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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

K.M. JOSEPH; J., AJAY RASTOGI; J., ANIRUDDHA BOSE; J., HRISHIKESH ROY; J., C.T. RAVIKUMAR; J.

CIVIL APPEAL NO(S). 3802-3803 OF 2020; April 25, 2023

M/S. N.N. GLOBAL MERCANTILE PRIVATE LIMITED *versus* **M/S. INDO UNIQUE FLAME LTD. & ORS.**

MAJORITY JUDGMENT *(K.M. Joseph; J., Aniruddha Bose; J., C.T. Ravikumar; J.)*

Arbitration and Conciliation Act, 1996; Section 7 - Whether the arbitration clause in a contract, which is required to be registered and stamped, but is not registered and stamped, is valid and enforceable? Held, an instrument which is exigible to stamp duty may contain an arbitration clause and which is not stamped cannot be said to be a contract enforceable in law within the meaning of S. 2(h) of the Contract Act and is not enforceable under S 2(g) of the Contract Act.

Arbitration and Conciliation Act, 1996; Section 7 - An arbitration agreement within the meaning of Section 7 of the Act attracts stamp duty and which is not stamped or insufficiently stamped cannot be acted upon in view of Section 35 of the Stamp Act unless following impounding and paying requisite duty. The provisions of Section 33 and the bar under Section 35 of the Stamp Act would render the arbitration agreement contained in such instrument as being non-existent in law until the instrument is validated under the Stamp Act.

Arbitration and Conciliation Act, 1996; Section 11 - the Court at the Section 11 stage is bound to examine the instrument and if found to be unstamped or insufficiently stamped the instrument is to be impounded at this stage itself.

Arbitration and Conciliation Act, 1996; Section 11 - Certified copy can be produced at the Section 11 stage only if it clearly indicates the stamp duty paid. If the same is not mentioned, the Court should not act on the said certified copy.

MINORITY JUDGMENT *(Ajay Rastogi; J., Hrishikesh Roy; J.)*

Arbitration and Conciliation Act, 1996; Section 7 - Non-stamping or insufficient stamping of the substantive instrument would not render the arbitration agreement unenforceable. Stamp deficiency being a curable defect would not render the arbitration agreement void.

Arbitration and Conciliation Act, 1996; Section 11 - the examination of the stamping and impounding may not be done at the threshold, i.e., at the pre-referral stage under Section 11. The copy or certified copy of arbitration agreement whether unstamped or insufficiently stamped, at the pre-reference stage, is an enforceable document for the appointment of arbitrator. Deciding on the stamp duty at the threshold also stalls the process, leading to procedural complexity and delay in litigation before the Courts.

For Appellant(s) Mr. Gagan Sanghi, Adv. Mr. Rameshwar Prasad Goyal, AOR

For Respondent(s) Mr. K Rama Kant Reddy, Sr. Adv. Mr. Rajul Srivastava, Adv. Ms. Charu Ambwani, AOR Ms. Komal Agarwal, Adv. Mr. Amit Khare, Adv. Ms. Manisha Ambwani, Adv. Mr. Sanjay Kapur, AOR Ms. Megha Karnwal, Adv. Mr. Surya Prakash, Adv. Mr. Arjun Bhatia, Adv. Mr. Lalit Rajput, Adv. Mr. Devesh Dubey, Adv. Mr. Debesh Panda, AOR Mr. Naman Maheshwari, Adv. Mr. Garv Malhotra, Adv. Mr. Udbhav Gady, Adv. Mr. Neil Chatterjee, Adv. Mrs. Snehal Maheshwari, Adv. Mr. Rahul Totala, Adv. Mr. Eshan Aprameya Chaturvedi, Adv. Mr. Kanishk Aggrawal, Adv. Ms. Malvika Trivedi, Sr. Adv. Mr. Premlal Krishnan, Adv. Mr. Rahul Arya, Adv. Mr. Madhav Bhatia, Adv. Mr. Shailendra Slaria, Adv. Ms. Bani Dixit, Adv. Mr. Himanshu Kapoor, Adv. Mr. Alok Tripathi, AOR Mr. Puneet Singh Bindra, AOR

J U D G M E N T

K.M. JOSEPH, J.

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1. We have perused the draft judgments prepared by our esteemed brothers Ajay Rastogi, J. and Hrishikesh Roy, J. With profound respect to our learned Brothers, we are unable to, however, concur with them in their reasoning and conclusions save as will be made clear. Hence, the following judgment.

A. THE REFERENCE

2. A Bench of three learned Judges disposed of Civil Appeal Nos. 3802-3803 of 2020 by Judgment dated 11.01.2021. The Judgment is reported in *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited and others*[1]. What is of relevance for the purpose of the Reference is the following:

"56. We are of the considered view that the finding in *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] and *Garware* [*Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it nonexistent in law, and unenforceable, is not the correct position in law.

57. In view of the finding in paras 146 and 147 of the judgment in *Vidya Drolia* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] by a coordinate Bench, which has affirmed the judgment in *Garware* [*Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , the aforesaid issue is required to be authoritatively settled by a Constitution Bench of this Court.

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

[1] (2021) 4 SCC 379

to payment of stamp duty, as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?"

B. A BIRD'S OVERVIEW OF THE FACTS IN N.N. GLOBAL

3. The first respondent, who was awarded the Work Order, entered into a sub-contract with the appellant. Clause 10 of the Work Order, constituting the subcontract, provided for an Arbitration Clause. The appellant had furnished a bank guarantee in terms of Clause 9. The invocation of the said guarantee led to a Suit by the appellant against the encashment of the bank guarantee. The first respondent applied under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, 'the Act', for short) seeking Reference. A Writ Petition was filed by the first respondent challenging the Order of the Commercial Court rejecting the Application under Section 8 of the Act. One of the contentions raised was that the Arbitration Agreement became unenforceable as the Work Order was unstamped. The High Court, however, allowed the Writ Petition filed by the first respondent. The issue relevant to this Bench was, whether the Arbitration Agreement would be enforceable and acted upon, even if the Work Order is unstamped and unenforceable under the Indian Stamp Act, 1899 (hereinafter referred to as, 'the Stamp Act', for short).

C. THE FINDINGS IN N.N. GLOBAL IN REGARD TO THE QUESTION UNDER THE CAPTION 'VALIDITY OF AN ARBITRATION AGREEMENT IN AN UNSTAMPED AGREEMENT'

4. The Court found that an Arbitration Agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. Under the Doctrine of Kompetenz–Kompetenz, the Arbitral Tribunal had competence to rule on its own jurisdiction, including objections with regard to the existence, validity and scope of the Arbitration Agreement. Section 16(1) of the Act was relied upon. The Court made a copious reference to case law in support of the Doctrine of Kompetenz-Kompetenz. Section 5 of the Act contemplated minimal judicial interference. The Court referred to the Maharashtra Stamp Act, 1958. Section 34 of the said Act, essentially, is *pari materia* with Section 35 of the Stamp Act, 1899 hereinafter referred to as the Stamp Act. There are other provisions, which essentially follow the same pattern as is contained in the latter Act. The Court, thereafter, went on to refer to Item 63 of Schedule I of the Maharashtra Stamp Act, 1958, which dealt with 'Works Contract'. It was found that the Stamp Act is a fiscal measure. Thereafter, the Court went on to discuss the Judgment of this Court reported in *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited*[2]. The Court referred to the following part of the Judgment in *SMS Tea Estates* (supra):

"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

[2] (2011) 14 SCC 66

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 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."

5. The Court further went on to find that, at the time *SMS Tea Estates* (supra) was decided, the law relating to reference to Arbitration under Section 11 of the Act, was expounded in the Constitution Bench decision reported in *SBP & Co. v. Patel Engineering Ltd. and another*[3], among other cases. It was further found that the law laid down was that in an Application under Section 11(6) of the Act, the Court may determine certain threshold issues, such as, whether the claim was time-barred, or a stale claim; whether there was accord and satisfaction, which would preclude the need for reference to arbitration. Thereafter, the Court refers to the amendment to Section 11 by the insertion of Sub-Section (6A) in Section 11. The Court referred to the Judgment in *Duro Felguera, S.A. v. Gangavaram Port Limited*[4], to conclude that what was to be gone into was only whether an Arbitration Agreement existed or not. The Court noted that the said position was affirmed by a Bench of three learned Judges in *Mayavati Trading Private Limited v. Pradyuat Deb Burman*[5]. Still further, the Court went on to notice the Judgment rendered by the Bench of two learned Judges in *Garware Wall Ropes Limited v. Coastal Marine Constructions & Engineering Limited*[6] and referred to para 22 of the said decision where this Court relied on Section 2 (h) of the Indian Contract Act, 1872 (hereinafter referred to as, 'the Contract Act', for short) and found that an unstamped agreement to be unenforceable.

6. In *Garware* (supra), the Bench of two learned Judges took the view that the Arbitration Clause contained in the sub-contract would not exist as a matter of law until the sub-contract was duly stamped. It was further found that Section 11(6A) deals with existence as opposed to Section 8, and Section 45 of the Act [See paragraph 29 of *Garware* (supra)]. The Bench of three learned Judges in its judgment in *N.N. Global* (supra), containing the Order of Reference to the Constitution Bench, found that an Arbitration Agreement is not included in the Schedule as an instrument chargeable to stamp duty. The Court referred to Item 12 of Schedule I of the Maharashtra Stamp Act, 1958, in this regard. Thereafter, the Court went on to find that the Work Order was chargeable to payment of stamp duty. The Court, however, found that the non-payment or the deficiency on the Work Order did not invalidate the main contract. Section 34 of the Maharashtra Act corresponding to Section 35 of the Stamp Act did not make the unstamped instrument, invalid, non-existent or unenforceable in law. The Court found that the Arbitration Agreement was a distinct and an independent contract. On the Doctrine of Separability, it would not be rendered invalid, unenforceable or non-existing, even if the substantive contract, in which it is contained, was inadmissible in evidence or could not be acted upon, in view of it not being stamped. The Bench in *N.N. Global* (supra) went on to hold as follows:

"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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[3] (2005) 8 SCC 618
[4] (2017) 9 SCC 729
[5] (2019) 8 SCC 714
[6] (2019) 9 SCC 209

27. The Stamp Act is a fiscal enactment for payment of stamp duty to the State on certain classes of instruments specified in the Stamp Act. Section 40 of the Stamp Act, 1899 provides the procedure for instruments which have been impounded, and sub-section (1) of Section 42 requires the instrument to be endorsed after it is duly stamped by the Collector concerned. Section 42(2) provides that after the document is duly stamped, it shall be admissible in evidence, and may be acted upon.

28. In our view, the decision in *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] 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 unenforceable 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 under Section 19 of the Contract Act, 1872.

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 unenforceable, 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.

30. The second issue in *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] that a voidable contract would not be arbitrable as it affects the validity of the arbitration agreement, is in our view not the correct position in law. The allegations made by a party that the substantive contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue. These issues can certainly be adjudicated through arbitration.

31. We overrule the judgment in *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] with respect to the aforesaid two issues as not laying down the correct position in law."

7. We may also notice paragraph-32 in *N.N. Global* (supra):

"32.*Garware* [*Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] judgment has followed the judgment in *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] . The counsel for the appellant has placed reliance on para 22 of the judgment to contend that the arbitration clause would be non-existent in law, and unenforceable, till stamp duty is adjudicated and paid on the substantive contract. We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying substantive commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract."

8. Thereafter, the Bench of three learned Judges in *N.N. Global* (supra) noted that the Judgment in *Garware* (supra) was cited with approval by a Bench of three learned Judges in *Vidya Drolia and others v. Durga Trading Corporation*[7]. The Court set out paragraphs 146 and 147 of *Vidya Drolia* (supra) and doubted the correctness of the said view and found it appropriate to refer the findings in paragraphs-22 and 29 of *Garware* (supra) as affirmed in paragraphs 146 & 147 of *Vidya Drolia* (supra) to the Constitution Bench. We deem it appropriate to now refer to the following paragraphs in *N.N. Global* (supra):

[7] (2021) 2 SCC 1

"35. The next issue which arises is as to which authority would exercise the power of impounding the instrument under Section 33 read with Section 34 of the Maharashtra Stamp Act, in a case where the substantive contract contains an arbitration agreement.

36. In an arbitration agreement, the disputes may be referred to arbitration by three modes.

36.1. The first mode is where the appointment of the arbitrator takes place by the parties consensually in accordance with the terms of the arbitration agreement, or by a designated arbitral institution, without the intervention of the court. In such a case, the arbitrator/tribunal is obligated by Section 33 of the Stamp Act, 1899 (or the applicable State Act) to impound the instrument, and direct the parties to pay the requisite stamp duty (and penalty, if any), and obtain an endorsement from the Collector concerned. This would be evident from the provisions of Section 34 of the Stamp Act which provides that "*any person having by law or consent of parties authority to receive evidence*" is mandated by law to impound the instrument, and direct the parties to pay the requisite stamp duty.

36.2. The second mode of appointment is where the parties fail to make the appointment in accordance with the arbitration agreement, and an application is filed under Section 11 before the Court to invoke the default power for making the appointment. In such a case, the High Court, or the Supreme Court, as the case may be, while exercising jurisdiction under Section 11, would impound the substantive contract which is either unstamped or inadequately stamped, and direct the parties to cure the defect before the arbitrator/tribunal can adjudicate upon the contract.

36.3. The third mode is when an application is filed under Section 8 before a judicial authority for reference of disputes to arbitration, since the subject-matter of the contract is covered by an arbitration agreement. In such a case, the judicial authority will make the reference to arbitration. However, in the meanwhile, the parties would be directed to have the substantive contract stamped in accordance with the provisions of the relevant Stamp Act, so that the rights and obligations emanating from the substantive contract can be adjudicated upon."

D. SUBMISSION OF THE PARTIES

9. Shri Gagan Sanghi, learned Counsel, appeared on behalf of the appellant (M/s N.N. Global Mercantile Private Limited). Initially, since there was no appearance for the first respondent, we appointed Shri Gourab Banerji, learned Senior Counsel as *Amicus Curiae*. We also heard Ms. Malavika Trivedi, learned Senior Counsel, appearing by way of intervention. Shri K Ramakanth Reddy, learned Senior Counsel appeared thereafter for the first respondent and made his submissions.

10. Shri Gagan Sanghi would take us through the provisions of the Stamp Act and the Act and contended that Section 35 of the Stamp Act barred admission of a not duly stamped instrument in evidence for any purpose in Court. Furthermore, a Court could not act upon such an instrument. Not even for a collateral purpose, ran the argument. There is an absolute bar. An Arbitration Agreement, even if contained in a Clause, in a Work Order or in other commercial contract, cannot have a separate existence as found in *N.N. Global* (supra). The Doctrine of the Arbitration Agreement being distinct and having a separate existence, has been erroneously understood in the context of Sections 33 and 35 of the Stamp Act. The Judgment in *SMS Tea Estates* (supra) ought not to have been overruled. The Principle of *Stare Decisis* could not have been overlooked. The learned Counsel drew our attention to the fact that several foreign countries have laws, which contain provisions similar to Sections 33 and 35 of the Stamp Act. In fact, he would contend that there was no occasion to make the reference as the main case stood disposed of. He would submit that even in an Application under Section 11 of the Act, the Court was bound to observe the mandate of the law contained in Sections 33 and 35 of the Stamp Act. The law has been correctly laid down in *SMS Tea Estates* (supra) and *Garware* (supra) and it was also correctly upheld in *Vidya Drolia* (supra). The amendment

to Section 11 by the insertion of sub-Section (6A), could not authorise a Court to overlook the dictate of Sections 33 and 35 of the Stamp Act.

11. Smt. Malvika Trivedi, learned Senior Counsel, projected the same complaint against the view taken in *N.N. Global* (supra). She, in fact, drew our attention to the impact of the view taken in *N.N. Global* (supra) to the proceedings under Section 9 of the Act. It is her case that the requirement to comply with Sections 33 and 35 of the Stamp Act, would not stand displaced, even in an Application under Section 9 of the Act.

12. Shri Gourab Banerji, learned *Amicus*, contended that actually, there were parts of *Garware* (supra), *Vidya Drolia* (supra) and *N.N. Global* (supra), which did lay down the law correctly. He began by pointing out that the Bench in *N.N. Global* (supra) was not correct in proceeding on the basis that, an Arbitration Agreement, was not required to be stamped. He drew our attention to Article 5 of Schedule I of the Maharashtra Stamp Act, 1958 in this regard. It is his submission that the existence and/or validity of an Arbitration Agreement is not affected by the provisions of the Stamp Act. Non-payment of the stamp duty will not invalidate the instrument. It is a curable defect. A true reading of Section 11(6A) would establish that the impounding of an unstamped or deficiently stamped instrument, is not to be done by the Judge under Section 11 but by the Arbitrator appointed under Section 11. Section 11(6A) compels the Court to confine its examination to the question of the existence of the Arbitration Agreement. In view of the fact that, neither *Garware* (supra) nor *N.N. Global* (supra) laid down the law correctly, he requested that the reference be reformulated as indicated later.

13. Relying upon the Judgment of this Court in *Hindustan Steel Ltd. v. Dilip Construction Company*[8], it is contended that an unstamped document can be acted upon, after payment of duty and penalty. Being a curable defect, it could not be found that an unstamped instrument did not exist in the eye of law. He drew our attention to the Judgment of the Privy Council in *Lachmi Narayan Agarwalla and Others v. Braja Mohan Singh (SINCE DECEASED)*[9], to contend that an unstamped instrument, with penalty paid, became effective in law. He further drew support from the following Judgments:

i. Joyman Bewa v. Easin Sarkar[10]*;*

ii. Gulzari Lal Marwari v. Ram Gopal[11]

iii. Purna Chandra Chakrabarty and others v. Kalipada Roy and another[12]*.*

14. The aforesaid case law, unerringly points to the conclusion that failure to stamp a document, did not affect the validity of the document. It merely rendered the document inadmissible in evidence. From the Judgment of the Pakistan Supreme Court in *United Insurance Company of Pakistan Limited v. Hafiz Muhammad Siddique*[13], the following words of Dorab Patel, J., are enlisted before us:

"It would be against all cannons of construction to enlarge the meaning of the words in Section 35 so as to render invalid instruments which fall within mischief of the section."

15. The learned *Amicus* would point out that stamp duty is levied with reference to the instrument and not the transaction. The Stamp Act is a consolidating Act. It is a fiscal law.

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[8] (1969) 1 SCC 597
[9] 51 Indian Appeals 332
[10] *AIR 1926 Calcutta 877*
[11] *ILR 1937 1 Calcutta 257*
[12] AIR 1942 Calcutta 386
[13] PLD 1978 SC 279

Securing revenue was the aim. It cannot be used to clothe a litigant with an arm of technicality. He drew our attention to Section 5 of the Act interdicting judicial intervention. He pointed out Section 8 of the Act, which, after the amendment in the year 2015, permits disallowing of making a reference to arbitration, only if the Court found *prima facie* that no valid Arbitration Agreement existed. Section 8, he pointed out, did refer to 'validity'. He took us through the decision in *SMS Tea Estates* (supra), in the context of the law laid down in *SBP* (supra), by the Constitution Bench, the Report of the Law Commission of India and emphasised the need for minimal interference and to give full meaning to Section 11(6A), by ensuring minimal interference. He drew our attention to the discussion by the high-level Committee, which preceded the amendment in Section 11. He commended for the Court's acceptance, the view taken by this Court in *Duro Felguera*[14], wherein, Justice Kurian Joseph, speaking for the Court inter alia, held in the post Section 11(6A) scenario, as follows:

"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 : (2009) 1 SCC (Civ) 117] . 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."

16. The learned *Amicus* would point out that nonstamping did not render the agreement null and void. In law and in point of fact, an unstamped instrument bears life. He would point out that *Duro Felguera* (supra) was approved by a Bench of three learned Judges in *Mayavati Trading* (supra). He would attack the finding in *Garware* (supra) that an unstamped instrument was void as being incorrect. He would submit that what is required in law, after the insertion of sub-Section (6A) is clear as daylight. The existence of an Arbitration Agreement, is all that should detain the Judge in an application under Section 11. No doubt, he would point out that there may be cases where the actual situation, which occasioned the Judgment in *Vidya Drolia* (supra), may exist. This means that since Section 5 of the Act makes certain disputes nonarbitrable, it may detain a Judge, who is approached under Section 11, to dissuade him from making a reference. There may arise occasions, which may leave the Judge with little choice but to decline the reference. An instance may be an agreement demonstrated to be made by a minor or a person of unsound mind. Such exceptional cases apart, the learned *Amicus* would request the Court to draw comfort from the thought that the Arbitrator is fully competent by virtue of the Doctrine of Kompetenz-Kompetenz, which stands enshrined in Section 16 of the Act, to deal with all sorts of objections. Having regard to the clear legislative intent, discernible from the Report of the Law Commission and the amendment to Section 11 of the Act, which finds its echo in the change brought about in Section 8 of the Act, by the same amendment, the effort must be to facilitate an unhindered and smooth passage for an Application seeking reference to arbitration. The learned *Amicus* with reference to paragraph-18 of *SBP* (supra), submits that the Court in *Garware* (supra) erred in holding that only if the Arbitrator was appointed, without intervention of the Court, Section 16 would have full play. It is pointed out that the Judgment in *SBP* (supra) will not have life, after the amendment in 2015. He would also point out that the Court in *Garware* (supra) erred in paragraph-19, when it suggested that the Court was only giving effect to a mandatory enactment, which purported to protect the public revenue. While it is correct, it is pointed

[14] (2017) 9 SCC 729

out that an agreement enforceable by law is a contract and Section 2(g) of the Contract Act, provides that an agreement not enforceable by law, is said to be void, non-stamping or inadequate stamping would not make an instrument void. It is pointed out that the suggestion that, an unstamped document did not become a contract, and that it was, therefore, unenforceable in law was incorrect. He also would find fault with the Court in *Garware* (supra), when it found that an unstamped document would not 'exist' as a matter of law. The solution suggested by the learned *Amicus* is that an Arbitrator may be appointed and, to allow the Arbitral Tribunal to fulfil its duties under the Stamp Act. In other words, it is pointed out, in keeping with the purpose of Section 11(6A) and the need for minimal interference, as contemplated in Section 5 of the Act, on a *prima facie* examination as to existence of an Arbitration Agreement, a reference must be made. He further also would point out that the Judgment of Justice Sanjiv Khanna in *Vidya Drolia* (supra) may require a revisit. With reference to paragraph-31, wherein Sanjiv Khanna, J., felt bound by the Constitution Bench Judgment in *SBP* (supra), it is pointed out that the learned Judge ignored the amendments to Sections 8 and 11 brought about by the amendment in 2015. He would further point out that in paragraphs-81 to 154, under the caption 'Who decides non-arbitrability', he calls for clarity to be brought. In paragraph-98, it is pointed out that an error was occasioned in coming to the conclusion that Sections 8 and 11 were complementary in nature and in exercising power under the two provisions, the jurisdiction was complementary. It is pointed out that the views of Justice Sanjiv Khanna appear to be inconsistent with that of the three-Judge Bench in *Mayavati* (supra). It is submitted by the learned *Amicus* that the observations of Justice Sanjiv Khanna, in paragraphs146, 147.1, 147.9 and paragraph-147.10 may require recalibration. Paragraphs-146 to 154, it is the stand of the *Amicus Curiae*, may have to be fine-tuned. Learned *Amicus* would point out that the conclusion of N.V. Ramana, J. in Paragraphs-237 and 244 may be endorsed to the extent of inconsistency with that of Justice Sanjiv Khanna. Coming to *N.N. Global* (supra), the learned *Amicus*, apart from pointing out that contrary to what was held, viz., that an Arbitration Agreement was not exigible to stamp duty, it was, indeed, liable. It is pointed out that the ratio in paragraphs-22 and 26, would have to be supported. It is the contention of the learned *Amicus* that Sections 8 and 11 of the Act could not be equated. The standard to be applied may be the same, i.e., a *prima facie* satisfaction of the existence of the Arbitration Agreement. In Section 11, the Court operates as a substitute of an Appointing Authority. There is only a narrow scope. It is his case, that in an Application under Section 8, the scope may be wider as one has to see whether there was a valid Arbitration Agreement. It is his submission that unless it is patently void, 'subject matter arbitrability' should be left to the Arbitrator. In a Section 8 Application, the Court should not undertake the exercise of examining of the issue relating to the stamp duty, which goes to admissibility and not jurisdiction. The word 'existence' in Section 11(6A) meant legally enforceable existence and not mere presence in the contract. The scope of the Court must be circumscribed to narrow the *prima facie* examination of:

i. Formal validity of the Arbitration Agreement at the stage of contract formation, including as to whether it is in writing;

ii. Whether the core contractual ingredients were fulfilled?;

iii. On rare occasions, whether the dispute was arbitrable;

17. The adjudication of stamp duty is a time-consuming affair and it would not align with the goal of the Act, which is to ensure the expeditious appointment of Arbitrators and the conclusion of the proceedings with the least judicial interference. If the Court refrained from interfering on the score of disputes as to stamp duty and allow the Arbitrator to deal

with the matter, which, he is, in law, fully competent to deal with, it would promote the very cause of speedy dispute resolution, which is the very goal of the institution of arbitration.

