Party autonomy has also been expressly recognized by international arbitration covenants as well as national arbitration legislations. For instance, Article 11(2) of the Model Law states that parties to an arbitration agreement are free to agree on a procedure for appointing the arbitrator or arbitrators. In a situation where the agreed procedure of the parties fails, the Model Law

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* Ed. Note: PART H

132 (2022) 1 SCC 712

permits the national courts to appoint arbitrators on a request of a party. The recourse to judicial appointment of arbitrators is often invoked as a last resort by the parties when their agreed procedure becomes unworkable. The power of appointment of arbitrators is vested with national courts to resolve the deadlock in appointment of an arbitrator.[133]

134. As discussed in the preceding segments of this judgment, Section 5 of the Arbitration Act disallows a judicial authority from intervening unless expressly provided under Part I. In the present proceedings, the exercise of the powers by the courts or judicial authorities as provided under Section 8 and 11 becomes particularly relevant for our consideration.

135. According to Fouchard, an arbitration agreement has both a positive and negative effect. The positive effect is that the parties ought to honor their undertaking to submit to arbitration any disputes covered by their arbitration. On the flip side, the negative effect of the arbitration agreement is that courts are prohibited from hearing such disputes.[134] Most international covenants have recognised the principle that courts lack jurisdiction to hear disputes covered by an arbitration agreement. For instance, Article II(3) of the New York Convention states that "*[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*"

136. In the Indian context, Section 8 provides that when an action is brought before a judicial authority in a matter which is the subject of an arbitration agreement, such judicial authority shall refer the parties to arbitration on an application made by a party to the arbitration agreement or any person claiming through or under him not later than the date of submitting their first statement on the substance of the dispute. Section 8 mandates the judicial authority to refer the parties to arbitration "*unless it finds that* prima facie *no valid arbitration agreement exists.*" Section 8 is based on Article 8 of the Model Law which provides that a "court" before

133 Digest of Case Law on the Model Law on International Commercial Arbitration (2012) 60

134 Fouchard (n 116) 402

which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration "*unless it finds that the agreement is null and void, inoperative or incapable of being performed.*" It is evident that Section 8 has made a departure from Article 8 by using the expansive term "judicial authority" rather than "court." The intention of the legislature to provide an expansive application can also be gauged from the fact that the expression "*unless it finds that the agreement is null and void, inoperative or incapable of being performed*" does not find place in Section 8.[135]

137. According to the UNCITRAL Working Group Commentary on the Model Law, Article 8 of the Model Law enshrines the "negative effect" of an arbitration agreement.[136] Moreover, Article 8 gives effect to the intention of the parties to submit their disputes to arbitration to the exclusion of courts, irrespective of whether such exclusion is expressed in the agreement. Similar legislation has also been incorporated under the English[137] and French[138] national laws. It is worth noting that most of the national legislations entitle the courts at the referral stage to review the existence and validity of arbitration agreements. For example, Section 9(4) of the English Arbitration Act, 1996 provides that a court can stay the legal proceedings unless satisfied that the arbitration agreement "*is null and void, inoperative, or incapable of being performed.*" Similarly, Article 1458 of

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135 A Ayyasamy v. A Paramsivam, (2016) 10 SCC 386

136 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, A/CN.9/264 (25 March 1985) 38.

137 Article 9(1) of UK Arbitration Act: It reads: "(1)A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
[…]
(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

138 Article 1458 of French Code of Civil Procedure, 1981. It reads: "If a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court, it shall declare itself incompetent.
If the dispute is not yet before an arbitral tribunal, the State court shall also declare itself incompetent, unless the arbitration agreement is manifestly null and void."

the French Civil Code provides that a state court is incompetent to decide on issues pertaining to an arbitration agreement, unless the arbitration agreement is "*manifestly null and void.*" Thus, the standard of review that the court should adopt at the pre-arbitral stage differs considerably across jurisdictions.

138. One of the major bottlenecks in the smooth functioning of arbitral proceedings is the inability of the parties to ensure the constitution of the arbitral tribunal once the dispute has arisen. To ensure that such disagreement between the parties does not derail the arbitral proceedings, international covenants as well as national laws allow judicial authorities to assist the parties in appointing arbitrators. For instance, Article 1444 of the French Civil Code in the context of domestic arbitration provides that *"[i]f a dispute has arisen and problems occur with regard to the constitution of the arbitral tribunal due to the behavior of a party or to the implementation of the appointment method, the arbitrator or arbitrators shall be appointed by the President of the Tribunal de Grande Instance."*[139] The said provision further provides that the President shall declare that there is no basis for appointment if the "*arbitration clause is manifestly null and void or insufficient to constitute an arbitral tribunal.*" The basis for providing judicial intervention to the extent of determining the validity of arbitration agreement is to ensure that the courts do not mechanically appoint arbitrators in situations where the arbitration does not have any contractual basis.[140]

139. Section 11 of the Arbitration Act deals with the appointment of arbitrators. It recognizes the autonomy of the parties to agree upon a procedure for appointment of an arbitrator or arbitrators. Section 11 requires the intervention of the court only when there is a deadlock or failure of the parties to follow the appointment procedure. In the process, Section 11 is meant to give effect to the mutual intention of the parties to settle their disputes by arbitration in situations where the parties fail to appoint an arbitrator or arbitrators. In an arbitration with three arbitrators, each party is required to appoint one arbitrator each, and subsequently the two arbitrators will appoint the third arbitrator. Section 11(6) confers

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139 Article 1444, French Code of Civil Procedure.
140 Fouchard (n 116) 495

powers on the Supreme Court and the High Court, as the case may be, on the failure of the parties to comply with the agreed arbitration procedure. Section 11(6) enlists three possible defects in the appointment procedure, namely: first, a party fails to act as required by the agreed procedure; second, the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure; or third, a person, including an institution, fails to perform any function entrusted to them or under the agreed procedure.

140. Section 11(6) has had a long and chequered history before this Court, particularly in respect of the nature of function of the Chief Justice or his designate in the appointment of an arbitrator. In **SPB & Co. v. Patel Engineering Ltd.,**[141] a seven-Judge Bench of this Court held that the power exercised by the Chief Justice of India or a Chief Justice of the High Court under Section 11(6) is a judicial power. In the process, this Court analysed the scope of the powers and authority of the referral court under Section 11(6). Moreover, this Court noted that Sections 8 and 11 are complementary in nature. Consequently, if the judicial authority acting under Section 8 has to mandatorily decide the issue of jurisdiction before referring the parties to arbitration, the same standard of scrutiny was also held to be applicable to the reference under Section 11. In conclusion, it was held that the Chief Justice or their designate at the referral stage under Section 11(6) had the right to determine all preliminary issues:

> "47 (*iv*) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge."

141 (2005) 8 SCC 618

141. The extent of judicial interference at the referral stage was scrutinised by a Bench of two Judges of this Court in **National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.**[142] This Court held that when the intervention of the court is sought under Section 11 of the Arbitration Act, the following categories of issues will arise before the referral court:

(i) The issues which the Chief Justice or his designate is bound to decide. These issues were: first, whether the party making the application has approached the appropriate High Court; and second, whether there is a valid arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement;

(ii) The issues which the Chief Justice or his designate may choose to decide or leave them to the decision of the arbitral tribunal. These issues were: first, whether the claim is a dead (long-barred) claim or a live claim; and second, whether the parties have concluded the contract/ transaction by recording the satisfaction of their mutual rights and obligations or by receiving the final payment without objection; and

(iii) The issues which the Chief Justice or their designate should leave exclusively to the arbitral tribunal. These issues were: first, whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration); and second, merits or any claim involved in the arbitration.

142. The decisions of this Court in **Patel Engineering** (supra) and **Boghara Polyfab** (supra) allowed for greater judicial interference at the pre-arbitral stage. In effect, the referral courts were encouraged to conduct mini-trials instead of summarily dealing with the preliminary issues. This was also noted by the Law Commission of India, which observed that judicial intervention in the arbitral proceedings is a pervasive problem in

142 (2009) 1 SCC 267

India leading to significant delays in the arbitration process.[143] The Law Commission recognized that one of the problems plaguing implementation of the Arbitration Act was that Section 11 applications were kept pending for years by the courts. To remedy the situation, the Law Commission proposed changing the then existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court". It also clarified that the power of appointment of arbitrators ought not to be regarded as a judicial act.

143. Significantly, the Law Commission observed that there was a need to reduce judicial intervention at the pre-arbitral stage, that is, prior to the constitution of the arbitral tribunal. Accordingly, it proposed limiting the scope of the judicial intervention at the referral stage under Sections 8 and 11 of the Arbitration Act "*to situations where the Court/ Judicial Authority finds that the arbitration agreement does not exist or is null and void.*" The Law Commission suggested insertion of sub-section 6A under Section 11 which would read: "*Any appointment by the High Court or the person or institution designated by it under sub-section (4) or sub-section (5) or sub-section (6) shall not be made only if the High Court finds that the arbitration does not exist or is null and void.*" In light of the recommendations of the Law Commission, Parliament passed the Arbitration and Conciliation (Amendment) Act 2015[144] to incorporate Section 11(6-A).

144. The Statement of Objects and Reasons of the 2015 Amendment Act states that sub-section (6A) is inserted in Section 11 to provide that the Supreme Court or the High Court while considering application under sub-section (4) to (6) "*shall confine to the examination of an arbitration agreement.*" With the coming into force of the 2015 Amendment Act, the nature of preliminary examination at the referral stage under Section 11 was confined to the existence of an arbitration agreement. It also incorporates a non-obstante clause which covers "*any judgment, decree or order of any Court.*" By virtue of the non-obstante clause, Section 11(6A) has set out a new position of law, which takes away the basis of the position laid down by the previous decisions of this Court in **Patel Engineering** (supra) and

143 Law Commission of India, 246th Report (2014)
144 "2015 Amendment Act"

Boghara Polyfab (supra). It is also important to note that Parliament did not incorporate the expression "*or is null and void*" as was suggested by the Law Commission. This indicates that Parliament intended to confine the jurisdiction of the courts at the pre-arbitral stage to as minimum a level as possible.

