REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 3802-3803 OF 2020

M/S. N.N. GLOBAL MERCANTILE PRIVATE LIMITED ....APPELLANT(S)

VERSUS

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

J U D G M E N T

Rastogi, J.

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I. Reference

1. This case deals with the larger question regarding the scope and ambit to which there should be an intervention of courts at the pre-referral stage in the working of arbitration contracts.

2. A three-Judge Bench of this Court in ***M/s. N.N. Global Mercantile Private Limited v. M/s. Indo Unique Flame Limited and Others***[1] has doubted the correctness of the view expressed in paras 146 and 147.1 of the coordinate three-Judge Bench of this Court in ***Vidya Drolia and Others v. Durga Trading Corporation***[2] and referred the matter to be settled authoritatively by the Constitution Bench of this Court.

3. The reference which has been made to settle authoritatively by the Constitution Bench is referred 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 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?"
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> (emphasis added)

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[1] (2021) 4 SCC 379

[2] (2021) 2 SCC 1

4. It is necessary to give background facts for better appreciation of the reference made for our consideration.

II. Conflicting Judgments

5. In the case of ***SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited***,[3] a two-Judge Bench of this Court was considering the issue in a pre-2015 amendment regime of whether an arbitration agreement in an unregistered and unstamped lease deed, which required compulsory registration under the Registration Act, 1908(hereinafter being referred to as the "Act 1908") was valid and enforceable. It was held as follows:

> "**19.** Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.
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> **21.** Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration

[3] (2011) 14 SCC 66

> clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence."

6. The above decision was followed in the case of ***Naina Thakkar v. Annapurna Builders***,[4] wherein it was held as follows:

> "**7.** It is true that the consequences provided in the Stamp Act, 1899 must follow where sufficient stamp duty has not been paid on an instrument irrespective of the willingness of a party to the instrument to pay deficit stamp duty but the procedure where the arbitration clause is contained in a document which is not registered although compulsorily registrable and which is not duly stamped as summed up by this Court in **SMS Tea Estates (P) Ltd.** case shall not be applicable to the proceedings under Section 8 of the [Arbitration and Conciliation] Act where the party making such application does not express his/her readiness and willingness to pay the deficit stamp duty and the penalty. It is not the duty of the Court to adjourn the suit indefinitely until the defect with reference to deficit stamp duty concerning the arbitration agreement is cured. Accordingly, we are of the opinion that no fault can be found in the order of the trial court in rejecting the application made under Section 8 of the Act as the document on which the petitioner relied upon was admittedly unregistered and insufficiently stamped."

7. An amendment was brought in the Arbitration and Conciliation Act, 1996 (hereinafter being referred to as the "Act, 1996"), and Section 11(6A) was inserted in 2016.

8. A two-Judge Bench in ***Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited***,[5] dealt

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[4] (2013) 14 SCC 354

[5] (2019) 9 SCC 209

with the issue whether an arbitration clause in an agreement which requires compulsorily to be stamped under the relevant Indian Stamp Act, 1899(hereinafter being referred to as the "Act, 1899"), but is not duly stamped, would be enforceable even after the insertion of clause (6A) to Section 11 of the Act, 1996. The Bench followed the reasoning and upholding of the decision in **SMS Tea Estates Private Limited**(supra), and held:

> "**19**....A close look at Section 11(6-A) would show that when the Supreme Court or the High Court considers an application under Sections 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in SMS Tea Estates when it comes to an unregistered agreement or conveyance. However, the Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11(6-A) does not, in any manner, deal with or get over the basis of the judgment in SMS Tea Estates, which continues to apply even after the amendment of Section 11(6-A).
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> **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)."

9. The decision in **Garware Wall Ropes Limited**(supra) was cited in approval by a three-Judge Bench in the case of **Vidya Drolia and Others**(supra) wherein it was held:

> "**146.** We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147. We would proceed to elaborate and give further reasons:

147.1 In Garware Wall Ropes Ltd., this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to 'existence' and 'validity' of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing paragraph 29 thereof:

> "**29.** This judgment in Hyundai Engg. case 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 subcontract 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, as followed by us.";

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement."

(Emphasis added)

10. Later, a three-Judge Bench in **M/s. N.N. Global Mercantile Private Limited**(supra) held that in arbitration jurisprudence, an "arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it

is embedded". This three-Judge Bench made a reference to the Constitution Bench, as it expressed its disagreements with the view expressed in **SMS Tea Estates Private Limited**(supra), **Garware Wall Ropes Limited**(supra), and **Vidya Drolia and Others**(supra). It held:

> "**26.** In our view, there is no legal impediment to the enforceability of the arbitration agreement, pending payment of Stamp Duty on the substantive contract. The adjudication of the rights and obligations under the Work Order or the substantive commercial contract would however not proceed before complying with the mandatory provisions of the Stamp Act…
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> **28.** In our view, the decision in **SMS Tea Estates** does not lay down the correct position in law on two issues i.e. (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as u/s 19 of the Indian Contract Act, 1872.
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> **29.** We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it un-enforceable, since it has an independent existence of its own. The view taken by the Court on the issue of separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the Stamp Act. The non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite Stamp Duty."

11. It also doubted the correctness of the view taken in **SMS Tea Estates Private Limited**(supra), which was approved in **Garware**

Wall Ropes Limited(supra) and **Vidya Drolia and Others**(supra), and held:

> "**56.** We are of the considered view that the finding in SMS Tea Estates and Garware 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 un-enforceable, is not the correct position in law.
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> **57.** In view of the finding in paragraph 146 and 147 of the judgment in Vidya Drolia by a co-ordinate bench, which has affirmed the judgment in Garware, the aforesaid issue is required to be authoritatively settled by a Constitution bench of this Court."

12. As the Benches in both **M/S. N.N. Global Mercantile Private Limited**(supra) and **Vidya Drolia and Others**(supra) are of equal strength, this Constitution Bench has been called upon to authoritatively rule on the issue. To adjudicate the issue, this Bench at first needs to examine whether the requirements under the Act, 1899 at pre-referral stage are required to be examined for appointment of Arbitrator under Section 11(6A) of the Act, 1996.

