REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3802-3803 OF 2020

M/S N.N. GLOBAL MERCANTILE PVT. LTD. APPELLANT(S)

VERSUS

M/S INDO UNIQUE FLAME LTD. & ORS. RESPONDENT(S)

J U D G M E N T

Hrishikesh Roy, J.

A. Introduction

1. I had the benefit of reading the erudite opinion of my Learned Brother, Justice K.M. Joseph (for himself and Justice Aniruddha Bose) and the separate judgment of Learned Brother Justice C.T. Ravikumar. However, I regret my inability to agree with the majority opinion and the concurring judgment. Echoing the words of Charles Evans Hughes[1] in one of his lectures delivered at the University of Columbia, let our minority opinion (self and Learned Brother Justice Ajay Rastogi, who has written a separate opinion), appeal to the brooding spirit of the future as also the powers of the legislature to examine the interplay between the *Arbitration and Conciliation Act, 1996 (*for short "Arbitration Act, 1996")and the *Indian Stamp Act,1899* (for short "Stamp Act,1899"); and to emphatically resolve the imbroglio to avoid any confusion in the minds of the stakeholders in the field of arbitration.

2. The role of Courts in arbitral proceedings has been much debated for years. Autonomy of the disputing party is the core of the arbitral process but if the parties fail to arrive at a consensus, the supervisory role of Courts becomes imperative. *Redfern and Hunter* on *International Commercial Arbitration*[2] describe the relationship between national courts and arbitral tribunals as follows:

> "To the extent that the relationship between national courts and arbitral tribunals is said to be one of 'partnership', it is not a partnership of equals. Arbitration may depend upon the agreement of the parties, but it is also a system built on law, which relies upon that law to make it effective both nationally and internationally. National Courts could exist without arbitration, but arbitration could not exist without the courts. *The real*

[1] Charles Evans Hughes, *The Supreme Court of The United States Its Foundations, Methods and Achievements*,(Columbia University Press) 68 (1928)
[2] Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th Edition, 2015, Oxford University Press), Chapter 7, Paragraph 7.03

issue is to define the point at which this reliance of arbitration on the national courts begins and at which it ends."

[Emphasis supplied]

3. The supervisory role of Courts under the *Arbitration Act,1996* can be broadly categorized into three parts i.e., pre-commencement of arbitral proceedings, during the arbitral proceedings and at the post-arbitration stage. *Section 8* and *Section 11* in Part I of the *Arbitration Act, 1996,* and *Section 45* in Part II of the *Arbitration Act,1996* specifically deal with the role of Courts before the initiation of arbitration proceedings. *Section 8* deals with the "Power to refer parties to arbitration" where there is an arbitration agreement; it provides for a mandatory reference to arbitration, unless the Court is *prima facie* satisfied that *no valid* arbitration agreement exists. *Section 11(6),* on the other hand, provides for *"Appointment of Arbitrators*" when parties fail to mutually agree on the name of an arbitrator or appoint an arbitrator in terms of the arbitration agreement. Section 45 refers to the *"Power of judicial authority to refer parties to arbitration"* in Part II of the *Arbitration Act,1996.*
4. Here in this reference, the extent of judicial intervention before the commencement of arbitral proceedings is being tested. It raises important issues of delays in the enforcement of arbitration agreements, subject to payment of stamp duty and whether an arbitration agreement would be non-existent, invalid/void, or unenforceable in law, if the underlying instrument is not stamped/insufficiently stamped, as per the relevant Stamp Act.
5. The moot question in this reference is whether the statutory bar under *Section 35* titled "Instruments not duly stamped inadmissible in Evidence" of the

Stamp Act,1899 would be attracted when an arbitration agreement is produced under *Section 11(6)* of the *Arbitration Act,1996*. As a corollary, this reference also tests the *scope* and *nature* of the Court's intervention specifically at the stage of appointment of arbitrator under *Section 11* of the *Arbitration Act, 1996.* The conundrum over the scope of judicial review and the validity/enforceability of the unstamped/insufficiently stamped arbitration agreement contained in an underlying contract is expected to be resolved in this reference.

B. Reference to the Constitution Bench

6. A 3-judge bench in *M/S N.N. Global Mercantile Private Limited v M/S Indo Unique Flame Limited and others*[3] (for short "NN Global") by doubting the reasoning in Paragraphs 146 and 147 of a coordinate bench of this Court in *Vidya Drolia and others v Durga Trading Corporation*[4] (for short "Vidya Drolia") considered it appropriate for the issue to be examined by a Bench of five judges. The matter before the Court in *Vidya Drolia(supra)* was related to subject-matter arbitrability but while deciding the question, it cited with approval Paragraphs 22 and 29 of the 2-judge Bench judgment in *Garware Wall Tropes Limited v Coastal Marine Constructions and Engineering Limited*[5](for short "Garware").

7. Following the decision in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*[6](for short "SMS Tea"), it was held in *Garware(supra)* that non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement and render it non-existent in law and unenforceable.

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[3] (2021) 4 SCC 379
[4] (2021) 2 SCC 1
[5] (2019) 9 SCC 209
[6] (2011) 14 SCC 66

8. This Court in *NN Global(supra)* overruled the 2-judge bench decision in *SMS Tea(supra)* which was cited with approval in *Garware(supra).*

9. *NN Global(supra)* relied *inter alia*, on the principle of *Kompetenz Kompetenz* and the doctrine of Separability incorporated under *Section 16* of the *Arbitration and Conciliation Act, 1996* to doubt the correctness of the view taken in *Vidya Drolia(supra)* and *Garware(supra)*. The relevant paragraphs which define the scope of this reference are extracted below:

> "34. We doubt the correctness of the view taken in paras 146 and 147 of the three-Judge Bench in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] . We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall Ropes Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , which has been affirmed in paras 146 and 147 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , to a Constitution Bench of five Judges.
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> 56. We are of the considered view that the finding in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] and Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and unenforceable, is not the correct position in law.
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> 57. In view of the finding in paras 146 and 147 of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] by a coordinate Bench, which has affirmed the judgment in Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , the aforesaid issue is required to be authoritatively settled by a Constitution Bench of this Court.
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> 58. We consider it appropriate to refer the following issue, to be authoritatively settled by a Constitution Bench of five Judges of this Court:
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> > "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?"

10. Thus, the correctness of the decisions in *SMS Tea(supra), Garware(supra), Vidya Drolia(supra),* as well as other relevant decisions is to be evaluated during the course of the reference. It has been brought to the notice of this Court that conflicting decisions have created a vexed situation for arbitral proceedings and hence, this issue is expected to be settled through this reference.

11. The background facts in *NN Global* (supra) which gave rise to this reference are to be noted at the outset:

C. Facts in *N.N. Global*[7]

12. *Indo Unique Flame Ltd.* (for short "Indo Unique Flame") entered into a sub-contract Work Order with *N.N. Global Mercantile Pvt. Ltd* ("NN Global") on 28.09.2015 for transportation of coal. In terms of Clause 9 of the Work Order, *NN Global* furnished a Bank Guarantee to *Indo Unique*. Clause 10 of the Work Order provided for an arbitration clause. Due to certain disputes in the principal contract, Indo Unique invoked the Bank Guarantee furnished by *NN Global*. Thereafter, *NN Global* filed a Civil Suit before the Commercial Court, Nagpur. An application under *Section 8* of the *Arbitration Act, 1996* was also filed seeking reference of the disputes to arbitration. The Commercial Court on 18.01.2018 rejected the application under *Section 8* of the *Arbitration Act, 1996* holding that the Bank Guarantee was an independent contract. Thereafter, *Indo Unique* filed a Writ Petition against the order of the Commercial Court. On 30.9.2020, the Bombay High Court allowed the

[7] (2021) 4 SCC 379

application under *Section 8* of the *Arbitration Act,1996*. It held that the non-stamping of Work Order can be raised at the stage of *Section 11* of the *Arbitration Act,1996* or before the Arbitral Tribunal at the appropriate stage. It set aside the order of the Commercial Court on 18.01.2018. An appeal was filed in this Court where *NN Global* contended that since the sub-contract was not stamped under the *Maharashtra Stamp Act, 1958,* the arbitration agreement would be rendered 'unenforceable'. It is in this context that the Court doubted the correctness of previous decisions in *Garware (supra)* which was cited with approval in *Vidya Drolia (supra)* declaring such arbitration agreements to not exist *in law* and reconsideration of the issue was sought from this Constitution Bench.

D. Modification of the reference question:

13. The original reference question in Para 58 of *N.N. Global (supra)* was set out as under:

> "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 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 in law, or invalid/void, pending payment of stamp duty on the substantive *contract*/instrument?"
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> [emphasis supplied]

Mr. Gourab Banerjee, learned Senior Counsel assisting this Court as *Amicus Curiae* however proposed to reframe the question of reference, as under:

> "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 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 ***in law***, or invalid/***void*****,** pending payment of stamp duty on the substantive ~~contract~~/instrument?"

[Emphasis in original]

14. It is seen that an erroneous observation pertaining to the *Maharashtra Stamp Act,1958* not subjecting an arbitration agreement to stamp duty was made in para 20, 24 and 58 in *NN Global(supra)*. In each of our four opinions, Justice KM Joseph, Justice C.T. Ravikumar, Justice Ajay Rastogi (& self), we find that this is not the correct position on the applicability of the *Maharashtra Stamp Act,1958*. The *Indian Stamp Act,1899* is a fiscal enactment that levies a charge on the execution of instruments. *Section 2(14)* of the *Stamp Act, 1899* defines "instrument" as "every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded". *Section 3* titled "Instruments chargeable with duty" provides *inter alia* that the instrument must be mentioned in the Schedule to the Act. It is essential to note that arbitration agreements are not specifically mentioned in *Schedule I* of the *Stamp Act,1899* as "instruments" which are required to be stamped. However, under the residuary entry in *Article 5(c)* of *Schedule I* of the *Stamp Act, 1899* titled as *"if not otherwise provided for",* stamp duty becomes payable. This residuary entry is contained in amendments to Schedule I of the *Stamp Act, 1899*, as well as various State Stamp Acts. I would therefore proceed on the basis that an arbitral agreement falls within the definition of "instrument" as stipulated under the *Stamp Act,1899* and would be subject to stamp duty.

E. Submissions of the Counsel:

15. We have heard the elaborate submissions from Mr. Gourab Banerjee, Learned Senior Counsel assisting this Court as Amicus Curiae; Mr. Gagan Sanghi,

Learned Counsel for the appellant; Ms. Malavika Trivedi, Learned Senior Counsel for the Intervenor in IA 18516 of 2022; Mr. Ramakanth Reddy, Learned Senior Counsel for Respondent No. 1 and Mr. Debesh Panda, Learned Counsel for the Intervenor in IA 199969 of 2022. They have cited various decisions of this Court as well as of Courts in other jurisdictions.

16. The learned *Amicus Curiae* makes the following specific submissions:

16.1. The Determination of whether an arbitration agreement is duly stamped or not, must be left to the arbitrator. *Section 11(6A) of the Arbitration Act, 1996* circumscribes the scope of the appointing authority. It begins with a non-obstante clause and was specifically meant to overrule the 7-judge bench in *SBP & Co v Patel Engg. Ltd*[8]. (for short *"SBP")* and *National Insurance Co. Ltd. V Boghara Polyfab (P) Ltd*[9] (for short *"Boghara Polyfab").* Moreover, the ambit of *Section 16* of *Arbitration Act, 1996* which deals with the competence of an arbitral tribunal to rule on its jurisdiction, is wide enough, according to Mr. Gourab Banerjee, to allow the arbitrator to make a determination with respect to the stamping of the instrument.

16.2. The *246th Report of the Law Commission of India*[10] (for short "246th LCI Report) recommended that the scope of authority be limited to "existence" and "validity" of the arbitration agreement. The legislature went one step further and limited the scope of the appointing authority under *Section 11(6A)* of the *Arbitration Act,1996* to confine to the examination of only "existence" and not

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[8] (2005) 8 SCC 618
[9] (2009) 1 SCC 267
[10] Law Commission of India, 'Amendments to the Arbitration and Conciliation Act 1996' (246th Report, August 2014) Available at (https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf) <Last accessed on 19.3.2023>

even "validity" of the arbitration agreement. Such approach is consistent with the objective of expeditious resolution of arbitration disputes. A Court under *Section 11(6)* of *Arbitration Act,1996* is in the nature of an appointing authority, to facilitate and assist arbitration.

16.3 The statutory bar in *Section 35 of the Stamp Act, 1899* would be triggered only when there is a finding that the document is not duly stamped. For the same, there ought to be an inquiry into stamping. Only on triggering of *Section 33(2) of the Stamp Act, 1899* titled *"Examination and impounding of instruments", Section 35* will follow. The examination under *Section 33(2) of the Stamp Act, 1899* should not be undertaken by a Court under *Section 11(6A) of the Arbitration Act, 1996,* but by the appointed arbitrator.