18. At the time of hearing Shri K. Ramakanth Reddy, learned senior counsel appeared for the first respondent. He would contend that the court must adopt a harmonious construction as between the Stamp Act and the Act. He emphasises the importance of conforming to Section 5 of the Act. He drew our attention to the judgment of this Court in *Great Offshore Ltd. v. Iranian Offshore Engg. & Construction Co.*[15] In the said judgment which is authored by a learned Single Judge, while dealing with a petition under Section 11 of the Act, *inter alia*, held:

55. Second, the plain language of Section 7 once again governs my conclusion. Section 7 does not require that the parties stamp the agreement. It would be incorrect to disturb Parliament's intention when it is so clearly stated and when it in no way conflicts with the Constitution.

60. Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want—an efficient, effective and potentially cheap resolution of their dispute. The *autonomie de la volonté* doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. (See Preamble to the Act.) The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts' directions should be to achieve the legislative intention.

19. He drew our attention to the judgment of this Court in *Commissioner of Income Tax v. Hindustan Bulk Carriers*[16], *inter alia*, that a Court should, faced with two interpretations avoid the construction which reduces the legislation to futility but accept a bolder construction which will produce an effective result qua the purpose sought to be achieved.

20. Shri Debesh Panda, learned counsel appearing for the Applicant (Intervention) in I.A.No.199969 of 2022 submitted that the Act constitutes a complete Code. Since Section 5 of the Act contains a non-obstante clause which declares that “notwithstanding anything contained in any other law for the time being in force” despite the Stamp Act on the principle of minimum interference except as provided in Part-I of the Act, the Court should not be detained by Sections 33 and 35 of the Stamp Act. He also reiterates that what is required under Section 11 is a *prima facie* satisfaction. Parliament did not require the consideration of validity when it enacted Section 11 (6A). There is a conscious distinction between Sections 8 and 11. In other words, there is a distinction between the expressions ‘existence’ and ‘validity’. The width of powers under Section 16 is untrammelled, it is contended.

E. ANALYSIS

21. In view of the submission made by the learned *Amicus* that the Court in *N.N. Global* (supra) was in error in proceeding on the basis that the Arbitration Agreement would not be exigible to stamp duty, the very premise of the Order of Reference would stand removed. The reformulated question sans the words, ‘which is not chargeable to payment of stamp duty’, and words, ‘unenforceable or invalid’, would, therefore, be as follows:

“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

[15] (2008) 14 SCC 240
[16] (2003) 3 SCC 57

the arbitration agreement contained in such an instrument, as being non-existent, pending payment of stamp duty on the substantive contract/instrument?"

F. THE ACT

22. Section 2(b) of the Act defines an Arbitration Agreement to be '*an agreement referred to in Section 7*'.

23. Section 5 of the Act declares as follows: -

"5. Extent of judicial intervention. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

24. Section 7 of the Act reads as follows:

"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 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."

25. Section 11 deals with Appointment of Arbitrators. Since we are concerned with the impact of Section 11(6A), which was inserted by Act 3 of 2016 w.e.f. 23.10.2015, we deem it appropriate to refer to the same:

"6A. The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or subsection (5), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

It must be noticed that the aforesaid provision stands omitted by Act 33 of 2019. But Act 33 of 2019 has not been brought into force.

G. WHAT LED TO THE INSERTION OF SECTION 11(6A)?

26. It is important to delve into the past and enquire as to what led to the insertion of sub-Section (6A) in Section 11 of the Act. The Act was passed in the year 1996. The Act is, undoubtedly, based on the UNCITRAL MODEL Law. The Hundred and Seventy-Sixth Report of the Law Commission of India made its recommendations for enacting amendments to the Act. This is followed by the Justice B.P. Saraf Committee Report, which was submitted on 29.01.2005. The nature of the power exercised by the courts under Section 11 of the Act, was the subject matter of considerable case law. Suffice it to notice, a Bench of seven learned Judges, with a lone dissent, in *SBP* (supra), proceeded to hold that the power exercised under Section 11(6) was a judicial power and not an

administrative power. In the Majority Judgment, the Court had occasion to consider the impact of Section 16 of the Act, which incorporates the Principle of Kompetenz-Kompetenz. The Court held, inter alia, as follows:

"12. … When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Subsection (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him." (Emphasis supplied)

27. We may next notice the Judgment rendered by a Bench of two learned Judges in *SMS Tea Estates* (supra). They dealt with three questions. What is of relevance, is the second question, which was, 'whether an Arbitration Agreement in an unregistered instrument, which is not duly stamped, is valid and enforceable'. The Court, inter alia, held as follows:

"20. The Scheme for Appointment of Arbitrators by the Chief Justice of Gauhati High Court, 1996 requires an application under Section 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every court, that is, a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per Section 38 of the Stamp Act.

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22. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registerable) and which is not duly stamped:

22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or 40 Section of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped."

(Emphasis supplied)

This view has been followed subsequently in Garware (supra) and also in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju & Bros.*[17] We have omitted repetition of paragraphs-19 and 21, which have been referred to earlier.

28. *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and another*[18] was a case of international arbitration arising under Section 45 of the Act. With a Bench of three learned Judges deciding the case, the majority with Justice Y.K. Sabharwal dissenting, took the view that in deciding the question as to whether a reference must be made to arbitration under Section 45, the approach must be to find out whether a *prima facie* case is made out and whether it was 'plainly arguable' that an Arbitration Agreement was in existence. The Court, in other words, took the view that there must be a *prima facie* satisfaction that there was an Arbitration Agreement, which is not *null and void*, inoperative or incapable of being performed. Section 45, it must be noticed, at the time when the case was decided, read as follows:

"45. 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 finds that the said agreement is null and void, inoperative or incapable of being performed." (Emphasis supplied)

29. It was on the aforesaid statutory text that Justice B.N. Srikrishna took the view that the finding as to the existence of the Arbitration Agreement, was to be a *prima facie* finding. Justice D.M. Dharmadhikari agreed with Justice B.N. Srikrishna with certain additions.

30. In *National Insurance Company Limited v. Boghara Polyfab Private Limited*[19], the question, which fell for consideration before the Bench of two learned Judges, was as to in what circumstances, a Court would refuse to refer a dispute relating to quantum to arbitration even though the contract contemplated a reference of such a dispute to arbitration. It also fell for consideration, as to whether the resistance to the reference on the ground that the applicant under Section 11 of the Act, received the amount and issued a full and final discharge voucher, which he contented was issued under undue influence, coercion and economic compulsion, justified the reference. Justice R.V. Raveendran,

[17] (2020) 4 SCC 612
[18] (2005) 7 SCC 234
[19] (2009) 1 SCC 267

speaking for the Court, inter alia, purported to follow the Judgment in *SBP* (supra) and held as follows:

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* [(2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (*i*) issues which the Chief Justice or his designate is bound to decide; (*ii*) issues which he can also decide, that is, issues which he may choose to decide; and (*iii*) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

23. It is clear from the scheme of the Act as explained by this Court in *SBP & Co.* [(2005) 8 SCC 618] , that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot reexamine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

24. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under Section 11 of the Act or by the Arbitral Tribunal as directed by the order under Section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant."

31. It is to be noticed that, at the time when the Court rendered *SBP* (supra) and *SMS Tea Estates* (supra), Section 11(6) contemplated appointment being made of an Arbitrator, essentially on the failure of parties to agree on the appointment or to make the appointment. It is in the context of the views expressed by the Courts, as aforesaid, that the Law Commission of India submitted the Two Hundred and Forty-Sixth Report in

August, 2014. In the said Report, after referring to the Judgment in *SBP* (supra) and the views expressed in *National Insurance* (supra), the Law Commission, *inter alia*, submitted the following recommendations:

"31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of Section 11, should also apply to Sections 8 and 45 of the Act - since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

31. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234, (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.

32. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. 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. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, Under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained Under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

(Emphasis supplied)

32. It is, accordingly, accepting the Report that Section 11(6A) came to be inserted. After having set out the events, which led to the insertion of Section 11(6A), we may take the narrative forward. In *Duro Felguera* (supra), we have noticed the view taken in paragraph 59 in an earlier part of this judgment, in essence, the duty to find out whether an arbitration agreement exists or not. The learned Judge also made observations in paragraph 48 wherein after quoting Section 11(6A) he held as follows:

"…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 for arbitration pertaining to the disputes which have arisen between the parties to the agreement."

33. In *Garware* (supra) a Bench of two learned Judges dealt with a case under Section 11(6A) itself and that too in the context of the Maharashtra Stamp Act, 1958. The contention raised by the appellant was that the Judgment in *SMS Tea Estates* (supra) continues to apply even after the introduction of Section 11(6A). In other words, notwithstanding the insertion of Section 11(6A), the procedure contemplated in *SMS Tea Estates* (supra) would have to be followed. The Court went on to hold, inter alia, as noticed by us already and which has been referred to in *N.N. Global* (supra):

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 Indian 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(6A), 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(6A).

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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 sub-contract 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(6A) 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."

34. We may notice that in Section 45 of the Act, for the words 'unless it finds', by Act 33 of 2019, the words 'unless it *prima facie* finds', were substituted. This amounted to a legislative recognition of the position taken by this Court through the Judgment rendered by Justice B. N. Srikrishna in *SMS Tea Estates* (supra).

35. In *Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman*[20], a Bench of three learned Judges of this Court *inter alia* held as follows:

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 : (2019) 2 SCC (Civ) 785], 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, SA* [*Duro Felguera, SA* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59 [Ed. : The said paras 48 & 59 of *Duro Felguera, A* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764, for ready reference, read as follows:"*48*. Section 11(6-A) added by the 2015 Amendment, reads as follows:

"11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or subsection (6), shall, *notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.*"(emphasis supplied)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 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 & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618 and *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117. 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—

[20] (2019) 8 SCC 714

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(6A) ought to be respected."].

36. The view taken in *Garware* (supra) [paragraphs-22 and 29 (supra)], came to be specifically approved by a Bench of three learned Judges in the Judgment reported in *Vidya Drolia* (supra). Therein, Justice Sanjiv Khanna wrote for the Court and Justice N.V. Ramana supplemented with his own Judgment. The Judgment was rendered on a Reference dated 28.02.2009 and the question was, whether landlord-tenant disputes, governed by provisions of the Transfer of Property Act were arbitrable or not. Apart from the said issue, the other conundrum was as to who would decide, viz., the Court at the reference stage, or the Arbitral Tribunal in the arbitration proceedings. The Court also found it fit to go into the question as to the scope and ambit of the jurisdiction at the reference stage. It is in the course of his Judgement that he made the following observations in pargraphs-146 and 147, 147.1 of *Vidya Drolia* (supra):

"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.* [*Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , 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 para 29 thereof : (SCC p. 238)

"*29*. This judgment in *Hyundai Engg. case* [*United India Insurance Co. Ltd.* v. *Hyundai Engg. & Construction Co. Ltd.*, (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] 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 sub-contract 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* [*United India Insurance Co. Ltd.* v. *Hyundai Engg. & Construction Co. Ltd.*, (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , 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."

37. It is thereafter that in *N.N. Global* (supra), the Court doubted the correctness of the view taken in the aforesaid paragraphs and referred to the findings in paragraph-22 and 29 in *Garware* (supra), which stood affirmed in paragraphs-146 and 147 of *Vidya Drolia* (supra). We may notice that paragraph-147 of *Vidya Drolia* (supra) purported to give reasons in regard to what was stated in paragraph-146. Paragraph-147 is followed by paragraphs- 147.1 to 147.11. However, what, apparently, the Court in *N.N. Global* (supra) doubted, appears to be paragraphs-146 and 147, which we understand in the context of this case, is to be confined to paragraph-147.1.

38. We may resume survey of the Act to the extent it is relevant. Section 16 enshrines the Principle of Kompetenz-Kompetenz. It reads as follows:

"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 subsection (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 subsection (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."

H. THE SCHEME OF THE STAMP ACT

39. Section 2(6) defines the word 'chargeable' as follows:

"2(6) "Chargeable". — —chargeable means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed:"

40. Section 2(11) defines the words 'duly stamped' as follows:

"2(11) "Duly stamped". — duly stamped, 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 the law for the time being in force in India:"

41. Section 2(12) defines the word 'executed' with reference to instruments as meaning 'signed'.

42. Section 2(14) defines the word 'instrument' as 'including every document, by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded'.

43. Section 3 deals with the instruments indicated therein being chargeable with duty, subject to what is provided by way of exemptions contained in Schedule I.

44. Section 4 contemplates a situation, where there are several instruments.

45. There are other provisions, which relate to other transactions. Section 17 deals with the time of stamping of instruments. Section 17 provides for instruments executed in India. It declares that such instruments, chargeable with duty, shall be stamped before or at the time of execution. Section 31 deals with adjudication as to proper stamp. The adjudication is to be made by the Collector. Chapter IV contains Section 33 and the Chapter heading is 'Instruments not duly stamped'. In the Stamp Act, Section 33 reads as follows:

"33. Examination and impounding of instruments. —

(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a pubic 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.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, 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: Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (V of 1989);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt, —

(a) the State Government may determine what offices shall be deemed to be public offices; (b) the State Government may determine who shall be deemed to be persons in charge of public offices."

46. Next, we must notice Section 35, which reads as follows:

"35. Instruments not duly stamped inadmissible in evidence, etc. — No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped : Provided that—

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of any instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one

rupee by the person tendering it;

(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure 1898 (V of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act."

47. Equally, we must bear in mind Section 36. It provides as follows:

"36. Admission of instrument where not to be questioned. —Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

48. Section 38 deals with, how instruments, which are impounded, must be dealt with. It reads as follows:

"38. Instruments impounded how dealt with. — (1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and 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."

49. Section 42 is relevant and it reads as follows: -

"42. Endorsement of instruments on which duty has been paid under sections 35, 40 or 41— (1) When the duty and penalty (if any), leviable in respect of any instrument have been paid under section 35, section 40 or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct:

Provided that—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate;

(b) nothing in this section shall affect clause 3."

50. Section 62(1)(b) makes it punishable with fine, which may extend to Rs.500/- for a person to execute or sign otherwise than as a witness, any instrument chargeable with duty, without the same being duly stamped. The proviso, no doubt, contemplates that if any penalty has been paid under Sections 35, 40 or 61, the same shall be reduced.

I. HINDUSTAN STEEL LIMITED ANALYSED

51. This Court in *Hindustan Steel Limited v. Dilip Construction Company*[21], was dealing with the following set of facts:

An award was made by an Umpire under the Indian Arbitration Act, 1940, which was filed in the Court. The appellant applied to set aside the Award, inter alia, contending that it was unstamped. It contended that it was on that account, invalid, illegal and liable to be set aside. The respondent thereupon applied to the District Court to have the Award impounded and validated by the levy of stamp duty and penalty. The Award was impounded and visited with duty and penalty, which was duly paid and certified. The contention of the appellant was that, not only could an unstamped Award, be not admitted in evidence, but it could not be acted upon, as the instrument had no existence in the eye of law. It is thereupon that the Court had held, inter alia:

"5. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

6. Relying upon the difference in the phraseology between Sections 35 and 36 it was urged that an instrument which is not duly stamped may be *admitted in evidence* on payment of duty and penalty, but it cannot be *acted upon* because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being *acted upon*, and the Legislature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and may be *acted upon* as if it has been duly stamped."

We may also profitably refer to paragraph-8 as well:

"8. Our attention was invited to the statement of law by M.C. Desai, J., in *Mst Bittan Bibi* v. *Kuntu Lal* [ILR (1952) 2 All 984] :

"A court is prohibited from admitting an instrument in evidence and a court and a public officer both are prohibited from acting upon it. Thus a court is prohibited from both admitting it in evidence and acting upon it. It follows that the acting upon is not included in the admission and that a document can be admitted in evidence but not be acted upon. Of course it cannot be acted upon without its being admitted, but it can be admitted and yet be not acted upon. If every document, upon admission, became automatically liable to be acted upon, the provision in Section 35 that an instrument chargeable with duty but not duly stamped, shall not be acted upon by the Court, would be rendered redundant by the provision that it shall not be admitted in evidence for any purpose. To act upon an instrument is to give effect to it or to enforce it."

"In our judgment, the learned Judge attributed to Section 36 a meaning which the legislature did not intend. Attention of the learned Judge was apparently not invited to Section 42(2) of the Act which expressly renders an instrument, when certified by endorsement that proper duty and

[21] (1969) 1 SCC 597

penalty have been levied in respect thereof, capable of being acted upon as if it had been duly stamped."

52. We draw the following conclusions, as to what has been laid down by a Bench of three learned Judges in *Hindustan Steel* (supra):

i. The Stamp Act is a fiscal measure intended to raise revenue;

ii. The stringent provisions of the Act are meant to protect the interest of the Revenue;

iii. It is not intended to be used as a weapon by a litigant to defeat the cause of the opponent;

iv. Upon the endorsement being made under Section 42(2) of the Stamp Act, the document would be admissible in evidence and can be acted upon.

We may only observe that the Court did not take into consideration Section 17 of the Stamp Act, which provides for the precise time, at which, the instrument is to be stamped. Equally, the Court did not bear in mind that Section 62 of the Stamp Act, penalises transgression of Section 17, inter alia. Still further, the Court was dealing with an instrument after it was impounded, and the payments made which were certified under Section 42(2).

It is true that an unstamped instrument is compulsorily impoundable under Section 33 of the Stamp Act. The procedure to be followed thereafter is also provided in the Act. After the procedure is followed and the duty and the penalty is paid, the instrument would come to be visited with the endorsement under Section 42(2). Thereafter, it becomes enforceable and it can be acted upon, as held in *Hindustan Steel* (supra).

J. THE INDIAN CONTRACT ACT, 1872 - A SURVEY; DISSECTION OF GARWARE, VIDYA DROLIA AND N.N. GLOBAL

53. Section 2(g) of the Contract Act provides that an agreement, not enforceable by law, is said to be void, whereas, Section 2(h) declares that an agreement enforceable by law, is a contract. Section 2(j) of the same Act provides that a contract, which ceases to be enforceable by law, becomes void, when it ceases to be enforceable. We may, at once, notice the distinction between an agreement and a contract. Not every agreement is a contract. Only those agreements, which are enforceable, are treated as contracts. The result of a contract, ceasing to be enforceable, is that, the contract becomes void. Next, we may notice Section 10. It reads as follows:

"What agreements are contracts. - All agreements are contracts, if they are made by the free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

Section 10, in the first part, when broken down into parts, consists of the following: 'Agreement must be made by free consent of parties'.

54. Section 14 defines 'free consent' and it reads:

"14. 'Free consent' defined. -Consent is said to be free when it is not caused by- (1) Coercion, as defined in section 15, or (2) Undue influence, as defined in section 16, or

(3) Fraud, as defined in section 17, or

(4) Misrepresentation as defined in section 18, or

(5) Mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."

55. The next part of Section 10 to be noticed is the expression 'parties competent to contract'. Section 11 of the Contract Act declares that every person is competent to contract, according to the law, to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Since Section 11 requires soundness of mind for the person to be competent to contract, Section 12 articulates as to what is sound mind for the purpose of the Contract Act. The next part in Section 10 is that there must be 'a lawful consideration and a lawful object'. The said aspect is dealt with in Section 23. It reads as follows:

"23. What consideration and objects are lawful, and what not. - The consideration or object of an agreement is lawful, unless- It is forbidden by law; or

Is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent; or

Involves or implies, injury to the person or property of another; or

The Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

56. The last part of the first limb of Section 10 provides that all agreements are contracts 'which are not hereby declared to be void'. Sections 24 to 30 are the remaining provisions in Chapter II, which deal with agreements, which are declared to be void within the meaning of Section 10. This is apart from Section 20 as we shall notice later. Also, the second part of Section 10 provides that peremptory requirements may still have to be met to constitute a contract a law.