13. Mr. Gourab Banerjee, learned senior counsel, who appears as Amicus Curiae to assist this Court, submits that the intention of the Act, 1996 and the later amendments made from time to time were to streamline the process and judicial intervention in arbitration

proceedings adds significantly to the delay in the arbitration process and that negates the benefit of arbitration. The Arbitration & Conciliation (Amendment) Act, 2015 (hereinafter being referred to as the 2015 Amendment) was introduced to emphasize the speedy disposal of cases relating to arbitration with minimal court interference.

14. Mr. Banerjee submits that so far as the scope and ambit of Section 11 is concerned, it is only to fill the gap and the Court is merely functioning as an appointing authority where the parties fail to appoint an Arbitrator. After the insertion of Section 11(6A) (2015 Amendment), the legislative policy and purport are essentially to minimize the Court's intervention at the stage of appointing the Arbitrator and with this intention, Section 11(6A) has been incorporated which ought to be respected.

15. Mr. Banerjee further submits that the scope of the Court should be circumscribed to confine to the examination, *prima facie*, of the formal existence of the arbitration agreement at the stage of contract formation, including whether the agreement is in writing and the core contractual ingredients qua the formation of the agreement are fulfilled. On rare occasions, if a question is being raised by the

parties, to some extent, the Court may examine the subject matter of dispute as arbitrable but that too as an exception. At the same time, so far as the Act, 1899 is concerned, it is only a fiscal measure enacted to secure revenue of the State in certain classes of instruments but that may not be invoked to arm a litigant with a weapon of technicality to meet the case of his/her opponent. Once the object of the revenue is secured according to law, the party staking his claim in the instrument will not be defeated on the ground of the initial defect in the instrument.

16. Mr. Banerjee further submits that even non-payment of stamp duty is a curable defect and this defect can be cured at any stage before the instrument is admitted into evidence by the Arbitral Tribunal. If the insufficiency of stamp or unduly stamped is being examined/adjudicated at the pre-referral stage by the Court under Section 11, it would be nothing but to encourage parasitical challenges and dilatory tactics in resisting reference to arbitration. The natural solution inevitable is to appoint the Arbitrator and to allow the dispute resolution proceedings to commence and permit the Arbitral Tribunal to fulfil its duty under the Act, 1996. There is no

reason why the Arbitral Tribunal cannot prevent the evasion of stamp duty.

17. It is also brought to our notice that at the time of submitting an application under Section 11 at the pre-referral stage, the parties are not under an obligation to file an original arbitration agreement and since the copy of the arbitration agreement is to be annexed with the application, in true sense, it is not an instrument as being contemplated under Section 2(14) of the Act, 1899, particularly at the pre-referral stage, the question of invoking Sections 33 or 35 of the Act, 1899 is not available to be invoked. In support of submission Mr. Banerjee has placed reliance on the judgment of this Court reported in ***Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao and Others***[6] which has been later followed by this Court in ***Hariom Agrawal v. Prakash Chand Malviya***[7].

18. Taking assistance thereof, Mr. Banerjee submits that Sections 33 or 35 are not concerned with any copy of the instrument and there is no scope for the inclusion of the copy of the document for the purpose of the Act, 1899. The copy of the instrument within the

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[6] (1971) 1 SCC 545
[7] (2007) 8 SCC 514

meaning of Section 2(14) of the Act, 1899 cannot be validated by impounding and it cannot be admitted as secondary evidence under the Act, 1899.

19. Mr. Banerjee further submits that the very question raised for consideration of this Court as to whether the arbitral agreement is valid or is in existence in law, is not open to be examined at the pre-referral stage for the reason that original instrument is not on record (arbitral agreement) and a conjoint reading of Sections 33 and 35 is not concerned with any copy of the instrument and the party can only be allowed to rely on the document in evidence which is an instrument withing the meaning of Section 2(14) and the validity of the document is always open to be examined at the post-referral stage by the Arbitrator/Arbitral Tribunal in its jurisdiction vested in Section 16 of the Act, 1996.

20. Mr. Gagan Sanghi, learned counsel for the appellant, submits that Section 35 of the Act, 1899 bars admission of unduly stamped "instrument" in evidence "for any purpose" and also "acting upon it" and it was held by this Court in ***Government of Andhra Pradesh***

and Others v P. Laxmi Devi(Smt.)[8] that "shall" in Section 33 of the Act, 1899 is mandatory and unstamped document must be impounded. Even assuming that stamp duty is not payable on an arbitration agreement under the 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 Act, 1899.

21. Mr. Sanghi further submits that separation of agreement from the substantive contract is nothing but a legal fiction created by Section 16 of the Act, 1996 and it cannot be an exception to Section 35 of the Act, 1899.

22. Mr. Sanghi further submits that the 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 and relied upon the judgment of the UK Supreme Court in ***Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb***[9] where it was held that an "arbitration clause is nonetheless part of bundle of rights and

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[8] (2008) 4 SCC 720

[9] (2020) UK SC 38

obligations recorded in the contractual document" and according to him, the issue of stamping is to be looked into at the very threshold, even if it is in exercise of Section 11 (6A), i.e. at the time of pre-arbitral stage with respect to appointment of arbitrator. According to him, an instrument would exist in law only when it is enforceable and "existence" defined in Section 11(6A) of the Act, 1996 in respect of an arbitration agreement, has to be a valid enforceable agreement and it is always open to examine the issue of non-stamping or of insufficiently stamped at the initial/pre-referral stage itself and further highlighting three modes as provided in ***M/s. N.N. Global Mercantile Private Limited*** (supra) i.e. impounding, payment of stamp duty and appointment of arbitrator, on an application filed under Section 11 of the Act, 1996, the Court is certainly "acting upon" the arbitration clause which is contended to be barred by the clear expression of Section 35 of the Act, 1899 and an Agreement, unless enforceable by law, cannot be termed to be in existence under Section 11(6A) of the Act, 1996.

23. Ms. Malvika Trivedi, learned senior counsel, who appears for the intervenor in I.A. No.18516 of 2022, submits that the regimes of the Act, 1899 and Act, 1908 are completely different. ***M/s. N.N.***

Global Mercantile Private Limited (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 shall remain in existence but without stamping, the instrument is incomplete/inchoate.