145. The effect and impact of the 2015 Amendment Act was subsequently clarified by this Court. In **Duro Felguera, S A v. Gangavaram Port Ltd.,**[145] Justice Kurien Joseph noted that the intention of the legislature in incorporating Section 11(6A) was to limit the scope of the referral court's jurisdiction to only one aspect – the existence of an arbitration agreement. To determine the existence of an arbitration agreement, the court only needs to examine whether the underlying contract contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. This Court further held that Section 11(6A) incorporates the principle of minimal judicial intervention:

> "59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co. and Boghara Polyfab*. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

146. In 2017, the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India submitted a report noting that while the 2015 amendment facilitated the speedy disposal of Section 11 applications, they failed to limit judicial interference in arbitral proceedings. Accordingly, the High-Level Committee recommended the amendment of Section 11 to provide for appointment of arbitrators solely by arbitral institutions designated by the Supreme Court in case of international commercial arbitrations or the High Court in case of all other arbitrations. In view of the report of the High-Level committee, Parliament enacted the

145 (2017) 9 SCC 729

Arbitration and Conciliation (Amendment) Act 2019[146] omitting Section 11(6A) so as to leave the appointment of arbitrators to arbitral institutions. Section 1(2) of the 2019 Amendment Act provides that amended provisions shall come into force on such date as notified by the Central Government in the official gazette However, Section 3 of the 2019 Amendment Act which amended Section 11 by omitting Section 11(6A) is yet to be notified. Till such time, Section 11(6A) will continue to operate.

147. In **Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman,**[147] a three-Judge Bench of this Court affirmed the reasoning in **Duro Felguera** (supra) by observing that the examination under Section 11(6A) is "*confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense.*" Moreover, it held that the position of law prior to the 2015 Amendment Act, as set forth by the decisions of this Court in **Patel Engineering** (supra) and **Boghara Polyfab** (supra), has been legislatively overruled. Thus, this Court gave effect to the intention of the legislature in minimizing the role of the courts at the pre-arbitral stage to the bare minimum.

148. Thereafter, in **Vidya Drolia** (supra), another three-Judge Bench of this Court, affirmed the ruling in **Mayavati Trading** (supra) that **Patel Engineering** (supra) has been legislatively overruled. In **Vidya Drolia** (supra), one of the issues before this Court was whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability. This Court began its analysis by holding that an arbitration agreement has to satisfy the mandate of the Contract Act, in addition to satisfying the requirements stipulated under Section 7 of the Arbitration Act to qualify as an agreement.

149. In the course of the decision, one of the questions before this Court in **Vidya Drolia** (supra) was the interpretation of the word "existence" as appearing in Section 11. It was held that existence and validity are intertwined. Further, it was observed that an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Therefore, this Court read the mandate of valid arbitration agreement

146 "2019 Amendment Act"
147 (2019) 8 SCC 714

contained in Section 8 into the mandate of Section 11, that is, "existence of an arbitration agreement."

150. At the outset, **Vidya Drolia** (supra) noted that "*Section 11 has undergone another amendment vide Act 33 of 2019 with effect from 9-8-2019.*" The purport of the omission of the said clause was further explained in the following terms:

> **"145.** Omission of sub-section (6-A) by Act 33 of 2019 was with the specific object and purpose and is relatable to by substitution of sub-sections (12), (13) and (14) of Section 11 of the Arbitration Act by Act 33 of 2019, which, vide sub-section (3-A) stipulates that the High Court and this Court shall have the power to designate the arbitral institutions which have been so graded by the Council under Section 43-I, provided where a graded arbitral institution is not available, the High Court concerned shall maintain a panel of arbitrators for discharging the function and thereupon the High Court shall perform the duty of an arbitral institution for reference to the Arbitral Tribunal. Therefore, it would be wrong to accept that post omission of sub-section (6-A) of Section 11 the ratio in *Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] would become applicable."

151. **Vidya Drolia** (supra) proceeds on the presumption that Section 11(6A) was effectively omitted from the statute books by the 2019 Amendment Act. This is also reflected in the conclusion arrived at by the Court, as is evident from the following extract:

> **"154.1.** Ratio of the decision in *Patel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) **and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable."**
>
> (emphasis supplied)

152. We are of the opinion that the above premise of the Court in **Vidya Drolia** (supra) is erroneous because the omission of Section 11(6A) has not been notified and, therefore, the said provision continues to remain

in full force. Since Section 11(6A) continues to remain in force, pending the notification of the Central Government, it is incumbent upon this Court to give true effect to the legislative intent.

153. The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the referral court to look into the ***prima facie*** existence of a **valid** arbitration agreement, Section 11 confines the court's jurisdiction to the examination of the **existence** of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the referral courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an arbitral tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of **Patel Engineering** (supra) where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.

154. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In **Duro Felguera** (supra), this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement – whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the

position of law laid down in **Vidya Drolia** (supra) in the context of Section 8 and Section 11 of the Arbitration Act.

155. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only *prima facie* proof of the existence of an arbitration agreement must be adduced before the referral court. The referral court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute.

156. Section 11(6A) uses the expression "examination of the existence of an arbitration agreement." The purport of using the word "examination" connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry.[148] On the other hand, Section 16 provides that the arbitral tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in **Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.**[149]

157. In **Shin-Etsu** (supra), this Court was called upon to determine the nature of adjudication contemplated by unamended Section 45 of the Arbitration Act when the objection with regards to the arbitration agreement being "*null and void, inoperative or incapable of being performed*" is raised before a judicial authority. Writing for the majority, Justice B N Srikrishna

148 P Ramanatha Aiyar, *The Law Lexicon* (Second edition, 1997) 666
149 (2005) 7 SCC 234

held that Section 45 does not require the judicial authority to give a final determination. The court observed that:

> "74. There are distinct advantages in veering to the view that Section 45 does not require a final determinative finding by the court. First, under the Rules of Arbitration of the International Chamber of Commerce (as in force with effect from 1-1-1998), as in the present case, invariably the Arbitral Tribunal is vested with the power to rule upon its own jurisdiction. Even if the court takes the view that the arbitral agreement is not vitiated or that it is not invalid, inoperative or unenforceable, based upon purely a *prima facie* view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration. Since the arbitrator's finding would not be an enforceable award, there is no need to take recourse to the judicial intercession available under Section 48(1)(a) of the Act."

158. When the referral court renders a *prima facie* opinion, neither the arbitral tribunal, nor the court enforcing the arbitral award will be bound by such a *prima facie* view. If a *prima facie* view as to the existence of an arbitration agreement is taken by the referral court, it still allows the arbitral tribunal to examine the issue in-depth. Such a legal approach will help the referral court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the arbitral tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement.

I*. Harmonious construction of the Arbitration Act, the Stamp Act, and the Contract Act

159. One of the cardinal principles of the interpretation of statutes is to discover and give effect to the legislative intention. If a statute is susceptible to two interpretations, the court will have to reject the construction which

* Ed. Note: PART I

will defeat the plain intention of the legislation.[150] The court has to ascertain the intention of the legislation by considering not only the clause to be interpreted, but also the entirety of the statute. The legislature often enacts a statute to give effect to legislative policy. When enacting a statute, the legislature often endeavors to ensure that the provisions of a statute do not contradict the provisions of the same statute or provisions of another statute. However, inconsistencies or contradictions may nonetheless arise between statutes. In such situations, it is left to the court to bring about a harmony between the working of such statutes.

160. In **Sultana Begum v. Prem Chand Jain,**[151] this Court analysed the relevant decisions of this Court and laid down the following principles pertaining to the harmonious construction of statutes:

a. It is the duty of the courts to avoid a head-on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them;

b. The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them;

c. When there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of harmonious construction;

d. The courts have also to keep in mind that an interpretation which reduces one of the provisions to a "dead letter" or "useless lumber" is not harmonious construction; and

e. To harmonize is not to destroy any statutory provision or to render it otiose.

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150 **CIT v. Hindustan Bulk Carriers, (2003) 3 SCC 57**
151 (1997) 1 SCC 373

161. In **Kandla Export Corporation v. OCI Corporation**[152], the issue before this Court was whether an appeal which was not maintainable under Section 50 of the Arbitration Act was nonetheless maintainable under Section 13(1) of the Commercial Courts Act 2015. Section 50 the Arbitration Act provides that no appeal shall lie from the order refusing to: (a) refer the parties to arbitration under section 45; and (b) enforce a foreign award under section 48. Section 13(1) of the Commercial Courts Act, 2015 allows any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court to file an appeal before the Commercial Appellate Division of that High Court.

162. This Court referred to the objects of both the statutes to observe that the Arbitration Act is meant to effectuate a speedy resolution of disputes between parties, while the Commercial Courts Act 2015 is for the speedy resolution of commercial disputes involving significant amounts of money. It was held that the provision of another appeal under Section 13(1) of the Commercial Courts Act 2015 in matters of foreign arbitration would be against the object of speedy enforcement of foreign arbitral awards. Therefore, this Court held that any construction of Section 13 of the Commercial Courts Act, 2015 which would lead to further delay, instead of an expeditious enforcement of a foreign award must be eschewed:

> "Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonized by giving effect to the special statute i.e. the Arbitration Act, vis-à-vis the more general statute, namely, the Commercial Courts Act, being left to operate in spheres other than arbitration."