57. Further, we have already noticed that free consent is indispensable for making an agreement, a contract, under Section 10. Free consent has been defined in Section 14 and it must be read in conjunction with Sections 15 to 18 as Sections 15 to 18 define coercion, undue influence, fraud and misrepresentation, respectively. Now, the result of there being coercion, fraud or misrepresentation in securing the consent of a party, is provided for in Section 19 of the Contract Act. The presence of the three elements results in what is described as a contract voidable at the option of the party, whose consent was so caused. The effect of misrepresentation has been dealt with by this Court in the judgment reported in *Ganga Retreat & Towers Ltd. v. State of Rajasthan*[22], as follows:

"28. According to Section 19 of the Contract Act when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. The latter may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true. According to Section 2 clause (i), an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. It is not necessary for us to record a clear finding whether there was a misrepresentation on the part of the respondents or not. Suffice it to observe that a voidable contract confers the right of election on the party affected to exercise its option to avoid the legal relations created by the contract or to stand by the contract and insist on its performance. However, his election to stand by the contract once exercised would have the effect of ratification of the contract with the knowledge of misrepresentation on the part of the other party and that would extinguish its power

[22] (2003) 12 SCC 91

of avoidance. In the very nature of the right conferred on the party affected, the law expects it to exercise its option promptly and communicate the same to the opposite party; for until the right of avoidance is exercised, the contract is valid, and things done thereunder may not thereafter be undone.

29. A right to rescind for misrepresentation can be lost in a variety of ways, some depending on the right of election. A representee on discovering the truth loses his right to rescind if once he has elected not to rescind. But he may lose even before he has made any election where by reason of his conduct or other circumstances it would be unjust or inequitable that he retains the right. For instance, where third parties have acquired rights under the contract; again where it would be unjust to the representor because it is impossible to restore him to his original position. Restitutio in integrum is not only a consequence of rescission, its possibility is indispensable to the right to rescind. Again, delay in election may make it unjust that the right to elect should continue. For this reason the right to rescission for misrepresentation in general must be promptly exercised. (See Indian Contract and Specific Relief Acts, Pollock and Mulla, 11th Edn., Vol. I, pp. 269-70.)"

Section 19A deals with there being no free consent on account of the consent of a party being obtained by undue influence. The said vitiating factor also, does not result in a void agreement but a voidable contract. Section 14, defining 'free consent', provides that consent is said to be free, when it is not caused by mistake, subject to the provisions of Sections 20, 21 and 22, after referring to the other four aspects, which detract from free consent. We notice what Section 20 provides. Section 20 declares that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. We may observe that this again is a case of an agreement, which is declared void within the meaning of Section 10, apart from Sections 24 to 30. Section 21 provides that a mistake as to any law in force in India, would not make the contract voidable. Thus, while Section 10 sets out the core element for an agreement to become a contract, the effect of nonconformity varies. Therefore, the lack of competency and absence of sound mind completely detract from the formation of a 'contract'. The absence of free consent arising from coercion, undue influence, misrepresentation and even fraud will, however, result in an agreement which is a 'contract' though voidable (see Sections 19 and 19A of the Contract Act). The effect of mistake, is again spelt out in Section 22, insofar as it provides that a contract is not voidable merely because one of the parties consented to the contract, labouring under a mistake as to a matter of fact. Section 37 comes under Chapter IV which deals with performance of contracts and of contracts which must be performed. Section 37 reads:

"37. Obligation of parties to contract. -The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract."

58. We have noticed that in the case of fraud, misrepresentation or coercion, the person whose consent is procured on the said basis, may insist that the contract be performed and that he be put in the position, in which he could have been, if the representation had not been made. In this context, we may notice, Section 64 of the Contract Act:

"64. Consequences of rescission of a voidable contract. -When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he had received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

59. As to what would happen, if an agreement is discovered to be void or becomes void, is provided in Section 65. It declares that when such an eventuality takes place, any person, who has, under such agreement or contract, received any advantage, is bound to restore it to the person from whom he has received it or make compensation for the same. In the context of Section 65, we may notice the nexus with Section 2(j) of the Contract Act. Section 2(j), as we have noticed, provides that, when the contract ceases to be enforceable, it becomes void. Thus, what may be an agreement and which fulfils the requirement that it is enforceable and, therefore, becomes a contract, can upon it ceasing to be enforceable, become void. However, here we must notice the view expressed by the Privy Council in the Judgement reported in *Mahanth Singh v. U Ba Yi*[23]. Therein the Court, inter alia, held as follows:

"A still more startling result, however, is brought about on this construction if s.2(j) is read with s.65 of the Indian Contract Act, since in such a case not only would every unenforceable contract become void but each party would be under the obligation of restoring or making compensation for any benefit received, no matter how much had been done towards the performance by either party.

But it is not necessary to adopt a construction leading to such surprising results.

The solution is, in their Lordships' view, to be found in the wording of s.2(j) itself. Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by s.2(g), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by s.2(j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void."

60. A Full Bench of the Allahabad High Court, while dealing with the effect of inclusion of nontransferable occupancy rights, along with other properties, which were transferable in a registered mortgage deed and, after referring to Section 23 of the Contract Act, held, in *Dip Narain Singh v. Nageshar Prasad and another*[24], inter alia, as follows:

"There is a clear distinction between an agreement which may be forbidden by law and one which is merely declared to be void. In the former case the legislature penalises it or prohibits it. In the latter case, it merely refuses to give effect to it. If a void contract has been carried out and consideration has passed, the promisor may not in equity be allowed to go back upon it without restoring the benefit which he has received. But if the promise comes to court to enforce it he would receive no help from a court of law. As pointed out above, the transfer of an occupancy tenancy is not actually forbidden by law but is declared to be void."

(Emphasis supplied)

61. To the extent that *N.N. Global* (supra) proceeds on the basis that the Stamp Act is a fiscal enactment and the object is to raise revenue, there may not be any serious room for objection. As far as the finding in paragraph-28 of *N.N. Global* (supra) that the decision in *SMS Tea Estates* (supra) does not lay down the correct law, when it holds that an Arbitration Agreement, in an unstamped commercial contract, cannot be acted upon or is rendered unenforceable, we are of the view that the finding in *N.N. Global* (supra) does not appear to be correct. A perusal of paragraph-29 would show that the Court in *N.N. Global* (supra) proceeded on the basis that the Arbitration Agreement, being an

[23] AIR 1939 PC 110
[24] AIR 1930 ALL 1 (FB) / 1929 SCC OnLine ALL 1

independent contract is not chargeable to payment of stamp duty and it would not invalidate the Arbitration Clause or render it unenforceable, since it had an independent existence of its own, cannot hold good in view of the admitted position before us that an Arbitration Agreement, in its own right, is exigible to stamp duty. The whole premise of the Court in *N.N. Global* (supra) being that the Arbitration Agreement, not being exigible to duty and it having a separate existence, the commercial contract in which the Arbitration Agreement is contained, being unstamped, would not impact the Arbitration Agreement, cannot hold good. The reasoning in *N.N. Global* (supra) in paragraph-32, for disapproving of *Garware* (supra) in paragraph-22 thereof, that the Arbitration Clause would be nonexistent in law and unenforceable till the stamp duty in adjudicated and paid on the substantive contract, is again on the premise that the Arbitration Agreement is a separate agreement under the Stamp Act, which is not exigible to stamp duty, which we have found is not the case in law. In this regard, we may refer to Article 5 of the Stamp Act:

Description of Instrument	Proper Stampduty
[5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT— (a) if relating to the sale of a bill of exchange; (b) if relating to the sale of a Government security or share in an incorporated company or other body corporate; (c) if not otherwise provided for 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;	Two annas. Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the security or share. Eight annas.

(Emphasis supplied)

62. While the Stamp Act is a fiscal enactment intended to raise revenue, it is a law, which is meant to have teeth. The point of time, at which the stamp duty is to be paid is expressly provided for in Section 17 of the Stamp Act. There cannot be any gainsaying, that call it a fiscal enactment, it is intended that it is to be implemented with full vigour. The duty of a Court must be to adopt an interpretation which results in the enforcement of the law, rather than allowing the law to be flouted with impunity. Once this principle is borne in mind, the task of the Court becomes less difficult. The law, as contained in Section 33 read with Section 35 of the Stamp Act, would result in the following conclusions:

i. Every person having, by law or consent of parties, the authority to receive evidence, before whom, an instrument is produced, is duty-bound to immediately impound the same. This is upon his forming the opinion that the instrument is not duly stamped. In a case, where the instrument does not bear any stamp at all, when it is exigible to stamp duty, there can be little difficulty in the person forming the opinion that it is not duly stamped. No doubt, under Section 33(2), in cases of ambiguity, the person shall examine the instrument to arrive at the liability. Apart from a person having authority to receive evidence, which, no doubt, would include a court and an Arbitrator, every person In-charge of a Public Office, before whom, such instrument is produced or comes in the performance of his functions, has the duty to impound the unstamped or insufficiently stamped document, arises. This is no doubt after 'examining' the instrument and ascertaining as to whether

the instrument was stamped as required when the document was executed or first executed [See Section 33(2)]. One exception in Section 33 is an Officer of the Police. In other words, the Officer of the Police has no authority to impound an unstamped or insufficiently stamped document produced before him. No doubt, a Criminal Court is not under compulsion vide the *proviso*. Section 33, no doubt, authorises delegation of power.

ii. Under Section 35, the Law-Giver has disabled the admission in evidence of an instrument not stamped or insufficiently stamped, for any purpose. This would include even a collateral purpose. This is in stark contrast with a document, which is compulsorily registerable but which is not registered. Under Section 49 of the Registration Act, 1908, an unregistered document may be used for proving a collateral transaction. Even this is impermissible, if the document is not stamped or insufficiently stamped. Section 35 further proceeds to declare that such an unstamped or insufficiently stamped document shall not be acted upon. It is important to juxtapose the embargo cast on an unstamped document as aforesaid with Section 2(h) of the Contract Act. Section 2(h) of the Contract Act provides that an agreement, which is enforceable in law is a contract whereas Section 2(g), an agreement not enforceable is void. The words 'enforceable in law' or 'not enforceable in law', understood in the context of Sections 33 and 35 of the Stamp Act, would mean that upon there being an occasion, which necessitates one of the parties to the agreement having to enforce the same through recourse to sanctions available in law, the same should be vouchsafed to him. Ordinarily, agreements are enforced through actions in Civil Courts. Remedies may be sought before Public Authorities. Both the Civil Courts and the Public Authorities are tabooed from giving effect to an unstamped instrument. Section 33 does not give a choice to the person, who has authority by law, or with consent, to take evidence, or to any Public Officer, but to impound the agreement. The unstamped or insufficiently stamped document cannot be used as evidence for any purpose. It would be inconceivable, as to how, it could be in the same breath, be found that an unstamped document is yet enforceable in law or that it is not enforceable in law. It is another matter that the parties may act upon it. Goods or services may change hands, for instance, under a document, which may be otherwise exigible to stamp duty. What is, however, relevant is that the State will not extend its protection, by appropriate sanctions. The rights, which would otherwise have been available, had the agreement been stamped, would remain frozen or rather they would not exist. We are further reinforced in our view, therefore, that the views expressed by this Court in *Garware* (supra) in paragraph-22, following *SMS Tea Estates* (supra), represent the correct position in law.

iii. Next, we must pass on to the correctness of the views expressed in paragraph-29 of *Garware* (supra). The Court drew upon the Judgment in *United India Insurance Company Limited and another v. Hyundai Engineering & Construction Company Limited and others*[25].

63. Justice Hrishikesh Roy in paragraph-84 of his draft Judgement finds that in paragraph-29 in *Garware* (supra), this Court relied on *United India Insurance Company Limited v. Hyundai Engineering and Construction Company Limited*[26]. Our learned Brother further notes in paragraph-84.1 that in *Hyundai* (supra), the issue of stamping was not in consideration and the question was whether the matter fell within excepted matter as the Arbitration Clause was dependant on whether the insurer accepted liability. Justice Hrishikesh Roy further finds that the approach in *Garware* (supra) in relying upon *Hyundai* (supra) was incorrect. This is as *Hyundai* (supra) has nothing to do with stamping and

[25] (2018) 17 SCC 607
[26] (2018) 17 SCC 607

should have been distinguished. Our learned Brother notices the contention of the learned Amicus that *Hyundai (supra)* relied on *Oriental Insurance Company v. Narbheram Power and Steel Private Limited*[27], in which case, the Court did not have occasion to interpret Section 11(6)(a) of the Act.

64. It is true that in *Hyundai* (supra), this Court was not dealing with the impact of the Stamp Act. The Court was dealing rather with the issue as to the effect of the Clause, in which it was agreed that there would be no arbitration, if the insurer disputed or did not accept liability under or irrespective of the policy. In the context of the said Clause, this Court, in *Hyundai* (supra), went on to hold, inter alia, that the denial of the plea about its liability by the insurer, rendered the 'making of the Arbitration Clause ineffective and incapable of being enforced, if not non-existent'. No doubt, in paragraph-29 of *Garware* (supra), this Court found that 'likewise in the facts of the present case, it is clear that the Arbitration Clause, i.e., contained in the sub-contract, would not exist as a 'matter of law' until the sub-contract is duly stamped as has been held by us above'. Therefore, the rationale for finding that an Arbitration Agreement in an unstamped sub-contract would not exist, was already furnished in paragraph-22. This Court was only drawing support from *Hyundai* (supra) for the proposition about non-existence of the instrument 'in law'. While, *Hyundai* (supra) did not relate to the Stamp Act, and even, removing the reference to *Hyundai* (supra), the finding about the non-existence of an unstamped agreement, would be supportable on the reasoning that what is contemplated in Section 11(6)(a) is no mere facial existence or existence in fact but also existence in law.

65. This Court in *Garware* (supra) took the view that unless the sub contract was stamped, the arbitration clause contained therein would not exist as a matter of law. This finding has been rendered apparently on the basis of the impact of the amendment leading to the insertion of Section 11(6A). The Court in *Garware* (supra) had in fact after setting out the law prior to the amendment based on the Two Hundred and Forty-Sixth Report of the Law Commission of India found in paragraph-19 that the Law Commission Report did not mention about *SMS Tea Estates* (supra). It is further found that it is for the very good reason that the court does not while deciding an application under Section 11 decide any preliminary issue. The Court further found that it was giving effect to the provisions of a mandatory enactment, which enjoins upon the Court, under the provisions of the Stamp Act, to first impound the agreement, and if only the penalty and the duty is paid thereafter, to act upon it. The Court had also found that it was not possible to bifurcate the arbitration clause. We would find that as found by us, being unstamped or insufficiently stamped, the agreement would not be enforceable till it is 'validated' which is permissible only in the manner provided in the Stamp Act and till then it would not exist 'in law'.

66. In the context of Article 136 of the Limitation Act, 1963, a Bench of three learned Judges in Dr. *Chiranji Lal (D) by Lrs. v. Hari Das (D) by Lrs.*[28] had to deal with the argument that a Final Decree for partition passed on 07.08.1981 became enforceable only on 25.05.1982, on which day the Decree came to be engrossed with stamp papers. Under Article 136, the period of twelve years begins to run when the 'Decree or Order' becomes 'enforceable', *inter alia*. The Court, inter alia, held as follows:

"23. Such an interpretation is not permissible having regard to the object and scheme of the Indian Stamp Act, 1899. The Stamp Act is a fiscal measure enacted with an object 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

[27] (2018) 6 SCC 534
[28] (2005) 10 SCC 746

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 initial defect in the instrument (*Hindustan Steel Ltd.* v. *Dilip Construction Co.* [(1969) 1 SCC 597]). …"

xxx xxx xxx

25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the Court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In *Yeswant Deorao Deshmukh* v. *Walchand Ramchand Kothari* [1950 SCC 766 : 1950 SCR 852 : AIR 1951 SC 16] it was said that the payment of court fee on the amount found due was entirely in the power of the decree-holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

26. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As above noted, there is no statutory provision prescribing a time-limit for furnishing of the stamp paper for engrossing the decree or time-limit for engrossment of the decree on stamp paper and there is no statutory obligation on the court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no timelimit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper. …"

(Emphasis supplied)

67. However, the said view must be understood in the context of the Law of Limitation standing in the peril of being wholly defeated by 'enforceability' of a Decree or Order within the meaning of Article 136, being made dependant on an act of volition of a party to pay the requisite stamp duty. Here, in the case before us, we are concerned with the duty of a Court, inter alia, under Sections 33 and 35 of the Stamp Act and its impact on an unstamped or insufficiently stamped agreement containing an Arbitration Clause. This is apart from the meaning to be attributed to the words 'existence of an Arbitration Agreement' in Section 11(6A) of the Act. We have explained the concept of 'enforceability' in the context of the Contract Act. What is closer to the facts is the concept of enforceability or rather the lack of enforceability resulting in the voidness of the contract in the sense explained by us.

K. THE STAMP ACT – WHETHER A PROCEDURAL LAW?

68. In this context, it will be profitable to notice the following discussion from the work Salmond on Jurisprudence, Twelfth Edition. Dealing with Law of Procedure, it is stated:

"What, then, is the true nature of the distinction? The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions- *jus quod ad actiones pertinent*-using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its

purposes and subject-matter. Substantive law is concerned with tPhe ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated."

(Emphasis supplied)

69. The Stamp Act, while it may be a fiscal measure, it may not fall within the fold of procedural law. The mere fact that Sections 33 and 35 may apply at a stage, when the person approaches a Court, inter alia, would not mean that the Stamp Act, providing for a duty on the executants to stamp the instrument at the point of time, as declared in Section 17, and what is more, penalising a deviation under Section 62, falls within the domain of procedural law. Pertinently, we may, in the Fourteenth Edition of The Indian Contract and Specific Relief Acts by Pollock and Mulla, note as follows:

"Unenforceable Contracts

Unenforceable contracts are valid in all respects, but may not be sued upon by the parties. Such disability may arise for want of registration; or because the time prescribed for filing the suit has expired; or because the plaintiff firm has not been registered; or the document or instrument does not bear the requisite stamp duty; or because the lender of money does not possess a licence under moneylending laws."

(Emphasis supplied)

70. We would find that an agreement, which is unenforceable on account of a substantive law, which would include the Stamp Act, would not be a contract, applying Section 2(h) of the Contract Act. It is only if an agreement is enforceable, that it would become a contract. It is only a 'contract', which would be the 'Arbitration Agreement', which is contemplated in Section 11(6A) of the Act. It may not be apposite to merely describe an unstamped Arbitration Agreement as a 'curable defect'. As long it remains an unstamped instrument, it cannot be taken notice of for any purpose, as contemplated in Section 35 of the Stamp Act. It remains unenforceable. Section 17 declares the time at which an instrument, executed in India, must be stamped. The said provision contemplates that stamping of such an instrument must take place before or at the time of the execution of document. No Public Officer, nor Court nor Arbitrator, can permit any person to ask them to act upon it or receive it as evidence. In law, it is bereft of life. It is 'not enforceable in law'. In the said sense, it also cannot exist in law. It would be void. Our view in this regard that voidness is conflated to unenforceability receives fortification from Section 2(j) of the Contract Act which renders a contract which ceases to be enforceable void.

71. What Section 11(6A) contemplates is a contract and it is not an agreement which cannot be treated as a contract. This is despite the use of the words 'arbitration agreement' in Section 11(6A). In other words, contract must conform to Section 7 of the Act. It must also, needless to say, fulfil the requirements of the Contract Act.

72. A voidable contract within the meaning of Section 19 and 19A, undoubtedly stands in stark contrast to void contracts. However, even in the categories of void contracts as for instance, Section 20 of the Contract Act provides that if on a material point, the parties were mistaken, the contract would be void. If in a given case where this is the contention raised by a party in a proceeding under Section 11 when the agreement otherwise satisfies the requirement of a contract to make it exist as an Arbitration Agreement, then, the Court would be justified in treating the agreement as one which exists and leave it open to the Arbitrator to go into the question, which can be done after the pleadings are laid and

evidence is unfolded before him. When an Arbitration Agreement is sought to be brought under the cloud on the basis that it is a voidable contract which has been avoided, again it may be a matter where the principle of Kompetenz-Kompetenz may be apposite and again the court under Section 11 would be justified in proceeding on the basis that an arbitration agreement exists. The question must undoubtedly be approached from the standpoint of advancing the sublime cause of speedy commencement, progress and conclusion of arbitration. When Parliament intervened by amending the Act, while in Section 8, it has employed the words *prima facie,* it has used the word 'examine' to ascertain about the existence of an arbitration agreement in Section 11 (6A). Likewise, in Section 8 the law giver has used the word 'valid' which is missing in Section 11(6A). Can it be said that an invalid agreement can be said to exist in law for the purpose of Section 11(6A)?

73. What is an invalid document or agreement? It is an expression which is associated and often conflated with the word void. We have already noticed Section 20 as an instance where a common mistake of the parties on a material subject renders the agreement void. We have also noticed that in view of the very nature of the voidness, a court under Section 11, may allow the application under Section 11 when shelter is taken under Section 20 of the Contract Act by the respondent. It would turn upon the facts. Coming to invalidity, a contract would be invalid as for instance if it is executed by a person of unsound mind. This would equally be the case where it is found that one of the parties was a minor. As far as the word 'invalid' is concerned, it has different shades of meaning. In the context of a contract, we notice the following statement in a judgment of the High Court of Karnataka reported in *Imambi v. Khaja Hussain alias Khajasab*[29]:

"In the context that the words are used the meaning is to be as laid down in Jones v. Bank of Gumming as follows: -

"The word "invalid" as applied to a contract does not always mean an absolute nullity, for a contract may be so imperfect as not to be enforceable, but not such an absolute nullity that it cannot be perfected."

(Vide Words & Phrases – Permanent Edition – West Publishing Co. Volume 22A)"

74. The aforesaid statement appears apposite in the context of an instrument which is unstamped or insufficiently stamped. This is for the reason that on the one hand as long as it is not stamped or is insufficiently stamped, it is both liable to be impounded under Section 33 of the Stamp Act and it cannot be used as evidence or registered. This is apart from the unambiguous bar against 'acting upon' such an instrument. On the other hand, if after such an instrument is impounded and duty and penalty is paid and a certificate is endorsed upon it within the meaning of Section 42(2) signals that the instrument regains life, the bar in Section 35 of the Stamp Act is removed permanently. Equally, under Section 36 in the case of an instrument (not secondary evidence of the instrument) which is allowed to be let in evidence without objection, then it would qualify as evidence founding a right. But this is an exception to the rule which is found in Section 35 of the Stamp Act. Thus, an unstamped or insufficiently stamped instrument represents a case of an agreement which not being enforceable, in the sense that the sanctions in law through a civil action is impermissible, is in the said sense, invalid. It is not invalid or void in the sense of it being still born or null and void in the sense that life cannot be poured into it. We may sum up. An agreement which is unstamped or insufficiently stamped is not enforceable, as long as it remains in the said condition. Such an instrument would be void

[29] AIR 1988 Karnataka 51

as being not enforceable [See Section 2(g) of the Contract Act]. It would not in the said sense exist in law. It can be "validated" by only the process contemplated in Section 33 and other provisions of the Stamp Act. We find the expression 'validation' used in the decision of this Court in *Hariom Agrawal v. Prakash Chand Malviya*[30] which we shall refer to in greater detail later. This necessarily means that the court would not view it as enforceable, and therefore, existing in law. In the sense explained, it would not be found as 'not void' and therefore 'not invalid'. Thus, in the context of the Act, the Stamp Act and the Contract Act, we are of the view that the opinion of this Court in *SMS Tea Estates* (supra), in this regard as reiterated in *Garware* (supra) and approved in *Vidya Drolia* (supra) is correct.