24. Ms. Trivedi further submits that the Act, 1899 envisages the payment of stamp duty, failing which the instrument, according to her, cannot be acted upon for any purpose and there is no ambiguity in the language of the Statute and we have to follow the golden principles of interpretation of the Statute.

25. Ms. Trivedi further submits that the powers of the Court under different provisions of law as well as the restrictions created in the Act, 1899 apply to the proceedings conducted in accordance with Section 9 of the Act, 1996 and submits that even if the arbitration clause stands severed, the Court will have to reach a prima facie conclusion as to whether the substantive contract which contained

the clause of arbitration is enforceable in law before granting interim measures invoking Section 9 of the Act, 1996.

26. Mr. Debesh Panda, learned counsel for the Intervenor in I.A. No. 199969 of 2022 submits that Part I of Act, 1996 deals with Sections 8, 9 and 11, whereas Section 45 is dealt within Part II. Section 45 has been recognized as a provision under Part II which is a complete code. The expression "unless it finds" in Section 45 was interpreted by majority in ***Shin-Etsu Chemical Co. Ltd. v Aksh Optifibre Ltd. and Another***[10] as a consideration on a prima facie basis. In 2019, Parliament amended Section 45 by substituting the expression "unless it finds" with "unless it prima facie finds", that brings the statute in line with the position settled in ***Shin Etsu*** (supra). In this background, the Act, 1899 merely creates a temporary infliction till the stamp duty is recovered, with or without penalty. The affliction only attaches to the instrument and not the transaction.

27. Mr. K. Ramakanth Reddy, learned senior counsel for respondent no.1 took us through the relevant Lok Sabha debates before the enactment of the Act, 1996 and taking assistance thereof

[10] (2005) 7 SCC 234

submits that the provisions of the Act 1996, Act 1899 and the Contract Act, 1872 (hereinafter being referred to as "Act, 1872") has to be harmonized. Section 17 of Act, 1899 has to be read with Section 31 of the Act, 1899. The plain language of Section 7 of the Act, 1996 does not require that the parties are under an obligation to stamp the agreement. The legislative intention would be defeated, if the Court insist on non-core technical requirements such as stamps, seals and originals for the purpose of acting upon the arbitration agreement at a pre-arbitration stage for appointment of an arbitrator invoking power under Section 11(6A) of the Act, 1996.

28. Learned counsel for the respondents, further submits that in the instant facts of the case, an application was filed under Section 8 for reference of disputes to arbitration and it was not maintainable under Section 34 of the Maharashtra Stamp Act, 1958 which is almost pari materia to the Act, 1899. The work order being an unstamped document could not be received in evidence for any purpose, or acted upon, unless it is duly stamped. In consequence thereof, the arbitration clause in the unstamped agreement also could not be acted upon or enforced since the arbitration clause would have no existence in law, unless the applicable stamp duty

(and penalty, if any) is paid on the work order and placed reliance on the judgment of this Court in ***Garware Wall Ropes Limited***(supra).

29. Learned counsel further submits that the High Court, while relying on the application under Section 8 had enforced a non-existent arbitration clause which is in violation of Section 34 of the Maharashtra Stamp Act, 1958 and further contended that the respondent had not indicated its willingness to pay the stamp duty, even though, at later stage, an objection was raised and, therefore, no justification arises to grant any further opportunity to now pay the stamp duty under the clause of arbitration.

30. We have heard learned counsel for the parties and with their assistance perused the material available on record and before delving into the reference, we feel apposite to discuss the statutory provisions related to the reference.

III. <u>Requirements under the Indian Stamp Act, 1899</u>

31. The Act, 1899 is a fiscal statute laying down the law relating to tax levied in the form of stamps on instruments recording transactions. The stamp duties on instruments specified in Entry 91 of List I(Union List) of Schedule VII of the Constitution of India (viz.

Bills of Exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts) are levied by the Union Government. Similarly, the stamp duties on instruments other than those mentioned in Entry 91 of the Union List above are levied by the States as per Entry 63 of List II(State List) of the Schedule VII. Provisions other than those relating to rates of duty fall within the legislative power of both the Union and the States by virtue of Entry 44 of the List III(Concurrent List). However, the stamp duties on all the instruments are collected and kept by the concerned States.

32. The term 'Instrument' has been defined under Section 2(14) of the Act, 1899 and the 'Instrument chargeable to Duty' is provided under Section 3 whereas Section 17 provides that all instruments chargeable with duty and executed by any person in India has to be stamped.

33. Sections 2(14), 3 and 17 of the Act, 1899 are extracted hereunder: -

> "**2(14)** — **Instrument**". — instrument includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded:

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

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

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

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

Provided that no duty shall be chargeable in respect of— (1) any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act 1894, Act No. 57 & 58 Vict. c. 60 or under Act XIX of 1838 Act No. or the Indian Registration of Ships Act, 1841, (CX of 1841) as amended by subsequent Acts.

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

18. Instruments other than bills and notes executed out of India.—(1) Every instrument chargeable with duty executed only out of [India], and not being a bill of exchange or promissory note, may be stamped within three months after it has been first received in [India]. (2) Where any such instrument cannot, with reference to the

> description of stamp prescribed therefore, be duly stamped by a private person, it may be taken within the said period of three months to the Collector, who shall stamp the same, in such manner as the [State Government] may by rule prescribe, with a stamp of such value as the person so taking such instrument may require and pay for."

34. 'Instrument' as defined under Section 2(14) of the Act, 1899 includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded. The term 'Instrument' as defined under Section 2(14) refers to the original instrument and not a copy or a duly certified copy of the same. It is only on production of the original instrument, the deficiencies in the stamp duty/penalty can be paid to validate the same.

35. Chapter IV (Section 33 to Section 48) of the Act, 1899 titled 'Instruments not duly stamped' provides for the procedure to be followed when an instrument which ought to have been stamped is not stamped.

36. Section 33 of the Act, 1899 provides for 'Examination and impounding of instruments'. Under sub-section (1) of Section 33, "Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an

officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same". Section 33(2) of the Act, 1899 provides that every instrument chargeable with duty shall be examined by such person as explained in sub-section (1), "in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed". The definition of 'duly stamped' as contained in Section 2(11) 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 law for the time being in force in India.

