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Case Comment: In Re Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899

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INTRODUCTION

With the increasing commercial activities in the nation, commercial disputes are also reaching soaring heights. In light of this, the principle of party autonomy in dispute resolution has gained significant traction and the role of arbitration is increasingly gaining prominence, substituting the lengthy procedures of the already occupied courts.¹ However, hindrances have arisen in the implementation of the arbitration practices, with one such issue being the validity of an arbitration agreement in an unstamped or insufficiently stamped contractual agreement.² This issue has been in contention since the case of *SMS Tea Estates (P) Ltd. v Chandmari TEA Co. (P) Ltd.*,³ [SMS Tea Estates] was decided and has had a long legal trajectory. The Supreme Court

¹ Shashwat Sinha, 'Indian Arbitration, Advancements and its Role in the Indian Legal System' (*Jus Corpus*, 31 January, 2022) <<https://www.juscorpus.com/indian-arbitration-advancements-and-its-role-in-the-indian-legal-system/>> accessed 12 December 2023

² In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899 (2023) SCC OnLine SC 1666

³ *SMS Tea Estates (P) Ltd v Chandmari Tea Co (P) Ltd* (2011) 14 SCC 66

finally settled this question, in the case, *In re interplay between Arbitration agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*,⁴ and upheld that such arbitration agreements in unstamped or insufficiently stamped arbitration agreements are not void.⁵

FACTS OF THE CASE/ BACKGROUND

On February 14, 2020, a three-judge bench of the Supreme Court in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v Bhaskar Raju and Brothers*,⁶ [**Dharmaratnakara**] had reversed the judgement of the High Court that had appointed an arbitrator as per the arbitration agreement between the parties despite the presence of such an arbitration agreement in an insufficiently stamped lease deed. Following this, a review petition was filed on July 7, 2021, which was dismissed on the grounds of delay and merits.⁷ The filing of a curative petition followed this up in pursuance of which the matter was listed for a hearing before the Supreme Court on August 24, 2023.⁸ However, the issue of the validity of a non-stamped arbitration agreement was also to be decided in the case of *Seka Dobric v SA Eonsoftech*,⁹ [**Seka**] due to which the Court had merged the arbitration petition in the Seka case and the curative petition in the Dharmaratnakara case to be heard together before a five-judge bench.¹⁰

On September 26, 2023, the five-judge bench, considering the larger ramifications, involved in the issue to be decided upon, referred the proceedings to a seven-judge bench.¹¹

⁴ In Re Arbitration (n 2)

⁵ Padmakshi Sharma, 'Arbitration Clauses In Unstamped Agreements Enforceable: Supreme Court-7 Judge overrules 'NN Global' Decision' (*Live Law*, 13 December 2023) <<https://www.livelaw.in/top-stories/arbitration-clauses-in-unstamped-agreements-enforceable-supreme-court-7-judge-bench-overruled-nn-global-decision-244387>> accessed 14 December 2023

⁶ *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v Bhaskar Raju and Brothers* (2020) 4 SCC 612

⁷ In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899 (2023) SCC OnLine SC 1666

⁸ *Ibid*

⁹ *Seka Dobric v SA Eonsoftech* Arb P No 25/2023

¹⁰ In Re Arbitration (n 2)

¹¹ Sharma (n 6)

Thus, considering the context of the proceedings, the seven-judge bench of the Supreme Court changed the name of the cause title to '*In Re: Interplay between the Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*,'¹² thus, primarily putting to question the decision of the Court in *NN Global Mercantile (P) Ltd. v Indo Unique Flame Ltd.*,¹³ **[NN Global 2]**.

LEGAL ISSUES

Whether the statutory bar contained in Section 35 of the Indian Stamp Act, 1899, **[Stamp Act]** applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Stamp Act, would 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.¹⁴

OBSERVATIONS OF THE COURT

The Supreme Court analysed various judgements, jurisprudence, International jurisdictions, and the rules of International Commercial Arbitration and gave an exhaustive judgement, settling the long-contested question over the validity of an arbitration agreement in an unstamped instrument. The Court observed firstly, that the Stamp Act enacted to secure revenue for the State cannot be used as a weapon of technicality to meet the case of the contesting party.¹⁵

Secondly, the defect due to insufficient stamping or non-stamping of the instrument is a curable defect.¹⁶

Thirdly, the Court backed the principle of arbitral autonomy and mentioned that the competence of an arbitral tribunal includes ruling on any objections over its jurisdiction which includes the question of the existence or validity of the arbitration agreement, thereby, highlighting the autonomy of the arbitral tribunals to decide upon the matters concerning their

¹² *In Re Arbitration* (n 2)

¹³ *NN Global Mercantile (P) Ltd v Indo Unique Flame Ltd* (2023) 7 SCC 1

¹⁴ *In Re Arbitration* (n 2)

¹⁵ *Ibid*

¹⁶ *Ibid*

jurisdiction instead of a court of law deciding upon the same, unless specified in the Indian Arbitration and Conciliation Act 1996 [**Arbitration Act**].¹⁷

Fourthly, while interpreting Section 5 of the Arbitration Act,¹⁸ the Court concluded that Section 5 differs from the UNCITRAL Model Law in the sense that Section 5, firstly, comprises a non-obstante clause unlike Article 5 and secondly, it limits the scope of judicial intervention to the extent as is provided in Part I of the Arbitration Act.¹⁹ Thereby, upholding the position of law that the use of the non-obstante clause signifies the removal of all such obstructions that may arise out of the provisions of other laws, standing in the way of the concerned legislation in question which incorporates such non-obstante clause.²⁰