16.4. If the court finds under *Section 11 of the Arbitration Act, 1996* that there is no agreement, then it can take a final view. However, if the Court feels that a deeper consideration is required then the same can be left to the Arbitral Tribunal under *Section 16* of the *Arbitration Act,1996*. According to Mr. Gourab Banerjee, the learned Senior Counsel, this is the appropriate way to harmonise *Section 11(6A)* with *Section 16* of the *Arbitration Act, 1996.*

16.5. The absence of stamping or instrument inadequately stamped would at best be an issue of admissibility but not about jurisdiction. The *Stamp Act,1899* is a fiscal measure enacted to secure revenue for the State for certain classes of instruments. It is, therefore, not enacted to arm a litigant with a weapon of technicality to meet the case of the opponent.

16.6. The learned Amicus Curiae points out that a Court exercising power under *Section 11(6A) of the Arbitration Act, 1996 is not a Court* as defined in

Section 2(1)(e) of the Arbitration Act, 1996 which has the authority to 'receive evidence'. In some sense, under *Section 11(6A)*, the Court is to only form a prime facie opinion.

16.7. Significantly, the parties are not under an obligation to file an original arbitration agreement and only the copy can be annexed which however is not an "instrument" as provided in *Section 2(14)* of the *Stamp Act, 1899*. The reading of *Section 33 or 35 of the Stamp Act, 1899* would pointedly suggest that these provisions are not concerned with the copy of the instrument. Validity is always open to examination at the post-referral stage. *[Jupudi Kesava Rao v Pulavarthi Venkata Subbarao and others*[11]*, Hariom Agrawal v Prakash Chand Malviya*[12]*]*

17. Projecting the contrary view, Mr. Gagan Sanghi, learned Counsel for the appellant makes the following submissions:

17.1. *Section 35* of the *Indian Stamp Act,1899* bars admission of unduly stamped "instrument" in evidence "for any purpose" and also "acting upon it". In *Govt. of AP. v P. Laxmi Devi*[13]*,* it was held that "shall" in *Section 33 of Stamp Act,1899* is mandatory and unstamped document must be impounded.

17.2. Even assuming that stamp duty is not payable on an arbitration agreement under *Stamp Act, 1899*, when arbitration agreement is contained as a clause in an instrument on which stamp duty is payable, such arbitration agreement as an *instrument,* attracts the bar of *Section 35* of the *Stamp Act,1899*.

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[11] (1971)1 SCC 545
[12] (2007) 8 SCC 514
[13] (2008) 4 SCC 720

17.3. The learned counsel argues that separation of agreement from the substantive contract is a legal fiction created by *Section 16 of the Arbitration Act, 1996*. *Section 16* of *Arbitration Act,1996* cannot be an exception to *Section 35* of the *Indian Stamp Act, 1899*.[*Bengal Immunity Co vs State of Bihar*[14]*, Para 69,70* of *Govt. of India v Vedanta*[15]*; Amazon V Future Retail*[16]]

17.4. According to Mr. Sanghi, *Doctrine of Separability* and *Kompetenz Kompetenz* has no bearing on the issue of enforceability of an arbitration agreement when proper stamp duty is not paid on the instrument containing the arbitration agreement. The learned counsel relied on the decision of UK Supreme Court in *Enka Insaat v OOO Insurance Company*[17] where it was held that an *"arbitration clause is nonetheless part of bundle of rights and obligations recorded in the contractual document"*.

17.5. The issue of stamping is to be looked into at the very threshold, even if it is in exercise of *Section 11 (6A) of the Arbitration Act, 1996*, i.e. at the time, the consideration with respect to appointment of arbitrator is undertaken. According to the learned counsel, an instrument would exist *in law* only when it is enforceable. Therefore, when the Court under Section *11(6A) of the Arbitration Act, 1996* is considering the "existence" of the arbitration agreement, it can examine the issue of non-stamping or of inadequate stamping at that stage itself.

17.6. Highlighting that three modes are provided in *NN Global (supra)* i.e. impounding, payment of stamp duty and then appointment of arbitrator, it is

[14] (1955) 2 SCR 603
[15] (2020)10 SCC 1
[16] (2022) 1 SCC 209
[17][2020] UKSC 38

argued that when an arbitrator is appointed in a *Section 11* application, the Court is certainly "acting upon" the arbitration clause which is contended to be barred by the clear wordings of *Section 35 of the Stamp Act, 1899*. An Agreement, unless "enforceable", is not in "existence".

18. The learned Senior Advocate, Ms. Malvika Trivedi, intervening on behalf of the Appellant made the following submissions:

18.1.The Regimes of the *Stamp Act, 1899* and *Registration Act, 1908* are completely different. *NN Global (supra*) wrongly applied the principles of registration of a document to the requirement of stamping a document. While the former is a curable defect, the latter determines the very existence and completion of a document/instrument. In the absence of registration, an instrument still remains in existence but without stamping, the instrument is incomplete/inchoate.

18.2.*The Stamp Act, 1899* envisages the payment of stamp duty, failing which the instrument according to Ms. Trivedi cannot be acted upon for any purpose. There is no ambiguity in the language of the Statute and plain reading should be opted.

18.3. The powers of the Court under different provisions of law, as well as the restrictions created in *the Stamp Act, 1899* apply to the proceedings conducted in accordance with *Section 9* of the *Arbitration Act,1996*. It is, therefore, argued that even if the arbitration clause stands severed, the Court will have to reach a *prima facie* conclusion on whether the main agreement is enforceable in law before granting interim measures.

19. Learned Counsel for the Respondent No. 1, Mr. Ramakanth Reddy, took us through the relevant Lok Sabha debates before the enactment of the *Arbitration Act,1996* and makes the following submissions:

19.1 Provisions of *Arbitration Act, 1996*; *Stamp Act, 1899* and *Contract Act, 1872* can be harmonized. *Section 17 of Stamp Act, 1899* has to be read with *Section 31* of *Stamp Act, 1899*.

19.2 Plain language of *Section 7 of the Arbitration Act,1996* does not require that the parties stamp the agreement. The legislative intention would be defeated, if the Court insists on non-core technical requirements such as stamps, seals and originals.

20. In his turn, Mr. Debesh Panda, learned Counsel for the Intervenor submits the following:

20.1 *Part I of Arbitration Act, 1996* deals with *Section 8,9 and 11* whereas *Section 45* is dealt with in Part II. *Section 45* has been recognized as a provision falling under Part II which is a "complete code". *[See Chloro Controls v Severn Trent Water Purification Inc[18]]* The expression *"unless it finds"* in *Section 45* was interpreted per majority in *Shin-Etsu Chemical Co. Ltd. v Aksh Optifibre Ltd[19] (*for short *"Shin-Etsu)* as a consideration on a "prima facie basis" only. In 2019, Parliament amended *Section 45.* It substituted the expression *"unless it finds."* with *"unless it prima facie finds".* It thus brings the statute in line with the position settled in *Shin Etsu (supra)*. In this background, the *Stamp Act, 1899* merely creates a temporary infliction till the stamp duty is recovered, with or

[18] (2013) 1 SCC 641
[19] (2005) 7 SCC 234

without penalty (as the case may be). The affliction only attaches to the instrument and not the transaction.

20.2 The *Arbitration Act, 1966* has always been held to be an exhaustive legislation in the nature of a complete Code. [*Paragraphs 83-84, 89* in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*[20]*]* According to Mr. Panda, the impounding of the parent instrument that contains the arbitration agreement by a forum that exercises power under the complete Code, either under *Section 8, 9 and 11* within *Part I*, or under *Section 45* within Part-II, is inconsistent with the character of *Arbitration Act, 1996* which is in the nature of a complete code.

21. Looking at the respective projection by the learned *Amicus Curiae* and other counsels, the following questions fall for our consideration:

i) Whether the non-stamping of the substantive contract/instrument would render the arbitration agreement *non-existent in law, void* and unenforceable at the stage of Section 11 of the *Arbitration Act, 1996* for the purpose of referring a matter for arbitration?

ii) Whether the examination of stamping and impounding should be done at the threshold by the Section 11 judge or should it be left to the arbitrator?

F. The Statutory framework of the *Stamp Act, 1899*

[20] (2011) 8 SCC 333

22. Let us begin by examining the objective behind the enactment of the *Stamp Act, 1899.* The 67th Law Commission Report[21] suggests that the idea of a fiscal enactment for the purpose of collecting revenue for the State first originated in Holland and thereafter, the *Bengal Regulation 6 of 1797* was enacted in India. This was initially limited to Bengal, Bihar, Orissa and Banaras. Subsequently, various stamp regulations were introduced in Bombay and Madras. The Stamp duties were primarily intended to compensate for the deficiency in public revenue due to abolition of tax for the maintenance of police establishments, leviable on "Indian Merchants and Traders". However, the Regulation paved way for later enactments relating to stamp duty. In 1860, the first Act relating to Stamp duties was enacted in India. This was repealed by the *Act of 1862, 1869, 1879* and subsequently, the *Act of 1899* was enacted which is the current legislation.

23. Reflecting on the objective of the *Stamp Act, 1899*, a 3-judge bench of this Court in *Hindustan Steel Ltd. v. Dilip Construction Co.*[22] (for short "Hindustan Steel") speaking through J.C. Shah J. made the following pertinent observation:

> "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."

24. Learned *Amicus Curiae*, Mr. Gourab Banerjee cited the decision of the Pakistan Supreme Court in *Union Insurance Company of Pakistan Ltd. v Hafiz Muhammad Siddique*[23] which addressed this issue as early as 1978, following the ratio in *Hindustan Steel (supra).* Faced with the question of whether there would be any valid arbitral proceedings, if the arbitration agreement is unduly stamped

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[21] Law Commission of India, *'Indian Stamp Act'* (67th Report, February,1997) available at https://lawcommissionofindia.nic.in/report_seventh/accessed on 11March 2023
[22] (1969) 1 SCC 597
[23] 1978 PLD SC 279

and hence, inadmissible in evidence under Section 35 of the *Stamp Act,1899*; the Court attributed a purely fiscal purpose to stamping, holding that stamping is not meant to interfere in commercial life. Discussing the provisions of the *Stamp Act,1899* including *Section 61* which empowers appellate Courts to revise decisions on "sufficiency" of stamps, Dorab Patel J concluded that:

> "the object of the legislature in enacting the Stamp Act was to protect public revenue and not to interfere with commercial life by *invalidating instruments* vital to the smooth flow of trade and commerce."
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> [emphasis supplied]

25. Thus, the object is to see that the revenue for the State is realised to the utmost extent[24] and not to affect the validity of the document. Its provisions must be construed narrowly to that extent. In the same judgment, it was elaborated by the Pakistan Supreme Court as under:

> "For example, an instrument would be produced in evidence only when there is a dispute about it, therefore, if the intention of the Legislature had been to render invalid all instruments not properly stamped, it would have made express provision in this respect and it would have also provided some machinery for enforcing its mandate in those cases in which the parties did not have occasion to produce unstamped instruments before the persons specified in the section."

26. This Court in *RIO Glass Solar SA v. Shriram EPC Limited and Ors.*[25] while holding that foreign awards need not be stamped noted that the *Stamp Act,1899* reflects the fundamental policy of Indian law. A 2-judge bench speaking through Nariman J. noted as under:

> " 34. ……The fundamental policy of Indian law, as has been held in Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644, and followed in Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49, makes it clear that if a statute like the Foreign Exchange Regulation Act, 1973 dealing

[24] J.M.A. Raju v Krishnamurthy Bhatt, AIR 1976 Guj 72; Chiranji Lal (Dr.) v. Hari Das (2005) 10 SCC 746; Jagdish Narain v. Chief Controlling Revenue Authority, AIR 1994 All 371.
[25] (2018) 18 SCC 313

> with the economy of the country is concerned, it would certainly come within the expression "fundamental policy of Indian law". *The Indian Stamp Act, 1899, being a fiscal statute levying stamp duty on instruments, is also an Act which deals with the economy of India, and would, on a parity of reasoning, be an Act reflecting the fundamental policy of Indian law."*
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> [emphasis supplied]

27. The object of the Stamp Act can be further understood from S. Krishnamurthy Aiyar's Commentary[26] on the *Stamp Act, 1899* where discussing the judgments in *Hindustan Steel(supra)* and *J.M.A Raju v Krishnamurthy Bhatt* [27], the object is stated as under:

> "The object of the Stamp Act is a purely fiscal regulation. Its sole object is to increase the revenue and all its provisions must be construed as having in view the protection of revenue. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The whole object is to see that the revenue of the State is realised to the utmost extent"

It is plain that the legislative intent and object behind the *Stamp Act,1899*, is to secure revenue for the State and it is an Act reflecting the fundamental policy of Indian law. Thus, policy considerations and securing revenue must also be kept in mind while interpreting the provisions of the *Stamp Act,1899.*

27.1. In the case of *Commissioner of IT v. Chandanben Maganlal*[28], it was held that any provision relating to a tax statute must be interpreted so that the meaning of such provision must harmonise with the legislature's intention behind the law. Let us now consider *Section 35* & *36* of the *Stamp Act, 1899* with which we are directly concerned. They are extracted below:

> "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

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[26] S. Krishnamurthy Aiyar, *The Indian Stamp Act, An Exhaustive Summary with State Amendments*; 7th Edn, P. 22
[27] AIR 1976 Guj 72
[28] (2000) 245 ITR 182

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;
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> *(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 66 [the 67 [Government]] or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act."*

"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 duly stamped."