37. A plain reading of Section 33 of the Act, 1899 thus explains that when an instrument or a document is produced before the authority, it is the duty of such authority to examine whether the instrument is duly stamped or not, and if it is found that the instrument is not "duly stamped" under Section 33(2), the concerned authority shall impound the said instrument.

38. Section 34 of the Act, 1899 provides a discretion to the concerned officer that if any receipt chargeable with a duty not exceeding “ten naye paise” is tendered to or produced before them unstamped in the course of the audit of any public account, such officer may in their discretion, “instead of impounding the instrument, require a duly stamped receipt to be substituted therefore.”

39. A plain reading of Section 35 of the Act, 1899 suggests that an inadmissible instrument because of being unstamped or insufficiently stamped may be made admissible if the relevant stamp duty and a penalty is paid later. This shows that the requirement under Section 35 is not rigid, and can be rectified even at a later stage. An unstamped or insufficiently stamped instrument is not completely invalid, and it can be made valid and admissible in evidence after fulfilling the conditions prescribed in the proviso to Section 35.

40. Section 37 of the Act, 1899 deals with admission of improperly stamped instruments. It provides that the State Government may make rules providing that, where an instrument bears a stamp of

sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

41. Section 38 of the Act, 1899 provides for the procedure for how the instruments impounded are to be dealt with. Sub-Section (1) of Section 38 provides that when the person impounding an instrument under Section 33 admits such instrument in evidence upon payment of a penalty as provided by Section 35 or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

42. Sections 39 and 40 of the Act, 1899 provide a procedure of exercising discretion by the Collector to either refund, certify the instrument as duly stamped, or collect the stamp duty.

43. A plain reading of Sections 33, 35 and 2(14) of the Act, 1899 clearly demonstrates that the instrument which is not duly stamped

can be impounded and when the required fee and penalty has been paid, the said instrument can be taken as an evidence under Section 35 of the Act, 1899. But, at the same time, Sections 33 and 35 are not concerned with any copy of the instrument and party can be allowed to rely on the document which is an instrument within the meaning of Section 2(14) of the Act, 1899. This Court had an occasion to consider the scope and ambit of Sections 33, 35 and 36 of the Act, 1899 and Section 63 of the Evidence Act, 1872 in ***Jupudi Kesava Rao***(supra) and it was held that:

> "**13.** The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (*a*) is only applicable when the original instrument is actually before the court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfil the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself. Section 25 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. 'Instrument' is defined in Section 2(14) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. <u>There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act</u>.

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

44. This view has been affirmed by a three-Judge Bench of this Court in ***Hariom Agrawal****(supra)* wherein it has been held as under:

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

45. Law on the subject is well settled that duly certified copy/photocopy of the alleged instrument cannot be validated by impounding and this cannot be admitted in evidence under the Act, 1899. It leads to the conclusion that the deficiency in an instrument,

whether it is unduly stamped or insufficiently stamped, can be rectified through a procedure as prescribed under the Act, 1899. It clearly indicates that the requirement under the Act can indeed be fulfilled even after the time when the instrument was executed. The requirement under the Act is not rigid or strict, so as to make the instrument invalid at the first instance.

46. It also shows that the purpose of the Act, 1899 is not to declare an instrument as completely invalid if it is unstamped or insufficiently stamped, but to collect the stamp duty on each instrument. The object of the Act, 1899 is to secure revenue for the state.

47. This Court, in the case of ***Hindustan Steel Ltd. v. Messrs Dilip Construction Company***,[11] dealt with the object of the Act, 1899 and held:

> **"7.** The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a

[11] (1969) 1 SCC 597

> bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification."

48. The Bench, after explaining that the scope of the Act, 1899 is to secure revenue for the state and not to be used as means to harass the litigant, concluded that unstamped instruments can be acted upon after payment of duty and penalty. Initial defects can be cured and it is never the intention of the legislature to treat an initially unstamped instrument as *non-est* in law.

49. The Statute deals with the instances of failure to stamp a document which has got to be stamped under the provisions of the Act, 1899 but does not affect the validity of the transaction embodied in the document. That Part IV of the Act, 1899 deals with the contingencies of non-payment of stamp duties and once the object of securing the interest of the revenue of State is secured, the claim based on instrument can always be acted upon on payment of the requisite stamp duty.

50. We, therefore, hold that the deficiencies under the Act, 1899 can be fulfilled, and do not render any instrument invalid

permanently. Now, it is to be seen whether the Court or Arbitral Tribunal can order rectification of the deficiencies under the Act 1899, if any.

IV. Historical Background of Arbitration in India

51. Arbitration can be understood as a procedure of dispute resolution in which the dispute is submitted, by the agreement of the parties, to the appointed Arbitrator or the Arbitral Tribunal who are having the jurisdiction to resolve the dispute in accordance with the applicable law as agreed among the parties. Alternatively, it can be understood as a mechanism to adjudicate disputes between the parties outside the court in a quasi-judicial manner.

52. The process of arbitration as a preferable method of dispute resolution is not new in India. According to the scholars of the ancient Hindu literature, "*Brhadaranayaka Upanishad*" is the earliest known treatise that mentions a system that can be closely associated with present-day arbitration as the same involved various arbitral bodies such as "Puga" or the local courts, "Srenis" or the people carrying out the same profession and "Kulas" or members concerned with the social matters of the same part of the society. All

the above-explained bodies were called the Panchas and cumulatively formed Panchayat. The same has been affirmed by the Privy Council in the case of ***Vytla Sitanna v. Marivada Viranna***[12] wherein it was observed that the parties used to refer the dispute to the elected panchayat and these adjudicating bodies were responsible to pass the award which was based on the principle of fair and equitable settlement of the dispute based on the prevalent legal as well as moral grounds.

53. The arbitration regime in India further evolved with the enactment of the first Bengal Regulation by the Britishers in the year of 1772. Subsequent to this enactment, all the disputes were submitted to arbitration and the award of the same had the same value as that of any decree passed by the Court. Further, the Bengal Regulation of 1781 also contained provision as reproduced herein:

> "The judge do recommend and so far as he can without compulsion prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties … No award of any arbitrator be set aside, except upon full proof, made by oath of two creditable witnesses that the arbitrators had been guilty of gross corruption or partially, in the course of which they had made their award."[13]

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[12] AIR 1934 PC 105.