75. Section 11(6A) cannot be understood as merely predicating for an Arbitration Agreement existing literally. This means that the mere existence of the arbitration agreement for all intents and purposes on the exterior purporting to project a contract duly executed, may in certain situations, be insufficient under Section 11. If for reasons such as it being unstamped when it is clearly required to be stamped, then it cannot be said to be a case where the agreement exists for it would be no existence in law. While we agree, the Court must be careful in selecting contracts where an arbitration agreement which is produced is not to be acted upon for the reason that it does not exist in law, all we hold is that an Arbitration Agreement, which is unstamped, does not exist and an unstamped contract, containing an Arbitration Agreement, would not exist as it has no existence in law.

L. SECTION 7 OF THE ACT – ITS IMPACT

76. Our learned Brother, Justice Hrishikesh Roy, is right in noticing that Section 7 of the Act provides for what an Arbitration Agreement means for the purpose of Part I. However, with great respect, we express our inability to agree that a plain reading of Section 7 of the Act, would make it clear that an Arbitration Agreement can be even non-contractual. For the purpose of clarity, we may reproduce Section 7(1) of the Act at this juncture:

"7(1) 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."

(Emphasis supplied)

77. We are inclined to hold that what Section 7(1) contemplates is an Arbitration Agreement. We are also inclined to think that what the Law-Giver has intended to convey is that under the Arbitration Agreement, the parties must submit disputes, which have arisen or which may arise between them. The disputes may have arisen or may arise in respect of a defined legal relationship. The defined legal relationship, in turn, can be either contractual or otherwise. Therefore, what can give rise to disputes can be a legal relationship, which is non-contractual. The legal relationship may arise from out of a Statute. It may arise in relation to a tort but an Arbitration Agreement must always mean an agreement. It is really a contract which is intended as an agreement enforceable by law is a contract. An Arbitration Agreement may be a Clause in an agreement providing for Arbitration. It may be a separate or a standalone agreement [Section 7(2) of the Act]. An Arbitration Agreement must be in writing [See Section 7(3) of the Act]. As to what all are comprehended within the requirement that the Arbitration Agreement must be in writing, is set out in Sections 7(4)(a) to 7(4)(c).

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[30] (2007) 8 SCC 514

It includes a document which is signed by the parties [See Section 7(4)(a)]. An Arbitration Agreement would be treated as contained in writing, if there is an exchange of letters, telex, telegrams or other means of telecommunications, including, communications through electronic means which provide a record of the agreement [See Section 7(4)(b)]. Next, we may notice that an Arbitration Agreement will be treated as contained in writing, if there is an exchange of statements of claims and defence, in which, the existence of the agreement is alleged by a party and not denied by the other [See Section 7(4)(c)]. Finally, Section 7(5) contemplates an Arbitration Agreement by incorporation, viz., a reference in a contract to a document containing an Arbitration Clause, would constitute an Arbitration Agreement, if the contract is in writing and the reference is such as to make that Arbitration Clause part of the contract. The true scope of Section 7(5) of the Act has been elaborately considered in *M.R. Engineers & Contractors Private Limited v. Som Datt Builders Limited*[31].

78. Section 3(a) of the Stamp Act, no doubt, contemplates that every instrument mentioned in the Schedule, which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899, is chargeable with duty. Clause (c) of Section 3 also contemplates 'execution' of a document out of India, being chargeable with duty. Section 17 of the Stamp Act also contemplates that in respect of documents executed in India, they shall be stamped before or at the time of execution. Justice Hrishikesh Roy would reason that an Arbitration Agreement, as defined in Section 7 of the Act, need not be an instrument chargeable to stamp duty as stamp duty is payable under the Stamp Act only on instruments, which are executed. The word 'executed' has been defined in the Stamp Act as meaning 'signed'.

79. Section 7(3)(b) of the Act contemplates that an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement, would constitute an Arbitration Agreement in writing within the meaning of Section 7(3) of the Act. We may notice that the proviso (c) to Section 35 of the Stamp Act reads as follows:

"(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;"

80. Thus, the Stamp Act does contemplate a contract or agreement being formed through correspondence through two or more letters. It then suffices that any one of the letters bears the proper stamp. Even proceeding on the basis that an Arbitration Agreement is contained in letters and it is signed and, therefore, executed within the meaning of the Stamp Act, then, it would fall within the four corners of Sections 33 and 35 of the Stamp Act.

81. We do notice that a Bench of two learned Judges have, in the Judgment reported in *Govind Rubber Limited v. Louids Dreyfus Commodities Asia Private Limited*[32], had this to say about the need for an Arbitration Agreement being signed:

"15. A perusal of the aforesaid provisions would show that in order to constitute an arbitration agreement, it need not be signed by all the parties. Section 7(3) of the Act provides that the arbitration agreement shall be in writing, which is a mandatory requirement. Section 7(4) states that the arbitration agreement shall be in writing, if it is a document signed by all the parties. But a perusal of clauses (*b*) and (*c*) of Section 7(4) would show that a written document which may

[31] (2009) 7 SCC 696
[32] (2015) 13 SCC 477

not be signed by the parties even then it can be arbitration agreement. Section 7(4)(*b*) provides that an arbitration agreement can be culled out from an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.

16. On reading the provisions it can safely be concluded that an arbitration agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7(4)(*c*) provides that there can be an arbitration agreement in the exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be prima facie shown that the parties are at ad idem, then the mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. Therefore, signature is not a formal requirement under Section 7(4)(*b*) or 7(4)(*c*) or under Section 7(5) of the Act."

82. When it comes to Section 7(4)(c), what is constituted as an Arbitration Agreement as being in writing is an exchange of Statement of Claims and Defence, wherein the existence of an agreement is alleged by one party and not denied by another. There must however be 'an agreement', the allegation of the existence of which remains unrefuted. Since, Section 7(1) defines an arbitration agreement to be one, under which, parties submit 'all' or 'certain disputes', which have arisen or will arise, such an agreement must be alleged to exist and the allegation must remain undenied. The formation of such an agreement must necessarily be tested with reference to the indispensable requirements, such as, competency to contract and presence of sound mind.

83. All that we are holding is, an Arbitration Agreement must satisfy the requirements in Section 7(1) and, therefore, it must be an agreement. *Sans* an agreement, there cannot be a reference to arbitration. While Justice Hrishikesh Roy is right in holding that Section 10 of the Contract Act recognises oral agreements and that a written agreement is a *sine qua non* for a valid Arbitration Agreement, Section 10 of the Contract Act, it must be noticed, in the second part, provides that nothing contained in the first part, would affect any law, which, inter alia, requires that any contract is required to be made in writing. Section 7(3) of the Act which insists that an arbitration agreement must be in writing harmonises with Section 10 of the Contract Act.

84. We would think that whenever an Arbitration Agreement, as defined in Section 7 of the Act, also attracts stamp duty under the Stamp Act, then, the provisions of Sections 33 and 35 of the Stamp Act would come into play. As held in *SMS Tea Estates Private Limited* (supra), if an Arbitration Clause constitutes the Arbitration Agreement and the instrument, viz., the instrument or contract, in which the Arbitration Clause is contained, is unstamped, when it is otherwise exigible to stamp duty, then, the provisions of Section 33 as also Section 35 of the Stamp Act would operate. The court acting under Section (11) of the Act is not free to disregard their mandate.

85. An Arbitration Agreement, may be a Clause in an instrument, which attracts stamp duty. In such a case, the Court, acting under Section 11, is bound to act under Sections 33 and 35 of the Stamp Act, if the instrument is not stamped or insufficiently stamped. If an Arbitration Agreement is a standalone agreement and which attracts duty under the Stamp Act, then also, the same position obtains.

M. THE ALTERNATIVE PERSPECTIVE

86. In *Garware* (supra), the Court referred to paragraph-59 of *Duro Felguera* (supra) to find that, the Court in the said case, proceeded on the basis that the mischief that was sought to be remedied by the insertion of Section 11(6A), was as contained in *SBP* (supra) and *National Insurance* (supra). We must, however, notice that in paragraph-18 of *Garware* (supra), the Court referred to paragraph-12 of *SBP* (supra), which we have already noticed and, thereafter, the Court went on to hold, inter alia, as follows:

"19. It will be seen that neither in the Statement of Objects and Reasons nor in the Law Commission Report is there any mention of *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] . This is for the very good reason that the Supreme Court or the High Court, while deciding a Section 11 application, does not, in any manner, decide any preliminary question that arises between the parties. The Supreme Court or the High Court is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect revenue. *SMS Tea Estates* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] has taken account of the mandatory provisions contained in the Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11. 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* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] 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* [*SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] , which continues to apply even after the amendment of Section 11(6-A)."

(Emphasis supplied)

87. This is apart from, the Court after referring to Sections 2(g) and 2(h) of the Contract Act, going on to make the observations at paragraph-22 and, finally, paragraph-29 which we have noticed. In fact, in paragraph-30, the Court went on to disapprove various Judgments of High Courts, which included the Full Bench of the High Court of Bombay in *Gautam Landscapes Pvt. Limited v. Shailesh S. Shah*[33], insofar as it related to the High Court holding that after the insertion of Section 11(6A) of the Act, the Court, acting under Section 11(6), need not be detained by the aspect relating to the document not being stamped.

88. Section 11(6A) of the Act, no doubt, contemplated constraining the court to not stray into areas which were permissible under the earlier regime which was set out in *SBP* (supra) as explained in *National Insurance* (supra). It must be understood that when the law giver changes the law it would be indeed a wise approach and fully commended in

[33] (2019) SCC OnLine Bom 563

law to ascertain the mischief which the legislature was dealing with. Equally, the court would naturally enquire as to what is the relief against the mischief which the law giver has provided. The mischief as we understand was the perception that courts were overstepping the limits of minimal interference in consonance with the principle enshrined in Section 5 of the Act. In other words, if we may bear in mind paragraphs 22.2 and 22.3 of *National Insurance Company* (supra) it would appear that they fell outside of the question relating to the existence of an arbitration agreement. The Stamp Act is a law passed by the same law-giver. It is a law which is meant to have life, and therefore, to be enforced. The legislature would not have possibly contemplated, when it incorporated Section 11(6A), that the courts must turn a blind eye to the injunction of a law and allow it to be defeated. This to our minds involves adopting an interpretation which would ignore the principle of harmonious construction of statutes.

89. As far as the conclusion in paragraph 55 of *Great Offshore Ltd. (supra)* that since Section 7 of the Act does not stipulate for stamping, stamping may not be required under the Stamp Act, does not commend itself to us as the correct position in law. We are equally unable to subscribe to the view that stamp duty, *inter alia*, should be treated as a 'technicality'. We are also of the view that the view taken by the learned Single Judge otherwise in the said paragraph again does not represent the correct position.

90. Section 5 no doubt provides for a non-obstante clause. It provides against judicial interference except as provided in the Act. The non-obstante clause purports to proclaim so despite the presence of any law which may provide for interference otherwise. However, this does not mean that the operation of the Stamp Act, in particular, Sections 33 and 35 would not have any play. We are of the clear view that the purport of Section 5 is not to take away the effect of Sections 33 and 35 of the Stamp Act. The Court under Section 11 purporting to give effect to Sections 33 and 35 cannot be accused of judicial interference contrary to Section 5 of the Act.

91. It is nobody's case that if the contract which contains the arbitration clause is an instrument within the meaning of the Stamp Act is produced before the court under Section 11 of the Act, and it is found to be unstamped on the face of it, that Sections 33 and 35 and other allied provisions of the Stamp Act would have no play. In fact, in *N.N. Global* (supra), this Court directed the work order (the contract containing the arbitration clause) to be impounded. Section 11 (6A) of the Act which requires the court to examine whether an arbitration agreement exists, was the need realized and articulated by Parliament to curb the court from straying into other areas highlighted in *National Insurance* (supra). In other words, proceeding on the basis that an 'unstamped agreement' exists, it would not deflect the court of its statutory duty to follow the regime under Sections 33 and 35 of the Stamp Act.

N. THE AMICUS CURIE SPRINGS A SURPRISE

92. This Court pointed out to the existence of the Scheme prepared by the Supreme Court in exercise of the powers under Section 11(10). Paragraph 2(a) of the Scheme, inter alia, reads as follows:

"2. Submission of request. -The request to the Chief Justice under sub-section (4) or subsection (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;"

93. Thereafter, when the curtains were about to be rung down on the hearing, the learned *Amicus* brought the following aspect to notice of the Court. He pointed out that

under the Scheme, the applicant need produce only the certified copy of the Arbitration Agreement. He would draw support from the Judgments of this Court in *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao and others*[34] *and Hariom Agrawal* (supra) to contend that even applying Sections 33 and 35 by the Court at the stage of Section 11 of the Act, the certified copy cannot be impounded. He, thus, sought to take the wind out of the sail of the appellant's contention, by contending that in most of the cases, since certified copies are alone being filed and they cannot be impounded, and as after reference to the Arbitrator based on the certified copy, the Arbitrator is competent, in law, under Sections 33 and 35 of the Stamp Act to do the needful, this Court may bear this aspect in mind. Thereupon, Shri Gagan Sanghi, would point out that even in the certified copy, the factum of payment of the stamp duty must be entered. The said aspect, in fact, engaged the attention of this Court in *SMS Tea Estates* (supra).

94. Reference has been made to *Jupudi Kesava Rao* (supra), to contend that a copy of an instrument, cannot be treated as an instrument under the Stamp Act for the purpose of Sections 33 and 35 of the Stamp Act. A copy cannot be impounded under Section 33, it is pointed out. Therefore, Section 33, which mandates impounding of an unstamped instrument, would not apply to a certified copy, which is permitted to be produced under the Scheme. Reliance has been placed on paragraphs-13 and 14 of *Jupudi Kesava Rao* (supra):

"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. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.

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 supplied)

[34] (1971) 1 SCC 545

95. In *Jupudi Kesava Rao* (supra), the appellant relied on oral evidence to prove the lease document which was insufficiently stamped. The High Court held that oral evidence could not be acted upon to prove the lease agreement. The main question, which arose was, whether secondary evidence of a written agreement to grant a lease, was barred under Sections 35 and 36 of the Stamp Act. The Court went on to find, on a survey of the Evidence Act that it did not purport to deal with admissibility of documents in evidence, which were required to be stamped under the Stamp Act. It is thereafter that the Court went on to hold what was done in paragraphs-13 and 14 of the Judgment. While dealing with Section 35 of the Act, the Court, inter alia, held that 'the second limb of Section 35 of the Stamp Act, which related to acting upon the instrument, would 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 tantamount to the document being acted upon by the person having by law or Authority, to receive evidence. *Proviso* (a) is only applicable, it was found 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. It is, thereafter, the Court observed that 'there is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act'. The Court also, in paragraph-14, found that Section 36 of the Stamp Act, which precludes a party, who did not object to the admission of an unstamped or insufficiently stamped document, in evidence, from raising the objection later, did not apply to secondary evidence.

96. In *Hariom Agrawal (supra)*, a Bench of three learned Judges, was dealing with the impugned Order of the High Court, by which, it held that a photocopy of the original agreement, could neither be impounded nor could it be accepted as secondary evidence. It was after following *Jupudi Kesava Rao* (supra), the Court held as follows:

"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 supplied)

97. The submission appears to be that the Scheme provides for a certified copy of the Arbitration Agreement and if the Arbitration Agreement is a part of the contract, which is either not stamped or insufficiently stamped and, since, it cannot be impounded under Section 33 of the Stamp Act, cannot be validated. All that the Court has to look into is, whether an Arbitration Agreement exists.

98. It is, no doubt, true that under the Scheme, an applicant can produce, either the Original or the certified copy. What is a certified copy? A certified copy is to be understood in the light of Section 76 of the Indian Evidence Act, 1872 (hereinafter referred to as, 'the Evidence Act', for short). It reads as follows:

"76. Certified copies of public documents.— Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be

sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.— Every 3public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies." Explanation. —Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section."

99. This necessarily would take us to Section 74 of the Evidence Act, which defines what is a 'public document'. Section 74 reads as follows:

"74. Public documents. —The following documents are public documents: —

(1) Documents forming the acts, or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country; of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents."

100. We have already noticed that Section 35 of the Stamp Act interdicts the registration of an instrument unless it is duly stamped.

101. The interplay of the Evidence Act, the Stamp Act and the Registration Act is to be understood as follows:

In regard to an instrument, which is executed in India and which is liable to be stamped, then, stamping has to take place before or at the time of the execution of the instrument. It is after the instrument is stamped that it can be presented for registration. Section 17 of the Registration Act provides for documents, which are compulsorily registrable. Section 18 permits registration of other documents at the option of the persons concerned. An instrument, which is registered, necessarily involves, it being duly stamped before it is so registered. This result is inevitable, having regard to the impact of Section 35 of the Stamp Act. In fact, an instrument, which is not duly stamped and which is produced before the Registering Authority, would be liable to be impounded under Section 33 of the Stamp Act. What Section 74 read with Section 76 of the Evidence Act provides for is, the issuance of certified copies. Certified copies can be issued only in respect of public documents. Section 62 inter alia of the Evidence Act defines primary evidence as the document itself produced for the inspection of the court. Section 63 of the Evidence Act defines 'secondary evidence' as meaning and including, inter alia, 'certified copies under the provisions hereinafter contained'. The provisions 'hereinafter contained' referred to in Section 63 must be understood as Section 74 read with Section 76. A certified copy can be given, no doubt, of 'public records kept in any State of private documents'. Thus, if a sale deed between two private parties comes to be registered, instead of producing the original document, a certified copy of the sale deed, may qualify as secondary evidence and a certified copy can be sought for and issued under Section 76 of the Evidence Act. The expression 'public records kept in any State of a private document' in Section 74 is not confined to documents, which are registered under the Registration Act. A private document, which is kept as a public record, may qualify as a public document. What is important is, to bear in mind that in view of Section 33 of the Stamp Act, an instrument, which is not duly stamped, if it is produced before any Public Office, it would become liable to be impounded and dealt with as provided in the Stamp Act. Let us assume a case where a contract, which contains an Arbitration Clause, is registered. As we have noticed, if the contract, in which

the Arbitration Clause is contained, is exigible to stamp duty, then, registration cannot be done without the instrument being duly stamped. It is keeping the same in mind that in *SMS Tea Estates* (supra), this Court held that, 'if what is produced is a certified copy of the agreement/contract/instrument, containing the Arbitration Clause, it should disclose that the stamp duty has been paid on the original'.

This again is for the reason that a certified copy is a true copy of the document. The Officer, who certifies the document, must be the person having the custody of the public document. The public document in the case of public records of private documents, in the case of a registered document, would necessarily involve the document being stamped before registration. The Scheme framed by the Chief Justice, permits the production of a duly certified copy to relieve the party of the burden of producing the original but what is contemplated is only the production of the certified copy, which duly discloses the fact of payment of stamp duty. It is worthwhile to also notice paragraph-5 of the Scheme. It reads:

"5. Seeking further information. -The Chief Justice or the person or the institution designated by him under paragraph 3 may seek further information or clarification from the party making the request under this Scheme."

102. Therefore, it is not as if the Judge dealing with an Application under Section 11 of the Act, is bereft of authority to seek information or clarification so as to be satisfied that the certified copy satisfies the requirement as laid down in *SMS Tea Estates* (supra) that stamp duty payable has been paid.

103. We have already indicated the scheme of the Evidence Act in so far as it relates to the admission of secondary evidence. We have also found that the Scheme contemplates, without anything more, the production of a form of secondary evidence, viz., a certified copy of the Arbitration Agreement. Even if an Arbitration Agreement between the two parties becomes a public document under Section 74(c) of the Evidence Act on the basis that it is a public record, other than as being a registered document and on the basis that, it was produced before any public office and it became a public record of a private document, in keeping with the mandate of Section 33 of the Stamp Act and other connected provisions, such a document again would have been impounded, unless it was originally stamped as per law. In other words, if a certified copy is produced, along with a request under Section 11 of the Act, to be treated as a document, on which the Application under Section 11 could be maintained, it must necessarily comply with the requirement that it declares the stamp, which has been paid in regard to the original.

104. The production of a copy of an instrument, may not lead to the impounding of the copy as Section 33, which mandates impounding, applies only in regard to the original, which alone is treated as an instrument under Section 2(14) of the Stamp Act. We must understand the context of the ruling in *Jupudi Kesava Rao* (supra) and *Hariom Agrawal* (supra) to be that a party cannot 'validate' an instrument by producing a copy and by getting it impounded and paying the duty and penalty. In fact, as observed in paragraph-13 of *Jupudi Kesava Rao* (supra), the Court cannot be invited to act upon a copy of an instrument, which is insufficiently stamped. Thus, such a copy, while it cannot be impounded under Section 33, it cannot also be acted upon under Section 35.

O. SECTIONS 33 AND 35 OF THE STAMP ACT; THE COURT OR THE ARBITRATOR TO ACT?

105. There was considerable debate at the Bar as regards the wisdom in relegating the issue relating to payment of stamp duty to the Arbitrator. On the one hand, the learned *Amicus*, supported by learned Counsel for the Respondent, would canvass that, bearing in mind the object of the Act, and in particular, Section 5 of the Act, prohibiting judicial

interference, except as provided, questions relating to non-payment of stamp duty and the amount to be paid, are capable of being dealt with by the Arbitrator. The concern of the Court, that the interest of the Revenue is protected, is best balanced with the overwhelming need to fastrack the arbitration proceedings and they are best harmonised by ensuring that the Arbitrator will look into the matter and ensure that the interest of the Revenue is not jeopardised. On the other hand, the appellant and the intervener would point out that the Court cannot ignore the mandate of the law contained in Sections 33 and 35 of the Stamp Act and a view taken by this Court, on the said lines, will only encourage evasion of the law, whereas, if the Court follows the mandate of Sections 33 and 35 of the Stamp Act and adheres to what has been laid down in *Garware* (supra), not only would the law be observed, but, when the matter reaches the Arbitrator, the issue would have been given the quietus. Such a view would also encourage persons falling in line with the Stamp Act.