28. Section 35 proscribes authorities from considering unstamped documents but the exceptions to the statutory bar under *Section 35* as provided in *35(a),(b),(d)* and *(e)* and *Section 36*, would clearly suggest that non-payment of stamp duty is a curable defect and the document would not be rendered void at the first instance, if the requisite Stamp duty is not paid. Thus, there is no absolute bar. It is also well-settled in law that failure to stamp a document

does not affect the validity of the transaction embodied in the document; it merely renders a document inadmissible in evidence[29].

28.1. K. Krishnamurthy[30] in the Commentary on the *Indian Stamp Act, 1899* discusses the proviso to *Section 35 of Stamp Act, 1899* as under:

> "This proviso enables Courts and Arbitrators to admit in evidence documents unstamped or deficiently stamped on payment of the proper duty and penalty. An instrument not duly stamped shall be admitted in evidence on payment of the duty and penalty. An instrument not duly stamped 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 together with penalty[31]. An award which is not engrossed on stamped paper or is engrossed on *an insufficiently stamped paper may be validated with retrospective effect by payment of the duty or deficit duty[32]. Where an award is not stamped, the defect in the award can be cured by impounding the document and after the defect is removed it can be brought on record and made a rule of the Court.* [33]"
>
> [emphasis supplied]

29. Similarly, *Section 42(2)* of the *Stamp Act, 1899* which deals with the consequence of non-stamping provides as follows:

> "42. Endorsement of instruments in which duty has been paid under section 35, 40 or 41.—
> (1) When the duty and penalty (if any) leviable in respect of any instrument have been paid under section 35, section 40 or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.
>
> *(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated* ***as if it had been duly stamped****, and shall be delivered on his*

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[29] Gulzari Lal Malwari v Ram Gopal AIR 1937 Cal 765; Mattegunta Dhanalakshmi v Kantam Raju Saradamba,AIR 1977 AP 348; See also Puranchandra v Kallipada Roy, AIR 1942 Cal 386;Boottam Pitchiah v Boyapati Koteswara Rao AIR 1964 AP 519
[30] K. Krishnamurthy, *The Indian Stamp Act, An Exhaustive Summary with State Amendments;*12th Edition P. 372-373
[31] Omprakash v. Laxminarayan 2014(1) SCC 618
[32]Pattoolal Sharma v Rajadhiraj Umrao Singh AIR 1955 NUC 2621
[33] Wilson & Co. Pvt. Ltd. V K.S. Lokavinayagam AIR 1992 Mad 100

application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct:

Provided that—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate;

(b) nothing in this section shall affect the Code of Civil Procedure, 1882 (14 of 1882), section 144 clause 3."

[emphasis supplied]

30. The phraseology of *Sections 36, 35 and 42* of the *Stamp Act,1899* was considered in *Hindustan Steel (supra).* The factual backdrop therein was that Hindustan Steel made an application under *Section 30* and *33* of the *Indian Arbitration Act,1940* for setting aside the award on the ground that it was unstamped and as such, *void ab initio*. This Court, however, held that there is no bar against an instrument not duly stamped being "acted upon", *after* payment of stamp duty and penalty according to the procedure prescribed in the Act. It was pertinently observed as follows:

"6. Relying upon the difference in the phraseology between Sections 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. *The argument ignores the true import of Section 36.*

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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 supplied)

31. The above would indicate that there is no absolute bar against the instrument being "acted upon" since at a later stage the defect is curable.

31.1. Arguing that the above course is not available, Ms. Malavika Trivedi, learned Senior Counsel for the intervenor had contended that *Section 35* provides for a statutory bar, where the agreement shall not be admitted in evidence for any purpose nor shall it be acted upon, registered or authenticated by any such person or by any public officer. It is, therefore, submitted that when a Court appoints an arbitrator under *Section 11* of *Arbitration Act,1996,* it is certainly "acting upon" the arbitration clause, which is barred by the clear language of *Section 35* of the *Stamp Act,1899*. Let us now proceed to test the above argument.

31.2 In *Hameed Joharan v. Abdul Salam*[34] in the context of an unstamped decree for partition, 2 judges of this Court had the occasion to interpret *Section 35 of the Stamp Act,1899* and the interplay with *Article 136* of the *Limitation Act,1963.* It was contended in that case that an instrument not duly stamped, cannot be "acted upon". The issue therein was whether a decree passed in a suit for partition can be acted upon/enforced, without engrossing on stamp paper. It was also argued that the period of limitation begins to run from the

[34] (2001) 7 SCC 573

date when the decree becomes *enforceable* i.e. when the decree is engrossed on the stamp paper. In this context, the Court opined that:

> "38. .....Undoubtedly, Section 2(15) includes a decree of partition and Section 35 of the Act of 1899 lays down a bar in the matter of unstamped or insufficient stamp being admitted in evidence or being acted upon — *but does that mean that the prescribed period shall remain suspended until the stamp paper is furnished and the partition decree is drawn thereon and subsequently signed by the Judge? The result would however be an utter absurdity.* As a matter of fact, if somebody does not wish to furnish the stamp paper within the time specified therein and as required by the civil court to draw up the partition decree or if someone does not at all furnish the stamp paper, does that mean and imply, no period of limitation can be said to be attracted for execution or a limitless period of limitation is available. *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."*
>
> [Emphasis supplied]

31.3. Thus, it was held that the *Stamp Act,1899* cannot override the effect of another statute such as the *Limitation Act,1963* operating in a completely different sphere. Further, the expression "executability" and "enforceability" was distinguished to mean that "enforceability" cannot be a subject matter of *Section 35* of *Stamp Act,1899*. It was conclusively held that *enforceability cannot be suspended* until furnishing of stamp paper. At most, a document can be rendered non-executable.

31.4. Thereafter, a 3-judge bench of this Court in *Chiranji Lal (Dr.) v. Hari Das*[35] after discussing the above judgment in *Hameed Joharan(supra)* on the question of period of limitation beginning to run from the date of the decree being engrossed on the stamp paper, pertinently held as under:

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[35] 2005) 10 SCC 746

> "23. *Such an interpretation is not permissible having regard to the object and scheme of the Indian Stamp Act, 1899.* The Stamp Act is a fiscal measure enacted with an object 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 initial defect in the instrument (Hindustan Steel Ltd. v. Dilip Construction Co. [(1969) 1 SCC 597])."
>
> [emphasis supplied]

31.5. It was specifically held that "the starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper."

31.6. Thus, unstamped/insufficiently stamped document does not affect the enforceability of a document nor does it render a document invalid[36]. A plain reading of the provisions would also make it clear that a document can be "acted upon" at a later stage. It is therefore a curable defect.

32.The learned Counsel for the Appellant, Mr. Gagan Sanghi argued that Section 35 and 33 are mandatory provisions as it uses the word "shall" and an unstamped document must be impounded at the threshold. In *Principles of Statutory Interpretation* by Justice G.P. Singh[37] on the use of the word "shall" and presumption of the word being imperative, it is stated:

> " ….this prima facie inference about the provision being imperative may be rebutted by other considerations flowing from such construction. There are numerous cases where the word "shall" has therefore been construed as merely directory. The word 'shall', observes HIDAYATULLAH, J. "is ordinarily mandatory but sometimes not so interpreted if the context or the intention otherwise demands

[36] Gulzari Lal Malwari v Ram Gopal AIR 1937 Cal 765; Mattegunta Dhanalakshmi v Kantam Raju Saradamba,AIR 1977 AP 348; See also Puranchandra v Kallipada Roy, AIR 1942 Cal 386;Boottam Pitchiah v Boyapati Koteswara Rao AIR 1964 AP 519

[37] Justice G.P. Singh: *Principles of Statutory Interpretation*,(LexisNexis,2016) at P. 450-451; Burjore and Bhawani Prasad v Bhagana ILR 10 Cal 557; Sainik Motors v State of Rajasthan 1962 (1) SCR 517 ; State of UP v Babu Ram AIR 1961 SC 751

and points out SUBBARAO J. "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."*

[emphasis supplied]

32.1. P.B. Maxwell in the *Commentary* on *Interpretation of Statutes*[38] notes that an Act is to be regarded in its entirety and discusses the following three ways of interpretation:

"Passing from the external aspects of the Statute to its contents, it is an elementary rule that construction is to be made of all parts together, and not of one part only by itself"

i) Individual words are not considered in isolation, but may be have their meaning determined by other words in the Section in which they occur.

ii) The meaning of a section may be controlled by other individual sections in the same Act.

iii) Lastly, the meaning of a section may be determined, not so much by reference to other individual provisions of the Statute, as by the scheme of the Act regarded in general"

[emphasis supplied]

32.2. Justice G.P. Singh in *Interpretation of Statutes* further notes[39]:

" The principle that the statute must be read as a whole is equally applicable to *different parts of the same section*. The section must be construed as a whole whether or not one of the parts is a saving clause or a proviso. Subbarao J calls it "an elementary rule that construction of a section is to be made of all the parts together" [emphasis supplied]

32.3. Thus, on a consolidated reading of *Section 35,36* and the proviso to Section *35 and 42* ; the use of the word "acted upon" in all these sections or even in the same section, read with the objective and legislative intent of the *Stamp Act 1899*, it is clear that the bar under *Section 35* is not intended to be absolute; non-payment of stamp duty is a curable defect as the objective is to protect revenue. Moreover, none of the provisions of the *Stamp Act,1899* have the effect of rendering a document *invalid* or *void ab initio*.

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[38] P St J Langan, *Maxwell on The Interpretation of Statutes* (N M Tripathi Private Ltd, 1976); P. 58-64

[39] Justice G.P. Singh: *Principles of Statutory Interpretation*,(LexisNexis,2016) at P. 46;

G. The Statutory Scheme of the *Arbitration Act,1996*

33. It is apposite to refer to the parliamentary intent behind the enactment of the *Arbitration Act, 1996* which replaced the *Arbitration Act,1940*. The first law on the subject was the *Arbitration Act, 1899* with limited application in the Presidency towns of Calcutta, Bombay and Madras. Thereafter, the second schedule of the provisions of the *Civil Procedure Code, 1908* dealt with arbitration. The major consolidated legislation was the *Arbitration Act,1940* which was based on the *(English) Arbitration Act,1940*. The Law Commission in its *246th LCI Report*(supra) notes that this arbitral regime was based on the mistrust of the arbitral process and "The 1996 Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980." The relevant part of the Statement of Object and Reasons is extracted below:

> (i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
>
> (ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
>
> (iii) to provide that the arbitral tribunal gives reasons for its arbitral award;
>
> (iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
>
> *(v) to minimise the supervisory role of courts in the arbitral process;*
>
> (vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
>
> (vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

[emphasis supplied]

34. Further, on reading *Article 5* of the Model Law and *Section 5* of the *Arbitration Act,1996*, which cover the provisions for judicial intervention in arbitral proceedings, it is clear that the Parliament went beyond Article 5 of the UNCITRAL Model law and added a non-obstante clause. To substantiate this point, it is pertinent to quote the provisions in full.

Article 5 of the *UNCITRAL Model Law,1985* reads as under:

" Article 5. Extent of Court intervention- In matters governed by this Law, no court shall intervene except where so provided in this Law."

Section 5 of the *Arbitration Act,1996* reads as under:

"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."

[emphasis supplied]

35. Additionally, reflecting on the purpose of Article 5, Dr. Peter Binder in *UNCITRAL Model Law on International Commercial Arbitration, 1985*[40] notes:

"1-107 : According to the Commission Report, the purpose of Article 5 was "to achieve a certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the (model) law on international commercial arbitration all instances of court intervention. The Analytical Commentary describes the effect of Article 5 as being "to exclude any general or residual powers given to

[40] P. Binder, *International Commercial Arbitration And Conciliation In UNCITRAL Model Law Jurisdictions* 274 (2nd ed., Sweet & Maxwell London 2005) P. 50-51

> the courts in a domestic system which are not listed in the model law"
>
> In addition to the great advantage of providing clarity of law, which is particularly important for foreign parties(protecting them from unwanted legal surprises, *Article 5 also functions to accelerate the arbitral process in allowing less of a chance of delay caused by intentional and dilatory court proceedings*."
>
> [emphasis supplied]

36. A collective reading of the Statement of Object and Reasons of the *Arbitration Act,1996* r/w *Section 5* of the Act, and Article 5 of the Model Law, would make it abundantly clear that the legislative intent behind the enactment was to *inter alia,* minimise the intervention of the Courts and provide for timely resolution of disputes. By adding a *non-obstante* clause, the Parliament through Section 5 made a significant departure from Article 5 and gave an overriding effect over the provisions of any other law for the time being in force. It circumscribed the role of the judicial authority, especially in context of the Courts exercising any residual power that may accrue to them through *any* provision in *any* law.

37. Let us now refer to the unamended *Section 11(6)* of the *Arbitration Act,1996* which is based on the Article 11 of the UNCITRAL Model law:

> "11 Appointment of arbitrators. —
>
> (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 Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

38. Even though the key provisions in the *Arbitration Act,1996* are primarily based on the UNCITRAL Model Law, the legislature has also made significant departures, while amending *Section 11* and *Section 8* of the *Arbitration Act,1996*.