Fifthly, the Supreme Court concluded that Section 5 of the Arbitration Act limits the courts from dealing with substantive objections relating to the existence and validity of arbitration agreements at the appointment stage and that any determination by the courts in such a stage is limited to the *prima facie* existence of an arbitration agreement as per Sections 8,²¹ and 11,²² of the Arbitration Act.²³ This therefore, prevents the courts from interfering with the decision of the parties to settle their disputes by arbitration and to ensure that the disputes are to be settled by arbitration without any untimely delay, in light of the self-containing character of the Arbitration Act.²⁴

DECISION

The Supreme Court upheld that the authority of the persons to impound the unstamped or insufficiently stamped instrument, empowered to receive evidence by mutual consent of the parties, includes the authority of the arbitral tribunal for the same until the stamp duty was duly

¹⁷ *Ibid*

¹⁸ Indian Arbitration and Conciliation Act 1996, s 5

¹⁹ In Re Arbitration (n 2)

²⁰ *Ibid*

²¹ Indian Arbitration and Conciliation Act 1996, s 8

²² Indian Arbitration and Conciliation Act 1996, s 11

²³ In Re Arbitration (n 2)

²⁴ *Ibid*

paid and then can proceed to adjudicate the dispute before it, as was to be done as per the arbitration agreement.²⁵

In differentiating between the inadmissibility and voidness of an agreement, the Court held that an agreement when void is unenforceable in a court of law but when an instrument is inadmissible, it means that the question is if that instrument can be relied upon by the court of law while adjudicating upon the case before it, hence the difference between the two terms.²⁶

The Supreme Court, overturning the NN Global 2 judgement held that the Arbitration Act has primacy over the Stamp Act and the Indian Contract Act, 1872, [**Contract Act**] because, firstly, the Arbitration Act is a special law, thus, owing to the doctrine of *generalia specialibus non derogant*, it holds primacy over the Stamp Act and the Contract Act.²⁷ This is with respect to the question pertaining in the case at hand that, whether an unstamped arbitration agreement is rendered unenforceable pending the payment of stamp duty so as to impose a bar on the referral court to refer the parties to arbitration, the issue not being if all the agreements are rendered unenforceable under the provisions of the Stamp Act but whether the arbitration agreements in particular are unenforceable. Thus, owing to Section 5 of the Arbitration Act, it takes precedence over any other laws, with respect to the scope of the matters to be dealt with in the Arbitration Act.²⁸

In this regard, the Court harmoniously constructed the three statutes before it and upheld the effect of the competence-competence doctrine, thereby, holding that the arbitral tribunal is vested with the power and authority to determine its enforceability, including the questions of validity of the contract or instrument containing the arbitration agreement and its authority in relation to the question of its adequate stamping. In doing so, the ultimate object of the Stamp Act is preserved and only the determining authority here, instead of a court is the arbitral

²⁵ *Ibid*

²⁶ Sharma (n 6)

²⁷ In Re Arbitration (n 2)

²⁸ *Ibid*

tribunal, thus giving effect to the purpose of the Arbitration Act in addition to the purpose of the Stamp Act.²⁹

Therefore, in light of the questions raised, and arguments advanced, the Supreme Court ultimately held that:

- Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or *void ab initio* or unenforceable;³⁰
- Non-stamping or inadequate stamping is a curable defect;³¹
- An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned court must examine whether the arbitration agreement *prima facie* exists;³²
- Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal;³³ and
- The decisions in *NN Global 2* and *SMS Tea Estates* are overruled. Furthermore, paragraphs 22 and 29 of *Garware Wall Ropes Ltd. v Coastal Marine Constructions & Engg. Ltd.*,³⁴ [**Garware Ropes**] are overruled to the extent as has been held in the judgement.³⁵

ANALYSIS and CONCLUSION

The judgement is a welcome step in efforts to make India an arbitration hub, thereby, moving ahead in removing the obstacles to the arbitration regime in India. The Court in settling the issue, resorted to the rules of interpretation in line with the cases, statutes, and International

²⁹ Sharma (n 6)

³⁰ In Re Arbitration (n 2)

³¹ *Ibid*

³² *Ibid*

³³ *Ibid*

³⁴ *Garware Wall Ropes Ltd v Coastal Marine Constructions & Engg Ltd* (2019) 9 SCC 209

³⁵ Apoorva, '7 Judge bench verdict: Supreme Court Judgement on validity of Unstamped Arbitration Agreement' (SCC Online Blog 13 December, 2023) <<https://www.scconline.com/blog/post/2023/12/13/7-judge-bench-verdict-supreme-court-judgment-on-validity-of-unstamped-arbitration-agreement/>> accessed 17 December 2023

practices which certainly makes this a landmark judgement in the history of Arbitration in India. However, it must be kept in mind that the insufficient stamping is not used as a *mala fide* tool to purposefully delay the arbitral proceedings,³⁶ and steps must be taken to balance the independence of the arbitral autonomy of the parties with the limited judicial intervention of the courts as is prescribed in the Arbitration Act, thereby, establishing a just and lawful Arbitration regime in the nation.

³⁶ Hrishikesh Goswami and Aryan Soni, 'Stamping Out Uncertainty: Resolving the Conundrum of Unstamped Arbitration Agreements' (*IndiaCorpLaw* 14 December 2023) <<https://indiacorplaw.in/2023/12/stamping-out-uncertainty-resolving-the-conundrum-of-unstamped-arbitration-agreements.html#:~:text=Stamping%20Out%20Uncertainty%3A%20Resolving%20the%20Conundrum%20of%20Unstamped%20Arbitration%20Agreements,-By%20Guest&text=The%20enf>> accessed 17 December 2023