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The Case of Unstamped and/or Insufficiently Stamped Documents

Introduction

- Various attempts have been made by the Legislature and the Courts alike to promote arbitration as a dispute resolution mechanism in India and help position the country globally as an arbitration friendly destination. To this end, the Indian Courts have attempted to protect the autonomy of the parties as the core of the arbitral process. However, the recent decision of the Supreme Court in *NN Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Ors* may impact the emerging 'arbitration friendly' status of India. In this matter, the Supreme Court by a majority of 3:2 has decided that an unstamped contract containing an arbitration clause and/or an unstamped arbitration agreement does not 'exist in law'.¹
- The Supreme Court has in various previous judgments dealt with the issue of unstamped contracts and/or insufficiently stamped contracts and its impact on an arbitration agreements/clause. This debate began with *SMS Tea Estates (P) Ltd v Chandmari Tea Co. (P) Ltd (SMS Tea)*² wherein it was held that non-payment of Stamp Duty on the commercial contract would invalidate even the arbitration agreement and render it non-existent in law and, thus, unenforceable. Thereafter, the decision of the Apex Court was upheld in the matter of *Garware Wall Tropes Ltd v Coastal Marine Constructions and Engineering Ltd ('Garware')*³ and recently in *Vidya Drolia & Ors v Durga Trading Corporation (Vidya Drolia)*⁴.
- Having said that, even more recently, a three-judge bench in *NN Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Ors*⁵ doubted the correctness of the decision in *Vidya Drolia* regarding the matter of unstamped/insufficiently stamped commercial contracts containing an arbitration clause, and this question was referred to be considered by a bench of five judges. Before discussing the judgment given by the five-judge bench, here is a brief summary of the facts that gave rise to the dispute in *NN Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Ors*.

NN Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Ors – Coordinate Bench decision

- Indo Unique Flame Ltd (**Indo Unique**) was granted work for the beneficiation/washing of coal to the Karnataka Power Corporation Ltd (**KPCL**) (**Principal Contract**). Subsequent thereto, Indo Unique entered into a sub-contract/work order with NN Global Mercantile Pvt Ltd (**NN Global**) on September 28, 2015 for the purposes of transportation of coal from its washery at Village Punwat to the stockyard, siding, coal handling and loading into wagons at Pandharpaoni siding, Maharashtra (**Work Order**).
- In discharge of its obligations under the Work Order, NN Global furnished a Bank Guarantee for an amount of INR 3,36,00,000 to Indo Unique for the average stock of washed coal lying at the stockyard.
- Clause 10 of the Work Order provided for resolution of disputes between the parties by way of arbitration.
- Certain disputes arose under the Principal Contract between Indo Unique and KPCL which led to KPCL invoking the Bank Guarantee provided by Indo Unique under the Principal Contract. Subsequently, Indo Unique invoked the Bank Guarantee furnished by NN Global under the Work Order.

¹ See para 115

² (2011) 14 SCC 66

³ (2019) 9 SCC 209

⁴ (2021) 2 SCC 1

⁵ (2021) 4 SCC 379

- Aggrieved by the actions of Indo Unique, NN Global filed a Civil Suit before the Commercial Court, Nagpur. Thereafter, Indo Unique filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) seeking reference of the disputes to arbitration on account of Clause 10 of the Work Order. The Commercial Court on January 18, 2018 rejected the application under Section 8 of the Arbitration Act on the grounds that the Bank Guarantee was an independent contract and the arbitration clause in the Work Order was not a general arbitration clause which would cover the disputes related to the Bank Guarantee.
- Thereafter, Indo Unique filed a Civil Revision Petition before the Bombay High Court challenging the order of the Commercial Court which was subsequently withdrawn on the grounds of maintainability with permission to Indo Unique to file a Writ Petition. The Writ Petition against the order of the Commercial Court was filed wherein the Bombay High Court allowed the application under Section 8 of the Arbitration Act.
- On the issue of the arbitration agreement being unenforceable since the Work Order was unstamped, it was held that the non-stamping of Work Order could be raised either under Section 11 of the Arbitration Act or before the Arbitral Tribunal at the appropriate stage.
- An appeal was filed by NN Global where it was contended that since the Work Order was not stamped under the Maharashtra Stamp Act, 1958, the arbitration agreement would be rendered unenforceable. It is in this context that the reconsideration of the issue was sought from the Constitution Bench.