[13] C. V. Nagarjuna Reddy, Role of Arbitration in the Wake of CPC (Amendment) Act, 1999, The Indian Council of Arbitration,

54. It is quite evident from the above-mentioned clause that the Bengal Regulations contained provisions to enable the parties to refer the dispute to be settled by the process of arbitration as per the mutual agreement of the parties, especially in disputes involving breach of the contractual obligations and partnership deeds. Arbitration also found a place in the earliest enacted legislation by the State i.e., Code of Civil Procedure, 1859. Specifically, the provision in Schedule II of the Code of Civil Procedure, 1908 contained the procedure relating to arbitration. These statutory provisions primarily dealt with two types of arbitrations:

i) Arbitration initiated by the Courts in any pending civil suit.

ii) Arbitration wherein there is no involvement or intervention of the Court.

55. Apart from these two types of arbitration, there evolved a third kind of arbitration known as "Statutory Arbitration" wherein the

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https://www.icaindia.co.in/icanet/quterli/apr-june2002/ica5.html (Last accessed on 22nd January, 2023 at 10:50 pm).

procedure of arbitration is governed by the provisions contained in the statute.

56. The major development in the arbitration regime came with the enactment of the Arbitration Act, 1899 which was quite comparable to the English Arbitration Act, 1899. This enactment can be understood as the first step in the direction of enforcement of arbitration in India. The Arbitration Act, 1899 was initially applicable to all the presidency towns and there existed judicial intervention right from the initial reference of the dispute to the process of arbitration.

57. With the rapidly changing times, the evolution of the arbitration regime in India also gained momentum. The Code of Civil Procedure, 1908 was amended to insert the provision contained under Section 89 which exclusively dealt with the applicability and enforceability of the arbitration. In the early 20th century, arbitration emerged as an acceptable mode of dispute resolution and in order to meet its growing popularity, the Arbitration Act, 1940(hereinafter being referred to as the "Act, 1940") was enacted by the legislature. The Act, 1940 was enacted with the primary motive of providing speedy

and less costly method of dispute resolution in the form of arbitration. However, there existed many inadequacies in the practical application of the provisions contained in the Act, 1940.

58. The Act, 1940 contained many provisions similar to the provisions contained under the English Arbitration Act, 1934 but still it did not have any provision for enforceability of the foreign award. Also, the provisions contained in the Act, 1940 facilitated the intervention of the judiciary at all the three stages of the arbitral proceedings, i.e., before the dispute was referred to the arbitration, during the pendency of the arbitral proceedings and after passing the arbitral award.

59. The ineffective functioning of the provision contained under the Act, 1940 was regularly criticised by the Judiciary. The following observation by Justice D.A. Desai in the case of ***Guru Nanak Foundation v. Rattan Singh and Sons***[14] is quite relevant to be mentioned here:

> "**1.** Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are

[14] (1981) 4 SCC 634

> conducted and without an exception challenged in Courts, has made Lawyers laugh and legal philosophers weep."

60. This Court further observed in the case of ***Food Corporation of India v. Joginderpal Mohinderpal and Another***[15] that the law governing arbitration is supposed to be less technical and more suitable to practical problems by ascertaining equity and fair play in the entire process. Despite such severe criticism by this Court, no amendment was brought in the Act, 1940 by the legislature for a long period of time.

61. It was only by the late 20th century, there came a major shift in the development of arbitration in India. Due to the economic liberalization and alike policies of the government in 1991, there was a need felt to create a conducive environment for attracting foreign investments. Therefore, based on the 76th Report of the Law Commission of India as well as the Model UNCITRAL law, the Act, 1996 was enacted by the legislature. The Act,1996 came into force from 16th August, 1996 with an object of making the process of

[15] (1989) 2 SCC 347

arbitration cost effective, less technical and in accordance with the prevalent international practices across the world.

V. Intent behind incorporation of Section 11(6A) of the Arbitration and Conciliation Act, 1996

62. A major shift for the development of arbitration in India happened with the enactment of the Act, 1996. Based on the 76th Report[16] of the Law Commission of India as well as the Model UNCITRAL law, the Act, 1996 was enacted with an object of making the process of arbitration cost effective, less technical and in accordance with the prevalent international practices across the world. The legislative intent was to provide effective and speedy procedure for dispute resolution among the parties as well as to limit the scope of judicial intervention in the process of arbitration.[17] India is gradually moving in the direction of minimal judicial intervention keeping abreast with the developments of arbitration in other regimes.

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[16] Law Commission of India, 76th Report on Arbitration Act, 1940

[17] Paragraph No. 4(v), Statement of Objects and Reasons, Arbitration and Conciliation Act, 1996.

63. The Constitution Bench of this Court while examining the pre 2015 amendment regime in ***SBP & Co. v. Patel Engineering Ltd.* and Another**[18] held that all the preliminary or threshold issues pertaining to jurisdiction of the Arbitrator/Arbitral Tribunal should be examined by the Court under Section 11 of the Act, 1996. This position of law was sought to be changed by the Law Commission in its 246th Report, which states as follows:

> "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. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. **If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal.** However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void."[19]
>
> (Emphasis added)

[18] (2005) 8 SCC 618

[19] LAW COMMISSION OF INDIA Report No. 246 Amendments to the Arbitration and Conciliation Act 1996, pg. 43

64. In the said report, the Law Commission of India concluded that the judicial intervention in arbitration proceedings adds significantly to the delay in the arbitration process and ultimately negates the benefit of arbitration. At paragraph 24, the Law Commission noted as follows: "*…[I]t is observed that a lot of time is spent for appointment of arbitrators at the very threshold of arbitration proceedings*."[20]

65. The Law Commission suggested the insertion of sub-Section (6A) to Section 11 in the Act, 1996 which was accepted by the Legislature by way of the 2015 amendment to the Act, 1996. Section 11(6A) unambiguously by its intention manifests that "[the] Supreme Court or, as the case may be, the High Court, while examining an 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 examine only to the "existence of an arbitration agreement".