39. Next, it would be appropriate to briefly trace the jurisprudential history of *Section 11(6) of the Arbitration Act,1996* for the purpose of this reference.

i) Evolution of law under *Section 11(6) of Arbitration Act, 1996*

40. A 2-judge Bench of this Court in *ICICI Ltd. v. East Coast Boat Builders & Engineers Ltd*[41] taking into consideration delays in appointment of arbitrators under *Section 11(6),* referred the question of jurisdiction of a Section 11 judge to consider arbitrability of a dispute to a three-judge bench. It was noted that in *KR Raveendranathan v. State of Kerala*[42], another two Judge Bench of this Court had already referred to a larger Bench, a similar question.

41. Thereafter, in *Sundaram Finance Ltd. v. NEPC* India Ltd[43], a 2-judge bench opined that:

> "12. ...under the 1996 Act, appointment of arbitrator(s) is made as per the provisions of section 11, which does not require the Court to pass a judicial order appointing [the] arbitrator(s)."

42. The above obiter was affirmed by a 2-judge Bench in *Ador Samia Pvt Ltd. v. Peekay Holdings Ltd*[44] (for short "Ador Samia"). Dealing with the question of appeal under *Article 136* of the Constitution of India, from an order made by the Chief Justice of a High Court appointing an arbitrator, this Court held that an order under *Section 11* of the *Arbitration Act,1996* was an *administrative order*. This was affirmed by a three- Judge Bench in *Konkan Railways Corpn v.*

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[41] (1998)9 SCC 728
[42] (1996)10 SCC 35
[43] (1999)2 SCC 479
[44] (1999)8 SCC 572

Mehul Construction Co[45] (for short "Konkan Railways(I)") where the matter came up for reconsideration of the ratio in *Ador Samia(supra).* It was observed as under:

> " 4. ...When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same."

43. The three-judge bench decision was subsequently affirmed by five judges in *Konkan Railways Corpn v. Mehul Construction Co*[46](for short *"Konkan Railways (II)").* This Court held therein that the power exercised by the Chief Justice or 'any person or institution' designated by him under section 11 is not adjudicatory. Following a detailed review of the precedents, it was held that the function of the Chief Justice or his designate under Section 11 is to only "fill the gap left" and appoint an arbitrator for expeditious constitution and commencement of arbitration proceedings.

44. The seven judges of this Court in *SBP* (supra) overturned the decision in *Konkan Railways (II)* (supra). It was held therein that deciding an application for appointment is an exercise of 'judicial' power, as opposed to an 'administrative' power and that the Court is also authorized to record evidence:

> "39. ....[f]or the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the

[45] (2000)7 SCC 201
[46] (2002) 2 SCC 388

documents produced or take such evidence or get such evidence recorded"

45. However, Justice C.K. Thakker dissented from the majority opinion and came to the conclusion that it was an administrative power in the following passage:

> "85. ...There is [...] no doubt in my mind that at that stage, the satisfaction required is merely of prima facie nature and the Chief Justice does not decide lis nor contentious issues between the parties. Section 11 neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters."

46. The four main reasons behind the dissent can be summarised as under:

> "111. ....Firstly, the function of the Court is to interpret the provision as it is and not to amend, alter or substitute by interpretative process. Secondly, it is for the legislature to make a law applicable to certain situations contemplated by it and the judiciary has no power in entering into 'legislative wisdom'. Thirdly, as held by me, the 'decision' of the Chief Justice is merely prima facie decision and sub-section (1) of Section 16 confers express power on the arbitral tribunal to rule on its own jurisdiction. Fourthly, it provides that remedy to deal with situations created by the order passed by the arbitral tribunal. The sheet anchor of his dissent is that in the guise of interpreting a statute, judicial legislation is not permissible."

47. In the dissenting opinion in Paragraph 95 & 96, Justice Thakkar further held as under:

> "95. Now, let us consider Section 16 of the Act. This section is new and did not find place in the old Act of 1940. Sub-section (1) of that section enables the Arbitral Tribunal to rule on its own jurisdiction. It further provides that the jurisdiction of the Tribunal includes ruling on any objections with respect to existence or validity of the arbitration agreement. Sub-sections (2), (3) and (4) lay down procedure of raising plea as to the jurisdiction of the Arbitral Tribunal and entertaining such plea. Sub-section (5) mandates that the Arbitral Tribunal "shall decide" such plea and, "where the Arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award". Sub-section (6) is equally important and expressly enacts that a party aggrieved by an arbitral award may invoke Section 34 of the Act for setting aside such award.

> The provision appears to have been made to prevent dilatory tactics and abuse of immediate right to approach the court. If an aggrieved party has right to move the court, it would not have been possible to preclude the court from granting stay or interim relief which would bring the arbitration proceedings to a grinding halt. The provisions of Section 16(6) read with Section 5 now make the legal position clear, unambiguous and free from doubt.
>
> 96. Section 16(1) incorporates the well-known doctrine of *Kompetenz-Kompetenz* or competence de la competence. It recognises and enshrines an important principle that initially and primarily, it is for the Arbitral Tribunal itself to determine whether it has jurisdiction in the matter, subject of course, to ultimate court-control. It is thus a rule of chronological priority. *Kompetenz-Kompetenz* is a widely accepted feature of modern international arbitration, and allows the Arbitral Tribunal to decide its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement, subject to final review by a competent court of law i.e. subject to Section 34 of the Act."

48. The above line of reasoning in Justice Thakkar's dissent resonates with the internationally recognized principle of *Kompetenz Komptenz* and the doctrine of separability. The majority opinion in *SBP (supra)* suggests that a Section 11 Court could conduct a mini-trial at the pre-referral stage. The jurisprudential correctness of *SBP(supra)* has been doubted and was considered as excessive judicial intervention by the *246th LCI Report*(supra). It has been legislatively overruled by subsequent amendments in the *Arbitration Act,1996* which will be discussed later in this judgment.

49. Thereafter, a two-judge bench in *Boghara Polyfab* (supra) which followed *SBP(supra*), allowed the court to examine, *inter alia*, the following issues:

> "22.2. (a) Whether the claim is a dead (long barred) claim or a live claim.
>
> (b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection."

50. The *246th LCI report*(supra), discussing both *SBP*(supra) and *Boghara*(supra) significantly noted that the real issue is the "scope" and "nature" of judicial intervention:

> "29. The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power – which *obfuscates the real issue* underlying such nomenclature/description as to:
>
> > -*the scope of such powers* – i.e. the scope of arguments which a Court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not – i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc; and which of these it should leave for decision of the arbitral tribunal.
> >
> > -*the nature of such intervention* – i.e. would the Court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the arbitral tribunal"
>
> [emphasis supplied]

51. As regards *nature,* the 246th LCI Report(supra) noted that the exposition of law on the point is to be found in *Shin Etsu* (supra) where this Court while interpreting *Section 45* of the *Arbitration Act,1996* held that the issue should be looked at on a "prima facie" basis only. On *scope*, it was recommended that the Court should restrict to the examination of whether the agreement is "null and void" and if the Court finds that the agreement does not exist, that decision would be final. It made the following recommendation as regards *Section 8* and *11* of the *Arbitration Act,1996:*

> "33. ...The *scope* of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement *does not exist* or is *null and void.* In so far as the *nature* of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be."

52. The 2015-Amendment significantly restricted the *scope* of intervention even further as we will notice below.

ii) Post-2015 Regime: Insertion of *Section 11(6A)*

53. There has been a major shift post-2015 amendment with the insertion of *Section 11(6A)* in the *Arbitration Act,1996*. The legislative intent is clear from the plain reading of Section 11(6A) as extracted below:

> "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]

54. The basis for this amendment, as explained in *246th LCI Report*(supra), was to undo the effect *of SBP(supra)* and *Boghara(supra)* which widened the scope of inquiry and intervention by a Court under *Section 11(6)* of the *Arbitration Act,1996. Section 11(6A*) uses the phrase "notwithstanding any judgment, decree or order of any Court" and effectively overrules judgments which widened the scope of inquiry. *Section 11(6A)* does not use the word "null and void" as recommended by the Law Commission. Thus, the legislature went one step further and confined the examination to the "existence" of the arbitration agreement.

55. Now let us notice the language used in *Sections 8,11* and *45* of the *Arbitration Act,1996*, all of which deal with the power of Courts at the pre-arbitral stage.

55.1. *Section 8* of the *Arbitration Act,1996* titled "Power to refer parties to arbitration where there is an arbitration agreement" has been amended in 2015

with the following language: *"unless it finds that prima facie no valid arbitration agreement exists"* .

55.2. Section 45 in Part II titled *"Power of judicial authority to refer parties to arbitration"* has also been amended and notified in 2019. The amendment in *Section 45* was made after the judgment of three judges in *Shin Etsu(supra)* where in a case of international arbitration, the question before this Court was when an application under *Section 45* is moved, is the Court required to pass a *prima facie* finding or a final-finding based on the merits of the case, which would result in a full-fledged trial? In the majority opinion, it was held as under:

> "105. ...the object of the Act would be defeated if proceedings remain pending in the court even after commencing of the arbitration. It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by Section 45, the court is required to take only a *prima facie view* for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal or before the court at the post-award stage"

55.3. Pursuant to *Shin Etsu(Supra)*, the 2019 Amendment to Section 45 states: "*...unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed".* Thus, from the above discussion it is clear that *Section 8* uses the word "validity" and *Section 45* uses the phrase "null and void, inoperative or incapable of being performed". In that sense, Section 11(6A) is a unique provision which is confined to the "existence" of the arbitration agreement and not its "validity". The amended provision also does not find place in the UNCITRAL Model Law. Learned Amicus Curiae pointed to

the definition of *confine* in P. Ramanatha Aiyar's Advanced Law Lexicons[47] which states: *"imprison; hold in custody. To keep within circumscribing limits".*

56. On reading the language in *Section 11(6A)* with *Section 5* of the *Arbitration Act1996*, and an interpretation based on legislative intent, it is apparent that the scope under *Section 11(6A)* is very narrow.

iii)Post- 2019 Amendment and the Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India.

57. The Committee led by Justice Srikrishna[48] had recommended further changes to the *Arbitration Act, 1996*. It had recommended for the deletion of *Section 11(6A)* with the power of appointment of arbitrators being left entirely to the arbitral institutions. Drawing inspiration from Singapore, Hong Kong, United Kingdom etc., the Committee recommended that this would prevent further delays and set the momentum for institutional arbitration in India. Under the amended *Section 11(6)*, the appointment of arbitrators is to be done by the arbitral institution:

> "…the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be."

58. Insertion of *Section 6(B)* by *Act 3 of 2016* which is yet to notified reads as under:

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[47] P. Ramanatha Aiyar, *The Encyclopaedic Law Dictionary with Words and Phrases, Legal Maxims and Latin terms*(5th Edition); P. 1037

[48] Government of India, *'Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (HLC Report, July 2017) Available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf <Last accessed on 19.3.2023>

> "(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.]"
>
> [emphasis supplied]

Even though the amendments are not notified yet and there is limited clarity on the process, we may take a cue about the intention of the legislature which seems to be to ensure minimal judicial intervention at the pre-referral stage of appointment of arbitrator.

59. It would be apposite to refer now to the prevalent position amongst the most-preferred arbitral institutions i.e. the *International Chamber of Commerce Court (ICC Court), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the Arbitration Institute of the Stockholm Chambers of Commerce (SCC)* which were mentioned in the report of the High-level Committee and those can be broadly noted as under:-

1.ICC Arbitration Rules, 2021:

> "Article 6. Effect of the Arbitration Agreement.—
> (4) In all cases referred to the Court under Article 6(3)…The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist.
> (5) In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the *arbitral tribunal itself."*

2. HKIAC Arbitration Rules:

> *"*Article 11 – HKIAC's Prima Facie Power to Proceed
> 11.1 The arbitration shall proceed if and to the extent that HKIAC is satisfied, *prima facie*, that an arbitration agreement under these Procedures may exist. Any question as to *the jurisdiction of the arbitral tribunal shall be decided by the arbitral tribunal* once constituted.

11.2 HKIAC's decision pursuant to Article 11.1 is without prejudice to the admissibility or merits of any party's pleas."

3. LCIA Arbitration Rules:

"Article 23. Jurisdiction and Authority
23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement."

4. SIAC International Arbitration Centre Rules, 2016:

"Article 28. Jurisdiction of the Tribunal
28.1 If any party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration, before the Tribunal constituted,the Registrar shall determine if such objection shall be referred to the Court. If the Registrar so determines, the Court shall decide if it is prima facie satisfied that the arbitration shall proceed. The arbitration shall be terminated if the Court is not so satisfied. Any decision by the Registrar or the Court that the arbitration shall proceed is without prejudice to the power of the Tribunal to rule on its own jurisdiction.
28.2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement. An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

5. Arbitration Institute of SCC Rules:

"Article 11. Decisions by the Board
The Board takes decisions as provided under these Rules, including deciding:
(i) whether the SCC manifestly lacks jurisdiction over the dispute pursuant to Article 12 (i);
Article 12(i). Dismissal
The Board shall dismiss a case, in whole or in part, if:
(i) the SCC manifestly lacks jurisdiction over the dispute;..."