The reference

- In view thereof, the question for consideration before the Constitution Bench was to determine whether the statutory bar contained in Section 35 of the Stamp Act 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 as being non-existent, pending payment of Stamp Duty on the substantive contract/instrument⁶?

Judgment – Majority view

- In its analysis of the matter in consideration, the Court dwelled into the Arbitration Act with specific discussion on the definition of an arbitration agreement as per Section 2 (b) and Section 7. The Court further went on to analyze the extent of judicial interference under Sections 5, 11, specifically Section 11 (6) and 16 of the Arbitration Act.
- This discussion was primarily focused on establishing what constitutes a ‘valid’ arbitration agreement under the scheme of the Arbitration Act. The salient features of an arbitration agreement are contained in Section 7 of the Act *i.e.*, (a) an arbitration agreement may either be in the form of a clause in a contract or as a separate agreement altogether; and (b) an arbitration agreement must be in writing either in a document signed by both parties, in an exchange of letters, telegrams or other means of telecommunication; by exchange of statement of claim and defense where the existence of the agreement is not denied or reference in a contract to a document containing an arbitration clause.
- The Court also observed (and set aside) the view taken in the matter of *Great Offshore Ltd v. Iranian Offshore Engineering & Construction Co (Great Offshore)*⁷ that Section 7 of the Arbitration Act does not stipulate for an arbitration agreement to be stamped, and the absence of this stipulation in Section 7 of the Arbitration Act does not exclude the requirements of Section 33 and Section 35 (among other provisions) of the Stamp Act and, thus, an arbitration agreement/clause is required to be stamped.
- Section 5 and 11 of the Arbitration Act establish the extent of judicial interference by a Court. While Section 5 entirely restricts the Courts from interfering with disputes subject to arbitration, Section 11 allows the intervention of the Courts in *albeit* certain limited circumstances. Section 11 deals with the appointment of an arbitrator essentially on the failure of the parties either to agree on the appointment of an arbitrator or failure to make the appointment altogether.
- For the purpose of the present matter, Section 11 (6A) sets out the limit of interference of the Court while dealing with the appointment of an arbitrator *i.e.*, the duty of the Court is only to find out whether an arbitration agreement ‘exists.’⁸ The Courts have been particularly conscious of the wording used in the section under discussion and have considered the meaning of the same in the matters of *Garware and United India Insurance Company Ltd & Anr v Hyundai Engineering & Construction Company Ltd & Ors (Hyundai Engg)*⁹. In the aforesaid cases, the Courts have held that an arbitration clause/agreement may exist; however, the enforceability of the arbitration clause/agreement would have to be tested by reading Section 11 (6A) together with Section 7(2) of the Arbitration Act and Section 2(h) of the Contract Act. Specifically, in *Hyundai Engg* the Court held that while an arbitration clause may exist in policy, it would

⁶ See para 2 & 21

⁷ (2008) 14 SCC 240

⁸ See para 32

⁹ (2018) 17 SCC 607



not exist in law unless the liability is admitted by the insurer (in terms of the facts of that case). The Court also held that Section 11 (6A) solely deals with the ‘*existence*’ of the arbitration agreement¹⁰.