66. The 2015 amendment, including Section 11(6A), and the later amendments are in line with this evolution of arbitration jurisprudence. With the series of amendments to the principal Act,

[20] Paragraph No. 24, Report No. 246, Law Commission of India.

1996, it is quite evident that the legislature is continuously engaging with the rapidly evolving arbitration regime in India and the various challenges allied it with the object to reduce the scope of intervention by the courts in the arbitration processes. It can be expected that the arbitration in India is conducted in accordance with the following views expressed by Justice Sabyasachi Mukharji in the case of **Food Corporation of India(supra)**:

> "**7.** We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done."

The above discussed approach of the legislature has been acknowledged by this Court.

67. In the case of ***Duro Felguera, S.A. v. Gangavaram Port Limited***[21], this Court explained the scope and effect of the changes brought in by the 2015 amendment in the following words:

> **"48**..... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides

[21] (2017) 9 SCC 729

> for arbitration pertaining to the disputes which have arisen between the parties to the agreement…
>
> **59.** The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.**"**
>
> (Emphasis added)

68. This position was affirmed by a three-judge bench *in* ***Mayavati Trading Private Limited v. Pradyuat Deb Burman***[22]:

> **"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 [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362], as Section 11(6-A) is confined to the 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 in **Duro Felguera, S.A.**…,"
>
> (Emphasis added)

69. Thus, the 2015 amendment aims to limit the intervention of Courts to minimal examining the existence and not the validity of an arbitration agreement at the pre-referral stage of the arbitration proceedings.

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[22] (2019) 8 SCC 714

VI. Scope of Section 11(6A) w.r.t. Section 8, Section 16 and Section 45 of Arbitration and Conciliation Act, 1996

70. Section 11(6A) of the Act, 1996 reads as follows:

> "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."

71. The scope of inquiry under Section 11(6A) is restricted to examine the "existence of an arbitration agreement". The phrase 'existence of an arbitration agreement' is to be understood in a literal sense keeping the intention of the legislature after the introduction of the 2015 amendment. The position of law that prevails after the insertion of 2015 amendment is that there should be minimal interference by the Courts. The limited scope of the Court to examine at the pre-referral stage is whether the arbitration agreement, prima facie, exists as referred to under Section 7 of the Act, 1996 which includes determination of the following factors:

(i) Whether the arbitration agreement is in writing;

(ii) Whether the core contractual ingredients qua the arbitration agreement are fulfilled?

(iii) On rare occasions, on a serious note of objection, if any, it may examine whether the subject matter of dispute is arbitrable?

72. Section 8(1), which was replaced by the amendment of 2015, mandates a judicial authority to refer parties to arbitration unless there is prima facie finding that no valid arbitration agreement exists. The language used in the provision is as follows:

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

> an arbitration may be commenced or continued and an arbitral award made."

73. The Section provides that the Court can examine, whether prima facie there does not exist an arbitration agreement. The scope of this Section can be seen from the 246th Law Commission Report[23], which made the following note while suggesting amendment to Section 8:

> **"....**of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the **judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void.** If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void."

74. A plain reading of the Section 8 indicates that it limits the intervention of the Court to only one aspect i.e., when it finds that prima facie no valid arbitration agreement exists or is null and void.

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[23] LAW COMMISSION OF INDIA Report No. 246 Amendments to the Arbitration and Conciliation Act 1996, pg. 43

75. The scheme of the Act, 1996 manifests that Sections 8 and 11 are complementary in nature and both relate to reference to arbitration and have the same scope and ambit with respect to judicial interference. The Court, under Sections 8 and 11, has to refer the matter to arbitration or to appoint an Arbitrator, provided the party has established a prima facie existence of an arbitration agreement, nothing more nothing less. At the same time, the Court should refer the matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".

76. At this stage, we would like to observe that the statutory scheme has been framed for appointment of an Arbitrator by various High Courts and also by this Court - called the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, the relevant portion of the same is extracted hereunder:-

> **1. Short title**. -This Scheme may be called The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996.
>
> **2. Submission of request**. - The request to the Chief Justice under sub-section (4) or sub-section (5) or sub-section (6) of section 11 shall be made in writing and shall be accompanied by-
>
> ***(a) the original arbitration agreement or a duly certified copy thereof;***

(b) the names and addresses of the parties to the arbitration agreement;

(c) the names and addresses of the arbitrators, if any, already appointed;

(d) the name and address of the person or institution, if any, to whom or which any function has been entrusted by the parties to the arbitration agreement under the appointment procedure agreed upon by them;

(e) the qualifications required, if any, of the arbitrators by the agreement of the parties;

(f) a brief written statement describing the general nature of the dispute and the points at issue;

(g) the relief or remedy sought; and

(h) an affidavit, supported by the relevant document, to the effect that the condition to be satisfied under sub-section (4) or sub-section (5) or sub-section (6) of section 11, as the case may be, before making the request to the Chief Justice, has been satisfied.

77. It is clear from the scheme of which a reference has been made that while the applicant approaches the Court for appointment of an Arbitrator, he is not supposed to file an original arbitration agreement and attested copy of the agreement can be annexed at the pre-referral stage which is indeed not an instrument as referred to under Section 2(14) of the Act, 1899.

78. So far as the reference made of submitting a certified copy of the arbitration agreement is concerned, suffice it to say, that arbitration agreement executed between the parties relating to the business/commercial transactions is not required to be compulsorily

registered under the Act, 1908. The obligation to register the document is invoked under provisions of the substantive law, namely, Transfer of Property Act, 1882, while Section 17 of the Act, 1908 mandates that the non-testamentary instrument that created any right, title or interest of the value of Rs.100/- or upwards in an immovable property must be compulsorily registered. If document is not registered, transfer is void, there is no valid transfer, and the property described in the instrument does not pass on, for example, mortgage does not become complete and enforceable until it is registered under the Act, 1908.

