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

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Abstract

In a significant shift, the Indian Supreme Court has ruled that unstamped arbitration agreements, while inadmissible in evidence, remain valid and enforceable. This landmark decision overturns previous rulings and reasserts the principle of arbitral autonomy. Courts are now barred from assessing the validity of such agreements at the pre-arbitral stage, leaving that authority solely to the designated arbitral tribunals. This prioritizes minimal judicial interference and upholds the tribunals' competence to rule on their own jurisdiction. Furthermore, the Arbitration Act is declared to take precedence over both the Stamp Act and Contract Act concerning these agreements, further solidifying the primacy of arbitral processes. This judgment marks a significant victory for swift and efficient dispute resolution through arbitration, minimizing unnecessary delays and upholding the independence of arbitral tribunals.

Keywords: Arbitration Agreement, Unstamped Contracts, Separability, Arbitral Autonomy, kompetenz- kompetenz, Harmonious Construction.

Title

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

Case No.:

Curative Petition (C) No. 44 of 2023

Judgement Date

13-12-2023

Court Supreme Court Quorum

7 Judge bench

Author and citation (Judge that authored the judgement)

Dr Dhananjaya Y Chandrachud, CJI

Introduction

According to Section 7(1) of the Arbitration and Conciliation Act 1996 the "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. Arbitration agreements are often embedded in underlying instruments or substantive contracts. Now the primary issue that arises is whether such arbitration agreements would be non-existent, unenforceable, or invalid if the underlying contract is not stamped. To adjudicate upon the matter the Apex Court considered three statutes i.e., the Arbitration and Conciliation Act 1996, the Indian Stamp Act 1899, and the Indian Contract Act 1872.

Background

The enforceability of arbitration agreements within unstamped contracts is a contentious issue. In *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*,¹ (hereinafter referred to as "N N Global 1") a 3-judge bench held arbitration agreements valid despite unstamped contracts. However, in *SMS Tea Estates*² and *Garware Wall Ropes*³ cases ruled otherwise, deeming arbitration clauses in unstamped contracts unenforceable.

¹ [2021] 4 SCC 379

² *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd* [2011] 14 SCC 66

³ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd* [2019] 9 SCC 209

The Constitution Bench in *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*⁴ (hereinafter referred as “N N Global 2”) by a majority of 3:2, overruled *N N Global 1*, asserting that unstamped instruments lack legal existence and enforceability, extending to arbitration agreements within them. Courts cannot act under the Arbitration Act without adhering to the Stamp Act's mandate to examine and impound unstamped instruments.

Facts and Issues

A five-judge bench of the Supreme Court while hearing a curative petition against the judgement in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Bros.*⁵ and in *Seka Dobric v. SA Eonsoftech (P) Ltd.*⁶ a three-Judge Bench of this Court while hearing a Section 11 of the Act of 1996 application for the appointment of arbitrators, directed the proceedings to be listed along with the curative petition. On 26 September 2023, the five-Judge Bench differed with the view taken in *N N Global 2* (supra) and referred the issue to a seven-Judge Bench.

Issue

1. Whether an unstamped or insufficiently stamped instrument containing an arbitration agreement would be rendered non-existent, unenforceable, or invalid?
2. Whether the court may take cognizance as to the jurisdiction of the arbitral tribunal at the initial stage of arbitral proceeding?
3. Whether there is harmony between Indian Stamp Act, Indian Contract Act, Arbitration and Conciliation Act or not?

Arguments on behalf of Petitioners.

The Petitioners simply submit that *N N Global 2* (supra) does not establish the right legal position. The learned counsel's submissions on behalf of the petitioners and intervenors can be summed up in the following arguments: -

1. The doctrine of separability recognizes that an arbitration agreement is a self-contained agreement, distinct from the underlying contract.
2. Courts, when examining the existence of an arbitration agreement under Section 11(6A) of

⁴ [2023] 7 SCC 1

⁵ [2020] 4 SCC 612

⁶ Arbitration Petition No. 25 of 2023.

Act of 1996, should not extend their inquiry to the adequacy of stamping under the Stamp Act.

3. Mandating the courts at the referral stage to follow the prescriptions contained under Section 33 of the Stamp Act would amount to exceeding the remit of examination. The Arbitration Act confines the authority of referral court to the examination of an arbitration agreement and not the instrument.
4. The arbitral tribunal has the competence to rule on its own jurisdiction, including on issues pertaining to stamping.
5. Mandating the courts to examine stamping issues at pre-arbitral stages (Section 8 or 11 Act of 1996) would undermine the legislative intent of minimal judicial interference enshrined in Section 5 of the Arbitration Act.
6. An unstamped instrument is not void, but merely inadmissible in evidence, a defect that can be cured by payment of stamp duty.