163. In **Silpi Industries v. Kerala State Road Transport Corporation,**[153] the issue before this Court was whether a counter-claim was maintainable in arbitration proceedings initiated under Section 18(3) of the Micro, Small and Medium Enterprises Development Act 2006. Section 18(3) provides that where the conciliation proceedings initiated by any party are not successful and stand terminated without any settlement between the parties, the Micro and Small Enterprises Facilitation Council shall either take

152 (2018) 14 SCC 715
153 2021 SCC OnLine SC 439

up the dispute for arbitration or refer it to any institution or centre. The said provision further states that the provisions of the Arbitration Act shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in Section 7(1) of the Arbitration Act.

164. This Court noted that Section 23(2A) of the Arbitration Act gives the respondent a right to submit a counter-claim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal. It was held that since Section 18(3) of the MSME Act expressly provides that proceedings initiated under Section 18(3) shall be carried out as if they were in pursuance of an arbitration agreement under Section 7(1) of the Arbitration Act, the right to make a counter-claim before the statutory authorities exists under the MSMED Act. In this way, the two statutes were harmonized.

165. In the present reference, the challenge before this Court is to harmonize the provisions of the Arbitration Act and the Stamp Act. The object of the Arbitration Act is to *inter alia* ensure an efficacious process of arbitration and minimize the supervisory role of courts in the arbitral process. On the other hand, the object of the Stamp Act is to secure revenue for state. It is a cardinal principle of interpretation of statutes that provisions contained in two statutes must be, if possible, interpreted in a harmonious manner to give full effect to both the statutes.[154] In providing a harmonious interpretation, this Court has to be cognizant of the fact that it does not defeat the purpose of the statutes or render them ineffective.[155] The challenge, therefore, before this Court is to preserve the workability and efficacy of both the Arbitration Act and the Stamp Act.[156]

i. The Arbitration Act will have primacy with respect to arbitration agreements

166. As discussed in the preceding segments, the Arbitration Act is a legislation enacted to *inter alia* consolidate the law relating to arbitration in India. It will have primacy over the Stamp Act and the Contract Act in relation to arbitration agreements for multiple reasons.

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154 **Jagdish Singh v. Lt. Governor, Delhi, (1997) 4 SCC 435**
155 **State of Tamil Nadu v. M K Kandaswami, (1975) 4 SCC 745**
156 **CIT v. Hindustan Bulk Carriers, (2003) 3 SCC 57**

a. The Arbitration Act is a special law and the Indian Contract Act and the Stamp Act are general laws

167. It is trite law that a general law must give way to a special law. This rule of construction stems from the doctrine *generalia specialibus non derogant.* In **LIC v. D.J. Bahadur,**[157] this Court held:

> "52. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law."

In Sundaram Finance Ltd. v. T. Thankam,[158] this Court held:

> "13. … Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law—*generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."

169. The following position of law emerges from these precedents:

a. The principal subject-matter as well as the particular perspective or focus illuminate the path to ascertain whether a law is a general law or a special law; and

b. The court should examine whether its jurisdiction has been ousted in terms of the procedure prescribed by a special law.

170. To determine which of the three statutes that this Court is faced with is a special law, it is necessary to first refer to their subject-matter:

157 (1981) 1 SCC 315
158 (2015) 14 SCC 444

a. The Stamp Act is a law governing the payment of stamp-duty for all manner of instruments. Schedule I to the Stamp Act sets out various types instruments which fall within the ambit of the said legislation;

b. The Contract Act, as the name suggests, sets out the rules in relation to contracts in general. An arbitration agreement is one of the many different types of contracts to which it is applicable; and

c. The Arbitration Act contains the law relating to domestic arbitration, international commercial arbitration, the enforcement of foreign arbitral awards, and conciliation.

171. Second, the "particular perspective" of this case pertains to whether an unstamped arbitration agreement is rendered unenforceable pending the payment of stamp-duty so as to interpose a bar on the referral court to refer parties to arbitration. The issue is not whether all agreements are rendered unenforceable under the provisions of the Stamp Act but whether arbitration agreements in particular are unenforceable.

172. The Arbitration Act is a special law in the context of this case because it governs the law on arbitration, including arbitration agreements – Section 2(1)(b) and Section 7 of this statute define an arbitration agreement. In contrast, the Stamp Act defines 'instruments'[159] as a whole and the Contract Act defines 'agreements'[160] and 'contracts.'[161]

173. It is not only the definition of 'arbitration agreement' but also the other provisions of the Arbitration Act and the purpose for which it was enacted that makes it a special law. As observed by this Court in **Bhaven Construction.** (supra), "*the Arbitration Act is a code in itself*."[162] It provides for a detailed mechanism by which arbitration may be conducted, with a view to ensuring its success as a speedy and efficacious alternative to the courts. The Statements of Objects and Reasons of the Arbitration Act

159 Section 2(14), Stamp Act
160 Section 2(e), Contract Act
161 Section 2(h), Contract Act
162 Ibid at paragraph 12

records that the main objective of this law was to **comprehensively** cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation.

b. Section 5 of the Arbitration Act

174. In the above segments, we have dealt with the scope of Section 5 of the Arbitration Act. It restricts the extent of judicial intervention in various matters governed by Part I of the Arbitration Act.[163] The non-obstante clause in this provision is of particular significance. It indicates that the rule in Section 5 (and consequently, the provisions of the Arbitration Act) must take precedence over any other law for the time being in force. Any intervention by the courts (including impounding an agreement in which an arbitration clause is contained) is, therefore, permitted only if the Arbitration Act provides for such a step, which it does not. Sections 33 and 35 cannot be allowed to operate in proceedings under Section 11 (or Section 8 as the case may be), in view of the non-obstante clause in Section 5. This being the case, we are unable to agree with the decision in **N N Global 2** (supra), that the court in a proceeding under section 11 must give effect to Sections 33 and 35 of the Stamp Act despite the interdict in Section 5. The court held:

> "129. Section 5 no doubt provides for a non obstante clause. It provides against judicial interference except as provided in the Act. The non obstante clause purports to proclaim so despite the presence of any law which may provide for interference otherwise. However, this does not mean that the operation of the Stamp Act, in particular, Sections 33 and 35 would not have any play. We are of the clear view that the purport of Section 5 is not to take away the effect 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 of the Act."

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163 **CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd., (2003) 12 SCC 140; Empire Jute Co. Ltd. v. Jute Corpn. of India Ltd., (2007) 14 SCC 680; Associate Builders v. DDA, (2015) 3 SCC 49; Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75**

175. Section 5 is effectively rendered otiose by the interpretation given to it in **N N Global 2** (supra). The court failed to provide a reason for holding that Section 5 of the Arbitration Act does not have the effect of excluding the operation of Sections 33 and 35 of the Stamp Act in proceedings under Section 11 of the Arbitration Act. The non-obstante clause in Section 5 does precisely this. In addition to the effect of the non-obstante clause, the Arbitration Act is a special law. We must also be cognizant of the fact that one of objectives of the Arbitration Act was to minimise the supervisory role of courts in the arbitral process.[164]

176. In **Hameed Joharan v. Abdul Salam,**[165] this Court made the following observations on the interplay between the Stamp Act and the Limitation Act 1963:

> "38. … The intent of the legislature in engrafting the Limitation Act shall have to be given its proper weightage. Absurdity cannot be the outcome of interpretation by a court order and wherever there is even a possibility of such absurdity, it would be a plain exercise of judicial power to repel the same rather than encouraging it. The whole purport of the Indian Stamp Act is to make available certain dues and to collect revenue but it does not mean and imply overriding the effect over another statute operating in a completely different sphere."

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

177. 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. This provision stands in contrast to Section 33(2) of the Stamp Act which also uses the word "examine." Section 33(2) requires the person before whom an instrument is produced, to examine whether it is stamped with a stamp of the value and description required by the law when such instrument was executed or first executed.

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164 Statements of Objects and Reasons, Arbitration Act
165 (2001) 7 SCC 573

Although Parliament was aware of the mandate of Section 33(2), it did not require the court acting under Section 11 to also undertake the examination required by Section 33(2).

ii. Harmonious construction of the three statutes under consideration

a. The effect of the competence-competence doctrine

178. In **A. Ayyasamy v. A. Paramasivam,**[166] a two-judge Bench of this Court of which one of us, DY Chandrachud, J, was a part emphasized that arbitration must provide a "one-stop forum" for the resolution of disputes and held that (a) Courts must give effect to the commercial understanding of parties to arbitration agreements that arbitration is efficacious; and (b) This can be done by minimising judicial intervention:

> "48. The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. **Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process.** The commercial understanding is reflected in the terms of the agreement between the parties. **The duty of the court is to impart to that commercial understanding a sense of business efficacy.**
>
> …
>
> 53. … Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. **Minimising the intervention of courts is again a recognition of the same principle."**
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> **(emphasis supplied)**

179. The decision of the majority in **N N Global 2** (supra) assumes that the inadmissibility of the document in evidence renders it unenforceable.

166 (2016) 10 SCC 386

However, the effect of the principle of *competence-competence* is that the arbitral tribunal is vested with the power and authority to determine its enforceability. The question of enforceability survives, pending the curing of the defect which renders the instrument inadmissible. By appointing a tribunal or its members, this Court (or the High Courts, as the case may be) 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. The arbitral tribunal will answer precisely these questions.

180. In terms of Section 10 of the Contract Act, agreements are contracts if they are:

a. Made by the free consent of parties competent to contract;

b. For a lawful consideration;

c. With a lawful object; and

d. Not expressly declared to be void under its provisions.

181. These requirements do not affect any law in force and not expressly repealed, which:[167]

a. Requires contracts to be made in writing;

b. Requires contracts to be made in the presence of witnesses; or

c. Laws relating to the registration of documents.

182. In addition, Section 7 of the Arbitration Act specifies the requirements for the existence of an arbitration agreement.

183. It is the arbitral tribunal and not the court which may test whether the requirements of a valid contract and a valid arbitration agreement are met. If the tribunal finds that these conditions are not met, it will decline to hear the dispute any further. If it finds that a valid arbitration agreement exists, it may assess whether the underlying agreement is a valid contract.