60. Thus, the approach of the reputed arbitral institutions worldwide would show that there is express recognition of the principle of *Kompetenz-Kompetenz* and role of Courts is limited to *preliminary prima facie* examination. A reading of the above rules would also show that arbitral institutions have recognized the *prima- facie test* to determine the existence of the arbitration agreement. Discussing the rules of the major international arbitral institutions,

William Park in an article titled "Challenging Arbitral Jurisdiction: The Role of Institutional Rules"[49] writes:

> " On occasion, however, arbitrations have been filed without even minimal indicia of consent to the arbitral process. No document seems to exist saying the respondent actually agreed to arbitrate with the claimant. In such instances, efficiency will be served by early consideration of a respondent's argument that the case should not proceed. To this end, the ICC Rules permit the ICC Court to consider obvious jurisdictional defects, with arbitration going forward only to the extent the ICC Court is *prima facie* satisfied that an arbitration agreement may exist."

61. Thus, the objective behind the prima-facie test while referring a party to arbitration, is to also ensure that a non-consenting party is not bound to the process of arbitration and the doctrine of party autonomy is upheld with minimal intervention of Courts.

62. Chandrachud J.(as he then was) in the concurring opinion in *A. Ayyasamy vs A. Paramasivam & Ors*[50] (for short *"Ayyasamy")* noted, *inter alia,* that jurisprudence in India must strengthen institutional efficacy of arbitration with minimal intervention of Courts:

> "53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. 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*."
>
> [emphasis supplied]

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[49] Park, William. *"Challenging Arbitral Jurisdiction: The Role of Institutional Rules*", Boston University School of Law, Public Law Research Paper (2015).
[50] (2016) 10 SCC 386

63. It upheld the one-stop arbitration principle propounded by the *House of Lords* in *Fiona Trust and Holding Corporation v. Privalov*[51] .

> "46. In *Fiona Trust and Holding Corpn.* v. *Privalov* [*Fiona Trust and Holding Corpn.* v. *Privalov*, (2007) 1 All ER (Comm) 891 : 2007 Bus LR 686 (CA)] , the Court of Appeal emphasised the need to make a fresh start in imparting business efficacy to arbitral agreements. The Court of Appeal held that : (Bus LR pp. 695 H-696 B & F, paras 17 & 19)
>
> > "*17*. ... For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.
> >
> > ***
> >
> > *19*. One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction."
>
> Arbitration must provide a one-stop forum for resolution of disputes. *The Court of Appeal held that if arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract is procured by bribery, just as much as they can decide whether a contract has been vitiated by misrepresentation or non-disclosure.*
>
> [Emphasis supplied]

64. Thus, the one-stop arbitration approach would ensure that all issues on initial illegality or whether a contract is void can be decided by the arbitral institutions subject, of course, to the ultimate supervisory jurisdiction of the Courts. An arbitral award can be set aside by Courts as per the legislative

[51] (2007) 1 All ER(Comm) 891 (Paras 17-18)

mandate in Section 34 of the *Arbitration Act,1996.* This would prevent multiplicity of proceedings in Courts and tribunals and ensure minimal judicial intervention.

H. Discussion on *SMS Tea*:

65. Having broadly discussed the legislative scheme of the *Stamp Act,1899* and the *Arbitration Act,1996,* let us now examine the correctness of the decisions referred to in *NN Global(supra).*

66. The judicial position on the enforceability of an arbitration agreement contained in an unstamped or insufficiently stamped agreement can be traced from this Court's 2011 decision in *SMS Tea (supra*). The facts of the case were that the appellant was granted lease of two tea estates for a term of 30 years. The leases deed contained an arbitration clause. On abrupt eviction by the respondent from the tea estates, the appellant filed an application under *Section 11* of the *Arbitration Act, 1996* for the appointment of arbitrator. The learned Chief Justice of Guwahati High Court dismissed the *Section 11* application and held that the lease deed was compulsorily registrable under *Section 17* of the *Registration Act,1908* and *Section 106* of the *Transfer of Property Act,1882* ; and as the lease deed was not registered, even the arbitration clause would be rendered invalid. The matter reached this Court where one of the questions was whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable. It was observed that the arbitration agreement in an unstamped or insufficiently stamped instrument is invalid, given that *Section 35* of the *Stamp Act, 1899* expressly bars the authority before which such unstamped or insufficiently

stamped instrument is presented to act on such an instrument. At this stage, it is important to keep in mind that decision in *SMS* (supra)came at a time when *SBP* (supra) and *Boghara Polyfab* (supra) continued to hold the field i.e. prior to the insertion of *Section 11(6A)* to the Act. Thus, even at the Section 11 stage, under the law which existed before the 2015 Amendment, the Court had wide powers and could also conduct detailed adjudication. Even though this Court in *SMS Tea(supra)* succinctly recognized the doctrine of separability in the context of *Registration Act, 1908*, it held that strict and mandatory provisions of the *Stamp Act,1899* on non-payment of Stamp duty could not be read harmoniously with the relevant provisions of the *Arbitration Act, 1996.* It was held as under:

> "22.1. 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.
>
> 22.2. 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."

67. The judgment in *SMS Tea(supra)* has been upheld in *Naina Thakkar(supra)* and *Black Pearl Hotels v Planet M. Retail Ltd.*[52] (for short "Black Pearl Hotels"). It has also been cited with approval in a recent judgement by 3 judges of this Court in *Dharmaratnakara* (supra). As noted earlier, the Court in *Garware* (supra) also followed *SMS Tea* (supra) which has been cited with approval in *Vidya Drolia* (supra). This legal proposition is doubted by this Court in *NN Global* (supra) and referred to us.

[52] (2017) 4 SCC 498

68. *Section 11(6A)* as we have noted above begins with a non-obstante clause viz. "notwithstanding any judgment, decree or order of any Court" and effectively overrules all judgments which widened the ambit of examination.

69. The first submission before us by Mr. Gagan Sanghi, learned Counsel for the Appellant on this aspect was that the observations of two different three-Judge Bench decisions in *Dharmaratnakara (*supra) and *Black Pearl Hotels*(supra) have not been considered in *NN Global* (supra) which is another three-judge bench and that this seriously calls into question the finding of *NN Global* (supra).

70. It is significant to note here that the above two judgments did not consider the recent *11(6A)* Amendment. *Black Pearl Hotels* (supra) was delivered *pre-11(6A)* and hence stands legislatively overruled. In *Dharmaratnakara* (supra), it appears that the amendment to *Section 11(6A)* was not brought to the notice of the Court and the earlier judgment in *Garware* (supra) was not considered. This could also be because the Court considered the order which was passed prior to introduction of *Section 11(6A)*. In *Dharmaratnakara* (supra), the issue before the Court was whether a document executed between parties was a lease deed or an "agreement to lease", and whether arbitration could be invoked under the said document. Even after determination by the Registrar (Judicial) of the Karnataka High Court that the concerned document was a lease deed, the deficit stamp duty was not paid. The Court relied on *SMS Tea(supra),* to hold that the arbitration agreement could not be acted upon, unless stamp duty is paid.

71. From the discussion above, it is clear that *Dharmaratnakara* (supra) does not lay down the correct position in light of the post-2015 amendment regime. Through the Amending Act, *SMS Tea (supra)* stands legislatively overruled.

72. The correct exposition of law after the insertion of *Section 11(6A)* is to be found in *Duro Felguera, S.A. v. Gangavaram Port Ltd*[53] (for short "Duro Felguera") where it was held that, *"(a)fter the (2015) 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.*" This has been re-affirmed by a 3-judge bench in *Mayavati Trading Private Limited v. Pradyuat Deb Burman*[54] where it was held as under:

> "10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the 15 examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) – see paras 48 & 59."

73.The following extract from *Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.*[55] is equally pertinent where the Court interpreted *Section 11 (6A)* to conclusively hold that a Section 11 judge cannot conduct a mini-trial at that stage:

> "29. The facts of this case remind one of Alice in Wonderland. In Chapter II of Lewis Caroll's classic, after little Alice had gone down the Rabbit hole, she exclaims "Curiouser and curiouser!" and Lewis Caroll states "(she was so much surprised, that for the

[53] (2017) 9 SCC 729
[54] (2019) 8 SCC 714
[55] (2021) 5 SCC 671

> moment she quite forgot how to speak good English)". This is a case which eminently cries for the truth to come out between the parties through documentary evidence and cross-examination. Large pieces of the jigsaw puzzle that forms the documentary evidence between the parties in this case remained unfilled. The emails dated 22nd July, 2014 and 25th July, 2014 produced here for the first time as well as certain correspondence between SBPDCL and the Respondent do show that there is some dealing between the Appellant and the Respondent qua a tender floated by SBPDCL, but that is not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause. Given the inconclusive nature of the finding by CFSL together with the signing of the agreement in Haryana by parties whose registered offices are at Bombay and Bihar qua works to be executed in Bihar; given the fact that the Notary who signed the agreement was not authorised to do so and various other conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties. *The prima facie review spoken of in Vidya Drolia (supra) can lead to only one conclusion on the facts of this case - that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same.* For all these reasons, we set aside the impugned judgment of the Delhi High Court in so far as it conclusively finds that there is an Arbitration Agreement between the parties."
>
> [emphasis supplied]

74. At this point, it would suffice to note that the Court in *SMS Tea(supra)* held that an arbitral agreement would be rendered *inadmissible in evidence* if the underlying contract is not stamped. *It did not*, however, state that an unstamped arbitration agreement would be rendered *void* as held in *Garware(supra)* in the later decision. While *SMS Tea*(supra) extended the separability presumption in the context of the *Registration Act, 1908* we will notice below that this presumption can also be extended in the context of *Stamp Act,1899* through harmonious construction.

I. Discussion on *Garware*

75. The facts in *Garware*(supra) were that a sub-contract, for the installation of geo-textile tubes embankment with toe mound at village Pentha in Odisha, was provided by the employer for prevention from coastal erosion. Owing to disputes between parties, the sub-contract was terminated. The Respondent filed a petition under Section 11 which was allowed by the Bombay High Court and sole arbitrator was appointed. On appeal, this Court primarily relied on *SMS Tea*(supra) to hold that the arbitration agreement in an unstamped document cannot be acted upon and hence, an arbitrator could not be appointed until the unstamped agreement in question was impounded. Despite considering the amended *Section 11(6A)* and the *246th LCI Report*(supra) to note that *SBP(supra)* and *Boghara(supra)* have been overruled, the Court held that "*SMS Tea Estates ha(d), in no manner, been touched by the amendment of Section 11(6-A)"* since it was not excluded by either the *246th LCI Report*(supra) or the Statement of Object and Reasons of the 2015 Amendment. It was further held that as per *Section 2(h)* of the *Indian Contract Act1872,* an agreement becomes a contract only if it is enforceable by law and hence, an unstamped document would be unenforceable due to the bar under *Section 35* of the *Stamp Act,1899.* The following paragraph has been doubted by *NN Global(supra):*

> "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)."

76. The above proposition of law in *Garware*(supra) appears to be incorrect. As noted earlier, the judgment in *SMS Tea(supra)* stands legislatively overruled as it was delivered in the pre-2015 amendment regime. Even though there is no express mention in the *246th LCI Report*(supra), the non-obstante clause effectively overrules it.

77. Now let us consider *Section 2(g)* and *2(h)* of the *Indian Contract Act,1872* which read as under:

> "(g) An agreement not enforceable by law is said to be void;
> (h) An agreement enforceable by law is a contract;"

Incorporating the principle in *Garware(supra)* would mean that as per *Section 2(g)* and *(h)* of the *Contract Act, 1872*, an agreement would be rendered *void-ab-initio*, if it is not stamped. This would however be contrary to the legislative scheme of the *Stamp Act,1899* as per which non-stamping/insufficient stamping is a curable defect as discussed earlier. Moreover, stamp duty is levied on the instrument and not the transaction.[56]

77.1. In *Gulzari Lal Malwari v Ram Gopal*[57] Lord Williams J while discussing Section 35 of the *Stamp Act, 1899* noted that there is no provision in the *Stamp Act,1899* which renders a document invalid:

> "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 but an instance of a document being rendered invalid by the omission of stamps is contained in the English Stamp Act, s. 93*, which provides:—
>
> > A contract for sea insurance (other than such insurance as is referred to, in the fifty-fifth section of the Merchant Shipping Act, Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance"

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[56] Board of Revenue v N. Narasimhan AIR 1961 Mad 504; A. Bapiraju v District Registrar AIR 1968 AP 142
[57] AIR 1937 Cal 765

[emphasis supplied]

77.2. Moreover, the language of *Section 11(6A)* confines the scope of enquiry to only "existence." and not even whether a contract is null and void, as recommended by the *246th LCI Report*(supra). The question on validity and existence can be gone into by the arbitrator under *Section 16* of the *Arbitration Act,1996* and not by the Court under *Section 11* of the *Arbitration Act, 1996.*

J. Interplay between the *Stamp Act 1899, Contract Act 1872* and the *Arbitration Act,1996*

i) Arbitration Act,1996 is a special legislation

78. In order to understand the interplay between the three Acts, reference to the relevant provisions is necessary.

i) *Stamp Act,1899:*

The residuary entry in *Article 5(c)* of *Schedule I* of the *Indian Stamp Act,1899* with the title "Agreements" as noted earlier, states *"if not otherwise provided for"* which, as held by us, brings under its ambit even an Arbitration Agreement.

Now, Instrument is defined under *Section 2(14)* as under:

> "(14) "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or record."