106. We see merit in the contention of the appellant. Apart from the Court acting in consonance with the law, when it adheres to Sections 33 and 35 of the Stamp Act, where it applies, in our view, under the watchful gaze of the Court, be it the High Court or the Supreme Court, the issue relating to stamp duty, in a case where there is no stamp duty paid, is best resolved.

107. The question would arise as follows:

i. A document containing the Arbitration Clause may not bear any stamp duty. We have already found that even an Arbitration Agreement, on its own, may be required to be stamped, as submitted by the learned *Amicus*. But then the Court can proceed on the basis that the amount of stamp duty, which the Arbitration Agreement contained in an Arbitration Clause, would be exigible to being extremely meagre, there is very little likelihood of such an agreement not being stamped. Therefore, what the Court is to consider is, whether when the contract, in which the Arbitration Clause is contained, is not duly stamped, it becomes the duty of the Court to act under Sections 33 and 35 of the Stamp Act.

ii. We have already indicated the background, consisting of the views expressed by this Court, about the nature of review undertaken under Section 11, which led to the insertion of Section 11(6A). Parliament clearly intended to deal with the Court undertaking excessive review, in exercise of the power under Section 11(6) of the Act. It was to curtail excessive judicial interference, which was in keeping also with the principle enshrined in Section 5 of the Act that Parliament interfered and enacted the amendment resulting in Section 11(6A) being inserted. Parliament was aware of the view taken by this Court in *SMS Tea Estates* (supra), namely that, if the Arbitration Agreement was not duly stamped, then, it had to be impounded and dealt with as provided therein. The mandate of the Stamp Act did not conflict with the legislative command contained in Section 11(6A), viz., to examine whether an Arbitration Agreement existed. Proceeding on the basis, in fact, that a contract, containing the Arbitration Agreement, which is not duly stamped, could be said to exist in law, it would still not dislodge the duty cast on the Court under Section 11 to follow the mandate of Sections 33 and 35 of the Stamp Act. In other words, on the aforesaid view, following the command under Section 11(6A), could not detract from, the Court also at the same time, following the equally binding mandate contained in the Stamp Act.

iii. The question further arises, as to whether, in view of the power of the Court under Section 11, to find only *prima facie*, the existence of the Arbitration Agreement, it would

enable the Court to make a Reference and appointment and relegate the issue of impounding of the document to the Arbitrator.

iv. Any shirking of the statutory duty by the Court under Section 11 to act in tune with the peremptory statutory dictate of the Stamp Act, appears to us unjustifiable. Such abdication of its plain duty is neither contemplated by the Law-Giver nor would it be justifiable as causing the breach of Section 11(6A).

v. The view that cases under Section 11 of the Act would consume more time and hinder the timely progress of arbitration and that the matter must be postponed so that the Arbitrator will more suitably deal with it, does not appeal to us. While the Stamp Act is primarily intended to collect revenue and it is not intended to arm a litigant to raise 'technical pleas', this would hardly furnish justification for the Court to ignore the voice of the Legislature couched in unambiguous terms. We find that the view expressed in *SMS Tea Estates* (supra), being reiterated, despite the insertion of Section 11(6A), would promote the object of the Stamp Act and yet be reconcilable with the mandate of Section 11(6A). We may, however, qualify what we have said with a caveat. There may be cases, where no stamp duty is seen paid. It paves the way for the unambiguous discharge of duty under Sections 33 and 35 of the Stamp Act. There may, however, be cases, where it may be stamped but the objection is taken by the party that it is not duly stamped. In such cases, no doubt, it is ordinarily the duty of the Court to examine the matter with reference to the duty under Section 33(2). If the claim that it is insufficiently stamped, appears to the Court to be on the face of it, wholly without foundation, it may make the Reference on the basis of the existence of an Arbitration Agreement otherwise and then leave it open to the Arbitrator to exercise the power under Section 33, should it become necessary. This approach does justice to the word 'examine' in Section 33(2) of the Stamp Act while not ignoring the command of Section 11(6A) of the Act. It is not to be confused with the duty to examine prima facie whether an 'Arbitration Agreement' exists under Section 11(6A) of the Act, but is related to the duty to examine the matter under Section 33(2) of the Stamp Act.

vi. Under the Evidence Act, production of only the original document is permissible by way of evidence (See Section 62). However, secondary evidence is permissible under Section 63 and certified copies are treated as secondary evidence. Under the Scheme, in a proceeding under Section 11, without following the procedure in the Evidence Act, secondary evidence, in the form of certified copy, is permitted. It may be true that since certified copies are permitted to maintain an Application under Section 11 and, in law, impounding cannot be done of a certified copy, as it is not an instrument, the duty of the Court to examine the matter from the point of view of Section 33 of the Stamp Act, may not exist as such. However, we have explained what constitutes a certified copy, and that, in view of *SMS Tea Estates* (supra), the stamp duty paid must be indicated in the certified copy and, in appropriate case, the Court has power, under paragraph-5 of the Scheme, to call for information. It becomes the duty of the Court, in cases, where a certified copy is produced, to be satisfied that the production of the certified copy, fulfils the requirement in law. As already noticed, while the certified copy which does not show that the stamp duty is paid cannot be impounded under Section 33, it cannot be acted upon under Section 35 of the Stamp Act.

P. ARBITRATION AGREEMENT, A DISTINCT AGREEMENT AND ITS IMPACT?

i. The last question, which remains is, whether, if the contract, in which, the Arbitration Clause is located, is unstamped but the Arbitration Clause is stamped, the Court can

ignore the fact that the instrument containing in the Contract is unstamped. In the first place, such an eventuality cannot arise. This for the reason that unless there is misrepresentation or a fraud played, it is incomprehensible as to how, when the contract is produced, it will not be dealt with under Section 33 of the Stamp Act among other provisions. ii. The learned *Amicus*, in fact, points out that invariably the Arbitration Agreement is contained as a clause in a larger agreement. The contract would consist of the document containing the Arbitration Agreement. This brings us to the question as to whether the Arbitration Agreement can be treated as a separate contract, and even if the main contract is not stamped, it suffices if the Arbitration Agreement alone is stamped. iii. In *N.N. Global* (supra), in fact, the Court proceeded to impound the main contract which was the Work Order. The Doctrine of the Arbitration Agreement being a distinct and a separate agreement, is well-established.

The Doctrine of Kompetenz-Kompetenz has been enshrined in Section 16 of the Act. Section 16, undoubtedly, articulates the principle that the Arbitral Tribunal may rule on its jurisdiction including objections relating to the validity of the Arbitration Agreement and its very existence and, for that purpose, an Arbitration Clause forming part of the contract, is to be treated as an agreement independent from the other terms of the contract. Equally, Section 16(1)(b) declares that despite the Tribunal finding that the contract was null and void, it would not invalidate the Arbitration Clause. The evolution of the principle that an Arbitration Agreement is a separate and distinct agreement from the contract, would indicate that it would have no play in the context of the duty of a Court, within the meaning of Sections 33 and 35 of the Stamp Act, to act in consonance therewith. The efficacy of the Arbitration Clause in a contract is preserved so that the extinguishing of the contractual obligations by termination or non-performance or alleged performance, does not deprive the parties of their rights and the power of the Arbitrator to adjudicate on disputes, which, otherwise fall within the ambit of the Arbitration Clause.

The underlying principle behind treating the Arbitration Agreement as a separate agreement is to create a mechanism, which survives the contract so that disputes, falling within the Arbitration Agreement, are resolved. Thus, the rescission of the main contract would not result in the death of the Arbitration Clause. We agree that the Arbitration Clause may be a collateral term [See *Heyman v. Darwins Limited*[35]]. The Arbitration Agreement, it is found in *N.N. Global* (supra), 'exists and can be acted upon, irrespective of whether the main substantive contract is valid or not' [See paragraph-4.10 of N.N. Global (supra)]. It may be true that, ordinarily, the invalidity of the main agreement may not affect the Arbitration Clause [See paragraph-4.12 of *N.N. Global* (supra)]. However, proceeding on the basis that an Arbitration Agreement contained as a clause in the main contract, is a separate agreement and it can exist independently, the fallacy behind such a line of argument in the context of Sections 33 and 35 of the Stamp Act, can be demonstrated as follows:

The learned *Amicus* would urge that in *N.N. Global* (supra) the Court erred in finding that the Arbitration Agreement is not required to be stamped. If so, the Arbitration Clause, being the Arbitration Agreement, would require to be stamped. Is it conceivable that a contract, containing an Arbitration Clause, would be stamped only to cover the liability in regard to the Arbitration Agreement and leave the main agreement unstamped, when it is required to be stamped? Will not acceptance of such a view require the Court to adopt an interpretation that will plainly encourage parties to contravene the mandate of the Stamp Act. We are afraid that, therefore, even proceeding on the basis that an Arbitration

[35] (1942) AC 356 HL

Agreement is a separate agreement, would be of no avail in a case where the Arbitration Clause and the main Agreement are both exigible to stamp duty.

108. As found in *SMS Tea Estates* (supra), in view of the fact that there is a bar to the use of an instrument, which is not stamped or insufficiently stamped for any purpose (unlike Section 49 of the Registration Act, which allows an unregistered document to be used to prove a collateral transaction), an unstamped instrument, in which, an Arbitration Clause is part of, cannot be allowed to be used, as it would be allowing the instrument to be used to establish a collateral transaction. This is proceeding on the basis that an Arbitration Agreement is a collateral term and may have a distinct existence, separate from the main agreement.

Q. CONCLUSIONS

109. The view taken in *SMS Tea Estates* (supra) as followed in *Garware* (supra) and by the Bench in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and other Charities v. Bhaskar Raju and Brothers and others*[36] as to the effect of an unstamped contract containing an Arbitration Agreement and the steps to be taken by the Court, represent the correct position in law as explained by us hereinbefore. *N.N. Global* (supra) was wrongly decided, when it held to the contrary and overruled *SMS Tea Estates* (supra) and *Garware* (supra).

110. An instrument, which is exigible to stamp duty, may contain an Arbitration Clause and which is not stamped, cannot be said to be a contract, which is enforceable in law within the meaning of Section 2(h) of the Contract Act and is not enforceable under Section 2(g) of the Contract Act. An unstamped instrument, when it is required to be stamped, being not a contract and not enforceable in law, cannot, therefore, exist in law. Therefore, we approve of paragraphs-22 and 29 of *Garware* (supra). To this extent, we also approve of *Vidya Drolia* (supra), insofar as the reasoning in paragraphs-22 and 29 of *Garware* (supra) is approved.

111. The true intention behind the insertion of Section 11(6A) in the Act was to confine the Court, acting under Section 11, to examine and ascertain about the existence of an Arbitration Agreement.

112. The Scheme permits the Court, under Section 11 of the Act, acting on the basis of the original agreement or on a certified copy. The certified copy must, however, clearly indicate the stamp duty paid as held in *SMS Tea Estates* (supra). If it does not do so, the Court should not act on such a certified copy.

113. If the original of the instrument is produced and it is unstamped, the Court, acting under Section 11, is duty-bound to act under Section 33 of the Stamp Act as explained hereinbefore. When it does so, needless to say, the other provisions, which, in the case of the payment of the duty and penalty would culminate in the certificate under Section 42(2) of the Stamp Act, would also apply. When such a stage arises, the Court will be free to process the Application as per law.

114. An Arbitration Agreement, within the meaning of Section 7 of the Act, which attracts stamp duty and which is not stamped or insufficiently stamped, cannot be acted upon, in view of Section 35 of the Stamp Act, unless following impounding and payment of the requisite duty, necessary certificate is provided under Section 42 of the Stamp Act.

[36] (2020) 4 SCC 612

115. We further hold that the provisions of Sections 33 and the bar under Section 35 of the 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 instrument as being non-existent in law unless the instrument is validated under the Stamp Act.

116. In a given case, the Court has power under paragraph-5 of the Scheme, to seek information from a party, even in regard to stamp duty.

117. We make it clear that we have not pronounced on the matter with reference to Section 9 of the Act. The reference to the Constitution Bench shall stand answered accordingly.

118. We record our deep sense of appreciation for the efforts put in by Shri Gourab Banerji, learned senior counsel who has ably assisted this Court as Amicus.

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 prereferral 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 nonexistent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?"

(emphasis added)

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-

[1] (2021) 4 SCC 379
[2] (2021) 2 SCC 1
[3] (2011) 14 SCC 66

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.

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 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 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

[4] (2013) 14 SCC 354
[5] (2019) 9 SCC 209

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).

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…

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.

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 unenforceable, 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.

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 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.

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

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 prereferral 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 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

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[8] (2008) 4 SCC 720
[9] (2020) UK SC 38

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 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 nonexistent 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.

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[10] (2005) 7 SCC 234

III. Requirements under the Indian Stamp Act, 1899

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. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.

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 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.

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[11] (1969) 1 SCC 597

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]

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

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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, https://www.icaindia.co.in/icanet/quterli/apr-june2002/ica5.html%20(Last%20accessed%20on%2022nd%20January,%202023%20at%2010:50%20pm).

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

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[14] (1981) 4 SCC 634
[15] (1989) 2 SCC 347

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.

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)

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

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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.
[18] (2005) 8 SCC 618
[19] LAW COMMISSION OF INDIA Report No. 246 Amendments to the Arbitration and Conciliation Act 1996, pg. 43
[20] Paragraph No. 24, Report No. 246, Law Commission of India.

principal Act, 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 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.

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:

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[21] (2017) 9 SCC 729
[22] (2019) 8 SCC 714

"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 subsection (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

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

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.

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 subsection (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 subsection (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, 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:-

"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*

[24] (2020) 2 SCC 455
[25] (2014) 11 SCC 639

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_yo rk_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.

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* 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.

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[26] (2021) 5 SCC 671
[27] (2018) 17 SCC 607
[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/mediadocuments/uncitral/en/19-09955_e_ebook.pdf

(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 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

[29] (2021) 4 SCC 379

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. Answer to the Reference

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.

Hrishikesh Roy, J.

A. Introduction

1. I had the benefit of reading the erudite opinion of my Learned Brother, Justice K.M. Joseph (for himself and Justice Aniruddha Bose) and the separate judgment of Learned Brother Justice C.T. Ravikumar. However, I regret my inability to agree with the majority opinion and the concurring judgment. Echoing the words of Charles Evans Hughes[1] in one of his lectures delivered at the University of Columbia, let our minority opinion (self and Learned Brother Justice Ajay Rastogi, who has written a separate opinion), appeal to the brooding spirit of the future as also the powers of the legislature to examine the interplay between the *Arbitration and Conciliation Act, 1996 (*for short "Arbitration Act, 1996")and the *Indian Stamp Act,1899* (for short "Stamp Act,1899"); and to emphatically resolve the imbroglio to avoid any confusion in the minds of the stakeholders in the field of arbitration.

2. The role of Courts in arbitral proceedings has been much debated for years. Autonomy of the disputing party is the core of the arbitral process but if the parties fail to arrive at a consensus, the supervisory role of Courts becomes imperative. *Redfern and*

[1] Charles Evans Hughes, *The Supreme Court of The United States Its Foundations, Methods and Achievements*,(Columbia University Press) 68 (1928)

Hunter on *International Commercial Arbitration*[2]describe the relationship between national courts and arbitral tribunals as follows:

"To the extent that the relationship between national courts and arbitral tribunals is said to be one of 'partnership', it is not a partnership of equals. Arbitration may depend upon the agreement of the parties, but it is also a system built on law, which relies upon that law to make it effective both nationally and internationally. National Courts could exist without arbitration, but arbitration could not exist without the courts. *The real issue is to define the point at which this reliance of arbitration on the national courts begins and at which it ends*."

[Emphasis supplied]

3. The supervisory role of Courts under the *Arbitration Act,1996* can be broadly categorized into three parts i.e., pre-commencement of arbitral proceedings, during the arbitral proceedings and at the post-arbitration stage. *Section 8* and *Section 11* in Part I of the *Arbitration Act, 1996,* and *Section 45* in Part II of the *Arbitration Act,1996* specifically deal with the role of Courts before the initiation of arbitration proceedings. *Section 8* deals with the "Power to refer parties to arbitration" where there is an arbitration agreement; it provides for a mandatory reference to arbitration, unless the Court is *prima facie* satisfied that *no valid* arbitration agreement exists. *Section 11(6),* on the other hand, provides for *"Appointment of Arbitrators*" when parties fail to mutually agree on the name of an arbitrator or appoint an arbitrator in terms of the arbitration agreement. Section 45 refers to the *"Power of judicial authority to refer parties to arbitration"* in Part II of the *Arbitration Act,1996.*

4. Here in this reference, the extent of judicial intervention before the commencement of arbitral proceedings is being tested. It raises important issues of delays in the enforcement of arbitration agreements, subject to payment of stamp duty and whether an arbitration agreement would be nonexistent, invalid/void, or unenforceable in law, if the underlying instrument is not stamped/insufficiently stamped, as per the relevant Stamp Act.

5. The moot question in this reference is whether the statutory bar under *Section 35* titled "Instruments not duly stamped inadmissible in Evidence" of the *Stamp Act,1899* would be attracted when an arbitration agreement is produced under *Section 11(6)* of the *Arbitration Act,1996*. As a corollary, this reference also tests the *scope* and *nature* of the Court's intervention specifically at the stage of appointment of arbitrator under *Section 11* of the *Arbitration Act, 1996.* The conundrum over the scope of judicial review and the validity/enforceability of the unstamped/insufficiently stamped arbitration agreement contained in an underlying contract is expected to be resolved in this reference.

B. Reference to the Constitution Bench

6. A 3-judge bench in *M/S N.N. Global Mercantile Private Limited v M/S Indo Unique Flame Limited and others*[3] (for short "NN Global") by doubting the reasoning in Paragraphs 146 and 147 of a coordinate bench of this Court in *Vidya Drolia and others v Durga Trading Corporation*[4] (for short "Vidya Drolia") considered it appropriate for the issue to be examined by a Bench of five judges. The matter before the Court in *Vidya Drolia(supra)* was related to subject-matter arbitrability but while deciding the question, it cited with

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[2] Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th Edition, 2015, Oxford University Press), Chapter 7, Paragraph 7.03

[3] (2021) 4 SCC 379

[4] (2021) 2 SCC 1

approval Paragraphs 22 and 29 of the 2-judge Bench judgment in *Garware Wall Tropes Limited v Coastal Marine Constructions and Engineering Limited*[5](for short "Garware").

7. Following the decision in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*[6] *(*for short "SMS Tea"*),* it was held in *Garware(supra)* that non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement and render it non-existent in law and unenforceable.

8. This Court in *NN Global(supra)* overruled the 2-judge bench decision in *SMS Tea(supra)* which was cited with approval in *Garware(supra).*

9. *NN Global(supra)* relied *inter alia*, on the principle of *Kompetenz Kompetenz* and the doctrine of Separability incorporated under *Section 16* of the *Arbitration and Conciliation Act, 1996* to doubt the correctness of the view taken in *Vidya Drolia(supra)* and *Garware(supra)*. The relevant paragraphs which define the scope of this reference are extracted below:

"34. We doubt the correctness of the view taken in paras 146 and 147 of the three-Judge Bench in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] . We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall Ropes Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , which has been affirmed in paras 146 and 147 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , to a Constitution Bench of five Judges.

56. We are of the considered view that the finding in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] and Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] 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 unenforceable, is not the correct position in law.

57. In view of the finding in paras 146 and 147 of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] by a coordinate Bench, which has affirmed the judgment in Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , the aforesaid issue is required to be authoritatively settled by a Constitution Bench of this Court.

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?"

10. Thus, the correctness of the decisions in *SMS Tea(supra), Garware(supra)*, *Vidya Drolia(supra),* as well as other relevant decisions is to be evaluated during the course of the reference. It has been brought to the notice of this Court that conflicting decisions have created a vexed situation for arbitral proceedings and hence, this issue is expected to be settled through this reference.

11. The background facts in *NN Global* (supra) which gave rise to this reference are to be noted at the outset:

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[5] (2019) 9 SCC 209
[6] (2011) 14 SCC 66

C. Facts in *N.N. Global*[7]

12. *Indo Unique Flame Ltd.* (for short "Indo Unique Flame") entered into a sub-contract Work Order with *N.N. Global Mercantile Pvt. Ltd* ("NN Global") on 28.09.2015 for transportation of coal. In terms of Clause 9 of the Work Order, *NN Global* furnished a Bank Guarantee to *Indo Unique*. Clause 10 of the Work Order provided for an arbitration clause. Due to certain disputes in the principal contract, Indo Unique invoked the Bank Guarantee furnished by *NN Global*. Thereafter, *NN Global* filed a Civil Suit before the Commercial Court, Nagpur. An application under *Section 8* of the *Arbitration Act, 1996* was also filed seeking reference of the disputes to arbitration. The Commercial Court on 18.01.2018 rejected the application under *Section 8* of the *Arbitration Act, 1996* holding that the Bank Guarantee was an independent contract. Thereafter, *Indo Unique* filed a Writ Petition against the order of the Commercial Court. On 30.9.2020, the Bombay High Court allowed the application under *Section 8* of the *Arbitration Act,1996*. It held that the nonstamping of Work Order can be raised at the stage of *Section 11* of the *Arbitration Act,1996* or before the Arbitral Tribunal at the appropriate stage. It set aside the order of the Commercial Court on 18.01.2018. An appeal was filed in this Court where *NN Global* contended that since the sub-contract was not stamped under the *Maharashtra Stamp Act, 1958,* the arbitration agreement would be rendered 'unenforceable'. It is in this context that the Court doubted the correctness of previous decisions in *Garware (supra)* which was cited with approval in *Vidya Drolia (supra)* declaring such arbitration agreements to not exist *in law* and reconsideration of the issue was sought from this Constitution Bench.

D. Modification of the reference question:

13. The original reference question in Para 58 of *N.N. Global (supra)* was set out 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 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 nonexistent, unenforceable in law, or invalid/void, pending payment of stamp duty on the substantive *contract*/instrument?"

[emphasis supplied]

Mr. Gourab Banerjee, learned Senior Counsel assisting this Court as *Amicus Curiae* however proposed to reframe the question of reference, 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 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 ***in law***, or invalid/***void*****,** pending payment of stamp duty on the substantive ~~contract~~/instrument?"