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167 Section 10, Contract Act

184. By enacting Section 16 of the Arbitration Act, Parliament has (in a manner of speaking) permitted an agreement to arbitrate to be **preliminarily** enforced even if it is only an agreement. After parties have been referred to arbitration under Section 8 of the Arbitration Act or after the appointment of arbitrators under Section 11 of the Arbitration Act the arbitral tribunal will have jurisdiction to determine all questions and issues in dispute between the parties. The legitimate concerns of the revenue in the realization of stamp duty are not defeated because the arbitral tribunal has the jurisdiction to act in pursuance of the provisions of the Stamp Act.

185. The corollary of the doctrine of *competence-competence* is that courts may only examine whether an arbitration agreement exists on the basis of the *prima facie* standard of review. The nature of objections to the jurisdiction of an arbitral tribunal on the basis that stamp-duty has not been paid or is inadequate is such as cannot be decided on a *prima facie* basis. Objections of this kind will require a detailed consideration of evidence and submissions and a finding as to the law as well as the facts. 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.

186. The purpose of vesting courts with certain powers under Sections 8 and 11 of the Arbitration Act is to facilitate and enable arbitration as well as to ensure that parties comply with arbitration agreements. The disputes which have arisen between them remain the domain of the arbitral tribunal (subject to the scope of its jurisdiction as defined by the arbitration clause). The exercise of the jurisdiction of the courts of the country over the substantive dispute between the parties is only possible at two stages:

a. If an application for interim measures is filed under Section 9 of the Arbitration Act; or

b. If the award is challenged under Section 34.

Issues which concern the payment of stamp-duty fall within the remit of the arbitral tribunal. The discussion in the preceding segments also make it evident that courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9.

187. One of the intervenors, the Singapore International Arbitration Centre, submitted that the decision in **N N Global 2** (supra) reversed the *prima facie* standard by observing that the court may refer a dispute to the arbitral tribunal if objections as to its being duly stamped are "*on the face of it, wholly without foundation.*" We agree with this submission.

188. Once the arbitral tribunal has been appointed, it will act in accordance with law and proceed to impound the agreement under Section 33 of the Stamp Act if it sees fit to do so. It has the authority to receive evidence by consent of the parties, in terms of Section 35. The procedure under Section 35 may be followed thereafter. In this manner, the *competence-competence* doctrine is given life and arbitration proceedings can continue to remain a faster alternative to suits before the trial courts or other, similar actions.

b. The effect of the word "shall" in Sections 33 and 35 of the Stamp Act

189. Sections 33 and 35 of the Stamp Act use the word "shall." While this ordinarily indicates that the provision is mandatory, it may be read as directory. In **Sainik Motors v. State of Rajasthan,**[168] this Court held:

> "The word 'shall' is ordinarily mandatory, but it is sometimes not so interpreted if the context or the intention otherwise demands."

190. In **State of U.P. v. Babu Ram Upadhya,**[169] this Court held that the principles for the construction of statutes which used the mandatory word "shall" were as follows:

> "29. The relevant rules of interpretation may be briefly stated thus : When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the

168 1961 SCC OnLine SC 15
169 1960 SCC OnLine SC 5

impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

191. This Court must therefore interpret Sections 33 and 35 to assess whether they are mandatory in relation to a court presiding over proceedings under Section 8 or Section 11 by examining:

a. Whether the context indicates that the provision is directory;

b. The scope of the statute;

c. The nature and design of the statute;

d. The consequences which would follow from construing it one way or another;

e. The impact of other provisions;

f. The consequences of non-compliance; and

g. Whether the object of the legislation will be furthered or destroyed.

192. The decisions adverted to in the preceding paragraphs were delivered in the context of a single provision in a single statute. Additional factors must be considered in cases such as the present one, where multiple statutes appear to operate in relation to a single issue (or a single agreement such as the arbitration agreement in the present case). To this list of considerations which must animate the court's evaluation of whether a provision is mandatory or directory, we would add that the scope, nature, and design of all the statutes which appear to operate simultaneously must be considered. Their interplay and the intention of the legislature must be evaluated in the context of all such statutes. The question of whether the object(s) of the applicable legislation(s) will be furthered or destroyed must also be considered in view of all such statutes.

c. The object of the Stamp Act is preserved

193. In **N N Global 2** (supra), the majority judgment observed as follows:

> "92. While the Stamp Act is a fiscal enactment intended to raise revenue, it is a law, which is meant to have teeth. The point of time, at which the stamp duty is to be paid is expressly provided for in Section 17 of the Stamp Act. There cannot be any gainsaying, that call it a fiscal enactment, it is intended that it is to be implemented with full vigour. The duty of a Court must be to adopt an interpretation which results in the enforcement of the law, rather than allowing the law to be flouted with impunity. Once this principle is borne in mind, the task of the Court becomes less difficult."

194. The interpretation accorded to the Stamp Act by this Court in the present judgment does not allow the law to be flouted. The arbitral tribunal continues to be bound by the provisions of the Stamp Act, including those relating to its impounding and admissibility. The interpretation of the law in this judgment ensures that the provisions of the Arbitration Act are given effect to while not detracting from the purpose of the Stamp Act.

195. The interests of revenue are not jeopardised in any manner because the duty chargeable must be paid before the agreement in question is rendered admissible and the *lis* between the parties adjudicated. The question is at which stage the agreement would be impounded and not whether it would be impounded at all. The courts are not abdicating their duty but are instead giving effect to:

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

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 delay the adjudication of the *lis*.

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

196. The decision of the Constitution Bench in **N N Global 2** (supra) gives effect exclusively to the purpose of Stamp Act. It prioritises the objective of the Stamp Act, i.e., to collect revenue at the cost of the Arbitration Act. As discussed previously, the purpose of the Arbitration Act is to ensure that a speedy and efficacious alternative dispute resolution system is available to parties both commercial and otherwise. This purpose is in danger of being undermined by the interpretation accorded to the Stamp Act in **N N Global 2** (supra). 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 will delay the commencement of arbitration. It is a well-known fact that courts are burdened with innumerable cases on their docket. This has the inevitable consequence of delaying the speed at which each case progresses. Arbitral tribunals, on the other hand, deal with a smaller volume of cases. They are able to dedicate extended periods of time to the adjudication of a single case before them. If an agreement is impounded by the arbitral tribunal in a particular case, it is far likelier that the process of payment of stamp-duty and a penalty (if any) and the other procedures under the Stamp Act are completed at a quicker pace than before courts.

J*. SMS Tea Estates and Garware Wall Ropes were wrongly decided

i. SMS Tea Estates

197. The genesis of the present issue stems from a two-Judge Bench decision of this Court in **SMS Tea Estates** (supra). In that case, the appellant and respondent executed a lease deed with respect to two tea estates in favor of the appellant. The lease deed provided for the settlement of disputes between the parties by arbitration. When the appellant sought to invoke the arbitration clause, the respondent opposed the same on the ground that the lease deed was unregistered and not duly stamped, and was therefore invalid, unenforceable, and not binding. The High Court dismissed the appellant's application for the appointment of an arbitrator. On appeal, *inter alia* the following issues came for consideration before this Court: first, whether an arbitration agreement contained in an unregistered (but compulsorily registerable) instrument is valid and enforceable; and second, whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable.

198. With regard to the first issue, the Court analysed Section 49 of the Registration Act. Section 49 of the Registration Act provides that an

* Ed. Note: PART J

unregistered document cannot be received as evidence of any transaction affecting such property or conferring such power unless it has been registered. However, the proviso to Section 49 provides that an unregistered instrument can be used as evidence of any collateral transaction not required to be effected by such instrument. In view of the aforesaid provision, this Court held that an arbitration agreement contained in an unregistered instrument is a collateral term relating to the resolution of disputes, which was unrelated to the performance of the contract. Therefore, it was held that an arbitration agreement contained in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

199. With regard to the second issue, it was noted that Section 35 of the Stamp Act does not contain a proviso like Section 49 of the Registration Act enabling the unstamped instrument to be used for a collateral purpose. Thereafter, this Court observed that Section 33 casts a duty upon every court, as also an arbitrator, before whom an unregistered instrument chargeable with stamp duty is produced to examine the instrument in order to ascertain whether it is duly stamped. If the Court or arbitrator comes to the conclusion that the instrument is not duly stamped, it has to necessarily impound the document. The Court laid down the procedure to be adopted when an arbitration is contained in a document which is not duly stamped in the following terms:

a. The Court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/ document is duly stamped and whether it is an instrument which is compulsorily registerable.

b. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

c. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before

> the Collector (as contemplated in Section 35 of Section 49 of the Stamp Act), and the defect with reference to deficit duty is cured, the court may treat the document as duly stamped.

200. **SMS Tea Estates** (supra) allowed the courts to impound the document under Section 33 of the Stamp Act at the Section 11 stage. Thus, the courts were mandated to intervene at the pre-arbitral stage before the arbitral tribunal could assume jurisdiction. **SMS Tea Estates** (supra) was decided in 2011. At that time, **Patel Engineering** (supra) and **Boghara Polyfab** (supra) held the field, which held that the referral courts had wide powers to decide a large number of preliminary issues, including the existence and validity of arbitration agreements. As discussed in the segments above, the Law Commission of India recommended amendments to Sections 8 and 11 with a view to restrict the scope of the judicial intervention "*to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void.*"

201. Pursuant to the recommendations of the Law Commission of India, Parliament incorporated Section 11(6A) which clarified that the scope of judicial intervention was limited to the examination of the existence of an arbitration agreement. The legislative note on Clause 11(6A) states that "*[s]ub-section (6A) is inserted to provide that the Supreme Court or the High Court while considering applications under sub-section (4) to (6) shall confine to the examination of an arbitration agreement."* More importantly, the said provision contains a non-obstante clause which reads: *"notwithstanding any judgment, decree or order of any Court."*

202. In **Emmar MGF Land Ltd. v. Aftab Singh,**[170] this Court was examining the purport of Section 8 which included a similar non-obstante clause as contained in Section 11(6A). This Court explained the purpose of the non-obstante clause contained in Section 8 in the following terms:

> "52. […] The words "notwithstanding any judgment, decree or order of the Supreme Court or any court" added by amendment in Section 8 were with intent to minimise the intervention of judicial authority in the context of arbitration agreement. As per the amended Section 8(1),

170 (2019) 12 SCC 751

> the judicial authority has only to consider the question "whether the parties have a valid arbitration agreement?" The Court cannot refuse to refer the parties to arbitration "unless it finds that prima facie no valid arbitration agreement exists". The amended provision, thus, limits the intervention by judicial authority to only one aspect i.e. refusal by judicial authority to refer is confined to only one aspect, when it finds that prima facie no valid arbitration agreement exists."