Section 17 provides for the timing of stamping:

> " Instruments executed in India.—All instrument chargeable with duty and executed by any person in [India] *shall be stamped before or at the time of execution."*

"Execution" is defined in *Section 2(12)*:

> "Executed" or "Execution" used with reference to instruments, mean "signed" and "signature"

ii) *Indian Contract Act,1872:*

An agreement under the *Indian Contract Act,1872* is defined in *Section 2(e)* as under:

> "Every promise and every set of promises, forming the consideration for each other, is an agreement".

Sections 2(g), 2(h) and 2(j) and Section 10 of the *Indian Contract Act,1872* state:

> "(g) An agreement not enforceable by law is said to be void;
> (h) An agreement enforceable by law is a contract;"
> (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable
> (10) 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.

iii) *Arbitration Act,1996:*

Section 2(b) provides as under:

> "(b) arbitration agreement" means an agreement referred to in section 7"

Let us now consider *Section 7* of the *Arbitration Act, 1996* which specifically defines Arbitration agreement:

> "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 [any other electronic means] other means of telecommunication 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."
>
> [emphasis supplied]

78.1. The following conclusions can be drawn from a consolidated reading of the above provisions in the three enactments:

i) There are no specific requirements in *Section 7* of the *Arbitration Act,1996* or any other provision in the *Arbitration Act,1996* as a whole, which provide for necessary stamping for validity of an arbitration agreement or elaborate generally on the same.

ii) Even though *Section 10* of *the Indian Contract Act,1872* recognises oral agreements, a written agreement is *sine-qua-non* for a valid arbitration agreement.

iii) "Signing" is just an example of one of the conditions that may satisfy the form of an arbitration agreement. Thus, the mandatory requirement of a signature is ruled out for an arbitration agreement in *Section 7* of the *Arbitration Act,1996.* Since *Section 7(2)*(*c)* of the *Arbitration Act, 1996* recognises even exchange of claim and defence as written arbitration agreements, there is no signing requirement. Even if a written arbitration agreement is not signed, the parties can still be bound to an arbitration agreement[58]. However, *Section 17* of

[58] Chennai Container Terminal Pvt Ltd v. Union of India, 2007 3 Arb LR 218 (Mad), Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir 1960), Travancore Devaswom Board v.

the *Stamp Act, 1899* provides for the timing of stamping i.e. before or at the time of execution and the term "execution" is defined in the Stamp Act,1899 to mean "signature"

iv) Even though arbitral "awards" are liable to stamp duty under *Item 12* of the *Stamp Act, 1899* and are specifically mentioned in *Schedule I* ; the arbitration agreement for the purpose of stamp duty, gets covered only under the residuary entry viz *"if not otherwise provided for"* in Article 5(c). *The Stamp Act,1899* does not *specifically* refer to an arbitration agreement.

v) As per *Section 7* of the *Arbitration Act, 1996*, Arbitration Agreement can even be non-contractual.

vi) *Section 7(4)(c)* of *Arbitration Act,1996* envisages that the scope of arbitration is not limited to the dispute initially referred to arbitration, but also encompasses any disputes that are included in the pleadings of the parties i.e. statement of claim and defence.

78.2 *The Appointment Of Arbitrators By The Chief Justice Of India Scheme, 1996* provides *inter alia* for the original or certified copy of the "*arbitration agreement"* for a *Section 11(6)* application. I completely agree with the opinion of my Learned Brother, Justice K.M. Joseph that an arbitration agreement has to comply with the indispensable requirements under the *Contract Act,1872* such as competency to contract and presence of sound mind. However, when it comes to "formal" validity which could include requirements of signature, stamps, seals; I'm unable to concur that the evidentiary bar under Section 35

Panchamy Pack, 2004 13 SCC 510; Also see, David St. John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration*(24th Edition); P. 49

of the *Stamp Act,1899* should be juxtaposed with *Section 2(g)* and *(2h)* of the *Contract Act,1872* to make the agreement "void". For example, as per *Section 10* of the *Contract Act,1872,* even oral agreements are valid but as per the "form" of arbitration agreement provided in Section 7 of *Arbitration Act,1996* , it has to necessarily be in writing. Another point worth noting is that if an arbitration agreement can be for example, even non-contractual and does not necessarily require signature, how far the general provisions of *Stamp Act,1899* and the *Contract Act,1872* can apply to prove "formal" validity of an arbitration agreement produced under Section 11(6) of the Arbitration Act, 1996? *Section 2(h)* of the *Contract Act,1872* states that an agreement enforceable by law is a contract but a plain reading of *Section 7* of the *Arbitration Act,1996* may also prove that an "arbitration agreement" can be non-contractual. This is not to say that the provisions of the *Contract Act,1872* or *Stamp Act,1899* would not apply. As rightly held in *Vidya Drolia*(supra) and noted by my Learned Brother Justice K.M. Joseph, pre-conditions to formation of contract under the *Contract Act,1872* must be met which includes free consent of the parties, absence of fraud and misrepresentation etc. However, in my view, in this reference, we are concerned with a formal requirement. The point being that when a special law provides for the specific requirements for the "formal" validity of an arbitration agreement, it cannot be rendered void by a general law. An Arbitration agreement has special attributes[59] and is not a conventional agreement in that sense. Moreover, none of the provisions of the *Stamp Act,1899* would lead us to the conclusion that an arbitration agreement would

[59] O.P. Malhotra and Indu Malhotra, *The Law and Practice of Arbitration and Conciliation*, Lexis Nexis,2nd Edition; P. 270

be invalid/void-ab-initio when it is not stamped. Thus, the conclusion in *Garware(supra*) that an unstamped agreement would be rendered void is *not only* inconsistent with *Section 7* of the *Arbitration Act,1996* but also the *Stamp Act,1899* as per which a document can at most, be rendered inadmissible in evidence.

78.3 In the context of *Arbitration Act,1996* being a Special law, CR Datta's treatise titled *Law Relating to Commercial & Domestic Arbitration*[60] notes:

> "The Act of 1996 is a **special Act** and a Central Act which provides that this Act will prevail over any other law so far as the matters governed by this Act are concerned. The Authority of the Law Courts has been curtailed. The Courts cannot intervene in any manner dealt with by Part I of this Act unless specifically empowered to do so. A judicial authority may intervene or exercise its powers to the extent specified in Sections 8,9,11,13,14,16,1727,34,36,37,42,43,45,50,54,58,59,70,74, 77,81 and 82 of the Act. See Union of India v Popular Construction Co. 2001 8 SCC 470, United India Insurance Company v Kumar Texturisers AIR 1999 Bom 118) Section 5 restrains the Courts from interfering with the process of arbitration except in the manner provided in the 1996. CDC Financial Services (Mauritius) Ltd v BPI Communications Ltd. 2005 (Supp.) Arb LR 558(SC)"
>
> [Emphasis supplied]

78.4 At the cost of repetition, let us now refer to *Section 5* of the *Arbitration Act, 1996* to understand the special nature of the Act. As noted above, *Arbitration Act,1996* is a special legislation and *Section 5* begins with a non-obstante clause which overrides powers of judicial authorities acting under any other

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[60] CR Datta, *Law Relating to Commercial and Domestic Arbitration(Along with ADR)* P. 98; Union of India v Popular Construction Co 2001 (8) SCC 470; United India Insurance Co. Ltd. V Kumar Texturisers AIR 1999 Bom 118

law other than the *Arbitration Act,1996.* As argued by the learned Counsel for the Intervenor, Debesh Panda, the special nature of the Act is also established from the non-obstante clause in *Section 5* of the *Arbitration Act,1996*. On the Arbitration Act being a self-contained code, Justice Indu Malhotra[61], comments as under:

> "The Arbitration and Conciliation Act, 1996 is a self-contained code governing the law relating to Arbitration, including Section 5 which gives it an overriding effect over statutes. Once it is held that the 1996 Act is a self-contained code and is exhaustive, it carries with it the negative import that only such acts which are permissible in the statute may be done, and none others."

78.5 The use of the expression "so provided" in *Section 5*, disregards all forms of intervention except that, which is specified in *Part I.* Such intention is apparent from the language of the non-obstante clause. As noted earlier, this provision is yet another instance where Parliament went a step beyond the language employed in the *UNCITRAL Model Law of 1985.*

78.6 The doctrine of *generalia specialibus non derogant* i.e. general law will yield to the special law is well-established in Indian jurisprudence. In the concurring opinion of Chandrachud DY J. (as he then was) in *Ayyasamy*(supra) on *Section 8* of the *Arbitration Act,1996,* it was noted:

> "44. ….Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. 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 of the procedure under the special statute. *The general law should yield to the special law - generalia*

[61] Justice Indu Malhotra, *Commentary on the Law of Arbitration*, Vol. I, 4th Ed., P. 248

> *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 grievances and of course unnecessarily increase the pendency in the court."

78.7 Having noted that the *Arbitration Act,1996* is a special legislation, and that general law should yield to special law, let us now examine the principle of harmonious construction for the purpose of this reference.

ii)Harmonious Construction

79.It would be apposite to refer to the application of principle of harmonious construction as explained by Kasliwal, J. while expressing his partial dissent in *St. Stephen's College* v. *University of Delhi*[62] :

> *"140.* … The golden rule of interpretation is that words should be read in the ordinary, natural and grammatical meaning and the principle of harmonious construction merely applies the rule that where there is a general provision of law dealing with a subject, and a special provision dealing with the same subject, the special prevails over the general. If it is not constructed in that way the result would be that the special provision would be wholly defeated. The House of Lords observed in *Warburton* v. *Loveland* [(1831) 2 Dow & Cl 480 : 6 ER 806 : (1824-34) All ER Rep 589 (HL)] as under: (ER p. 814)
>
> *'No rule of construction can require that, when the words of one part of a statute convey a clear meaning … it shall be necessary to introduce another part of the statute which speaks with less perspicuity, and of which the words may be capable of such construction, as by possibility to diminish the efficacy of the [first part]*[63]*.'*
>
> [emphasis supplied]

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[62] (1992) 1 SCC 558

[63] *Anandji Haridas and Co. (P) Ltd.* v. *S.P. Kasture* [AIR 1968 SC 565 : (1968) 1 SCR 661] , *Patna Improvement Trust* v. *Lakshmi Devi* [AIR 1963 SC 1077 : 1963 Supp (2) SCR 812] , *Ethiopian Airlines* v. *Ganesh Narain Saboo* [(2011) 8 SCC 539 : (2011) 4 SCC (Civ) 217] , *Usmanbhai Dawoodbhai Memon* v. *State of Gujarat* [(1988) 2 SCC 271 : 1988 SCC (Cri) 318] , *South India Corpn. (P) Ltd.* v. *Board of Revenue* [AIR 1964 SC 207 : (1964) 4 SCR 280] , *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth* [(1984) 4 SCC 27]

79.1. On a harmonious reading of the inconsistencies in the provisions of the three different Acts quoted earlier, we find that the general law must yield to the special law in the sense, that an arbitration agreement cannot be rendered void on insufficient stamping by a general law, especially when none of the provisions of the *Arbitration Act,1996* which is a special Act provide for stamping. The requirement for the "formal" validity of an arbitration agreement under *Section 7* of the *Arbitration Act,1996* would take precedence, considering the special nature of the Act and the principle of minimal judicial intervention. Applying the rule of construction that in cases of conflict between a specific law and a general law, the specific law prevails and the general law like the *Contract Act,1872* applies only to such cases which are not covered by the special law; I therefore, hold that Section 2(e), 2(g) , 2(h) of the *Contract Act,1872* cannot override Section *7* contained in the special law i.e. the *Arbitration Act,1996* when it comes to formal validity.

79.2. Moreover, when the words of the statute in *Section 11* of the *Arbitration Act ,1996* do not mention *"validity"* or even *"inoperable and incapable of being performed"* as mentioned in *Section 45* of the *Arbitration Act,1996* or *"prima facie no valid arbitration agreement"* in *Section 8* of the *Arbitration Act, 1996*, it must be understood that the general words in a different statute such as the *Contract Act, 1872* cannot override the specific words used in the special law. That is to say, that an arbitration agreement cannot be rendered "*void"* on insufficient stamping by a Section 11 judge when the scope of examination is only limited to the "existence" of the arbitration agreement and not *"validity"*.

79.3. Coming back to the evidentiary bar under *Section 35* of the *Stamp Act,1899* it is important to understand that since the scope of a Section 11 judge is limited, the court cannot receive evidence in such cases. Before the 2015 Amendment to the *Arbitration Act,1996*, as per the position laid down in *SBP(supra),* the Chief Justice had wide powers to receive evidence, including affidavits, and get evidence recorded at the stage of appointment of arbitrator. Under the amended Section 11, as noted before, the scope is "confined" to the examination of the "existence" of the arbitration agreement. Thus, post-amendment, it can most certainly not admit evidence. A Section 11 Court is "not an authority to receive evidence" as provided in *Section 35* of the *Stamp Act,1899*. Moreover, it is an undisputed position that *Section 35* of the *Arbitration Act,1996* does not preclude an arbitrator to impound or admit evidence. It states "any person having by law or consent of parties, authority to receive evidence." Thus, the statutory bar under *Section 35* of the *Stamp Act,1899* would not apply when a document is produced at the stage of a Section 11 proceeding of the *Arbitration Act,1996.*

79.4. It is essential to interpret the special law in a way that gives effect to its specific provisions, while also ensuring that it is consistent with the general law to the extent possible. Impounding at the stage of *Section 11* would stall arbitral proceedings right at the outset because of the statutory bar under *Section 35* of the *Stamp Act, 1899*. One way to harmonise *Section 35 of Stamp Act,1899* and *Section 11* of the *Arbitration Act,1996* is for the Section 11 judge to defer necessary stamping and impounding to the arbitrator/collector, as applicable. A plain reading of *Section 35* of the *Stamp*

Act,1899 makes it clear that it does not preclude an Arbitrator or Collector to impound the unstamped/insufficiently stamped document.