[Emphasis in original]

14. It is seen that an erroneous observation pertaining to the *Maharashtra Stamp Act,1958* not subjecting an arbitration agreement to stamp duty was made in para 20, 24 and 58 in *NN Global(supra)*. In each of our four opinions, Justice KM Joseph, Justice C.T. Ravikumar, Justice Ajay Rastogi (& self), we find that this is not the correct position on the applicability of the *Maharashtra Stamp Act,1958*. The *Indian Stamp Act,1899* is a fiscal enactment that levies a charge on the execution of instruments. *Section 2(14)* of the *Stamp Act, 1899* defines "instrument" as "every document by which any right or liability is,

[7] (2021) 4 SCC 379

or purports to be, created, transferred, limited, extended, extinguished or recorded". *Section 3* titled "Instruments chargeable with duty" provides *inter alia* that the instrument must be mentioned in the Schedule to the Act. It is essential to note that arbitration agreements are not specifically mentioned in *Schedule I* of the *Stamp Act,1899* as "instruments" which are required to be stamped. However, under the residuary entry in *Article 5(c)* of *Schedule I* of the *Stamp Act, 1899* titled as *"if not otherwise provided for"*, stamp duty becomes payable. This residuary entry is contained in amendments to Schedule I of the *Stamp Act, 1899*, as well as various State Stamp Acts. I would therefore proceed on the basis that an arbitral agreement falls within the definition of "instrument" as stipulated under the *Stamp Act,1899* and would be subject to stamp duty.

E. Submissions of the Counsel:

15. We have heard the elaborate submissions from Mr. Gourab Banerjee, Learned Senior Counsel assisting this Court as Amicus Curiae; Mr. Gagan Sanghi, Learned Counsel for the appellant; Ms. Malavika Trivedi, Learned Senior Counsel for the Intervenor in IA 18516 of 2022; Mr. Ramakanth Reddy, Learned Senior Counsel for Respondent No. 1 and Mr. Debesh Panda, Learned Counsel for the Intervenor in IA 199969 of 2022. They have cited various decisions of this Court as well as of Courts in other jurisdictions.

16. The learned *Amicus Curiae* makes the following specific submissions:

16.1. The Determination of whether an arbitration agreement is duly stamped or not, must be left to the arbitrator. *Section 11(6A) of the Arbitration Act, 1996* circumscribes the scope of the appointing authority. It begins with a nonobstante clause and was specifically meant to overrule the 7-judge bench in *SBP & Co v Patel Engg. Ltd*[8]. (for short *"SBP")* and *National Insurance Co. Ltd. V Boghara Polyfab (P) Ltd*[9] (for short *"Boghara Polyfab").* Moreover, the ambit of *Section 16* of *Arbitration Act*, *1996* which deals with the competence of an arbitral tribunal to rule on its jurisdiction, is wide enough, according to Mr. Gourab Banerjee, to allow the arbitrator to make a determination with respect to the stamping of the instrument.

16.2. The *246th Report of the Law Commission of India*[10] (for short "246th LCI Report) recommended that the scope of authority be limited to "existence" and "validity" of the arbitration agreement. The legislature went one step further and limited the scope of the appointing authority under *Section 11(6A)* of the *Arbitration Act,1996* to confine to the examination of only "existence" and not even "validity" of the arbitration agreement. Such approach is consistent with the objective of expeditious resolution of arbitration disputes. A Court under *Section 11(6)* of *Arbitration Act,1996* is in the nature of an appointing authority, to facilitate and assist arbitration.

16.3. The statutory bar in *Section 35 of the Stamp Act, 1899* would be triggered only when there is a finding that the document is not duly stamped. For the same, there ought to be an inquiry into stamping. Only on triggering of *Section 33(2) of the Stamp Act, 1899* titled *"Examination and impounding of instruments", Section 35* will follow. The examination under *Section 33(2) of the Stamp Act, 1899* should not be undertaken by a Court under *Section 11(6A) of the Arbitration Act, 1996,* but by the appointed arbitrator.

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[8] (2005) 8 SCC 618
[9] (2009) 1 SCC 267
[10] Law Commission of India, 'Amendments to the Arbitration and Conciliation Act 1996' (246th Report, August 2014) Available at (https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf) <Last accessed on 19.3.2023>

16.4. If the court finds under *Section 11 of the Arbitration Act, 1996* that there is no agreement, then it can take a final view. However, if the Court feels that a deeper consideration is required then the same can be left to the Arbitral Tribunal under *Section 16* of the *Arbitration Act,1996*. According to Mr. Gourab Banerjee, the learned Senior Counsel, this is the appropriate way to harmonise *Section 11(6A)* with *Section 16* of the *Arbitration Act, 1996.*

16.5. The absence of stamping or instrument inadequately stamped would at best be an issue of admissibility but not about jurisdiction. The *Stamp Act,1899* is a fiscal measure enacted to secure revenue for the State for certain classes of instruments. It is, therefore, not enacted to arm a litigant with a weapon of technicality to meet the case of the opponent.

16.6. The learned Amicus Curiae points out that a Court exercising power under *Section 11(6A) of the Arbitration Act, 1996 is not a Court* as defined in *Section 2(1)(e) of the Arbitration Act, 1996* which has the authority to 'receive evidence'. In some sense, under *Section 11(6A)*, the Court is to only form a prime facie opinion.

16.7. Significantly, the parties are not under an obligation to file an original arbitration agreement and only the copy can be annexed which however is not an "instrument" as provided in *Section 2(14)* of the *Stamp Act, 1899*. The reading of *Section 33 or 35 of the Stamp Act, 1899* would pointedly suggest that these provisions are not concerned with the copy of the instrument. Validity is always open to examination at the post-referral stage. *[Jupudi Kesava Rao v Pulavarthi Venkata Subbarao and others*[11]*, Hariom Agrawal v Prakash Chand Malviya*[12]*]*

17. Projecting the contrary view, Mr. Gagan Sanghi, learned Counsel for the appellant makes the following submissions:

17.1. *Section 35* of the *Indian Stamp Act,1899* bars admission of unduly stamped "instrument" in evidence "for any purpose" and also "acting upon it". In *Govt. of AP. v P. Laxmi Devi*[13]*,* it was held that "shall" in *Section 33 of Stamp Act,1899* is mandatory and unstamped document must be impounded.

17.2. Even assuming that stamp duty is not payable on an arbitration agreement under *Stamp 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 *Stamp Act,1899*.

17.3. The learned counsel argues that separation of agreement from the substantive contract is a legal fiction created by *Section 16 of the Arbitration Act, 1996*. *Section 16* of *Arbitration Act,1996* cannot be an exception to *Section 35* of the *Indian Stamp Act, 1899*.[*Bengal Immunity Co vs State of Bihar*[14]*, Para 69,70* of *Govt. of India v Vedanta*[15]*; Amazon V Future Retail*[16]]

17.4. According to Mr. Sanghi, *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. The learned counsel relied on the decision of UK Supreme Court in *Enka Insaat v OOO Insurance*

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[11] (1971)1 SCC 545
[12] (2007) 8 SCC 514
[13] (2008) 4 SCC 720
[14] (1955) 2 SCR 603
[15] (2020)10 SCC 1
[16] (2022) 1 SCC 209

Company[17] where it was held that an *"arbitration clause is nonetheless part of bundle of rights and obligations recorded in the contractual document"*.

17.5. The issue of stamping is to be looked into at the very threshold, even if it is in exercise of *Section 11 (6A) of the Arbitration Act, 1996*, i.e. at the time, the consideration with respect to appointment of arbitrator is undertaken. According to the learned counsel, an instrument would exist *in law* only when it is enforceable. Therefore, when the Court under Section *11(6A) of the Arbitration Act, 1996* is considering the "existence" of the arbitration agreement, it can examine the issue of non-stamping or of inadequate stamping at that stage itself.

17.6. Highlighting that three modes are provided in *NN Global (supra)* i.e. impounding, payment of stamp duty and then appointment of arbitrator, it is argued that when an arbitrator is appointed in a *Section 11* application, Court is certainly "acting upon" the arbitration clause which is contended to be barred by the clear wordings of *Section 35 of the Stamp Act, 1899*. An Agreement, unless "enforceable", is not in "existence".

18. The learned Senior Advocate, Ms. Malvika Trivedi, intervening on behalf of the Appellant made the following submissions:

18.1. The Regimes of the *Stamp Act, 1899* and *Registration Act, 1908* are completely different. *NN Global (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 still remains in existence but without stamping, the instrument is incomplete/inchoate.

18.2. *The Stamp Act, 1899* envisages the payment of stamp duty, failing which the instrument according to Ms. Trivedi cannot be acted upon for any purpose. There is no ambiguity in the language of the Statute and plain reading should be opted.

18.3. The powers of the Court under different provisions of law, as well as the restrictions created in *the Stamp Act, 1899* apply to the proceedings conducted in accordance with *Section 9* of the *Arbitration Act,1996*. It is, therefore, argued that even if the arbitration clause stands severed, the Court will have to reach a *prima facie* conclusion on whether the main agreement is enforceable in law before granting interim measures.

19. Learned Counsel for the Respondent No. 1, Mr. Ramakanth Reddy, took us through the relevant Lok Sabha debates before the enactment of the *Arbitration Act,1996* and makes the following submissions:

19.1. Provisions of *Arbitration Act, 1996*; *Stamp Act, 1899* and *Contract Act, 1872* can be harmonized. *Section 17 of Stamp Act, 1899* has to be read with *Section 31* of *Stamp Act, 1899*.

19.2. Plain language of *Section 7 of the Arbitration Act,1996* does not require that the parties stamp the agreement. The legislative intention would be defeated, if the Court insists on non-core technical requirements such as stamps, seals and originals.

20. In his turn, Mr. Debesh Panda, learned Counsel for the Intervenor submits the following:

20.1. *Part I of Arbitration Act, 1996* deals with *Section 8,9 and 11* whereas *Section 45* is dealt with in Part II. *Section 45* has been recognized as a provision falling under Part II

[17] [2020] UKSC 38

which is a "complete code". *[See Chloro Controls v Severn Trent Water Purification Inc[18]]* The expression *"unless it finds"* in *Section 45* was interpreted per majority in *Shin-Etsu Chemical Co. Ltd. v Aksh Optifibre Ltd[19]* (for short *"Shin-Etsu)* as a consideration on a "prima facie basis" only. In 2019, Parliament amended *Section 45.* It substituted the expression *"unless it finds."* with *"unless it prima facie finds".* It thus brings the statute in line with the position settled in *Shin Etsu (supra)*. In this background, the *Stamp Act, 1899* merely creates a temporary infliction till the stamp duty is recovered, with or without penalty (as the case may be). The affliction only attaches to instrument and not the transaction.

20.2. The *Arbitration Act, 1966* has always been held to be an exhaustive legislation in the nature of a complete Code. [*Paragraphs 83-84, 89* in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.[20]]* According to Mr. Panda, the impounding of the parent instrument that contains the arbitration agreement by a forum that exercises power under the complete Code, either under *Section 8, 9 and 11* within *Part I*, or under *Section 45* within Part-II, is inconsistent with the character of *Arbitration Act, 1996* which is in the nature of a complete code.

21. Looking at the respective projection by the learned *Amicus Curiae* and other counsels, the following questions fall for our consideration:

i) Whether the non-stamping of the substantive contract/instrument would render the arbitration agreement *non-existent in law, void* and unenforceable at the stage of Section 11 of the *Arbitration Act, 1996* for the purpose of referring a matter for arbitration?

ii) Whether the examination of stamping and impounding should be done at the threshold by the Section 11 judge or should it be left to the arbitrator?

F. The Statutory framework of the *Stamp Act, 1899*

22. Let us begin by examining the objective behind the enactment of the *Stamp Act, 1899.* The 67th Law Commission Report[21] suggests that the idea of a fiscal enactment for the purpose of collecting revenue for the State first originated in Holland and thereafter, the *Bengal Regulation 6 of 1797* was enacted in India. This was initially limited to Bengal, Bihar, Orissa and Banaras. Subsequently, various stamp regulations were introduced in Bombay and Madras. The Stamp duties were primarily intended to compensate for the deficiency in public revenue due to abolition of tax for the maintenance of police establishments, leviable on "Indian Merchants and Traders". However, the Regulation paved way for later enactments relating to stamp duty. In 1860, the first Act relating to Stamp duties was enacted in India. This was repealed by the *Act of 1862, 1869, 1879* and subsequently, the *Act of 1899* was enacted which is the current legislation.

23. Reflecting on the objective of the *Stamp Act, 1899*, a 3-judge bench of this Court in *Hindustan Steel Ltd. v. Dilip Construction Co.[2223]* (for short "Hindustan Steel") speaking through J.C. Shah J. made the following pertinent observation:

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[18] (2013) 1 SCC 641
[19] (2005) 7 SCC 234
[20] (2011) 8 SCC 333
[21] Law Commission of India, *'Indian Stamp Act'* (67th Report, February,1997) available at https://lawcommissionofindia.nic.in/report_seventh/accessed on 11March 2023
[22] (1969) 1 SCC 597
[23] PLD SC 279

"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."

24. Learned *Amicus Curiae*, Mr. Gourab Banerjee cited the decision of the Pakistan Supreme Court in *Union Insurance Company of Pakistan Ltd. v Hafiz Muhammad Siddique*[23] which addressed this issue as early as 1978, following the ratio in *Hindustan Steel (supra).* Faced with the question of whether there would be any valid arbitral proceedings, if the arbitration agreement is unduly stamped and hence, inadmissible in evidence under Section 35 of the *Stamp Act,1899*; Court attributed a purely fiscal purpose to stamping, holding that stamping is not meant to interfere in commercial life. Discussing the provisions of the *Stamp Act,1899* including *Section 61* which empowers appellate Courts to revise decisions on "sufficiency" of stamps, Dorab Patel J concluded that:

"the object of the legislature in enacting the Stamp Act was to protect public revenue and not to interfere with commercial life by *invalidating instruments* vital to the smooth flow of trade and commerce."

[emphasis supplied]

25. Thus, the object is to see that the revenue for the State is realised to the utmost extent[24] and not to affect the validity of the document. Its provisions must be construed narrowly to that extent. In the same judgment, it was elaborated by the Pakistan Supreme Court as under:

"For example, an instrument would be produced in evidence only when there is a dispute about it, therefore, if the intention of the Legislature had been to render invalid all instruments not properly stamped, it would have made express provision in this respect and it would have also provided some machinery for enforcing its mandate in those cases in which the parties did not have occasion to produce unstamped instruments before the persons specified in the section."

26. This Court in *RIO Glass Solar SA v. Shriram EPC Limited and Ors.*[25] while holding that foreign awards need not be stamped noted that the *Stamp Act,1899* reflects the fundamental policy of Indian law. A 2-judge bench speaking through Nariman J. noted as under:

"34. ……The fundamental policy of Indian law, as has been held in Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644, and followed in Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49, makes it clear that if a statute like the Foreign Exchange Regulation Act, 1973 dealing with the economy of the country is concerned, it would certainly come within the expression "fundamental policy of Indian law". *The Indian Stamp Act, 1899, being a fiscal statute levying stamp duty on instruments, is also an Act which deals with the economy of India, and would, on a parity of reasoning, be an Act reflecting the fundamental policy of Indian law."*

[emphasis supplied]

27. The object of the Stamp Act can be further understood from S. Krishnamurthy Aiyar's Commentary[26] on the *Stamp Act, 1899* where discussing the judgments in *Hindustan Steel(supra)* and *J.M.A Raju v Krishnamurthy Bhatt*[27], the object is stated as under:

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[24] J.M.A. Raju v Krishnamurthy Bhatt, AIR 1976 Guj 72; Chiranji Lal (Dr.) v. Hari Das (2005) 10 SCC 746; Jagdish Narain v. Chief Controlling Revenue Authority, AIR 1994 All 371.
[25] (2018) 18 SCC 313
[26] S. Krishnamurthy Aiyar, *The Indian Stamp Act, An Exhaustive Summary with State Amendments*; 7th Edn, P. 22
[27] AIR 1976 Guj 72

"The object of the Stamp Act is a purely fiscal regulation. Its sole object is to increase the revenue and all its provisions must be construed as having in view the protection of revenue. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The whole object is to see that the revenue of the State is realised to the utmost extent"

It is plain that the legislative intent and object behind the *Stamp Act,1899*, is to secure revenue for the State and it is an Act reflecting the fundamental policy of Indian law. Thus, policy considerations and securing revenue must also be kept in mind while interpreting the provisions of the *Stamp Act,1899.*

27.1. In the case of *Commissioner of IT v. Chandanben Maganlal*[28]*,* it was held that any provision relating to a tax statute must be interpreted so that the meaning of such provision must harmonise with the legislature's intention behind the law. Let us now consider *Section 35* & *36* of the *Stamp Act, 1899* with which we are directly concerned. They are extracted below:

"35. Instruments not duly stamped inadmissible in evidence, etc.— No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that—

(a) any such instrument [shall], be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of 66 [the 67 [Government]] or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act."

"36. Admission of instrument where not to be questioned.—Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly stamped."

28. Section 35 proscribes authorities from considering unstamped documents but the exceptions to the statutory bar under *Section 35* as provided in *35(a),(b),(d)* and *(e)* and *Section 36*, would clearly suggest that non-payment of stamp duty is a curable defect and the document would not be rendered void at the first instance, if the requisite Stamp duty is not paid. Thus, there is no absolute bar. It is also well-settled in law that failure to stamp

[28] (2000) 245 ITR 182

a document does not affect the validity of the transaction embodied in the document; it merely renders a document inadmissible in evidence[29].

28.1. K. Krishnamurthy[30] in the Commentary on the *Indian Stamp Act, 1899* discusses the proviso to *Section 35 of Stamp Act, 1899* as under:

"This proviso enables Courts and Arbitrators to admit in evidence documents unstamped or deficiently stamped on payment of the proper duty and penalty. An instrument not duly stamped shall be admitted in evidence on payment of the duty and penalty. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such together with penalty[31]. An award which is not engrossed on stamped paper or is engrossed on *an insufficiently stamped paper may be validated with retrospective effect by payment of the duty or deficit duty[32]. Where an award is not stamped, the defect in the award can be cured by impounding the document and after the defect is removed it can be brought on record and made a rule of the Court.* [33]"

[emphasis supplied]

29. Similarly, *Section 42(2)* of the *Stamp Act, 1899* which deals with the consequence of non-stamping provides as follows:

"42. Endorsement of instruments in which duty has been paid under section 35, 40 or 41.—

(1) When the duty and penalty (if any) leviable in respect of any instrument have been paid under section 35, section 40 or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) *Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated* ***as if it had been duly stamped****, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct:*

Provided that—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate;

(b) nothing in this section shall affect the Code of Civil Procedure, 1882 (14 of 1882), section 144 clause 3."

[emphasis supplied]

30. The phraseology of *Sections 36, 35 and 42* of the *Stamp Act,1899* was considered in *Hindustan Steel (supra).* The factual backdrop therein was that Hindustan Steel made an application under *Section 30* and *33* of the *Indian Arbitration Act,1940* for setting aside the award on the ground that it was unstamped and as such, *void ab initio*. This Court, however, held that there is no bar against an instrument not duly stamped being "acted

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[29] Gulzari Lal Malwari v Ram Gopal AIR 1937 Cal 765; Mattegunta Dhanalakshmi v Kantam Raju Saradamba,AIR 1977 AP 348; See also Puranchandra v Kallipada Roy, AIR 1942 Cal 386 Boottam Pitchiah v Boyapati Koteswara Rao AIR 1964 AP 519

[30] K. Krishnamurthy, *The Indian Stamp Act, An Exhaustive Summary with State Amendments;*12th Edition P. 372-373

[31] Omprakash v. Laxminarayan 2014(1) SCC 618

[32] Pattoolal Sharma v Rajadhiraj Umrao Singh AIR 1955 NUC 2621

[33] Wilson & Co. Pvt. Ltd. V K.S. Lokavinayagam AIR 1992 Mad 100

upon", *after* payment of stamp duty and penalty according to the procedure prescribed in the Act. It was pertinently observed as follows:

"6. Relying upon the difference in the phraseology between Sections 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. *The argument ignores the true import of Section 36.-*

By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and ***may be acted upon as if it has been duly stamped****."*

(emphasis supplied)

31. The above would indicate that there is no absolute bar against the instrument being "acted upon" since at a later stage the defect is curable.

31.1. Arguing that the above course is not available, Ms. Malavika Trivedi, learned Senior Counsel for the intervenor had contended that *Section 35* provides for a statutory bar, where the agreement shall not be admitted in evidence for any purpose nor shall it be acted upon, registered or authenticated by any such person or by any public officer. It is, therefore, submitted that when a Court appoints an arbitrator under *Section 11* of *Arbitration Act,1996,* it is certainly "acting upon" the arbitration clause, which is barred by the clear language of *Section 35* of the *Stamp Act,1899*. Let us now proceed to test the above argument.

31.2 In *Hameed Joharan v. Abdul Salam*[34] in the context of an unstamped decree for partition, 2 judges of this Court had the occasion to interpret *Section 35 of the Stamp Act*,*1899* and the interplay with *Article 136* of the *Limitation Act,1963.* It was contended in that case that an instrument not duly stamped, cannot be "acted upon". The issue therein was whether a decree passed in a suit for partition can be acted upon/enforced, without engrossing on stamp paper. It was also argued that the period of limitation begins to run from the date when the decree becomes *enforceable* i.e. when the decree is engrossed on the stamp paper. In this context, the Court opined that:

"38. …..Undoubtedly, Section 2(15) includes a decree of partition and Section 35 of the Act of 1899 lays down a bar in the matter of unstamped or insufficient stamp being admitted in evidence or being acted upon — *but does that mean that the prescribed period shall remain suspended until the stamp paper is furnished and the partition decree is drawn thereon and subsequently signed by the Judge? The result would however be an utter absurdity.* As a matter of fact, if somebody does not wish to furnish the stamp paper within the time specified therein and as required by the civil court to draw up the partition decree or if someone does not at all furnish the stamp paper, does that mean and imply, no period of limitation can be said to be attracted for execution or a limitless period of limitation is available. *The intent of the legislature in engrafting the Limitation Act shall have to be given its proper weightage*. Absurdity cannot be the outcome of interpretation by a court order and wherever there is even a possibility of such absurdity, it would be a plain exercise of judicial power to repel the same rather than encouraging it. *The*

[34] (2001) 7 SCC 573

whole purport of the Indian Stamp Act is to make available certain dues and to collect revenue but it does not mean and imply overriding the effect over another statute operating in a completely different sphere."

[Emphasis supplied]

31.3. Thus, it was held that the *Stamp Act,1899* cannot override the effect of another statute such as the *Limitation Act,1963* operating in a completely different sphere. Further, the expression "executability" and "enforceability" was distinguished to mean that "enforceability" cannot be a subject matter of *Section 35* of *Stamp Act,1899*. It was conclusively held that *enforceability cannot be suspended* until furnishing of stamp paper. At most, a document can be rendered non-executable.

31.4. Thereafter, a 3-judge bench of this Court in *Chiranji Lal (Dr.) v. Hari Das*[35] after discussing the above judgment in *Hameed Joharan(supra)* on the question of period of limitation beginning to run from the date of the decree being engrossed on the stamp paper, pertinently held as under:

"23*. Such an interpretation is not permissible having regard to the object and scheme of the Indian Stamp Act, 1899.* The Stamp Act is a fiscal measure enacted with an object 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 initial defect in the instrument (Hindustan Steel Ltd. v. Dilip Construction Co. [(1969) 1 SCC 597])."