203. In **Emmar MGF Land** (supra), this Court clarified that the expression "notwithstanding any judgment" referred to in Section 8(1) relates to those judicial precedents which explained the discretion and power of judicial authority to examine various aspects while exercising powers under Section 8. In a similar vein, Section 11(6A) intended to minimize judicial interference to the examination of the existence of an arbitration agreement. Accordingly, the non-obstante clause contained in Section 11(6A) pertains to those judicial precedents which delved into the discretion and power of referral courts to intervene and examine the existence and validity of an arbitration agreement at the Section 11 stage. This includes **SMS Tea Estates** (supra) considering the fact that it mandated the referral court to judicially intervene in the arbitration process by impounding the unstamped instrument containing the arbitration agreement. Therefore, we hold that Section 11(6A) also legislatively altered the basis of **SMS Tea Estates** (supra) to the extent that it dealt with judicial intervention at the Section 11 stage.

ii. Garware Wall Ropes

204. In **Garware Wall Ropes** (supra), a Bench of two Judges of this Court was called upon to decide the effect of an arbitration clause contained in a contract which requires to be stamped. Since **SMS Tea Estates** (supra) was decided before the introduction of Section 11(6A) of the Arbitration Act, another pertinent issue before this Court was whether introduction of this provision removed the basis for the decision in **SMS Tea Estates** (supra) to the extent that an unstamped instrument could be impounded not by the referral court under Section 11 but by the arbitrator. This Court held that the referral court under Section 11(6A) would be bound by the mandatory provisions of the Stamp Act to examine and impound the unstamped instrument. It was further observed that since the Stamp Act applied to the

instrument as a whole, it was not possible to bifurcate the arbitration clause contained in such instrument and give it an independent existence.

205. This Court in **Garware Wall Ropes** (supra) further analysed the purport of the word "existence" contained in Section 11 of the Arbitration Act. It was held that an arbitration agreement contained in an unstamped instrument would not exist in law. The relevant paragraph is extracted below:

> "22. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of section 11(6-A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that SMS Tea Estates has, in no manner, been touched by the amendment of Section 11(6-A)."

206. Further, this Court noted Section 11(13) of the Arbitration Act which provides a timeline of sixty days for disposal of any application for appointment of an arbitrator. In view of Section 11(13), this Court held that the provisions of the Stamp Act and the Arbitration Act need to be harmoniously construed. Accordingly, the Court held that once the High Court impounds an unstamped instrument at the Section 11 stage, it shall hand it over to the relevant authority under the Maharashtra Stamp Act to be decided within a period of forty-five days from which such authority receives the instrument. Once the stamp duty and penalty was paid, the High Court could proceed expeditiously to hear and dispose of the Section 11 application.

207. The conclusions of this Court in **Garware Wall Ropes** (supra) can be summarized as follows: first, there was no legislative intent to overrule **SMS Tea Estates** (supra) because neither the Statement of Objects and Reasons of the 2015 Amendment Act nor the Law Commission of India Report, 2014 mentions it; second, the referral court at the Section 11 stage is only giving effect to the provisions of the Stamp Act and not deciding any preliminary issues between the parties; third, the separability presumption could only be applied for limited purposes. Since the Stamp Act applies to the instrument as a whole, it is not possible to bifurcate the arbitration

clause contained in such agreement; and fourth, an arbitration clause in an unstamped contract would not exist, leading to the conclusion that Section 11(6A) has not overruled **SMS Tea Estates** (supra).

208. The Statement of Objects and Reasons of the 2015 Amendment Act are as follows:

> "(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days.
>
> "(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues."

209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and **not other issues"**. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a time-bound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. Therefore, even though the Law Commission of India Report or the Statement of Objects and Reasons of the 2015 Amendment Act do not specifically refer to **SMS Tea Estates** (supra), it nevertheless does not make any difference to the position of law as has been set out above.

210. **Garware Wall Ropes** (supra) relied on **Patel Engineering** (supra) to observe that "it is difficult to accede to the argument made by the learned counsel on behalf of the respondent that Section 16 makes it clear that an arbitration agreement has an independent existence of its own, and must be applied while deciding an application under Section 11 of the 1996 Act." In view of this observation, it was held that the separability presumption cannot be applied in case of an unstamped instrument because the Stamp Act applies to the instrument as a whole. As discussed in the preceding segments, the separability presumption ensures the validity of an arbitration

agreement notwithstanding the invalidity, illegality, or non-existence of the underlying contract.

211. The scope of authority of an arbitral tribunal under Section 16 is wide because it can deal with issues pertaining to the existence and validity of an arbitration agreement. In his dissenting opinion in **NN Global 2** (supra), Justice Roy correctly observes that since *"[s]ection 16 specifically deals with both existence and validity whereas Section 11 only deals with existence, the former should be given more weight."* This observation comports with the stated goal of the Arbitration Act to minimize the supervisory role of courts in the arbitral process. Post the 2015 Amendment Act the referral courts are only required to *prima facie* determine the existence or validity of an arbitration agreement. The basis for such *prima facie* determination lies in the fact that the arbitral tribunal will later have the competence to rule on the issue of existence and validity of the arbitration agreement. Therefore, the separability presumption applies at the referral stage.

212. In **Intercontinental Hotels Group (India) (P) Ltd v. Waterline Hotels (P) Ltd.,**[171] the issue before a Bench of three Judges of this Court in a Section 11 application was: whether the court can proceed to appoint an arbitrator when the underlying contract is incorrectly stamped. In that case, it was observed that although *"stamp duty has been paid, whether it be insufficient or appropriate is a question that may be answered at a later stage as this Court cannot review or go into this aspect under Section 11(6)."*

213. The discussion in preceding segments has held that non-stamping or insufficient stamping of an instrument does not render it invalid or non-existent. Therefore, paragraphs 22 and 29 of **Garware Wall Ropes** (supra), which held that an arbitration agreement contained in an unstamped or insufficiently stamped contract would be non-existent in law, does not set forth the correct position of law.

K*. The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996

214. In **N N Global 2** (supra), the majority considered the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996.[172] Para 2 of the 1996 Scheme reads as follows:

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* Ed. Note: PART K

171 (2022) 7 SCC 662

172 "1996 Scheme"

> "2. Submission of request.- The request to the Chief Justice under sub-section (4) or sub-section (5) or sub-section (6) of section 11 shall be made in writing and shall be accompanied by-
>
> (a) the original arbitration agreement or a duly certified copy thereof;
>
> The 1996 Scheme provides that an application under Section 11 for the appointment of an arbitrator shall be accompanied by the original arbitration agreement or a duly certified copy.

215. In **SMS Tea Estates** (supra), it was observed that a certified copy of the agreement/ contract/ instrument containing the arbitration clause should disclose the stamp duty that has been paid on the original. **N N Global 2** (supra) has endorsed this view. In that case, this Court further referred to paragraph 5 of the 1996 Scheme which allows the Chief Justice or the person or the institution designated by him under para 3 to seek further information or clarification from the party making request under the Scheme. Consequently, it was held that a Judge dealing with an application under Section 11 could seek further clarification or information with respect to the payment of stamp duty to satisfy the requirements as laid down in **SMS Tea Estates** (supra).

216. **N N Global 2** (supra) also refers to the two-Judge Bench decision of this Court in **Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao**[173] where it was held that Section 35 of the Stamp Act renders any secondary evidence of an unstamped or insufficiently stamped instrument inadmissible in evidence. It was further held that any secondary evidence of such instrument cannot be acted upon in terms of Section 35. Subsequently, a three-Judge Bench of this Court in **Hariom Agrawal v. Prakash Chand Malviya**[174] affirmed **Jupudi Kesava Rao** (supra) by observing that Sections 33 and 35 of the Stamp Act are not concerned with any copy of the instrument. The relevant paragraph is extracted below:

> **"10.** It is clear from the decisions of this Court and a plain reading of Sections 33, 35 and 2(14) of the Act that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument it can be taken in

173 (1971) 1 SCC 545
174 (2007) 8 SCC 514

evidence under Section 35 of the Stamp Act. Sections 33 or 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the document which is an instrument within the meaning of Section 2(14). There is no scope for the inclusion of the copy of the document for the purposes of the Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this cannot be admitted as secondary evidence under the Stamp Act, 1899."

217. An arbitration agreement or its certified copy is not rendered void or unenforceable because it is unstamped or insufficiently stamped. We accordingly clarify that the position of law laid down in **Jupudi Kesava Rao** (supra) and **Hariom Agrawal** (supra) cannot constrain a referral court at Section 11 stage (as well as Section 8 stage) from acting upon a certified copy of an arbitration agreement and referring the parties to arbitral tribunal.