79.5. In this context, even if we are to assume that the *Stamp Act,1899* is a substantive law, the view taken by us is not intended to undermine the *Stamp Act,1899* in any substantial way. This is because the primary objective being revenue generation, could still be achieved even if the collection of stamp duty is deferred to the arbitrator and not at the stage of a judge referring the matter for arbitration. Additionally, if such a contention is raised before the referring judge, she/he can also caution the arbitrator on the aspect of no/deficient stamp duty on the concerned instrument. Such a course will also protect the interest of the revenue and the substantive law.

K. Implication of changing nature of transaction and the advent of the technology

80. As we are proceeding on the basis that an arbitration agreement is liable to stamp duty, this Court cannot also be oblivious of the technological advancements as commercial transactions are going beyond pen and paper agreements. The 2015 amendment to *Section 7* of the *Arbitration Act,1996* which defines arbitration agreement recognizes electronic communication, bringing the process in conformity with Article 7 of the UNCITRAL Model law which was amended in 2006. It modernized and broadened the form of arbitration agreement to conform with international contract practices. The exchange of letters, telex, telegrams or other means of telecommunication *including communication through electronic means* which provide a record of the agreement are now recognized as valid arbitration agreement.

80.1.Dr. Peter Binder in *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*[64] notes:

> "The wording in "exchange of letters,telex, telegrams or other means of telecommunication" indicates Model law's flexibility towards *future means of communication by being geared solely at the "record of the agreement" rather than the strict direct signature of the agreement.* Incidentally, Article 5(Section III) of the Montreal Protocol No. 4 to the Warsaw Convention which concerns the formal requirements of an air waybill, provided the impetus for the wording "Any other means which would preserve a record of the carriage to be performed may, with the consent of the consigner, be substituted for the delivery of an air waybill." The Protocol specifically had electronic means of communication in mind, as the aviation industry was among the first to use this technology in business."
>
> [emphasis supplied]

80.2.What logically follows from the above is that the traditional laws must not render these new forms of agreements unenforceable on insufficient stamping. Recently, the Stockholding Corporation of India Ltd. has been authorised to provide e-stamp services, which allows for the payment of stamp duties for some Indian States. The *Indian Stamp Act(Collection of Stamp-Duty Through Stock Exchanges, Clearing Corporations and Depositories) Rules 2019* as amended through the *Finance Act,2021* has been brought about to build a pan-India securities market and to enhance revenue. It amended the definition of "execution" to include signature even in electronic form.

80.3. However, the definition of "duly stamped" in *Section 2(11*) of the *Stamp Act,1899* remains unchanged:

> "'Duly Stamped' as applied to an instrument means that the instrument *bears an adhesive or impressed stamp* of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for time being in force."
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> [emphasis supplied]

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[64] Supra at note 40; P. 67-68

80.4. The penalty for an instrument which is not "*duly stamped"* is provided in *Section 62* of the *Stamp Act,1899.* In this discussion, we must be conscious that the *Stamp Act,1899* was enacted nearly 125 years ago and the lawmakers could not have contemplated the march of law and the myriad issues which would crop up through the advent of technology and also the new enactments such as the *Arbitration Act,1996*. The legal framework pertaining to e-contracts is still at a nascent stage in India.

80.5. Richard Susskind in his book[65], *"The End of Lawyers? Rethinking the Nature of Legal Services,"* suggests that new technologies and processes, such as artificial intelligence and blockchain, may be able to simplify and streamline the arbitration process in the future. We now have the phenomenon of smart contracts and metaverse in the sphere of commercial transactions where technology and artificial intelligence are integrated. The developments in the legal framework must attune to such developing trends in technology and be conscious of their implications today and for the future.

80.6 Noticing the emerging trends, the Chief Justice of India in a recent conference observed[66] that legal professionals across the globe are recommending smart contract arbitration. Describing smart contracts and how arbitration can be used to resolve disputes, Chief Justice DY Chandrachud commented:

> "Technology and artificial intelligence are integrated into commercial transactions. One such example of integration of technology and contracts is a smart contract, where the terms and conditions of the

[65] Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, Oxford University Press, 2010

[66] Dr D.Y. Chandrachud, International Conference: Arbitration in the Era of Globalization (4th Edn., Dubai, 19-3-2022).

> contract are encoded. A breach in the terms of the contract would automatically enforce the contract.

80.7. Modern arbitration law focuses on substance over form[67]. Learned Counsel, Mr. Ramakanth Reddy appearing for Respondent No. 1, referred to a judgment delivered in 2008 in *Great Offshore Ltd. v. Iranian Offshore Engineering and Construction Company*[68] where the Court speaking through Dalveer Bhandari J. held as under:

> "59. The court has to translate the legislative intention especially when viewed in light of one of the Act's "main objectives": "to minimise the supervisory role of Courts in the arbitral process. [See: Statements of Objects and Reasons of Section 4(v] of the Act].*If this Court adds a number of extra requirements such as stamps, seals and originals, we would be enhancing our role, not minimising it.* Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties' intention to arbitrate would be foiled by formality.Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties' intention to arbitrate is upheld. Adding technicalities disturbs the parties' "autonomy of the will" (l' autonomie de la volonti), i.e., their wishes. [For a general discussion on this doctrine see Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Street & Maxwell, London, 1986 at pages 4 and 53].
>
> 60. *Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want - an efficient, effective and potentially cheap resolution of their dispute.* The autonomie de la volonti doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. [See Preamble to the Act]. *The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts directions should be to achieve the legislative intention."*
>
> [emphasis supplied]

[67] Supra at Note 59; P. 274
[68] (2008) 14 SCC 240

80.8 Relying on the above case, in *Trimex International FZE vs Vedanta Aluminum Limited, India*[69], this Court held that the implementation of a contract cannot be affected merely because offer and acceptance was made via email.

80.9 In the context of the evolving law, it is important to observe that although an arbitration agreement is liable to stamp duty under the residuary entry, the technicality of stamping places hurdles in ensuring efficiency and efficacy in arbitration proceedings. An arbitration agreement does not even mandatorily require signature for it to be valid as per *Section 7* of the *Arbitration Act,1996*. The *Stamp Act,1899* is rooted in the past and does not take into account the changing nature of transactions and enactments such as the *Arbitration Act,1996*. This is an aspect which would require the attention of the legislature.

J. Doctrine of Separability

81. It appears that the Court in *Garware(supra)* rejected the concept of separability when it held:

> "15. .....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."

81.1. Historically, an arbitration agreement was treated as an accessory to the main contract[70]. Even if the main contract was found to be invalid or unenforceable, the arbitration agreement contained therein was also considered void[71]. This diminished the effectiveness of arbitration as a dispute

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[69] 2010 (1) SCALE 574
[70] Gary B. Born, *International Commercial Arbitration* (3rd ed., Kluwer Law International 2014) P. 380
[71] Union of India v Kishorilal Gupta & Bros (1959) 1 SCR 493

resolution mechanism since it made the enforceability of arbitration agreements *dependent* on the validity of the underlying contract. Arbitration clauses are uniformly regarded in almost every jurisdiction as separate from and not "an integral part" of the parties' underlying contract. It is regarded as a general principle reflected in International Arbitration Conventions, national arbitration legislations, judicial decisions, institutional arbitration rules and arbitral awards[72]. The early statutory recognition of the separability doctrine has also been recognized in United States with the separability presumption being a matter of substantive federal arbitration law.[73] Even in English law, the principle of separability stands codified under *Section 7* of the *English Arbitration Act, 1996*. It has been identified as one of the cornerstones of arbitration in multiple jurisdictions.

81.2 The argument advanced by the learned Counsel, Gagan Sanghi for the Appellants that the doctrine of separability is a legal fiction, should not be accepted in light of the well-established jurisprudence in India as this doctrine has been consistently upheld by this Court[74]. Moreover, it stands codified in *Section 16(1)* of the *Arbitration Act,1996* which reads as under:

> "16(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, –

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[72] Supra at note 70; Page 379-380.
[73] Buckeye Check Cashing Inc. v. Cardegna, 2006 SCC OnLine US SC 14
[74] National Agricultural Co-operative Marketing federation India Ltd. v Gains Trading Limited (2007) 5 SCC 692; Naihati Jute Mills Ltd. v Khayaliram Jagannath AIR 1968 SC 522; P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corporation & Ors (2009) 2 SCC 494

(i) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(ii) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

81.3 This Court in *NN Global(supra)* discussed judgments in US,UK and France, noting the importance of this principle in modern and contemporary arbitral jurisprudence:

> "4. It is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. This is based on the premise that when parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements viz. (i) the substantive contract which contains the rights and obligations of the parties arising from the commercial transaction; and, (ii) the arbitration agreement which contains the binding obligation of the parties to resolve their disputes through the mode of arbitration."

81.4 My learned Brother, Justice K.M. Joseph in the majority opinion notes that the entire basis of the reference stands removed since we are proceeding on the basis that even a standalone arbitration agreement is liable to stamp duty. His opinion that the objective behind the principle of treating an arbitration agreement as a separate agreement is to create a mechanism, wherein, the arbitral agreement survives the Contract so that the disputes falling within the Arbitration Agreement can be resolved, is correct. But I'm unable to agree with the proposition that is canvassed that since an arbitration agreement is liable to stamp duty, the separability presumption doesn't take us

further in this case. Let me set out the reason for my disinclination to accept such proposition.

81.5 As earlier stated in this opinion, the separability doctrine protects the arbitration clause even if the validity of the main contract is attacked. Therefore, if an arbitration agreement remains unaffected even if the main contract is null/void on issues of fraud or misrepresentation, it should not logically render an arbitration agreement, *void* on a technicality/formality, like stamping. The underlying rationale behind the principle of separability would then be made nugatory. The idea that an arbitration agreement is separate and independent with its own validity requirements, is to ensure that there is no hindrance to the enforceability of an arbitration agreement. This doctrine is also important to reduce circumstances in which the arbitral process may be halted/delayed. In *SMS Tea(supra)*, it was noted that the doctrine of separability can extend to an unregistered document, but not to an unstamped document as the bar under Section 35 is absolute. As I have noted above, the bar under Section 35 can be cured and the stamp duty can be collected at a later stage. Thus, *NN Global(supra)* rightly overruled *SMS Tea(supra)* on this aspect. Historically, the separability doctrine was introduced in order to protect the arbitration clause which, in turn, enabled arbitrators to adjudicate on the validity of the main contract[75]. Even though the doctrine of separability and *Kompetenz Kompetenz* are distinct as noted in *NN Global(supra),* reconciling the two principles would ensure that an arbitrator can rule on the objections of

[75] HM Holtzmann and JE Neuhaus,*A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation The Hague 1989) 485

validity, existence as well as necessary stamping, if required. The doctrine of *Kompetenz Kompetenz* is discussed in greater detail in the next section.

82.Turning to the decision in *Garware(supra)*, it appears that the Court in *Garware(supra)* rejected the concept of severability only by relying on *SBP(Supra)* when it held:

> "15. In view of the law laid down by seven-Judge Bench,[*SBP(Supra)]* 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."

83.In *SBP(Supra),*as we have noticed earlier in this opinion, stood legislatively overruled as a judge at the Section 11 stage could conduct detailed adjudication and make a conclusive determination at the pre-referral stage without deferring it to the arbitrator. As highlighted above, *Section 16* and *Section 11* of the *Arbitration Act,1996* indicates that there is an overlap when it comes to the word "existence". As Section 16 specifically deals with both existence and validity whereas Section 11 only deals with existence, the former should be given more weight. As such, the doctrine of *Kompetenz Kompetenz* comes into play as the arbitrator can decide on the validity of an agreement and the referral judge needs to confine his scrutiny to the existence of the arbitration agreement. However, in *SBP(supra*) it was generally held that the referral judge should decide on all aspects. If such a view is to be applied for answering the present reference, a mini-trial will have to be conducted by the referral judge. The question to be asked here is should we then push the Section 11 judge to deal with so many things that he/she left in a situation like

Little Alice in the play Alice in Wonderland as described in *Praveen Electricals(supra)*?

84. In the referral order in *NN Global(supra),* the paragraph 29 in Garware(supra) was doubted. In the *Garware(supra)* decision, this Court relied on *United India Insurance Co. ltd. v. Hyundai Engg. & Construction Co. Ltd.* [76]*(for short "Hyundai Engg.).* The paragraph 29 is extracted below for the discussion to be followed thereafter:

> "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 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."