Arguments on behalf of Respondents.

The Respondents largely contend that N N Global 2 (supra) is correct and is in line with the consistent position adopted by this Court in SMS Tea Estates (supra) and Garware Wall Ropes (supra), which ought not to be disturbed.

- The examination by the court under Section 11(6A) of the Arbitration Act is not confined to mere facial existence of an arbitration agreement. The referral court has to prima facie examine both the existence and validity of an arbitration agreement.
- Section 33 of the Stamp Act casts a mandatory legal requirement on courts under Section 11 Act of 1996 proceedings to impound an unstamped or insufficiently stamped instrument.
- The principle of separability contained in Section 16 of the Arbitration Act implies that an arbitration agreement can be treated as a distinct agreement only to determine its validity or enforceability.

Judgment

Issue I: The Hon'ble Supreme Court while deciding the issue whether an unstamped or insufficiently stamped instrument containing an arbitration agreement would be rendered non-existent, unenforceable, or invalid, observed as follows: -

- i. The Principle of Arbitral Autonomy is held as integral part of Arbitration law in India. It

means that the parties to an arbitration agreement have contractual freedom to submit the dispute between them to the Arbitration Tribunal. parties essentially distance themselves from the “risk of domestic judicial parochialism”.⁷ The competence of an arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

- ii. Principle of minimum judicial interference refers to minimising unnecessary interference by the national courts in arbitration proceeding.⁸ Primary objective of the Arbitration Act is to minimize the supervisory role of courts in the arbitral process. Party autonomy and settlement of disputes by an arbitral tribunal are the hallmarks of arbitration law.
- iii. Presumption as to separability of arbitral agreement.

The separability presumption, as incorporated under Article 16(1) of the Model Law, as well as Section 16 of the Arbitration Act, is qualified by the expression “for that purpose.” A plain reading may suggest that Section 16 has incorporated the separability presumption only for the particular purpose of allocation of competence over jurisdictional disputes Prior to the Arbitration Act (1996), judgments like *Damodar Valley Corporation v. K K Kar*⁹ treated void contracts as invalidating arbitration clauses. However, Section 16(1)(b) of the Arbitration Act safeguards arbitration agreements even if the contract is null and void. Subsequent judgments have reinforced this principle:

*Firm Ashok Traders v. Gurumukh Das Saluja*¹⁰ recognized arbitration clauses as independent agreements separable from other contract clauses.

*National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Co.*¹¹ held that arbitration clauses remain valid even after contract repudiation.

- *P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corp.*¹² reiterated that arbitration agreements are collateral terms that can survive contract termination.

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

⁸ Gary Born, *The Principle of Judicial Non-Interference in International Arbitration*

⁹ [1974] 1 SCC 141

¹⁰ [2004] 3 SCC 155

¹¹ [2007] 5 SCC 692

¹² [2009] 2 SCC 494

The Supreme Court upholds the separability presumption in Section 16, asserting that arbitration agreements are substantively independent from underlying contracts. This ensures arbitration agreements remain valid even if the contract is invalid, illegal, or terminated.

Issue II: The Hon'ble Supreme Court while deciding the issue, whether the court may take cognizance as to the jurisdiction of the arbitration tribunal at the initial stage of arbitral proceeding, considered the following: -

1. The doctrine of kompetenz-kompetenz

It is also known as competence-competence doctrine, as it is originally developed in Germany and was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any court.

The doctrine of competence-competence grants arbitral tribunals the power to rule on their own jurisdiction, including the existence and validity of the arbitration agreement. This principle aligns with the separability presumption, which isolates the arbitration agreement from the underlying contract's defects, ensuring the tribunal's jurisdiction even after the contract terminates. Essentially, the tribunal can decide all substantive issues related to the contract, including its own jurisdiction.

2. Indian law also recognizes competence-competence in Section 16 of the Arbitration Act:

- Section 16 empowers the tribunal to rule on its own jurisdiction and any objections regarding the arbitration agreement.
- Party's Right to Challenge: However, parties have the right under Section 16(2) and (3) to challenge the tribunal's jurisdiction based on the agreement's non-existence or invalidity.
- Limited Judicial Intervention: Courts can only intervene after the tribunal's award, meaning Section 16 upholds both procedural and substantive aspects of competence-competence.