218. The discussion in preceding segments indicates that the referral court at Section 11 stage should not examine or impound an unstamped or insufficiently stamped instrument, but rather leave it for the determination by the arbitral tribunal. When a party produces an arbitration agreement or its certified copy, the referral court only has to examine whether an arbitration agreement exists in terms of Section 7 of the Arbitration Act. The referral court under Section 11 is not required to examine whether a certified copy of the agreement/ instrument/ contract discloses the fact of payment of stamp duty on the original. Accordingly, we hold that the holding of this Court in **SMS Tea Estate** (supra), as reiterated in **N N Global 2** (supra), is no longer valid in law.

L*. Vidya Drolia does not deal with the issue of stamping

219. The genesis of these proceedings lies in **N N Global 1** (supra) doubting the correctness of the finding in **Vidya Drolia** (supra). **N N Global 1** (supra) doubted the correctness of the view taken in paragraphs 146 and 147 of the co-ordinate Bench in **Vidya Drolia** (supra), where the three-Judge Bench relied on **Garware Wall Ropes** (supra).

220. In paragraph 146, this Court was dealing with the issue of whether the expression "existence" as contained in Section 11(6A) also presupposes the validity of an arbitration agreement. The Court answered this proposition by observing that an arbitration agreement "exists" only

* Ed. Note: PART L

when it is valid and enforceable. Accordingly, it was held that existence of an arbitration agreement means an arbitration agreement which satisfies the requirements of both the Arbitration Act and the Contract Act. In the succeeding paragraphs, this Court sought to reinforce its conclusion. In the process, it referred to various precedents of this Court including **Garware Wall Ropes** (supra).

221. Paragraph 147.1 clarifies that it is referring to **Garware Wall Ropes** (supra) only for the purposes of establishing the correlation between existence and validity of an arbitration agreement. The relevant paragraph of **Garware Wall Ropes** (supra) refers to **United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd.**[175] in which the arbitration clause was triggered only if one of the parties admitted or accepted its liability. In that case, since the relevant party (the insurer) did not accept its liability, the court held that the arbitration clause did not exist in law although it existed in fact. **Garware Wall Ropes** (supra) relied on **Hyundai Engg.** (supra) to hold, albeit incorrectly, that an unstamped agreement would not exist as a matter of law until the underlying instrument is duly stamped. We are of the opinion that **Vidya Drolia** (supra) did not, in any manner, determine the effect of an unstamped or insufficiently stamped underlying contract on an arbitration agreement. It referred to **Garware Wall Ropes** (supra) only to buttress its interpretation that an arbitration agreement does not exist if it is invalid or illegal, which has been clarified in the above segments of this judgment.

222. Significantly, a two-Judge Bench of this Court in **Career Institute Educational Society v. Om Shree Thakurji Educational Society**[176] clarified that **Vidya Drolia** (supra) referred to **Garware Wall Ropes** (supra) only "*to interpret the word 'existence', and whether an 'invalid' arbitration agreement can be said to exist*" The two-Judge Bench further clarified that **Vidya Drolia** (supra) did not decide the issue of the effect of an unstamped or insufficiently stamped underlying contract on the arbitration clause. The relevant extract is as follows:

> "3. The judgement in Vidya Drolia v. Durga Trading Corporation did not examine and decide the issue of effect of unstamped or under-

175 (2018) 17 SCC 607
176 2023 SCC OnLine SC 586

stamped underlying contract on the arbitration agreement. As this issue and question has not been decided in Vidya Drolia (supra), the decision is not a precedent on this question."

223. We agree with these observations in **Career Institute Educational Society** (supra). **Vidya Drolia** (supra) did not deal with the issue of the effect of an unstamped or insufficiently stamped instrument on the existence or validity of an arbitration agreement. Therefore, the reasoning in **Vidya Drolia** (supra) does not lead to the conclusion that **Garware Wall Ropes** (supra) was rightly decided either on the aspect of examination and impounding of unstamped or insufficiently stamped instrument with respect to arbitration proceedings, or the validity of on arbitration agreement contained in an unstamped or insufficiently stamped underlying contract.

M*. Conclusions

224. The conclusions reached in this judgment are summarised below:

a. 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;

b. Non-stamping or inadequate stamping is a curable defect;

c. 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;

d. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal; and

e. The decision in **NN Global 2** (supra) and **SMS Tea Estates** (supra) are overruled. Paragraphs 22 and 29 of **Garware Wall Ropes** (supra) are overruled to that extent.

225. The Registry is directed to take administrative directions from Hon'ble Chief Justice of India for placing the matters before an appropriate Bench.

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* Ed. Note: PART M

SANJIV KHANNA, J.

I respectfully agree with the view expressed by the Hon'ble the Chief Justice of India Dr. D.Y. Chandrachud in his elaborate exposition of the different contours which arise for consideration in the present reference. Complementing the same, I would like to provide additional justifications for the final conclusion,viz., unstamped or insufficiently stamped instruments inadmissible in evidence in terms of Section 35 of the Indian Stamp Act, 1899[1], are not rendered void and void *ab initio*; 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 8[2] or 11[3] of the Arbitration

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1 For short, "the Stamp Act"

2 **8. Power to refer parties to arbitration where there is an arbitration agreement.—** (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that court.
(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

3 **11. Appointment of arbitrators**.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
(4) If the appointment procedure in sub-section (3) applies and—
(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a

party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, different High Courts or their designates, the High Court or its designate to whom the request has been first made] under the relevant sub-section shall alone be competent

and Conciliation Act, 1996[4]; and an objection as to insufficient stamping of the underlying agreement can 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.***[5] should be overruled.

2. The judgment authored by Hon'ble the Chief Justice, under the heading 'D. Indian Stamp Act, 1899', gives an overall view of the Stamp Act, and the procedures it prescribes. It also refers to Sections 33, 35and 36 of the Stamp Act, which I would like to elaborate on and elucidate.

3. Sections 33 and 35 of the Stamp Act are reproduced for reference:

"**33. Examination and impounding of instruments.—**(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his

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to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.

4 For short, "the Arbitration Act".

5 (2023) 7 SCC 1.

functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed:

Provided that—

(*a*) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(*b*) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,—

(*a*) the State Government may determine what offices shall be deemed to be public offices; and

(*b*) the State Government may determine who shall be deemed to be persons in charge of public offices."

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35.Instruments not duly stamped inadmissible in evidence, etc.— No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instruments is duly stamped:

Provided that—

(*a*) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty,

together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(*b*) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(*c*) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(*d*) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(*e*) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act."

4. Section 33 of the Stamp Act is cautiously worded,to not over expand its ambit and scope. The section applies on production of an instrument before a person who by law or consent of the parties has the authority to receive evidence.[6] It also applies when an instrument is produced before a person in charge of a public office. Production of the instrument must be during the course of performance of functions by such person orpublic officer. The proviso states that Section 33 shall not be deemed to require any Magistrate or Judge of a criminal court to examine or impound an instrument if he does not think fit to do so, except in proceedings 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).Police officers are not public officers under Section 33 of the Stamp Act.

6 Hereinafter also referred to as 'such person'.

5. Sub-section (3) to Section 33 states that in case of doubt, the State Government may determine which offices shall be deemed to be public offices and who shall be deemed to be persons in charge of the public offices.

6. Sub-section (2) to Section 33 states that for the purpose of sub-section (1), such person or public officer shall examine the instrument so chargeable and so produced or coming before him,in order to ascertain whether it is duly stamped as per the law in force in India when the instrument was executed or first executed.

7. Section 35 states that an instrument not duly stamped and chargeable with duty shall not be admitted in evidence by any person having by law or by consent of the parties the authority to receive evidence. The words "for any purpose" mean that the instrument cannot be relied upon for a collateral purpose either. Further, the instrument shall not be acted upon, registered or authenticated by such person or by any public officer, unless it is duly stamped. The words 'acted upon' are with reference to the acts or the proceedings before such officer or public officer, as the case may be.

8. Section 35 permits admission of an unstamped or under-stamped instrument after the same instrument is duly stamped. Proviso (a) requires payment of the chargeable duty and penalty, before an insufficiently stamped instrument is admitted in evidence, or is acted upon, registered or authenticated.

9. Section 40(1)(b) of the Stamp Act provides for payment of proper duty if the instrument impounded is not duly stamped. Section 42(1) provides for certifying that proper duty has been paid on the impounded instrument. Sub-section (2) of Section 42 provides that after certification the instrument shall be admissible in evidence, and may be registered, acted upon and authenticated as if it has been duly stamped.

10. Sections 33 and 35donot apply when an instrument is produced or is acted upon by the parties themselves, or by a person who does not have authority by law or by consent of the parties to receive evidence, or a person who is not a public officer. Sections 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.

11. The negative stipulations in Sections 33 and 35 are specific, *albeit* not so absolute as to make the instrument invalid in law. A "void *ab initio*" instrument, which is stillborn,has no corporeality in the eyes of law. It cannot confer or give rights, or create obligations. However, an instrument which is "inadmissible" exists in law, *albeit* 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. As rightly observed by Hon'ble the Chief Justice, Section 35 deals with admissibility etc. of an instrument and not invalidity.

12. Section 36 of the Stamp Act refers to the situation where the admission of an instrument is not to be questioned, and reads:

> "**36. Admission of instrument where not to be questioned.**—Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

Thus, where an instrument has been admitted in evidence, such admission shall not be called in question, except as provided in Section 61, at any stage of the same suit or proceedings on the ground that the instrument is not duly stamped. Consequently, where an instrument has been admitted in evidence, such instrument cannot be impounded as it cannot be called in question at any stage of the same suit or proceeding on the ground of insufficient stamping.

13. An instrument which is void *ab initio* or void, cannot be validated by mere consent or waiver, unless consent or wavier undoes the cause of invalidity. On the other hand, Section 36 of the Stamp Act incorporates the doctrine of waiver, estoppel and implied consent. That apart,after due stamping as per the Stamp Act, the unstamped or insufficiently stamped

instrument can be admitted in evidence, or be registered, authenticated or be acted upon by such person or public officer.