84.1. In *Hyundai(supra)*, the issue of stamping was not at all a matter of consideration and the Court decided on the arbitrability of the dispute and whether it was an excepted matter and in that process, held that the arbitration agreement would not "exist-in-law", as the arbitration clause was contingent on whether the insurer accepted liability. In these circumstances, the application of the proposition in *Hyundai Engg(supra)* to deal with the issue of unstamped document in *Garware(supra)* appears to be an incorrect

[76] (2018) 7 SCC 607

approach. This is because in *Garware(supra)*, the Court found that the issue of stamping would go into the existence of the arbitration agreement *in law.* This was done by erroneously importing the principle enunciated in *Hyundai(supra)* and therefore the earlier *Hyundai(supra)* which had nothing to do with the stamping of the document, should have been distinguished. At this point, we may also notice the argument of the Learned Amicus who argued that the Court in *Hyundai Engg(supra)* relied on *Oriental Insurance Co. Ltd. v. Narbheram Power and Steel (P) Ltd*[77] which never had the occasion to interpret Section 11(6A). For these reasons, I am of the considered view that applying the *Hyundai(supra)* principle to *Garware(supra)* is not acceptable. Consequently, the finding of the Court in Para 147.1 in *Vidya Drolia(supra)* placing reliance on the above paragraph viz. Para 29 in *Garware(supra)* also appears to be incorrect. The proposition of law in *NN Global(supra)* is therefore found to be correct.

L. Kompetenz Kompetenz and the issue of Judicial Logjam in India

85. Legal scholars have noted that the principle of *Kompetenz Komptenz* has been adopted in various forms in different countries[78]. *Article 16* of the UNCITRAL Model Law adopted the principle of *Kompetenz Kompetenz* providing that an arbitral tribunal has the jurisdiction to investigate and rule on its own jurisdiction. In a recent decision of the US Supreme Court in *Henry Schein, Inc. v Archer and White Sales, Inc*[79], it was held that where an arbitration clause

[77] (2018) 6 SCC 534
[78] John J. Barcello III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective,* Vanderbilt Journal of Transnational Law, Vol. 36, No.4, October 2003
[79] 2019 SCCOnline US SC 1

delegates the decision of arbitrability to arbitrators, Courts should have no say even if they consider the argument in favour as "wholly groundless". Justice Brett Kavanaugh opined:

> "Just as a Court may not decide a merits question that the parties have delegated to an arbitrator, a Court may not decide an arbitrability question that the parties have delegated to an arbitrator."

Proceeding further, *Section 16(1)* of the *Arbitration Act,1996* reads as under:

> "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."

85.1 It is clear from *Section 16(1*) of *Arbitration Act,1996* which uses the word "including" that an arbitral tribunal can not only rule on its own jurisdiction but also "any" objections on existence or validity. This Court in *Weatherford Oiltool Middle East Limited vs Baker Hughes Singapore PTE*[80] where the issue concerned the validity of an unstamped document, noted as under:

> "8. The bare reading of the afore-stated provision makes it clear that arbitral tribunal is competent not only to rule on its own jurisdiction but to rule on the issue of the existence or validity of the arbitration agreement. It further clarifies that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and 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."

[80] 2022 SCC OnLine 1464

85.2. Discussing the *Kompetenz Kompetenz* principles in *NN Global(supra)*, it was noted:

> "4.3. The doctrine of kompetenz – kompetenz implies that the arbitral tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the 8 Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section 16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. *The doctrine of kompetenz – kompetenz has evolved to minimize judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the arbitral tribunal."*
>
> [emphasis supplied]

85.3. Justice Thakker emphasized this in his dissenting opinion in *SBP(supra)* where it was held that the legislature intended to allow the tribunal to rule on its own jurisdiction and the function of the Chief Justice under *Section 11(6)* was only to "appoint an arbitrator without wasting any time."

85.4. At this point we may benefit by referring to George A. Bermann whose article titled *"Role of Courts at the threshold of Arbitration"*[81] would have some relevance in this discussion:

> "Positions at the polar ends of the spectrum of judicial involvement are not especially attractive. A system that permits plenary judicial enquiries into all aspects of enforceability of arbitration agreements prior to arbitration risks inviting costs, delay and judicial involvement in a very big way, contrary to arbitration's basis premises. On the other hand, a system that treats access to a court for these purposes as wholly off-limits, irrespective of the seriousness of the challenge, risks exacting too great a price in terms of arbitral legitimacy. Efficacy may be achievable through less drastic means."

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[81] George A. Bermann, *The Role of National Courts at the Threshold of Arbitration,* 28 American Review of International Arbitration 291 (2017) Available at https://scholarship.law.columbia.edu/faculty_scholarship/3012

85.5. Specific to the Indian context, while discussing *Kompetenz Kompetenz*, the overburdened judiciary and huge pendency of cases in our Courts cannot also be overlooked. The intent behind preferring arbitration would stand defeated, if the Court is expected to deal not only with the issue of existence but also validity of the agreement, at the stage of appointment of the arbitrator. In this context, the following observations were made in the *246th LCI report*(supra) noted:

> "22. Judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration. Two reasons can be attributed to such delays. First, the judicial system is over-burdened with work and is not sufficiently efficient to dispose cases, especially commercial cases, with the speed and dispatch that is required. *Second, the bar for judicial intervention (despite the existence of section 5 of the Act) has been consistently set at a low threshold by the Indian judiciary, which translates into many more admissions of cases in Court which arise out of or are related to the Act."*
>
> [emphasis supplied]

85.6. Considering the large pendency of cases as noted by the *246th LCI Report*(supra), it is essential that *Section 16* of the *Arbitration Act,1996* is given full play. Discussing the history of arbitration law in India, the *246th LCI Report*(supra) quoted the observations of Justice D.A. Desai in *Guru Nanak Foundation v Ratan Singh and Sons*[82] where commenting on the working of the *Arbitration Act, 1940*, it was noted that the challenge to arbitral proceedings in Courts have made "lawyers laugh and legal philosophers weep". The situation is not different today as was recently observed by this Court in *M/s Shree Vishnu Constructions v. The Engineer in Chief Military Engineering Service and others*[83] where it was noted that several applications under

[82] (1981) 4 SCC 634
[83] SLP(C) No. 5306/2022 dated 1.4.2022

section 11 were decided and disposed of after a period of four years which defeated the very purpose of the amended *Arbitration Act,1996*. Such observation was made on a detailed report/statement on the number of pending *section 11* applications before the Telangana High Court. This Court noticed that even an application filed in the year 2006 was still pending. The High Court Chief Justices across the country were accordingly requested to ensure that applications under section 11, be decided within a period of six months.

85.7 This Court in the recent judgment in *Intercontinental Hotels Group (India) Private Ltd. v. Waterline Hotels Pvt. Ltd*[84] on the issue of insufficiently /incorrectly stamped documents, proceeded to appoint the arbitrator under *Section 11(6),* considering the time-sensitivity while dealing with arbitration. It left open the issue of stamping to be decided at a later stage.

85.8 Importantly, *Section 11(13)* of the *Arbitration Act,1996* provides that appointment of Arbitrators should be made within 60 days and such a provision makes it amply clear that substantive adjudication cannot be done by Courts, at the pre-referral stage. This was canvassed in *Garware(supra)* but the Court instead set a deadline for 45 days for adjudication and 15 days for appointment of arbitrator with the following observation:

> "37. One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the

[84] 2022 SCC OnLine SC 83

> authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time frame provided by Section 29A of the 1996 Act."

85.9 The above enunciation in *Garware(supra)* as is apparent goes against the legislative mandate which had prescribed the deadline of 60 days for appointment of arbitrators under *Section 11(13)* of the *Arbitration Act, 1996.* The criticism that a deadline of 45 days would be impractical, cannot also be brushed aside lightly.

N. Discussion on *Vidya Drolia*

86. This case was concerned with the arbitrability of landlord-tenant disputes and the forum before which the issue of arbitrability must first be raised. The paragraph 146 as quoted below may require a relook in the context of the issue under consideration.

> "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 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 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."

86.1. As can be seen, the Court equated existence and validity and it was held that a contract only exists if it is valid. And it is valid only if it is enforceable. As far as the issue in the present case is concerned, the authors' Comments in *Russell on Arbitration*[85](24th Edition) in the context of English law provide useful pointers in this context:

> "**Existence and Validity of the arbitration agreement.** .. the Court draws a distinction between existence of the arbitration agreement, which is likely to be a matter for the Court(unless a stay under the inherent jurisdiction is granted) and its validity, which wherever possible should be left to the arbitrators."
>
> [emphasis in original]

86.2 I have already discussed that in the Indian regime, the Arbitrator under Section 16 has the jurisdiction to decide on "existence" and "validity". A plain reading of *Section 11(6A)* would show that the examination by Court is confined only to "existence" and not even "validity". Moreover, in the present reference, we are only concerned with the formal requirement of stamping and not arbitrability. Applying contextual interpretation to render an arbitration agreement void on the formal requirement of stamping would defeat the very purpose of the *Arbitration Act,1996.* A document cannot be rendered invalid or unenforceable especially if the defect is curable under the *Stamp Act,1899* as

[85] Supra at note 58; Chapter 7, P. 369

noted earlier. Moreover, none of the provisions in the *Stamp Act, 1899* have the effect of rendering a document invalid. Thus, we find the position in *Vidya Drolia(supra)* to the extent that it relies on *Garware*(supra) to be incorrect.

O. Conclusion

87. Harking back to Charles Evans Hughes with whose words we began the judgment, let us conclude with the following quote of the same judge reflected in *Prophets By Honor*[86]:

> "There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgement. Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity, which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect on public opinion at the time. This is so because what must ultimately sustain the court in public confidence of is the character and independence of the judges."

87.1 The practice of dissent in judicial decision-making process plays a critical role in revealing constitutional commitment to deliberative democracy. Allowing judges to express differing views and engage in a dialogue about the law and its interpretation can potentially lead to a more nuanced and refined understanding of the law, as the Court grapples with competing interpretations and seeks to reconcile them in a principled manner.

87.2 Confronted with a similar situation which is confronting us today where the present opinion is the minority one, Justice Stephen Breyer of the US Supreme Court in his dissenting opinion[87] in a question in the context of

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[86] Alan Barth, *Prophets with Honor*,1974 Ed. P 3-6
[87] Badgerow v. Walters, *596 U.S. 2022*

Federal Arbitration Act (FAA) spoke of interpreting not only the purpose of the Statute but also the likely *consequence*:

> "When interpreting a statute, it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation. Otherwise, we risk adopting an interpretation that, even if consistent with text, creates unnecessary complexity and confusion."

87.3. The objective behind the enactment of the *Arbitration Act,1996* was to, *inter alia*, avoid procedural complexity and the delay in litigation before Courts. Impounding and stamping at the Section 11 stage would frustrate the very purpose of the amended *Arbitration Act,1996* as the enforcement of arbitration agreements would be stalled on an issue, which is capable of being resolved at a later stage. To defer stamping to the stage of the arbitrator would in my view achieve the objective of both the *Arbitration Act,1996* and the *Stamp Act,1899*.

87.4. The contours of the jurisdiction of the judge referring matters for arbitration, cannot be permitted to suffer from confusion and ambiguity. As can be seen, the present 5 judge-Bench could not provide clarity on the issue referred to us, on account of the fractured verdict, leading to legal uncertainty. The constitution of a larger Bench in this Court is certainly not commonplace as the last occasion when 7 judges assembled was in the year 2017. Around 5 matters as I am informed, are already awaiting the attention of 7 judges Bench. In such backdrop, the interplay between the Acts and how its objective is to be achieved in the course of Arbitral proceedings either at the referral stage or thereafter is much too important to be left lingering for a clarificatory verdict by a larger Bench. Therefore, I would

appeal to the legislative wing of the State to revisit the Amendments which may be necessary in the *Stamp Act,1899* in its application to the *Arbitration Act,1996.* The State might put into place a convenient mechanism which would efface the inconsistencies in both the *Arbitration Act,1996* and the *Stamp Act,1899.* If we look at the legislative intent of the *Arbitration Act,1996* and what our country is hoping to be as the destination of choice for Arbitration, I'm of the considered opinion that it would be appropriate to interpret the statutory interplay in a constructive manner without defeating the legislative intent and thwarting the speedy referral to arbitration.

88. Following the above discussion, my opinion on the referred issue are as follows:

i) The examination of stamping and impounding need not be done at the threshold by a Court, at the pre-reference stage under *Section 11* of the *Arbitration Act, 1996.*

ii) Non-stamping/insufficient stamping of the substantive contract/instrument would not render the arbitration agreement *non-existent in law* and *unenforceable/void,* for the purpose of referring a matter for arbitration. *Garware(supra)* wrongly applied the principle in *Hyundai(supra)* to hold that an arbitration agreement would not *exist-in-law* if it is unstamped/insufficiently stamped. An arbitration agreement should not be rendered *void if* it is suffering stamp deficiency which is a curable defect. To this extent, *Garware(supra)* and *Hyundai(supra)* do not set out the correct law.

iii) The decision in *SMS Tea(supra)* stands overruled. Paragraphs 22 and 29 in *Garware (supra)* which were approved in paragraphs 146 and 147 in *Vidya Drolia (supra*) are overruled to that extent.

89. The invaluable assistance rendered by Mr. Gourab Banerjee, learned Senior Counsel as the *Amicus Curiae* deserves a special mention in finalizing this opinion.

.....J.
[HRISHIKESH ROY]

NEW DELHI
APRIL 25, 2023