3. Underlying principle of Sections 34 of the Arbitration Act.

Section 34 of the Arbitration Act outlines a clear framework for judicial intervention, but only after an arbitral award has been rendered. This suggests that courts are not intended to scrutinize

the jurisdiction of arbitral tribunals at the outset of proceedings. Limited grounds for setting aside Awards under section 34(2) restricts courts to setting aside awards on specific grounds, including Incapacity of a party, Invalidity of the arbitration agreement, Procedural irregularities, Ultra vires decisions by the tribunal, Conflict with public policy.

4. Case laws

The following Supreme Court judgment advocates that the principle of competence- competence empowers tribunals to primarily decide their own jurisdiction.

a) Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products¹³

This case highlights the broad scope of Section 16(1) of the Arbitration Act, which grants tribunals the power to rule on their own jurisdiction. The Court emphasizes that this power extends to examining all issues raised by the parties, including challenges related to the arbitration agreement's validity and limitations.

b) Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field¹⁴

This case clarifies that judicial intervention in jurisdictional matters should be minimized to avoid hindering the arbitral process. The Court reiterates the expansive nature of Section 16(1), arguing that it encompasses all preliminary issues impacting the tribunal's jurisdiction.

The Supreme Court held that Arbitration Act does not authorise courts to determine either the validity of an arbitration agreement or the jurisdictional competency of the arbitral tribunal at a pre-arbitral stage.

Issue III: Whether there is harmony between Indian Stamp Act, Indian Contract Act, Arbitration and Conciliation Act or not?

The Supreme Court in the present case established where harmony would exist between the three statutes and when the Arbitration Act would prevail. With reference to the above issue the Supreme Court held as following.

1. The Arbitration Act will have primacy over the Stamp Act and Contract Act concerning

¹³ [2018] 2 SCC 534

¹⁴ [2020] 2 SCC 455.

arbitration agreements.

The Arbitration Act shall take precedence over the Stamp Act and Contract Act in relation to arbitration agreements due to several reasons.

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

The doctrine of ‘*generalia specialibus non derogant*’ means that the special law shall prevail over general law. The doctrine was explained in *LIC v. D.J. Bahadur*¹⁵ as the Apex Court held that “In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law.”

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

Parliament was aware of the Stamp Act when it enacted the Arbitration Act. Yet, the latter does not specify stamping as a pre-condition to the existence of a valid arbitration agreement. Further, Section 11(6-A) of the Arbitration Act requires the court to confine itself to the examination of the existence of the arbitration agreement.

- iii. Section 5 of the Arbitration Act

Section 5 of the Arbitration Act limits the courts from dealing with substantive objections about the existence and validity of arbitration agreements at the referral or appointment stage. The non-obstante clause at the beginning of Section 5 sets forth the legislative intent of limiting judicial intervention during the arbitral process. It indicates that the rule in Section 5 (and consequently, the provisions of the Arbitration Act) must take precedence over any other law for the time being in force.

2. When there is harmony between the three statutes.

The Hon’ble Supreme Court held that there is harmony among the Arbitration Act, Stamp Act, and Contract Act with respect to the following matters: -

- i. The effect of the competence-competence doctrine.

¹⁵ [1981] 1 SCC 315

Section 16 of the Arbitration Act empowers the arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. section 10 Indian Contract Act lays down essentials when agreements are contracts. The interpretation of the law in this judgment ensured that the provisions of both statutes give effect to the competence-competence doctrine.

ii. The object of the Stamp Act is preserved

The arbitral tribunal continues to be bound by the provisions of the Stamp Act. The interests of revenue are not jeopardised in any manner because the duty chargeable must be paid before the agreement in question is rendered admissible and the lis between the parties adjudicated. The interpretation of the law in this judgment ensured that the provisions of the Arbitration Act are given effect while not detracting from the purpose of the Stamp Act

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

The object of the Arbitration Act is to inter alia ensure an efficacious process of arbitration and minimize the supervisory role of courts in the arbitral process. On the other hand, the object of the Stamp Act is to secure revenue for the state.

Traditional Courts are overburdened with numerous cases inevitably leading to delays. On the other hand, arbitral tribunals dedicate long periods for the adjudication of a single case. If the existence of an arbitration agreement is to be decided by the arbitral tribunal it will give effect to the object of both the statutes quickly.

Conclusion

In conclusion, unstamped or inadequately stamped contracts, while inadmissible in evidence, remain valid and are not automatically void. Non-stamping is considered a fixable issue.

Examining stamping issues isn't the court's responsibility during referral proceedings under the Arbitration Act, that falls within the jurisdiction of arbitral tribunal.