14. This has long been a recognised position of law, as accepted by this Court in several decisions, which I would like to refer to.

15. In ***Javer Chand and Others.*** v. ***Pukhraj Surana***[7], way back in 1961, a four Judges' Bench of this Court had examined the interplay between Sections 35 and 36 of the Stamp Act to hold that Section 36 is categorical in terms that when a document has been admitted in evidence, such admission cannot be called in question at any stage of the suit or proceedings on the ground that the instrument had not been duly stamped. The only exception recognised by Section 36 is the class of cases contemplated by Section 61 of the Stamp Act. Section 36 does not admit of any other exception. It does not matter whether the court has wrongly decided to admit the document in evidence. Section 35 is in the nature of a penal provision which has far reaching effects. The parties to the litigation have to be circumspect and have to be alert so as to challenge the admissibility of an instrument before it is admitted in evidence.

16. A five Judges' Bench in The ***State of Bihar***v. ***M/s Karam Chand Thapar and Brothers Ltd.***[8], has held that the instrument that can be validated under Section 35 is only the original, when it is unstamped or insufficiently stamped. A copy cannot be validated and acted upon,*albeit* where multiple copies are prepared and signed and sent to respective parties, each one would be an original instrument.

17. In ***Jupudi Kesava Rao***v. ***Pulavarthi Venkata Subbarao and Others***[9], a two Judges' Bench of this Court observed that The Indian Evidence Act, 1872 does not purport to deal with admissibility of the documents which are required to be stamped under the provisions of the Stamp Act. Thereafter, it is observed:

> "13. The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second

7 AIR 1961 SC 1655.
8 AIR 1962 SC 110.
9 (1971) 1 SCC 545.

limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (*a*) is only applicable when the original instrument is actually before the Court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfil the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself. Section 25 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. "Instrument" is defined in Section 2(14) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.

14. If Section 35 only deals with original instruments and not copies Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where the original instrument was admitted in evidence without objection at the initial stage of a suit or proceeding. In other words, although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the document is first tendered. Once the time for raising objection to the admission of the documentary evidence is passed, no objection based on the same ground can be raised at a later stage. But this in no way extends the applicability of Section 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped."

This judgment also holds that a copy of the instrument cannot be validated. It overruled the dictum that Section 36 will also apply where secondary evidence of an instrument unduly stamped, has been wrongly admitted.

18. In ***Hameed Joharan (DEAD) and Others*** v. ***Abdul Salam (DEAD) by LRs. and Others***[10], this Court observed that applicability of the Stamp Act stands restricted to the scheme of the Stamp Act. The Stamp Act being a true fiscal statute in nature, strict construction and not liberal interpretation is required to be effected . Section 2(15) includes a decree of partition and Section 35 lays down a bar on unstamped or insufficient stamp being admitted in evidence or being acted upon. The law however does not prescribe that the period for filing appeal shall remain suspended still stamp paper is furnished and the partition decree is drawn thereon and signed by the judge. The whole purport of the Stamp Act is to make available certain dues and collect revenue, but it does not mean and imply an overriding effect on another statute operating in a completely different sphere. Enforceability of a decree cannot be a subject matter of Section 35 of the Stamp Act, neither can the limitation be said to be under suspension. The heading of Section 35 itself denotes the limited sphere of applicability.

19. In ***Dr. Chiranji Lal (D) by LRs.*** v. ***Hari Das (D) by LRs***.[11], a three Judge Bench of this Court rejected the contention that an unstamped preliminary decree is not enforceable and, therefore, the period of limitation begins to run when the decree is engrossed on the stamp paper. The Stamp Act is a fiscal measure with the object to secure revenue for the State on certain classes of instruments. The Stamp Act is not enacted to arm the litigant with a weapon of technicality to meet the case of his opponent. As there is no rule which prescribes any time for furnishing of stamp paper or to call upon a person to pay stamp duty on a preliminary decree of partition, the proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereon was rejected.

10 (2001) 7 SCC 573.
11 (2005) 10 SCC 746.

20. In ***Hariom Agrawal*** v. ***Prakash Chand Malviya***[12], a three Judge Bench has referred to ***Karam Chand Thapar*** (supra), ***Jupudi Kesava Rao*** (supra), to observe:

> "10. It is clear from the decisions of this Court and a plain reading of Sections 33, 35 and 2(14) of the Act that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument it can be taken in evidence under Section 35 of the Stamp Act. Sections 33 or 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the document which is an instrument within the meaning of Section 2(14). There is no scope for the inclusion of the copy of the document for the purposes of the Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this cannot be admitted as secondary evidence under the Stamp Act, 1899."

21. In ***Shyamal Kumar Roy*** v. ***Sushil Kumar Agarwal***[13], this Court observed that Section 36 is a standalone clause which categorically prohibits the court of law from reopening the matter with regard to the sufficiency or otherwise of the stamp duty paid on an instrument in the event the same has been admitted in evidence, the only exception being Section 61 providing for reference and revision. Reliance was placed on ***Javer Chand*** (supra).

22. ***Avinash Kumar Chauhan***v. ***Vijay Krishna Mishra***[14] expounds the meaning of the words 'for any purpose' used in Section 35 of the Stamp Act. These words are to be given natural meaning and effect. They would include collateral purpose, as was held in the decision of the Privy Council in ***Ram Rattan***v. ***Parma Nand***[15]. Distinction was drawn between non-effect of registration of a document in terms of Section 49 of the Registration Act, 1908, which does not bar use of an unregistered document for a collateral purpose. Section 35 is differently worded, and when applicable, bars use of insufficiently stamped instrument for a collateral purpose.

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12 (2007) 8 SCC 514.
13 (2006) 11 SCC 331.
14 (2009) 2 SCC 532.
15 AIR 1946 PC 51.

23. It is necessary to affirm this legal position, as we enter into contracts or agreements several times in our interactions with others during the course of the day. Even written documents in the form of invoices, receipts or standard format agreements are often exchanged, and form the terms of the interactions. 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. To hold that insufficiently stamped instrument does not exist in law, will cause disarray and disruption.

24. Predictability and certainty are central tenets of law, especially in matters of commercial and routine nature. Adherence to the principle of *stare decisis* is essential for parties to be able to rely on the law to define their conduct in commercial or ordinary day to day dealings. Transient laws undermine public legitimacy and faith in the mandate of Rule of Law. This Court has previously observed that before reviewing and revising its earlier decision, the Court must satisfy itself whether it is necessary to do so in the interest of public good or for any other compelling reason, and the Court must endeavour to maintain certainty and continuity in the interpretation of the law in the country.[16] On several occasions, this Court has emphasised on certainty and consistency in judicial pronouncements as being the cornerstone of the administration of justice.[17] Consistency in judicial decisions is conducive to reassuring parties of the consequences of the transactions forming part of their daily affairs.[18]

25. An instrument is to be stamped as per Section 33 when it is executed or first executed. The expressions 'executed' and 'execution' have been defined in clause (12) to Section 2 of the Stamp Act to mean 'signed' or 'signature'.[19] It includes attribution of electronic record within the meaning

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16 *Keshav Mills Co. Ltd.* v. *Commissioner of Income Tax, Bombay North, Ahmedabad,* AIR 1965 SC 1636.

17 *Government of Andhra Pradesh* and Others v. *A.P. Jaiswal and Others*, (2001) 1 SCC 748.

18 *Total Environment Building Systems Pvt. Ltd.* v. *Deputy Commissioner of Commercial Taxes and Others*, 2022 SCC OnLine SC 953; *Union of India and Another* v. *Raghubir Singh (Dead) by LRs. etc.*, (1989) 2 SCC 754.

19 **2. Definitions.**—In this Act, unless there is something repugnant in subject or context,—

(12) Executed and execution.—"Executed" and "execution", used with reference

of Section 11 of the Information Technology Act, 2000[20]. I shall now analyse the relevance of execution or 'signature', with reference to an arbitration agreement as defined in Section 7 of the Arbitration Act.

26. Section 7of the Arbitration Act reads:

"**7. Arbitration agreement.**—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

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to instruments, mean "signed" and "signature"and includes attribution of electronic record within the meaning of Section 11 of the Information Technology Act, 2000 (21 of 2000).

20 **11. Attribution of electronic records.**—An electronic record shall be attributed to the originator—
(a) if it was sent by the originator himself;
(b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
(c) by an information system programmed by or on behalf of the originator to operate automatically.

An 'arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them. The disputes may be in respect of a defined legal relationship, whether contractual or not. An arbitration agreement has to be in writing.

27. Sub-section (4) to Section 7 specifies when an arbitration agreement can be said to be in writing. Clause (a) to sub-section (4) states that an arbitration agreement can be a document signed by the parties. According to clause (b) to sub-section (4) to Section 7, an arbitration agreement can be established or inferred from exchange of letters, telex, telegrams or other forms of communication, including communication through electronic means. The provision does not mention the need for 'execution' or signatures of the parties.[21] Similarly, clause (c) to sub-section (4) to Section 7 which refers to exchange of statements of claim and defence, in which the existence of the arbitration agreement is alleged by one party and not denied by the other, does not refer to an instrument which is signed by the parties. Clause (c) incorporates the principle wherein the parties by "consent" agree to the existence of an arbitration agreement, or impliedly agree by not denying its existence when alleged by one party and not denied by the other. An arbitration agreement is defined in the widest terms, and may be in the form of a clause in the underlying contract or separate from an underlying agreement. Significantly, even when it is a clause of the underlying agreement, it is treated as a separate agreement, an aspect to which I shall advert.

28. Section 16[22] of the Arbitration Act, empowers the arbitral tribunal

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21 *Caravel Shipping Services (P) Ltd.* v. *Premier Sea Foods Exim (P) Ltd.* (2019) 11 SCC 461; *Govind Rubber Ltd.* v. *Louis Dreyfus Commodities Asia Pvt. Ltd.* (2015) 13 SCC 477.

