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**NN GLOBAL III'S PROGRESSIVE STANCE ON UNSTAMPED
ARBITRATION AGREEMENTS**- Sonali Thakur¹**INTRODUCTION**

In the case of *M/S. N.N. Global Mercantile Private Limited Vs M/S. Indo Unique Flame Ltd. & Ors.*² (NN Global I), a three-judge bench, affirmed that an unstamped arbitration agreement, distinct from the underlying commercial contract, remains valid and enforceable. Due to uncertainties regarding the correctness of some findings, the matter was subsequently escalated to a five-judge bench (NN Global II) consisting of Justice KM Joseph, Ajay Rastogi, Aniruddha Bose, Hrishikesh Roy, and CT Ravi Kumar. By a 3:2 majority decision, the bench held that an unstamped arbitration agreement lacks legal validity and that SMS Tea Estates V Chandmari Tea Co. P. Ltd.'s judgment was wrongly decided. The dissenting opinion was rendered by Justice Ajay Rastogi and Hrishikesh Roy, who contended that unstamped arbitration agreements are valid at the pre-referral stage.³

On 13th December 2023, the seven-judge Supreme Court bench in the matter of *In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899*⁴ (NN Global III) finally ruled that insufficiently stamped arbitration agreements shall be considered curable defects which are enforceable in law, thereby overruling the five bench judgment rendered in April 2023.

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²*M/S. N.N. Global Mercantile Private Limited Vs M/S. Indo Unique Flame Ltd. & Ors.*, (2021) 4 SCC 379.

³Apoorva, *7-Judge Bench Verdict | Supreme Court Judgment on validity of Unstamped Arbitration Agreement*, SCC ONLINE BLOG, (Dec. 20, 2023, 9:29 PM), <https://www.sconline.com/blog/post/2023/12/13/7-judge-bench-verdict-supreme-court-judgment-on-validity-of-unstamped-arbitration-agreement/>.

⁴ *In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899* Curative Pet(C) No. 44 of 2023.

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FACTS OF THE CASE

In this appeal, the court faced the challenge of resolving a conflict that revolved around three separate statutes regulating arbitration agreements and stamp duty payment. Namely, The Arbitration and Conciliation Act of 1996, The Indian Contract Act of 1872, and the Stamp Act of 1899. The key issue the court had to analyze was whether an arbitration agreement contained within an instrument that needs to be correctly stamped is legally valid and enforceable. The court had to carefully examine the implications of the Stamp Act and how it interacts with the other statutes' provisions to determine whether an insufficiently or unstamped arbitration agreement could be upheld.

SUBMISSIONS OF THE PETITIONER

The petitioners argued before the court that it is vital to distinguish between the existence and the legitimacy of an arbitration agreement. They highlighted that as per Section 11(6A) of the Arbitration and Conciliation Act, 1996, the court's authority is limited to assessing the agreement's existence and does not extend to evaluating its validity. Therefore, the court's role is to ascertain whether a contract is in place.⁵ The scope will, thus, not include scrutinizing the sufficiency of stamping as per Section 33 of the Stamp Act.

Next, submissions made by the petitioners include assertions that deficiency in stamping should be viewed as a curable defect, seizing to have an impact once the state's revenue interest is secured. It was contended that non-payment of stamp duty, a temporary issue, should not affect the validity of an arbitration agreement. The claim was that implementing the Stamp Act safeguards public revenue rather than disrupts commercial operations by invalidating key instruments necessary for the seamless conduct of business transactions. If courts operated under Section 8 or Section 11 of the Arbitration Act and if they were to focus

⁵ Padmakshi Sharma, *Arbitration Clauses In Unstamped Agreements Enforceable : Supreme Court 7-Judge Bench Overrules 'NN Global' Decision*, LiveLaw, <https://www.livelaw-in.opj.remotlog.com/top-stories/arbitration-clauses-in-unstamped-agreements-enforceable-supreme-court-7-judge-bench-overruled-nn-global-decision-244387>

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on matters related to stamping, it would ultimately go against the legislative goal of reducing court involvement and ensuring swift appointment of arbitrators.⁶

Finally, the petitioners put forward that the doctrine of separability recognizes the critical notion that an arbitration agreement is a self-contained and separate entity from the base contract. Based on this line of reasoning, an arbitration agreement that is inadequately stamped or non-stamped remains valid and enforceable under Section 5 of the Stamp Act. Criticism was directed at the majority opinion in the case of *NNGlobal II* for not fully embracing the doctrine of separability, arguing that it is erroneous to conclude that the non-stamping of the underlying contract will automatically invalidate the arbitration agreement.

VERDICT

Before issuing the court's final verdict, Chief Justice Chandrachud addressed concerns over the maintainability of the constitutional question being referred to the seven-judge bench. This clarification was in response to the objections raised by senior advocates who contended that a curative petition to re-examine the *NNGlobal II* ruling exceeded the scope of the court's jurisdiction. To address these concerns, the court retitled the case, broadening the focus of the proceedings to address the constitutional question regarding the validity of the unstamped arbitration agreements. The bench clarified that despite being a curative petition, a special leave petition also existed in the case, thereby validating the reference.⁷

The court elucidates five conclusions to rest the issues presented to them.