- Relying on Hyundai Engg, in the present case, the Court went one step further to hold that despite the fact that Hyundai Engg did not deal with the Stamp Act, the finding relating to the ‘*existence of an arbitration agreement as a matter of law*’ would be applicable on the reasoning that what is contemplated in Section 11 (6A) is not a mere *existence in fact* but also existence in law¹¹.
- Similarly, the view taken in Garware (relying on Hyundai Engg) was upheld in Vidya Drolia wherein the Court examined the meaning of ‘*existence*’ under Section 11 and whether the term would exclude the question of enforceability/validity. It was held in Vidya Drolia that ‘*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.*’¹²
- The Apex Court then proceeded to analyze the provisions of the Stamp Act and the judgment in *Hindustan Steel Ltd v Dilip Construction Company*¹³ wherein the Supreme Court, dealing with the same proposition, held as follows:
 - The Stamp Act is a fiscal measure of raising revenue and protecting the interests of the revenue.
 - Under Section 42 (2) of the Stamp Act, upon endorsement being made, the document would be admissible in evidence and can be acted upon.
- It was after this, that the Court discussed at length the Indian Contract Act, 1872 with references to Section 2(g) dealing with an agreement not enforceable by law and thus being void, Section 2(h) dealing with an agreement enforceable by law and thus being a contract and Section 2(j) dealing with a contract which ceases to be enforceable becomes void¹⁴. The aim of this discussion was to highlight the distinction between an agreement and a contract as per the law. Pursuant to this analysis, the Apex Court held that an agreement only becomes a contract when it becomes enforceable in terms of Clause 2 (h) of the Contract Act on the grounds that: (a) unenforceability on account of a substantive law would include the Stamp Act; and (b) so long as a document remains unstamped, under Section 35 of the Stamp Act, the document cannot be acted upon and would remain unenforceable and would thus be void as per Section 2 (j) of the Contract Act.
- In view of this finding, the Apex Court stated that Section 11 (6A) of the Arbitration Act contemplates a ‘*contract*’ and not an ‘*agreement*’ despite of the use of the words ‘*arbitration agreement*’ in the section¹⁵.
- After setting out the above discussion on the law as in force, the Court held that the finding in NN Global that an arbitration agreement, in an unstamped commercial contract, can be acted on is not the correct law. It was held that an unstamped or insufficiently stamped agreement would not be enforceable till the time it is ‘*validated*’ and until then would not ‘*exist in law.*’¹⁶
- In conclusion, the Apex Court held the following:
 - The decisions in Garware (specifically paragraphs 22 and 29), SMS Tea, and Vidya Drolia (specifically paragraphs 146 and 147) as to the effect of an unstamped contract containing an arbitration agreement and the steps to be taken by the Court are the correct position in law.
 - An instrument which is exigible to Stamp Duty (containing an arbitration clause) cannot be a contract which is enforceable in law as per Section 2 (h) and (g) of the Contract Act and therefore cannot exist in law.
 - Section 11 of the Arbitration Act allows the Court to act on the basis of an original or certified copy of an arbitration agreement. However, as held in SMS Tea, the certified copy must indicate the Stamp Duty paid.
 - Upon the production of an original instrument under Section 11 of the Arbitration Act, and the same being unstamped, the Court is duty bound to act under Section 33 of the Stamp Act.
 - A joint reading of Section 33 and the bar under Section 35 of the Stamp Act establish that instruments chargeable to the Stamp Duty (under Section 3 read with the schedule to the Stamp Act) would render the arbitration agreement contained in such an instrument as being non-existent in law unless validated as per the Stamp Act.