22 **16. Competence of arbitral tribunal to rule on its jurisdiction.—**(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded

to rule on its own jurisdiction. This includes the authority to decide the existence and validity of the arbitration agreement. This has reference to Section 7 of the Arbitration Act, which I have examined. As per Section 16, an arbitration agreement is an agreement independent of the other terms of the contract, even when it is only a clause in the underlying contract. The section specifically states that a decision by the arbitral tribunal holding the underlying contract to be null and void, will not lead to *ipso jure* the invalidity of the arbitration clause. The existence of an arbitration agreement is to be ascertained with reference to the requirements of Section 7 of the Arbitration Act. In a given case the underlying contract may be null and void, but the arbitration clause may exist and be enforceable. Invalidity of an underlying agreement may not,unless relating to its formation, result in invalidity of the arbitration clause in the underlying agreement. Hon'ble the Chief Justice has elaborately explained the negative and positive contours of the doctrine of separability in reference to an arbitration agreement, with which I respectfully agree.

29. In this connection, I may note a decision of the Singapore High Court in the case of ***BNA*** v. ***BNB and Another***[23] which holds that a defect in the arbitration agreement does not render it void *ab initio* unless the defect is so fundamental or irretrievable as to negate the parties' intent or agreement to arbitrate. This principle is based upon the observations of the Court of Appeal of Singapore in the judgment in ***Insigma Technology Co Ltd*** v. ***Alstom Technology Ltd***[24].

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from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

23 [2019] SGHC 142.

24 [2009] SGCA 24.

30. Jurisprudentially it is important to distinguish the terms and consequences of an agreement void *ab initio*, and a voidable agreement, and the effect of illegality and violation of law on an agreement.

31. As per the Indian Contract Act, 1872[25], an agreement not enforceable by law is said to be void, and an agreement enforceable by law is a contract.[26] A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.[27]

32. The requirements of Section 10 of the Contract Act[28] are that the contract should be made by parties competent to contract, for lawful consideration and with lawful object. Consent of the parties should be free. The contract should not be expressly declared to be void. Section 2 has to be read with Section 10 and not in isolation, in order to avoid contradiction and to harmoniously apply the two sections.

33. Sections 11[29] and 12[30] deal with persons entitled to contract. In instances where a person is explicitly declared as incompetent or does not fall within the definition of a competent person under the aforesaid provisions, like a minor or a person of unsound mind, a contract entered into by such person would be void. An agreement is also rendered void when both parties are under mistake of fact[31]. As per Section 24, agreements are void if consideration and objects are unlawful in part.[32] This section does not have any application to the present issue, and neither are we concerned with Section 25, which relates to agreements without consideration and in

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25 For short, "the Contract Act".

26 **2 (g)** An agreement not enforceable by law is said to be void;**(h)** An agreement enforceable by law is a contract

27 **2 (j)** A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

28 **10. What agreements are contracts.—**All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writingor in the presence of witnesses, or any law relating to the registration of documents.

29 Section 11, The Indian Contract Act, 1872.

30 Section 12, The Indian Contract Act, 1872.

31 Section 20, The Indian Contract Act, 1872.

32 Section 24, The Indian Contract Act, 1872.

which situation they have to be treated as void[33]. Agreements which are in restraint of marriage or in restraint of trade are void.[34] Agreements by way of wager are also void.[35] Agreements, the meaning of which is not certain, or capable of being made certain, are void.[36] Section 28 states that agreements in restraint of legal proceedings are void, but Exception 1 states that a contract by which parties agree for disputes arising between them to be referred to arbitration shall not render the contract illegal.[37]

34. Sections 13 to 19A relate to consent[38], free consent[39], coercion[40], undue influence[41], fraud[42], misrepresentation[43], void ability of agreements without free consent[44], and power to set aside contract induced by undue influence[45]. The Contract Act declares contracts affected by the preceding provisions to be voidable at the option of the aggrieved party.

35. Under Section 21, a contract is not voidable because it is caused by mistake as to law enforced in India[46], and a contract where mistake of fact is made by one party is also not voidable as per Section 22[47].

36. According to Section 23 of the Contract Act, the consideration or object of an agreement is lawful unless it is forbidden by law or is of such nature as to defeat the provisions of law, or is fraudulent. Neither are these provisions applicable in case of unstamped or insufficiently stamped instruments, nor is the consideration or object unlawful as it involves or implies injury to a person or property of another. The last clause of Section 23 applies when the consideration or object of an agreement is regarded as

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33 Section 25, The Indian Contract Act, 1872.
34 Sections 26 and 27, The Indian Contract Act, 1872.
35 Section 30, The Indian Contract Act, 1872.
36 Section 29, The Indian Contract Act, 1872.
37 Section 28, The Indian Contract Act, 1872.
38 Section 13, The Indian Contract Act, 1872.
39 Section 14, The Indian Contract Act, 1872.
40 Section 15, The Indian Contract Act, 1872.
41 Section 16, The Indian Contract Act, 1872.
42 Section 17, The Indian Contract Act, 1872.
43 Section 18, The Indian Contract Act, 1872.
44 Section 19, The Indian Contract Act, 1872.
45 Section 19A, The Indian Contract Act, 1872.
46 Section 21, The Indian Contract Act, 1872.
47 Section 22, The Indian Contract Act, 1872.

immoral or opposed to public policy. An instrument whether unstamped or insufficiently stamped will not fall foul on the ground of consideration or object of the agreement being immoral, neither will it fall foul as opposed to public policy.

37. In ***B.O.I. Finance Ltd. v. Custodian and Others***[48] this Court after examining the case law on the subject of public policy, observed that in pursuant to an agreement to do an illegal act, a transaction, in part, takes place which would otherwise be valid if there was no such prior agreement, then notwithstanding the illegality of the contract, the completed transaction itself cannot be regarded as invalid.

38. Following this judgment, in ***Canara Bank and Others v. Standard Chartered Bank***[49], it is held that for the contract to be declared void on the ground of public policy, it must be shown that the object and consideration of the contract was one which was illegal. Where the object and consideration of the contract is not illegal as in the case of sale/ purchase of securities and payment of price, the contract will not be void on the ground of being opposed to public policy. The contention that the performance of contract in violation of law will be void on ground of public policy was rejected. These observations were made in the context of the argument that there was violation of law while carrying out the contract and the arrangement was opposed to public policy.

39. A judgment by Mr. Justice S.S. Nijjar in ***Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee***[50], has elaborately dealt with the terms 'void' and 'voidable' and states that they are used loosely and interchangeably with each other, though strictly in law, they are not so. It is also important to draw a distinction between contracts which are void, and those which are void *ab initio* due to lack of elements of offer or acceptance, which prevents a contract from coming into operation. Thus, a contract by a minor or by a person of unsound mind would be void due to lack of effectual offer or acceptance. But once the contract is made, that is to say where parties, whatever their innermost state of mind, have to all

48 (1997) 10 SCC 488.
49 (2002) 10 SCC 697.
50 (2014) 6 SCC 677.

outward appearances, agreed with sufficient certainty in the same terms of the subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of contract depends, or for fraud, or on some other equitable ground. Neither party can rely upon its own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, no matter that the other party knew that he was under a mistake.[51]

40. The judgment in ***Vidya Drolia and Others*** v. ***Durga Trading Corporation***[52], after referring to ***Avitel Post Studioz Ltd.*** v. ***HSBC PI Holdings (Mauritius) Ltd.***[53], draws a distinction between contract obtained through fraud, and post contract fraud or cheating. The latter falls outside the scope of Section 17 of the Contract Act. It observes that the fraud may permeate the entire contract and above all the agreement of arbitration, rendering it void. However, it may not be so when the allegations of fraud touch upon the internal affairs of the parties *inter se*, having no implication in the public domain.

41. There are also two aspects of the judgment in ***Vidya Drolia*** (supra), which need to be noticed. First, I agree to and accept the error made by me in the judgment which observes that Section 11(6A) of the Arbitration Act has ceased to be operative in view of the enforcement of Section 3 of the Arbitration and Conciliation (Amendment) Act, 2019. As rightly observed by Hon'ble the Chief Justice, Section 3 of the Arbitration and Conciliation (Amendment) Act, 2019which relates to the amendment to Section 11 has not been enforced. Secondly, as has been noted in the judgment of Hon'ble the Chief Justice and in ***Career Institute Educational Society*** v. ***Om Shree Thakurji Educational Society***[54], the issue before this Court in ***Vidya Drolia*** (supra)was not the validity of an unstamped or under-stamped arbitration agreement. No specific opinion was expressed on this question.

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51 *See ITC Ltd.*v. *George Joseph Fernandes and Another*(1989) 2 SCC 1, which quotes from *Smith* v. *Hughes* LR (1871) 6 QB 597 and *Solle*v. *Butcher* (1950) 1 KB 671. The judgment in ITC Ltd.(supra) was under the Arbitration Act,1940 and should not be applied to interpret the Arbitration and Conciliation Act, 1996.

52 (2021) 2 SCC 1.

53 (2021) 4 SCC 713.

54 2023 SCC OnLine SC 586.

The reference to the validity of an unstamped arbitration agreement, as mentioned in ***Garware Wall Ropes Ltd.*** v. ***Coastal Marine Constructions & Engg. Ltd.***[55], was only to serve the purpose of drawing a comparison between the 'existence' and the 'validity' of an arbitration agreement, and not a comment or opinion on the 'existence' of unstamped or under-stamped arbitration agreements.

42. For the reasons set out in detail by Hon'ble the Chief Justice and recorded herein, I agree with the conclusions drawn, and referred to above. I also concur with the other findings and ratio in the judgment by Hon'ble the Chief Justice.

Headnotes prepared by:
Bibhuti Bhushan Bose

Matters to be placed before appropriate Bench.

55 (2019) 9 SCC 209.