Firstly, agreements requiring proper stamping per Section 35 of the Stamp Act are not admissible as evidence. However, their inadmissibility does not render the agreement void, void ab initio, or unenforceable. As per Section 2(g) of the Indian Contract Act, an agreement that cannot be enforced legally is void. The admissibility of a document or oral

⁶Vasanth Rajsekarant, *N.N Global III: Supreme Court Performs The Balancing Act By Passing The Stamping Baton To Arbitral Tribunals*, SCC Online Blog, (Dec. 21, 2023, 11 AM) <https://www.sconline.com/blog/post/2023/12/15/n-n-global-iii-supreme-court-performs-the-balancing-act-by-passing-the-stamping-baton-to-arbitral-tribunals/#fn5>

⁷R. S Spandana, *Validity of an Unstamped Arbitration Agreement | Judgement Pronouncement*, Supreme Court Observer, (Dec. 14, 2023, 9:00 PM), <https://www.scobserver.in/reports/validity-of-an-unstamped-arbitration-agreement-judgement-pronouncement>,

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testimony pertains to whether it can be presented as evidence. An agreement can be null, yet its status as such will not automatically affect its admissibility. Conversely, a valid agreement can be inadmissible in evidence. The court elucidates an example in its judgment to explain this position. Suppose A and B enter an agreement restraining B from a specific trade void under Section 27 of the ICA, although the agreement will not be enforceable. In that case, it will remain admissible as evidence if A attempts to enforce it against B. In such a case, although the court won't enforce the void agreement, it can still be considered evidence for submissions.

Secondly, the Stamp Act does not render an instrument invalid or void due to non-payment of stamp duty. This defect is considered curable, and the Act provides a comprehensive rectification procedure. This remark by the court aligns with the dissenting judgment of Justice Hrishikesh Roy in the five-bench NN Global II judgment. He argued that the non-payment of stamp duty is a curable defect and that Section 11 of the Arbitration Act should be interpreted to promote minimal judicial intervention in the arbitral process. Justice Roy also noted that Section 35 of the Stamp Act allows for the deferment of the stamping issue to the arbitrator.

Thirdly, the court held that the objection regarding stamping is not to be decided under Section 8 or 11 of the Arbitration Act. The relevant court should primarily assess the presence of an arbitration agreement. This aligns with the Arbitration Act's aim to reduce court intervention in arbitration concerns. After the 2015 Amendment Act, courts tasked with referrals need only to make a preliminary determination about the presence or legitimacy of an arbitration agreement. Section 11 (6A) employs the phrase 'examination of the existence of arbitration agreement', which suggests a thorough yet not overly burdensome investigation into the matter.

The fourth closing observation by the Supreme Court stated that the objections concerning the stamping of an agreement are under the purview of the arbitral tribunal by the presumption of separability. This doctrine shields an arbitration agreement from defects or flaws of the underlying contract, preserving the tribunal's authority over the core rights and obligations of the parties, even if the main contract is terminated. Section 16 of the Act grants the tribunal authority to decide on its jurisdiction, which encompasses the ability to ascertain the

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existence and validity of the arbitration agreement. The court emphasized the competence-competence doctrine, enabling a tribunal to adjudicate on all relevant issues arising from the underlying contract, further underscoring its authority over the proceedings.

Finally, the court held that the *SMS Tea Estates' and Gaware judgments* were wrongly decided. In deciding the matter concerning *SMS Tea Estates*, the critical issue arose from a decision made by a two-judge bench of the Supreme Court. In this case, a lease agreement involved including an arbitration clause by the parties for dispute resolution. However, when arbitration was ultimately sought, it was contested because the lease deed was unregistered and inadequately stamped, rendering it invalid and unenforceable. As a result, the estate judgment allowed courts to seize such documents under Section 33 of the Stamp Act at the stage of Section 11 Arbitration Act, necessitating the court intervention even before an arbitral tribunal could take charge.

However, the Supreme Court overturned this approach, clarifying in later cases such as *Emmar MGF Land Vs. Aftab Singh*⁸ that the specific phrasing in Section 8(1) of the Arbitration Act, “notwithstanding any judgment,” was intended to overrule previous judicial decisions that allowed courts to scrutinize various aspects of the agreement extensively. Similarly, Section 11 (6A) of the Arbitration Act was explicitly designed to reduce judicial interference, focusing only on the existence of an arbitration agreement. Therefore, the non-obstante clause in Section 11(6A) counteracts judicial precedents, including the *SMS Tea Estates* judgment, which encouraged court intervention at the Section 11 stage by impounding unstamped documents containing arbitration agreements.

CONCLUSION

The series of judgments, culminating with *NN Global III*, marks a significant revolution in Indian arbitration law, delicately balancing legislative intent with the need for efficient arbitral processes. This trend aligns India's legal framework with international standards, particularly mirroring legal doctrines prevalent in the US and the UK. The reinforced authority of arbitral tribunals and the extended scope of the competence-competence

⁸*Emmar MGF Land Vs Aftab Singh*, (2019) 12 SCC 751.

principle have reduced judicial intervention and promoted swift dispute resolution. There can be negative future repercussions to this landmark decision as well. For instance, delayed arbitrations due to stamp duty disputes and misuse of stamping requirements as a dilatory tactic can pose potential challenges. A standardized practice of fulfilling stamp duty obligations before initiating arbitration may be a more promising resolution to ensure that procedural efficiency is upheld. This will ensure that the revenue interests of the state are protected without undermining the enforceability of arbitration agreements. As India furthers its goal of becoming an international arbitration hub, enhancing the ease of doing business and legal robustness in the face of such challenges are critical milestones India must accomplish.



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