¹⁰ See para 64

¹¹ See para 64

¹² See para 36

¹³ (1969) 1 SCC 597

¹⁴ See para 53

¹⁵ See para 70

¹⁶ See para 65



Minority view

- The decision taken by the minority opinion centers around the harmonization of the inconsistencies in the provisions of the Arbitration Act, Stamp Act, and the Contract Act. The minority opinion held that, as is precedentially held, general law must yield to special law. In the present case, this was applied to mean that an arbitration agreement cannot be rendered void on the grounds of it being unstamped or insufficiently stamped when the act itself (being a special enactment) does not provide for any such stamping.
- Applying the rules of construction that in cases where there is a conflict or ambiguity between general and special laws, special laws would prevail – Sections 2 (e), 2 (g), and 2 (h) of the Contract Act stood overridden by Section 7 of the Arbitration Act when it comes to formal ‘*validity*.’¹⁷
- The words of Section 11 of the Arbitration Act do not mention the term ‘*validity*’ as mentioned/referred to (in different terms) in other provisions of the Arbitration Act. In view thereof, the minority opinion held that an arbitration agreement cannot be rendered ‘*void*’ due to it being contained in an unstamped or insufficiently stamped contract by a Section 11 Court when the scope of examination under Section 11 of the Arbitration Act is limited to ‘*existence*’ and does not permit the Court/judge to go into the question of ‘*validity*.’¹⁸
- Testing this argument against the bar contained in Section 35 of the Stamp Act, the minority opinion holds that the question to receive evidence under Section 11 of the Arbitration Act does not arise because pursuant to the 2015 amendment to the Arbitration Act the scope under Section 11 is confined to ‘*existence*’ and thus a Section 11 Court is not ‘*an authority to receive evidence*’ as per Section 35 of the Stamp Act.
- The minority opinion also relies on the view taken by the majority in support of its argument that ‘*an authority to receive evidence*’ under Section 35 of the Stamp Act does not preclude an arbitrator to impound or admit evidence, so the question of deciding ‘*validity*’ of a document at the threshold in Section 11 does not arise¹⁹.

HSA Viewpoint

- The (majority) view taken by the Supreme Court regarding the validity of an arbitration agreement in the circumstance of the arbitration agreement itself or a commercial contract containing an arbitration clause being unstamped or insufficiently stamped, essentially widens the powers of the Court at the Section 11 stage by permitting the Courts to examine whether the document produced before it is a stamped or sufficiently stamped instrument as opposed to only determining the prima facie existence of an arbitration agreement.
- The wordings utilized in Section 11 and Section 7 of the Arbitration Act are extremely crucial to take note of specifically due to the absence of the word ‘*validity*’ in either clause. Implying that at the stage of Section 11 i.e., appointment of an Arbitrator – the Court is not sitting in judgment of the disputes that have arisen between the parties but is merely aiding to appoint the arbitral tribunal and in order to appoint the tribunal the Court only has to see the existence of a written arbitration agreement between the parties as has been settled by various judgments of the Supreme Court. A Section 11 Court is not a Court wherefrom the parties are to collect a judgment on the resolution of their disputes.
- The two diverging opinions on the issue, however, agree on the fact that an unstamped or insufficiently stamped agreement is not enforceable in law unless the same is validated. In the present facts and circumstances, the question of validity would arise at the time of enforcement of an arbitration agreement which is and should be different from the existence of an arbitration agreement. Now, in determining the existence of a written arbitration agreement, the Court need not go into determining the validity of the agreement by checking for the status of the Stamp Duty. By allowing the Court to determine whether the instrument produced has been stamped and/or sufficiently stamped, the Supreme Court has essentially created a situation which may stall the arbitral proceedings right at the threshold.
- In fact, it is quite contradictory of the Apex Court to have held that an issue such as Stamp Duty should be determined at the threshold while the issues of jurisdiction (also termed as threshold issues) are capable of being determined by the Arbitrator itself.
- While it is appreciable that the Apex Court has attempted to harmonize the three different statutes, but in essence the holding of the Court has come as a setback delaying the process of initiating arbitrations to begin with. With the law being settled with this judgment, the parties are duty bound to ensure that the contract/instrument/document (either containing an arbitration clause or as an arbitration agreement) produced before a Court is sufficiently stamped.

¹⁷ Justice Hrishikesh Roy; see para 79.1

¹⁸ Justice Hrishikesh Roy; see para 79.2

¹⁹ Justice Hrishikesh Roy; see para 79.3