[emphasis supplied]

31.5. It was specifically held that "the starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper."

31.6. Thus, unstamped/insufficiently stamped document does not affect the enforceability of a document nor does it render a document invalid[36]. A plain reading of the provisions would also make it clear that a document can be "acted upon" at a later stage. It is therefore a curable defect.

32. The learned Counsel for the Appellant, Mr. Gagan Sanghi argued that Section 35 and 33 are mandatory provisions as it uses the word "shall" and an unstamped document must be impounded at the threshold. In *Principles of Statutory Interpretation* by Justice G.P. Singh[37] on the use of the word "shall" and presumption of the word being imperative, it is stated:

" ….this prima facie inference about the provision being imperative may be rebutted by other considerations flowing from such construction. There are numerous cases where the word "shall" has therefore been construed as merely directory. The word 'shall', observes HIDAYATULLAH, J. "is ordinarily mandatory but sometimes not so interpreted if the context or the intention otherwise demands and points out SUBBARAO J. "when a statute uses the word 'shall', *prima facie it is mandatory, but the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute."*

[emphasis supplied]

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[35] 2005) 10 SCC 746

[36] Gulzari Lal Malwari v Ram Gopal AIR 1937 Cal 765; Mattegunta Dhanalakshmi v Kantam Raju Saradamba,AIR 1977 AP 348; See also Puranchandra v Kallipada Roy, AIR 1942 Cal 386;Boottam Pitchiah v Boyapati Koteswara Rao AIR 1964 AP 519

[37] Justice G.P. Singh: Principles of Statutory Interpretation,(LexisNexis,2016) at P. 450-451; Burjore and Bhawani Prasad v Bhagana ILR 10 Cal 557; Sainik Motors v State of Rajasthan 1962 (1) SCR 517 ; State of UP v Babu Ram AIR 1961 SC 751

32.1. P.B. Maxwell in the *Commentary* on *Interpretation of Statutes*[38] notes that an Act is to be regarded in its entirety and discusses the following three ways of interpretation:

"Passing from the external aspects of the Statute to its contents, it is an elementary rule that construction is to be made of all parts together, and not of one part only by itself"

i) Individual words are not considered in isolation, but may be have their meaning determined by other words in the Section in which they occur.

ii) The meaning of a section may be controlled by other individual sections in the same Act.

iii) *Lastly, the meaning of a section may be determined, not so much by reference to other individual provisions of the Statute, as by the scheme of the Act regarded in general*"

[emphasis supplied]

32.2. Justice G.P. Singh in *Interpretation of Statutes* further notes[39]:

"The principle that the statute must be read as a whole is equally applicable to *different parts of the same section*. The section must be construed as a whole whether or not one of the parts is a saving clause or a proviso. Subbarao J calls it "an elementary rule that construction of a section is to be made of all the parts together" [emphasis supplied]

32.3. Thus, on a consolidated reading of *Section 35,36* and the proviso to Section *35 and 42* ; the use of the word "acted upon" in all these sections or even in the same section, read with the objective and legislative intent of the *Stamp Act 1899*, it is clear that the bar under *Section 35* is not intended to be absolute; non-payment of stamp duty is a curable defect as the objective is to protect revenue. Moreover, none of the provisions of the *Stamp Act,1899* have the effect of rendering a document *invalid* or *void ab initio*.

G. The Statutory Scheme of the *Arbitration Act,1996*

33. It is apposite to refer to the parliamentary intent behind the enactment of the *Arbitration Act, 1996* which replaced the *Arbitration Act,1940*. The first law on the subject was the *Arbitration Act, 1899* with limited application in the Presidency towns of Calcutta, Bombay and Madras. Thereafter, the second schedule of the provisions of the *Civil Procedure Code, 1908* dealt with arbitration. The major consolidated legislation was the *Arbitration Act,1940* which was based on the *(English) Arbitration Act,1940*. The Law Commission in its *246th LCI Report*(supra) notes that this arbitral regime was based on the mistrust of the arbitral process and "The 1996 Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980." The relevant part of the Statement of Object and Reasons is extracted below:

(i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) *to minimise the supervisory role of courts in the arbitral process;*

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

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[38] P St J Langan, *Maxwell on The Interpretation of Statutes* (N M Tripathi Private Ltd, 1976); P. 58-64

[39] Justice G.P. Singh: *Principles of Statutory Interpretation*,(LexisNexis,2016) at P. 46;

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

[emphasis supplied]

34. Further, on reading *Article 5* of the Model Law and *Section 5* of the *Arbitration Act,1996*, which cover the provisions for judicial intervention in arbitral proceedings, it is clear that the Parliament went beyond Article 5 of the UNCITRAL Model law and added a non-obstante clause. To substantiate this point, it is pertinent to quote the provisions in full. *Article 5* of the *UNCITRAL Model Law,1985* reads as under:

" Article 5. Extent of Court intervention- In matters governed by this Law, no court shall intervene except where so provided in this Law." *Section 5* of the *Arbitration Act,1996* reads as under:

"5. Extent of judicial intervention.—*Notwithstanding anything contained in any other law for the time being in force*, in matters governed by this Part, no judicial authority shall intervene *except where so provided* in this Part."

[emphasis supplied]

35. Additionally, reflecting on the purpose of Article 5, Dr. Peter Binder in *UNCITRAL Model Law on International Commercial Arbitration, 1985*[40] notes:

"1-107 : According to the Commission Report, the purpose of Article 5 was "to achieve a certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the (model) law on international commercial arbitration all instances of court intervention. The Analytical Commentary describes the effect of Article 5 as being "to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law"

In addition to the great advantage of providing clarity of law, which is particularly important for foreign parties(protecting them from unwanted legal surprises, *Article 5 also functions to accelerate the arbitral process in allowing less of a chance of delay caused by intentional and dilatory court proceedings*."

[emphasis supplied]

36. A collective reading of the Statement of Object and Reasons of the *Arbitration Act,1996* r/w *Section 5* of the Act, and Article 5 of the Model Law, would make it abundantly clear that the legislative intent behind the enactment was to *inter alia,* minimise the intervention of the Courts and provide for timely resolution of disputes. By adding a *non-obstante* clause, the Parliament through Section 5 made a significant departure from Article 5 and gave an overriding effect over the provisions of any other law for the time being in force. It circumscribed the role of the judicial authority, especially in context of the Courts exercising any residual power that may accrue to them through *any* provision in *any* law.

37. Let us now refer to the unamended *Section 11(6)* of the *Arbitration Act,1996* which is based on the Article 11 of the UNCITRAL Model law:

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[40] P. Binder, *International Commercial Arbitration And Conciliation In UNCITRAL Model Law Jurisdictions* 274 (2nd ed., Sweet & Maxwell London 2005) P. 50-51

"11 Appointment of arbitrators. —

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

38. Even though the key provisions in the *Arbitration Act,1996* are primarily based on the UNCITRAL Model Law, the legislature has also made significant departures, while amending *Section 11* and *Section 8* of the *Arbitration Act,1996*.

39. Next, it would be appropriate to briefly trace the jurisprudential history of *Section 11(6) of the Arbitration Act,1996* for the purpose of this reference.

i) Evolution of law under *Section 11(6) of Arbitration Act, 1996*

40. A 2-judge Bench of this Court in *ICICI Ltd. v. East Coast Boat Builders & Engineers Ltd*[41] taking into consideration delays in appointment of arbitrators under *Section 11(6),* referred the question of jurisdiction of a Section 11 judge to consider arbitrability of a dispute to a three-judge bench. It was noted that in *KR Raveendranathan v. State of Kerala*[42], another two Judge Bench of this Court had already referred to a larger Bench, a similar question.

41. Thereafter, in *Sundaram Finance Ltd. v. NEPC* India Ltd[43], a 2-judge bench opined that:

"12. …under the 1996 Act, appointment of arbitrator(s) is made as per the provisions of section 11, which does not require the Court to pass a judicial order appointing [the] arbitrator(s)."

42. The above obiter was affirmed by a 2-judge Bench in *Ador Samia Pvt Ltd. v. Peekay Holdings Ltd*[44] (for short "Ador Samia"). Dealing with the question of appeal under *Article 136* of the Constitution of India, from an order made by the Chief Justice of a High Court appointing an arbitrator, this Court held that an order under *Section 11* of the *Arbitration Act,1996* was an *administrative order*. This was affirmed by a three- Judge Bench in *Konkan Railways Corpn v. Mehul Construction Co*[45] (for short "Konkan Railways(I)") where the matter came up for reconsideration of the ratio in *Ador Samia(supra).* It was observed as under:

" 4. …When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the

[41] (1998)9 SCC 728
[42] (1996)10 SCC 35
[43] (1999)2 SCC 479
[44] (1999)8 SCC 572
[45] (2000)7 SCC 201

arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same."

43. The three-judge bench decision was subsequently affirmed by five judges in *Konkan Railways Corpn v. Mehul Construction Co*[46](for short *"Konkan Railways (II)").* This Court held therein that the power exercised by the Chief Justice or 'any person or institution' designated by him under section 11 is not adjudicatory. Following a detailed review of the precedents, it was held that the function of the Chief Justice or his designate under Section 11 is to only "fill the gap left" and appoint an arbitrator for expeditious constitution and commencement of arbitration proceedings.

44. The seven judges of this Court in *SBP* (supra) overturned the decision in *Konkan Railways (II)* (supra). It was held therein that deciding an application for appointment is an exercise of 'judicial' power, as opposed to an 'administrative' power and that the Court is also authorized to record evidence:

"39. ….[f]or the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded"

45. However, Justice C.K. Thakker dissented from the majority opinion and came to the conclusion that it was an administrative power in the following passage:

"85. …There is […] no doubt in my mind that at that stage, the satisfaction required is merely of prima facie nature and the Chief Justice does not decide lis nor contentious issues between the parties. Section 11 neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters."

46. The four main reasons behind the dissent can be summarised as under:

"111. ….Firstly, the function of the Court is to interpret the provision as it is and not to amend, alter or substitute by interpretative process. Secondly, it is for the legislature to make a law applicable to certain situations contemplated by it and the judiciary has no power in entering into 'legislative wisdom'. Thirdly, as held by me, the 'decision' of the Chief Justice is merely prima facie decision and sub-section (1) of Section 16 confers express power on the arbitral tribunal to rule on its own jurisdiction. Fourthly, it provides that remedy to deal with situations created by the order passed by the arbitral tribunal. The sheet anchor of his dissent is that in the guise of interpreting a statute, judicial legislation is not permissible."

47. In the dissenting opinion in Paragraph 95 & 96, Justice Thakkar further held as under:

"95. Now, let us consider Section 16 of the Act. This section is new and did not find place in the old Act of 1940. Sub-section (1) of that section enables the Arbitral Tribunal to rule on its own jurisdiction. It further provides that the jurisdiction of the Tribunal includes ruling on any objections with respect to existence or validity of the arbitration agreement. Sub-sections (2), (3) and (4) lay down procedure of raising plea as to the jurisdiction of the Arbitral Tribunal and entertaining such plea. Sub-section (5) mandates that the Arbitral Tribunal "shall decide" such plea and, "where the Arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award". Sub-section (6) is equally important and expressly enacts that a party aggrieved by an arbitral award may invoke Section 34 of the Act for setting aside such award.

The provision appears to have been made to prevent dilatory tactics and abuse of immediate right to approach the court. If an aggrieved party has right to move the court, it would not have been possible to preclude the court from granting stay or interim relief which would bring the arbitration

[46] (2002) 2 SCC 388

proceedings to a grinding halt. The provisions of Section 16(6) read with Section 5 now make the legal position clear, unambiguous and free from doubt.

96. Section 16(1) incorporates the well-known doctrine of *Kompetenz-Kompetenz* or competence de la competence. It recognises and enshrines an important principle that initially and primarily, it is for the Arbitral Tribunal itself to determine whether it has jurisdiction in the matter, subject of course, to ultimate courtcontrol. It is thus a rule of chronological priority. *KompetenzKompetenz* is a widely accepted feature of modern international arbitration, and allows the Arbitral Tribunal to decide its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement, subject to final review by a competent court of law i.e. subject to Section 34 of the Act."

48. The above line of reasoning in Justice Thakkar's dissent resonates with the internationally recognized principle of *Kompetenz Komptenz* and the doctrine of separability. The majority opinion in *SBP (supra)* suggests that a Section 11 Court could conduct a mini-trial at the pre-referral stage. The jurisprudential correctness of *SBP(supra)* has been doubted and was considered as excessive judicial intervention by the *246th LCI Report*(supra). It has been legislatively overruled by subsequent amendments in the *Arbitration Act,1996* which will be discussed later in this judgment.

49. Thereafter, a two-judge bench in *Boghara Polyfab* (supra) which followed *SBP(supra*), allowed the court to examine, *inter alia*, the following issues:

"22.2. (a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection."

50. The *246th LCI report*(supra), discussing both *SBP*(supra) and *Boghara*(supra) significantly noted that the real issue is the "scope" and "nature" of judicial intervention:

"29. The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power – which *obfuscates the real issue* underlying such nomenclature/description as to:

-the scope of such powers – i.e. the scope of arguments which a Court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not – i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc; and which of these it should leave for decision of the arbitral tribunal.

-the nature of such intervention – i.e. would the Court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the arbitral tribunal"

[emphasis supplied]

51. As regards *nature,* the 246th LCI Report(supra) noted that the exposition of law on the point is to be found in *Shin Etsu* (supra) where this Court while interpreting *Section 45* of the *Arbitration Act,1996* held that the issue should be looked at on a "prima facie" basis only. On *scope*, it was recommended that the Court should restrict to the examination of whether the agreement is "null and void" and if the Court finds that the agreement does not exist, that decision would be final. It made the following recommendation as regards *Section 8* and *11* of the *Arbitration Act,1996:*

"33. …The *scope* of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement *does not exist* or is *null and void.* 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."

52. The 2015-Amendment significantly restricted the *scope* of intervention even further as we will notice below.

ii) Post-2015 Regime: Insertion of *Section 11(6A)*

53. There has been a major shift post-2015 amendment with the insertion of *Section 11(6A)* in the *Arbitration Act,1996*. The legislative intent is clear from the plain reading of Section 11(6A) as extracted below:

"The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section(4) or subsection(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."

[emphasis supplied]

54. The basis for this amendment, as explained in *246th LCI Report*(supra), was to undo the effect *of SBP(supra)* and *Boghara(supra)* which widened the scope of inquiry and intervention by a Court under *Section 11(6)* of the *Arbitration Act,1996. Section 11(6A*) uses the phrase "notwithstanding any judgment, decree or order of any Court" and effectively overrules judgments which widened the scope of inquiry. *Section 11(6A)* does not use the word "null and void" as recommended by the Law Commission. Thus, the legislature went one step further and confined the examination to the "existence" of the arbitration agreement.

55. Now let us notice the language used in *Sections 8,11* and *45* of the *Arbitration Act,1996*, all of which deal with the power of Courts at the pre-arbitral stage.

55.1. *Section 8* of the *Arbitration Act,1996* titled "Power to refer parties to arbitration where there is an arbitration agreement" has been amended in 2015 with the following language: *"unless it finds that prima facie no valid arbitration agreement exists" .*

55.2. Section 45 in Part II titled *"Power of judicial authority to refer parties to arbitration"* has also been amended and notified in 2019. The amendment in *Section 45* was made after the judgment of three judges in *Shin Etsu(supra)* where in a case of international arbitration, the question before this Court was when an application under *Section 45* is moved, is the Court required to pass a *prima facie* finding or a final-finding based on the merits of the case, which would result in a full-fledged trial? In the majority opinion, it was held as under:

"105. …the object of the Act would be defeated if proceedings remain pending in the court even after commencing of the arbitration. It is precisely for this reason that I am inclined to the view that at the prereference stage contemplated by Section 45, the court is required to take only a *prima facie view* for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal or before the court at the post-award stage"

55.3. Pursuant to *Shin Etsu(Supra)*, the 2019 Amendment to Section 45 states: "…*unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed".* Thus, from the above discussion it is clear that *Section 8* uses the word "validity" and *Section 45* uses the phrase "null and void, inoperative or incapable of being performed". In that sense, Section 11(6A) is a unique provision which is confined to the "existence" of the arbitration agreement and not its "validity". The amended provision also does not find place in the UNCITRAL Model Law. Learned Amicus Curiae pointed to the

definition of *confine* in P. Ramanatha Aiyar's Advanced Law Lexicons[47] which states: *"imprison; hold in custody. To keep within circumscribing limits".*

56. On reading the language in *Section 11(6A)* with *Section 5* of the *Arbitration Act1996*, and an interpretation based on legislative intent, it is apparent that the scope under *Section 11(6A)* is very narrow.

iii) Post- 2019 Amendment and the Report of the HighLevel Committee to Review the Institutionalisation of Arbitration Mechanism in India.

57. The Committee led by Justice Srikrishna[48] had recommended further changes to the *Arbitration Act, 1996*. It had recommended for the deletion of *Section 11(6A)* with the power of appointment of arbitrators being left entirely to the arbitral institutions. Drawing inspiration from Singapore, Hong Kong, United Kingdom etc., the Committee recommended that this would prevent further delays and set the momentum for institutional arbitration in India. Under the amended *Section 11(6)*, the appointment of arbitrators is to be done by the arbitral institution:

"…the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be."

58. Insertion of *Section 6(B)* by *Act 3 of 2016* which is yet to notified reads as under:

"(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this *section shall not be regarded as a delegation of judicial power* by the Supreme Court or the High Court.]"

[emphasis supplied]

Even though the amendments are not notified yet and there is limited clarity on the process, we may take a cue about the intention of the legislature which seems to be to ensure minimal judicial intervention at the pre-referral stage of appointment of arbitrator.

59. It would be apposite to refer now to the prevalent position amongst the most-preferred arbitral institutions i.e. the *International Chamber of Commerce Court (ICC Court), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the Arbitration Institute of the Stockholm Chambers of Commerce (SCC)* which were mentioned in the report of the High-level Committee and those can be broadly noted as under:-

1.ICC Arbitration Rules, 2021:

"Article 6. Effect of the Arbitration Agreement.—

(4) In all cases referred to the Court under Article 6(3)…The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist.

(5) In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the *arbitral tribunal itself."*

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[47] P. Ramanatha Aiyar, *The Encyclopaedic Law Dictionary with Words and Phrases, Legal Maxims and Latin terms*(5th Edition); P. 1037

[48] Government of India, *'Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (HLC Report, July 2017) Available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf <Last accessed on 19.3.2023>

2. HKIAC Arbitration Rules:

*"*Article 11 – HKIAC's Prima Facie Power to Proceed

11.1 The arbitration shall proceed if and to the extent that HKIAC is satisfied, *prima facie*, that an arbitration agreement under these Procedures may exist. Any question as to *the jurisdiction of the arbitral tribunal shall be decided by the arbitral tribunal* once constituted.

11.2 HKIAC's decision pursuant to Article 11.1 is without prejudice to the admissibility or merits of any party's pleas*."*

3. LCIA Arbitration Rules:

"Article 23. Jurisdiction and Authority

23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement."

4. SIAC International Arbitration Centre Rules, 2016:

"Article 28. Jurisdiction of the Tribunal

28.1 If any party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration, before the Tribunal constituted,the Registrar shall determine if such objection shall be referred to the Court. If the Registrar so determines, the Court shall decide if it is prima facie satisfied that the arbitration shall proceed. The arbitration shall be terminated if the Court is not so satisfied. Any decision by the Registrar or the Court that the arbitration shall proceed is without prejudice to the power of the Tribunal to rule on its own jurisdiction.

28.2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement. An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

5. Arbitration Institute of SCC Rules:

"Article 11. Decisions by the Board

The Board takes decisions as provided under these Rules, including deciding:

(i) whether the SCC manifestly lacks jurisdiction over the dispute pursuant to Article 12 (i); Article 12(i). Dismissal

The Board shall dismiss a case, in whole or in part, if:

(i) the SCC manifestly lacks jurisdiction over the dispute;…"

60. Thus, the approach of the reputed arbitral institutions worldwide would show that there is express recognition of the principle of *KompetenzKompetenz* and role of Courts is limited to *preliminary prima facie* examination. A reading of the above rules would also show that arbitral institutions have recognized the *prima- facie test* to determine the existence of the arbitration agreement. Discussing the rules of the major international arbitral institutions, William Park in an article titled "Challenging Arbitral Jurisdiction: The Role of Institutional Rules"[49] writes:

"On occasion, however, arbitrations have been filed without even minimal indicia of consent to the arbitral process. No document seems to exist saying the respondent actually agreed to arbitrate with the claimant. In such instances, efficiency will be served by early consideration of a respondent's argument that the case should not proceed. To this end, the ICC Rules permit the

[49] Park, William. *"Challenging Arbitral Jurisdiction: The Role of Institutional Rules*", Boston University School of Law, Public Law Research Paper (2015).

ICC Court to consider obvious jurisdictional defects, with arbitration going forward only to the extent the ICC Court is *prima facie* satisfied that an arbitration agreement may exist."

61. Thus, the objective behind the prima-facie test while referring a party to arbitration, is to also ensure that a non-consenting party is not bound to the process of arbitration and the doctrine of party autonomy is upheld with minimal intervention of Courts.

62. Chandrachud J.(as he then was) in the concurring opinion in *A. Ayyasamy vs A. Paramasivam & Ors*[50] (for short *"Ayyasamy")* noted, *inter alia,* that jurisprudence in India must strengthen institutional efficacy of arbitration with minimal intervention of Courts:

"53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. *Minimising the intervention of courts is again a recognition of the same principle*." [emphasis supplied]

63. It upheld the one-stop arbitration principle propounded by the *House of Lords* in *Fiona Trust and Holding Corporation v. Privalov*[51] .

"46. In *Fiona Trust and Holding Corpn.* v. *Privalov* [*Fiona Trust and Holding Corpn.* v. *Privalov*, (2007) 1 All ER (Comm) 891 : 2007 Bus LR 686 (CA)] , the Court of Appeal emphasised the need to make a fresh start in imparting business efficacy to arbitral agreements. The Court of Appeal held that : (Bus LR pp. 695 H-696 B & F, paras 17 & 19)

"*17*. … For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.