79. Indisputably, the arbitration agreement is not a public document to which compulsory registration as referred to under Section 17 of the Act, 1908 is required and one can obtain a certified copy of the public document under Sections 74 or 75 of the Evidence Act, 1872. The Public Officer having the custody of a public document can make available its certified copy as referred to under Section 76 of the Evidence Act, 1872. In the absence of the arbitration agreement being required to be compulsorily registered, within the scope and ambit of Section 17 of the Act, 1908, such arbitration agreement/document is not accessible in public domain

and is not a public document of which certified copy can be obtained, as referred to under Section 74 of the Evidence Act, 1872, failing which the question of presumption as to genuineness of document purporting to be a certified copy as referred to under Section 79 of the Evidence Act, 1872 may not arise.

80. In other words, when the arbitration agreement is not required to be compulsorily registered as referred to under Section 17 of the Act, 1908 the reference of a certified copy under the Scheme of Rules, 1996 appears to be of an authenticated copy of the arbitration agreement that qualifies the requirement of Section 7 of the Act, 1996 at the pre-referral stage for the purposes of appointment of an Arbitrator under Section 11(6A) of the Act, 1996. Hence, the question of raising objection regarding the arbitration agreement not being stamped or insufficiently stamped at the pre-referral stage may not arise.

81. Section 16 of the Act, 1996 is referred to 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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

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

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

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

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

82. Section 16(1) of the Act, 1996 envisaged that an Arbitral Tribunal can rule upon own jurisdiction, "including ruling on any objection with respect to the existence or validity of the arbitration agreement". The provision is based on the doctrine of *Kompetenz-Kompetenz* and the doctrine of Separability. The doctrine of *Kompetenz-Kompetenz* means that the Arbitral Tribunal is competent

enough to rule on its own jurisdiction. At the same time, the Doctrine of Separability severs the arbitration clause from the commercial contract. Section 16(1)(a) presupposes the existence of a clause of arbitration and mandates the same to be treated as independent to the other terms of the contract. Under Section 16, the Arbitral Tribunal shall have the jurisdiction to determine the validity of the arbitration agreement.

83. A division Bench of this Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited***[24] while placing reliance on ***Duro Felguera*** (supra) held that issues related to limitation must be raised before the Arbitral Tribunal. The Court observed the following:

> **"7.8.** By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in *Patel Engg.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267], were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more."

84. What the Courts at the pre-referral stage can examine under Section 11(6A) is only the "existence" of the arbitration agreement,

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[24] (2020) 2 SCC 455

while the Arbitral Tribunal shall have the jurisdiction to examine "any objections with respect to the existence or validity of the arbitration agreement".

85. Section 45 of the Act, 1996 provides that:

> "**Power of judicial authority to refer parties to arbitration.—** Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, [unless it prima facie finds] that the said agreement is null and void, inoperative or incapable of being performed."
>
> (Emphasis added)

86. A plain comparison between Section 11(6A) and Section 45 manifests that the scope of Section 45 is much broader. Under Section 45, a judicial authority has to examine whether the agreement is "null and void", "inoperative", or "incapable of being performed".

87. This Court in ***World Sport Group (Mauritius) Limited v. MSM Satellite (Singapore) Pte. Limited,***[25] in *paras 33 to 35* explained the difference between the terms 'null and void', 'inoperative' and 'incapable of being performed' as under:-

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[25] (2014) 11 SCC 639

"33. Mr. Gopal Subramanium's contention, however, is also that the arbitration agreement was inoperative or incapable of being performed as allegations of fraud could be enquired into by the court and not by the arbitrator. The authorities on the meaning of the words "*inoperative or incapable of being performed*" do not support this contention of Mr. Subramanium. The words "*inoperative or incapable of being performed*" in Section 45 of the Act have been taken from Article II(3) of the New York Convention as set out in para 27 of this judgment. *Redfern and Hunter on International Arbitration* (5th Edn.) published by the Oxford University Press has explained the meaning of these words "*inoperative or incapable of being performed*" used in the New York Convention at p. 148, thus:

"At first sight it is difficult to see a distinction between the terms 'inoperative' and 'incapable of being performed'. However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time-limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal."

34. Albert Jan Van Den Berg in an article titled "The New York Convention, 1958 — An Overview" published in the website of ICCA(www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of-1958_overview.pdf), referring to Article II(3) of the New York Convention, states:

"The words '*null and void*' may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.

The word '*inoperative*' can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.

The words '*incapable of being performed*' would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration."

> **35.** The book *Recognition and Conferment of Foreign Arbitral Awards : A Global Commentary on the New York Convention* by Kronke, Nacimiento, et al.(ed.) (2010) at p. 82 says:
>
> "Most authorities hold that the same schools of thought and approaches regarding the term *null and void* also apply to the terms *inoperative* and *incapable of being performed*. Consequently, the majority of authorities do not interpret these terms uniformly, resulting in an unfortunate lack of uniformity. With that caveat, we shall give an overview of typical examples where arbitration agreements were held to be (or not to be) inoperative or incapable of being performed.
>
> The terms *inoperative* refers to cases where the arbitration agreement has ceased to have effect by the time the court is asked to refer the parties to arbitration. For example, the arbitration agreement ceases to have effect if there has already been an arbitral award or a court decision with res judicata effect concerning the same subject-matter and parties. However, the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative. Additionally, the arbitration agreement can cease to have effect if the time-limit for initiating the arbitration or rendering the award has expired, provided that it was the parties' intent no longer to be bound by the arbitration agreement due to the expiration of this time-limit.
>
> Finally, several authorities have held that the arbitration agreement ceases to have effect if the parties waive arbitration. There are many possible ways of waiving a right to arbitrate. Most commonly, a party will waive the right to arbitrate if, in a court proceeding, it fails to properly invoke the arbitration agreement or if it actively pursues claims covered by the arbitration agreement."

88. The above explained examination does not arise in the language of Section 11(6A). That is to say, the legislature has not borrowed the language of Section 45 in Section 11(6A), which is limited to the 'existence' of the arbitration agreement.

VII. Limited Examination by Court under Section 11(6A) of the Arbitration and Conciliation Act, 1996

89. The limited scope of Section 11(6A) of the Act, 1996 has been explained by a three-judge bench of this Hon'ble Court in ***Pravin Electricals Private Limited v. Galaxy Infra and Engineering Private Limited***[26] at *para 17* placing its reliance on ***Vidya Drolia and Others***(supra) wherein it was held that the existence of an arbitration agreement means an agreement which satisfies the requirements of both the Act, 1996 and the Contract Act, 1872 and when it is enforceable in law. The judgment in ***United India Insurance Company Limited and Another v. Hyundai Engineering & Construction Company Limited and Others***[27] was also relied upon in ***Pravin Electricals Private Limited***(supra) to demonstrate that Section 11(6A) deals with "existence", juxtaposed to Section 16 and Section 45, which deal with "validity" of an arbitration agreement. There indeed lies a distinction between the "existence" and the "validity" of an arbitration agreement.

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[26] (2021) 5 SCC 671
[27] (2018) 17 SCC 607

90. The UNCITRAL Model Law also supports a distinction between jurisdictional objections based on the alleged non-existence, invalidity, or illegality of the arbitration agreement, and jurisdictional objections based upon the scope of a concededly valid arbitration agreement. [28] All issues of jurisdiction including the existence or validity of the arbitration agreement can be decided by the Arbitral Tribunal, whether or not appointed through the intervention of the court under Section 16 of the Act, 1996.

VIII. Interpretation of "Existence of Arbitration Agreement"

91. In order to determine the "existence of an arbitration agreement" under Section 11(6A), the Act, 1899 may not have a bearing owing to the reason that at the pre-referral stage, if the document is not duly stamped/insufficiently stamped that does not render the arbitration agreement non-existent as discussed and ascertained earlier. The only consideration that the courts/judicial authority at the pre-referral stage needs to follow is the *prima facie*

[28] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

existence of an arbitration agreement as referred under Section 7 of the Act, 1996 which provides:

> **"7. Arbitration agreement.—**
>
> (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
> (4) An arbitration agreement is in writing if it is contained in—
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

92. That is to say, the limited scope of the Court under Section 11(6A) at the pre-referral stage is to examine whether the arbitration agreement, prima facie, exists as referred to under Section 7 of the Act, 1996, which includes only the determination of the following factors:

(i) Whether the arbitration agreement is in writing?

(ii) Whether the core contractual ingredients qua the arbitration agreement are fulfilled?

(iii) On rare occasions, on a serious note of objection, if any, it may examine whether the subject matter of dispute is arbitrable?

IX. Clarification on Stamping of Arbitration Agreement

93. In the reference Order and in paras 20, 24 and 58 in particular, a reference has been made that Maharashtra Stamp Act, 1958 does not subject to arbitration agreement to payment of stamp duty. The relevant paragraphs of the **M/S. N.N. Global Mercantile Private Limited** (supra)[29] are as follows:

> **"20.** We have carefully perused the provisions of the Maharashtra Stamp Act, 1958 and Schedule I appended thereto, which enlists the instruments specified in Section 3, on which stamp duty is chargeable. We find that an arbitration agreement is not included in the Schedule as an instrument chargeable to stamp duty. Item 12 of Schedule I to the Maharashtra Stamp Act, 1958 includes an award **passed by an arbitrator to be chargeable for payment of stamp duty.....**
>
> In *Shriram EPC Ltd.* v. *Rioglass Solar SA* [*Shriram EPC Ltd.* v. *Rioglass Solar SA*, (2018) 18 SCC 313], this Court held that the payment of stamp duty is applicable to awards made in India, but does not include a "foreign award" which has not been included in the Schedule to the Stamp Act, 1899.
>
> **24.** ...Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of stamp duty, unlike various

[29] (2021) 4 SCC 379

other agreements enlisted in the Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, unenforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of stamp duty.

58. We consider it appropriate to refer the following issue, to be authoritatively settled by a Constitution Bench of five Judges of this Court:

"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?"

(Emphasis added)

94. There appears to be an error in the view taken by the 3-Judge Bench. The Schedule I to the Act, 1899 in its Article 5 titled "Agreement or Memorandum of Agreement" has a residuary entry which says ***(c) if not otherwise provided for*** *- Eight annas.* Article 5 has been reproduced as:

5. Agreement or Memorandum of an Agreement	
(a) If relating to the sale of a Bill of Exchange;	Two annas
(b) If relating to the sale of a Government Security or share in an incorporated Company or other body corporate	Subject to maximum of ten rupees, one anna for every Rs. 10000/- or part thereof of the value of the security or share
(c) if not otherwise provided for	**Eight annas**
Exemptions	

Agreement or memorandum of agreement – (a) for or relating to the sale of goods or Merchandise exclusively, not being a NOTE OR MEMORANDUM chargeable under No. 43; (b) made in the form of tenders to the Central Government for or relating to any loan;	

95. The examination of the arbitration agreement at the stage of Section 11(pre-referral stage) should be done cautiously in a way that it does not breach the legislative intent behind the provisions by opening the door wide open for judicial intervention.

96. We, however, refrain ourselves to examine the question regarding the scope and ambit of Section 9 of the Act, 1996 of which a reference has been made by a three-Judge Bench in **M/s. N.N. Global Mercantile Private Limited**(supra) since the present reference is not concerned to examine the scope of Section 9 of the Act, 1996 and leave it open to be examined in the appropriate proceedings.

X. <u>Answer to the Reference</u>

97. To conclude, in our view:

i) We accordingly hold that the existence of a copy/certified copy of an arbitration agreement whether unstamped/

insufficiently stamped at the pre-referral stage is an enforceable document for the purposes of appointment of an Arbitrator under Section 11(6A) of the Act, 1996 where the judicial intervention shall be minimal confined only to the *prima facie* examination of "existence of an arbitration agreement" alone keeping in view the object of 2015 amendment and the courts must strictly adhere to the time schedule for the appointment of Arbitrator prescribed under Section 11(13) of the Act, 1996.

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

iii) The decision in **SMS Tea Estates Private Limited**(supra) stands overruled. Paras 22 and 29 of **Garware Wall Ropes Limited**(supra) which are approved in paras 146 and 147 in **Vidya Drolia and Others**(supra) are overruled to that extent.

98. The reference is answered accordingly.

99. We appreciate the contribution made by Mr. Gourab Banerjee, Amicus Curiae in answering the reference made to this Court.

.....J.
(AJAY RASTOGI)

NEW DELHI;
APRIL 25, 2023.