***

19. One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction."

Arbitration must provide a one-stop forum for resolution of disputes. *The Court of Appeal held that if arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract is procured by bribery, just as much as they can decide whether a contract has been vitiated by misrepresentation or nondisclosure.*

[Emphasis supplied]

64. Thus, the one-stop arbitration approach would ensure that all issues on initial illegality or whether a contract is void can be decided by the arbitral institutions subject, of

[50] (2016) 10 SCC 386
[51] (2007) 1 All ER(Comm) 891 (Paras 17-18)

course, to the ultimate supervisory jurisdiction of the Courts. An arbitral award can be set aside by Courts as per the legislative mandate in Section 34 of the *Arbitration Act,1996.* This would prevent multiplicity of proceedings in Courts and tribunals and ensure minimal judicial intervention.

H. Discussion on *SMS Tea*:

65. Having broadly discussed the legislative scheme of the *Stamp Act*,*1899* and the *Arbitration Act,1996,* let us now examine the correctness of the decisions referred to in *NN Global(supra).*

66. The judicial position on the enforceability of an arbitration agreement contained in an unstamped or insufficiently stamped agreement can be traced from this Court's 2011 decision in *SMS Tea (supra*). The facts of the case were that the appellant was granted lease of two tea estates for a term of 30 years. The leases deed contained an arbitration clause. On abrupt eviction by the respondent from the tea estates, the appellant filed an application under *Section 11* of the *Arbitration Act, 1996* for the appointment of arbitrator. The learned Chief Justice of Guwahati High Court dismissed the *Section 11* application and held that the lease deed was compulsorily registrable under *Section 17* of the *Registration Act,1908* and *Section 106* of the *Transfer of Property Act,1882* ; and as the lease deed was not registered, even the arbitration clause would be rendered invalid. The matter reached this Court where one of the questions was whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable. It was observed that the arbitration agreement in an unstamped or insufficiently stamped instrument is invalid, given that *Section 35* of the *Stamp Act, 1899* expressly bars the authority before which such unstamped or insufficiently stamped instrument is presented to act on such an instrument. At this stage, it is important to keep in mind that decision in *SMS* (supra)came at a time when *SBP* (supra) and *Boghara Polyfab* (supra) continued to hold the field i.e. prior to the insertion of *Section 11(6A)* to the Act. Thus, even at the Section 11 stage, under the law which existed before the 2015 Amendment, the Court had wide powers and could also conduct detailed adjudication. Even though this Court in *SMS Tea(supra)* succinctly recognized the doctrine of separability in the context of *Registration Act, 1908*, it held that strict and mandatory provisions of the *Stamp Act,1899* on non-payment of Stamp duty could not be read harmoniously with the relevant provisions of the *Arbitration Act, 1996.* It was held as under:

"22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act."

67. The judgment in *SMS Tea(supra)* has been upheld in *Naina Thakkar(supra)* and *Black Pearl Hotels v Planet M. Retail Ltd.*[52] (for short "Black Pearl Hotels"). It has also been cited with approval in a recent judgement by 3 judges of this Court in *Dharmaratnakara* (supra). As noted earlier, the Court in *Garware* (supra) also followed *SMS Tea* (supra) which has been cited with approval in *Vidya Drolia* (supra). This legal proposition is doubted by this Court in *NN Global* (supra) and referred to us.

[52] (2017) 4 SCC 498

68. *Section 11(6A)* as we have noted above begins with a non-obstante clause viz. "notwithstanding any judgment, decree or order of any Court" and effectively overrules all judgments which widened the ambit of examination.

69. The first submission before us by Mr. Gagan Sanghi, learned Counsel for the Appellant on this aspect was that the observations of two different threeJudge Bench decisions in *Dharmaratnakara (*supra) and *Black Pearl Hotels*(supra) have not been considered in *NN Global* (supra) which is another three-judge bench and that this seriously calls into question the finding of *NN Global* (supra).

70. It is significant to note here that the above two judgments did not consider the recent *11(6A)* Amendment. *Black Pearl Hotels* (supra) was delivered *pre11(6A)* and hence stands legislatively overruled. In *Dharmaratnakara* (supra), it appears that the amendment to *Section 11(6A)* was not brought to the notice of the Court and the earlier judgment in *Garware* (supra) was not considered. This could also be because the Court considered the order which was passed prior to introduction of *Section 11(6A)*. In *Dharmaratnakara* (supra), the issue before the Court was whether a document executed between parties was a lease deed or an "agreement to lease", and whether arbitration could be invoked under the said document. Even after determination by the Registrar (Judicial) of the Karnataka High Court that the concerned document was a lease deed, the deficit stamp duty was not paid. The Court relied on *SMS Tea(supra),* to hold that the arbitration agreement could not be acted upon, unless stamp duty is paid.

71. From the discussion above, it is clear that *Dharmaratnakara* (supra) does not lay down the correct position in light of the post-2015 amendment regime. Through the Amending Act, *SMS Tea (supra)* stands legislatively overruled.

72. The correct exposition of law after the insertion of *Section 11(6A)* is to be found in *Duro Felguera, S.A. v. Gangavaram Port Ltd*[53] (for short "Duro Felguera") where it was held that, *"(a)fter the (2015) 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*." This has been re-affirmed by a 3-judge bench in *Mayavati Trading Private Limited v. Pradyuat Deb Burman*[54] where it was held as under:

"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 as Section 11(6A) is confined to the 15 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 Duro Felguera, S.A. (supra) – see paras 48 & 59."

73. The following extract from *Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.*[55] is equally pertinent where the Court interpreted *Section 11 (6A)* to conclusively hold that a Section 11 judge cannot conduct a mini-trial at that stage:

"29. The facts of this case remind one of Alice in Wonderland. In Chapter II of Lewis Caroll's classic, after little Alice had gone down the Rabbit hole, she exclaims "Curiouser and curiouser!" and Lewis Caroll states "(she was so much surprised, that for the moment she quite forgot how to speak good English)". This is a case which eminently cries for the truth to come out between

[53] (2017) 9 SCC 729
[54] (2019) 8 SCC 714
[55] (2021) 5 SCC 671

the parties through documentary evidence and cross-examination. Large pieces of the jigsaw puzzle that forms the documentary evidence between the parties in this case remained unfilled. The emails dated 22nd July, 2014 and 25th July, 2014 produced here for the first time as well as certain correspondence between SBPDCL and the Respondent do show that there is some dealing between the Appellant and the Respondent qua a tender floated by SBPDCL, but that is not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause. Given the inconclusive nature of the finding by CFSL together with the signing of the agreement in Haryana by parties whose registered offices are at Bombay and Bihar qua works to be executed in Bihar; given the fact that the Notary who signed the agreement was not authorised to do so and various other conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties. *The prima facie review spoken of in Vidya Drolia (supra) can lead to only one conclusion on the facts of this case - that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same.* For all these reasons, we set aside the impugned judgment of the Delhi High Court in so far as it conclusively finds that there is an Arbitration Agreement between the parties."

[emphasis supplied]

74. At this point, it would suffice to note that the Court in *SMS Tea(supra)* held that an arbitral agreement would be rendered *inadmissible in evidence* if the underlying contract is not stamped. *It did not*, however, state that an unstamped arbitration agreement would be rendered *void* as held in *Garware(supra)* in the later decision. While *SMS Tea*(supra) extended the separability presumption in the context of the *Registration Act, 1908* we will notice below that this presumption can also be extended in the context of *Stamp Act,1899* through harmonious construction.

I. Discussion on *Garware*

75. The facts in *Garware*(supra) were that a sub-contract, for the installation of geo-textile tubes embankment with toe mound at village Pentha in Odisha, was provided by the employer for prevention from coastal erosion. Owing to disputes between parties, the sub-contract was terminated. The Respondent filed a petition under Section 11 which was allowed by the Bombay High Court and sole arbitrator was appointed. On appeal, this Court primarily relied on *SMS Tea*(supra) to hold that the arbitration agreement in an unstamped document cannot be acted upon and hence, an arbitrator could not be appointed until the unstamped agreement in question was impounded. Despite considering the amended *Section 11(6A)* and the *246th LCI Report*(supra) to note that *SBP(supra)* and *Boghara(supra)* have been overruled, the Court held that "*SMS Tea Estates ha(d), in no manner, been touched by the amendment of Section 11(6-A)"* since it was not excluded by either the *246th LCI Report*(supra) or the Statement of Object and Reasons of the 2015 Amendment. It was further held that as per *Section 2(h)* of the *Indian Contract Act1872,* an agreement becomes a contract only if it is enforceable by law and hence, an unstamped document would be unenforceable due to the bar under *Section 35* of the *Stamp Act,1899.* The following paragraph has been doubted by *NN Global(supra):*

"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)."

76. The above proposition of law in *Garware*(supra) appears to be incorrect. As noted earlier, the judgment in *SMS Tea(supra)* stands legislatively overruled as it was delivered in the pre-2015 amendment regime. Even though there is no express mention in the *246th LCI Report*(supra), the non-obstante clause effectively overrules it.

77. Now let us consider *Section 2(g)* and *2(h)* of the *Indian Contract Act,1872* which read as under:

"(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;"

Incorporating the principle in *Garware(supra)* would mean that as per *Section 2(g)* and *(h)* of the *Contract Act, 1872*, an agreement would be rendered *voidab-initio*, if it is not stamped. This would however be contrary to the legislative scheme of the *Stamp Act,1899* as per which non-stamping/insufficient stamping is a curable defect as discussed earlier. Moreover, stamp duty is levied on the instrument and not the transaction.[56]

77.1. In *Gulzari Lal Malwari v Ram Gopal*[57] Lord Williams J while discussing Section 35 of the *Stamp Act, 1899* noted that there is no provision in the *Stamp Act,1899* which renders a document invalid:

"There is a clear distinction to be drawn between invalidity and inadmissibility of documents. Certain statutes and sections render documents invalid if they are not stamped. *No section of the Indian Stamp Act has this effect but an instance of a document being rendered invalid by the omission of stamps is contained in the English Stamp Act, s. 93*, which provides:—

A contract for sea insurance (other than such insurance as is referred to, in the fifty-fifth section of the Merchant Shipping Act, Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance"

[emphasis supplied]

77.2. Moreover, the language of *Section 11(6A)* confines the scope of enquiry to only "existence." and not even whether a contract is null and void, as recommended by the *246th LCI Report*(supra). The question on validity and existence can be gone into by the arbitrator under *Section 16* of the *Arbitration Act,1996* and not by the Court under *Section 11* of the *Arbitration Act, 1996.*

J. Interplay between the *Stamp Act 1899, Contract Act 1872* and the *Arbitration Act,1996*

i) Arbitration Act,1996 is a special legislation

78. In order to understand the interplay between the three Acts, reference to the relevant provisions is necessary.

i) *Stamp Act,1899:*

The residuary entry in *Article 5(c)* of *Schedule I* of the *Indian Stamp Act,1899* with the title "Agreements" as noted earlier, states *"if not otherwise provided for"* which, as held by us, brings under its ambit even an Arbitration Agreement.

Now, Instrument is defined under *Section 2(14)* as under:

"(14) "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or record." *Section 17* provides for the timing of stamping:

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[56] Board of Revenue v N. Narasimhan AIR 1961 Mad 504; A. Bapiraju v District Registrar AIR 1968 AP 142
[57] AIR 1937 Cal 765

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

"Execution" is defined in *Section 2(12)*:

"Executed" or "Execution" used with reference to instruments, mean "signed" and "signature"

ii) *Indian Contract Act,1872:*

An agreement under the *Indian Contract Act,1872* is defined in *Section 2(e)* as under:

"Every promise and every set of promises, forming the consideration for each other, is an agreement".

Sections 2(g), 2(h) and 2(j) and Section 10 of the *Indian Contract Act,1872* state:

"(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;"

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable

(10) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

iii) *Arbitration Act,1996:*

Section 2(b) provides as under:

"(b) arbitration agreement" means an agreement referred to in section 7"

Let us now consider *Section 7* of the *Arbitration Act, 1996* which specifically defines Arbitration agreement:

"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 [any other electronic means] other means of telecommunication 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."

[emphasis supplied]

78.1. The following conclusions can be drawn from a consolidated reading of the above provisions in the three enactments:

i) There are no specific requirements in *Section 7* of the *Arbitration Act,1996* or any other provision in the *Arbitration Act,1996* as a whole, which provide for necessary stamping for validity of an arbitration agreement or elaborate generally on the same.

ii) Even though *Section 10* of *the Indian Contract Act,1872* recognises oral agreements, a written agreement is *sine-qua-non* for a valid arbitration agreement.

iii) "Signing" is just an example of one of the conditions that may satisfy the form of an arbitration agreement. Thus, the mandatory requirement of a signature is ruled out for an arbitration agreement in *Section 7* of the *Arbitration Act,1996.* Since *Section 7(2)*(*c)* of the *Arbitration Act, 1996* recognises even exchange of claim and defence as written arbitration agreements, there is no signing requirement. Even if a written arbitration agreement is not signed, the parties can still be bound to an arbitration agreement[58]. However, *Section 17* of the *Stamp Act, 1899* provides for the timing of stamping i.e. before or at the time of execution and the term "execution" is defined in the Stamp Act,1899 to mean "signature"

iv) Even though arbitral "awards" are liable to stamp duty under *Item 12* of the *Stamp Act, 1899* and are specifically mentioned in *Schedule I* ; the arbitration agreement for the purpose of stamp duty, gets covered only under the residuary entry viz *"if not otherwise provided for"* in Article 5(c). *The Stamp Act,1899* does not *specifically* refer to an arbitration agreement.

v) As per *Section 7* of the *Arbitration Act, 1996*, Arbitration Agreement can even be non-contractual.

vi) *Section 7(4)(c)* of *Arbitration Act,1996* envisages that the scope of arbitration is not limited to the dispute initially referred to arbitration, but also encompasses any disputes that are included in the pleadings of the parties i.e. statement of claim and defence.

78.2 *The Appointment Of Arbitrators By The Chief Justice Of India Scheme, 1996* provides *inter alia* for the original or certified copy of the "*arbitration agreement"* for a *Section 11(6)* application. I completely agree with the opinion of my Learned Brother, Justice K.M. Joseph that an arbitration agreement has to comply with the indispensable requirements under the *Contract Act,1872* such as competency to contract and presence of sound mind. However, when it comes to "formal" validity which could include requirements of signature, stamps, seals; I'm unable to concur that the evidentiary bar under Section 35 Panchamy Pack, 2004 13 SCC 510; Also see, David St. John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration*(24th Edition); P. 49 of the *Stamp Act,1899* should be juxtaposed with *Section 2(g)* and *(2h)* of the *Contract Act,1872* to make the agreement "void". For example, as per *Section 10* of the *Contract Act,1872,* even oral agreements are valid but as per the "form" of arbitration agreement provided in Section 7 of *Arbitration Act,1996* , it has to necessarily be in writing. Another point worth noting is that if an arbitration agreement can be for example, even non-contractual and does not necessarily require signature, how far the general provisions of *Stamp Act,1899* and the *Contract Act,1872* can apply to prove "formal" validity of an arbitration agreement produced under Section 11(6) of the Arbitration Act, 1996? *Section 2(h)* of the *Contract Act,1872* states that an agreement enforceable by law is a contract but a plain reading of *Section 7* of the *Arbitration Act,1996* may also prove that an "arbitration agreement" can be non-contractual. This is not to say that the provisions of the *Contract Act,1872* or *Stamp Act,1899* would not apply. As rightly held in *Vidya Drolia*(supra) and noted by my Learned Brother Justice K.M. Joseph, pre-conditions to formation of contract under the *Contract Act,1872* must be met which includes free consent of the parties, absence of fraud and misrepresentation etc. However, in my view, in this reference, we are concerned with a formal requirement. The point being that when a special law provides for the specific

[58] Chennai Container Terminal Pvt Ltd v. Union of India, 2007 3 Arb LR 218 (Mad), Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir 1960), Travancore Devaswom Board v.

requirements for the "formal" validity of an arbitration agreement, it cannot be rendered void by a general law. An Arbitration agreement has special attributes[59] and is not a conventional agreement in that sense. Moreover, none of the provisions of the *Stamp Act,1899* would lead us to the conclusion that an arbitration agreement would be invalid/void-ab-initio when it is not stamped. Thus, the conclusion in *Garware(supra*) that an unstamped agreement would be rendered void is *not only* inconsistent with *Section 7* of the *Arbitration Act,1996* but also the *Stamp Act,1899* as per which a document can at most, be rendered inadmissible in evidence.

78.3 In the context of *Arbitration Act,1996* being a Special law, CR Datta's treatise titled *Law Relating to Commercial & Domestic Arbitration*[60] notes:

"The Act of 1996 is a **special Act** and a Central Act which provides that this Act will prevail over any other law so far as the matters governed by this Act are concerned. The Authority of the Law Courts has been curtailed. The Courts cannot intervene in any manner dealt with by Part I of this Act unless specifically empowered to do so. A judicial authority may intervene or exercise its powers to the extent specified in Sections 8, 9, 11, 13, 14, 16, 17, 27, 34, 36, 37, 42, 43, 45, 50, 54, 58, 59, 70, 74, 77, 81 and 82 of the Act. See Union of India v Popular Construction Co. 2001 8 SCC 470, United India Insurance Company v Kumar Texturisers AIR 1999 Bom 118) Section 5 restrains the Courts from interfering with the process of arbitration except in the manner provided in the 1996. CDC Financial Services (Mauritius) Ltd v BPI Communications Ltd. 2005 (Supp.) Arb LR 558(SC)"

[Emphasis supplied]

78.4 At the cost of repetition, let us now refer to *Section 5* of the *Arbitration Act, 1996* to understand the special nature of the Act. As noted above, *Arbitration Act,1996* is a special legislation and *Section 5* begins with a non-obstante clause which overrides powers of judicial authorities acting under any other law other than the *Arbitration Act,1996.* As argued by the learned Counsel for the Intervenor, Debesh Panda, the special nature of the Act is also established from the non-obstante clause in *Section 5* of the *Arbitration Act,1996*. On the Arbitration Act being a self-contained code, Justice Indu Malhotra[61], comments as under:

"The Arbitration and Conciliation Act, 1996 is a self-contained code governing the law relating to Arbitration, including Section 5 which gives it an overriding effect over statutes. Once it is held that the 1996 Act is a self-contained code and is exhaustive, it carries with it the negative import that only such acts which are permissible in the statute may be done, and none others."

78.5 The use of the expression "so provided" in *Section 5*, disregards all forms of intervention except that, which is specified in *Part I*. Such intention is apparent from the language of the non-obstante clause. As noted earlier, this provision is yet another instance where Parliament went a step beyond the language employed in the *UNCITRAL Model Law of 1985.*

78.6 The doctrine of *generalia specialibus non derogant* i.e. general law will yield to the special law is well-established in Indian jurisprudence. In the concurring opinion of Chandrachud DY J. (as he then was) in *Ayyasamy*(supra) on *Section 8* of the *Arbitration Act,1996,* it was noted:

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[59] O.P. Malhotra and Indu Malhotra, *The Law and Practice of Arbitration and Conciliation*, Lexis Nexis,2nd Edition; P. 270

[60] CR Datta, *Law Relating to Commercial and Domestic Arbitration(Along with ADR)* P. 98;
Union of India v Popular Construction Co 2001 (8) SCC 470; United India Insurance Co. Ltd. V Kumar Texturisers AIR 1999 Bom 118

[61] Justice Indu Malhotra, *Commentary on the Law of Arbitration*, Vol. I, 4th Ed., P. 248

"44. ….Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. *The general law should yield to the special law - generalia specialibus non derogant.* In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievances and of course unnecessarily increase the pendency in the court." 78.7 Having noted that the *Arbitration Act,1996* is a special legislation, and that general law should yield to special law, let us now examine the principle of harmonious construction for the purpose of this reference.

ii) Harmonious Construction

79. It would be apposite to refer to the application of principle of harmonious construction as explained by Kasliwal, J. while expressing his partial dissent in *St. Stephen's College* v. *University of Delhi*[62] :

"140. … The golden rule of interpretation is that words should be read in the ordinary, natural and grammatical meaning and the principle of harmonious construction merely applies the rule that where there is a general provision of law dealing with a subject, and a special provision dealing with the same subject, the special prevails over the general. If it is not constructed in that way the result would be that the special provision would be wholly defeated. The House of Lords observed in *Warburton* v. *Loveland* [(1831) 2 Dow & Cl 480 : 6 ER 806 : (1824-34) All ER Rep 589 (HL)] as under: (ER p. 814)

'No rule of construction can require that, when the words of one part of a statute convey a clear meaning … it shall be necessary to introduce another part of the statute which speaks with less perspicuity, and of which the words may be capable of such construction, as by possibility to diminish the efficacy of the [first part][63]*.'*

[emphasis supplied]

79.1. On a harmonious reading of the inconsistencies in the provisions of the three different Acts quoted earlier, we find that the general law must yield to the special law in the sense, that an arbitration agreement cannot be rendered void on insufficient stamping by a general law, especially when none of the provisions of the *Arbitration Act,1996* which is a special Act provide for stamping. The requirement for the "formal" validity of an arbitration agreement under *Section 7* of the *Arbitration Act,1996* would take precedence, considering the special nature of the Act and the principle of minimal judicial intervention. Applying the rule of construction that in cases of conflict between a specific law and a general law, the specific law prevails and the general law like the *Contract Act,1872* applies only to such cases which are not covered by the special law; I therefore, hold that Section 2(e), 2(g) , 2(h) of the *Contract Act,1872* cannot override Section *7* contained in the special law i.e. the *Arbitration Act,1996* when it comes to formal validity.

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[62] (1992) 1 SCC 558

[63] *Anandji Haridas and Co. (P) Ltd.* v. *S.P. Kasture* [AIR 1968 SC 565 : (1968) 1 SCR 661], *Patna Improvement Trust* v. *Lakshmi Devi* [AIR 1963 SC 1077 : 1963 Supp (2) SCR 812] , *Ethiopian Airlines* v. *Ganesh Narain Saboo* [(2011) 8 SCC 539 : (2011) 4 SCC (Civ) 217] , *Usmanbhai Dawoodbhai Memon* v. *State of Gujarat* [(1988) 2 SCC 271 : 1988 SCC (Cri) 318] , *South India Corpn. (P) Ltd.* v. *Board of Revenue* [AIR 1964 SC 207 : (1964) 4 SCR 280] , *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth* [(1984) 4 SCC 27]

79.2. Moreover, when the words of the statute in *Section 11* of the *Arbitration Act ,1996* do not mention *"validity"* or even *"inoperable and incapable of being performed"* as mentioned in *Section 45* of the *Arbitration Act,1996* or *"prima facie no valid arbitration agreement"* in *Section 8* of the *Arbitration Act, 1996*, it must be understood that the general words in a different statute such as the *Contract Act, 1872* cannot override the specific words used in the special law. That is to say, that an arbitration agreement cannot be rendered "*void"* on insufficient stamping by a Section 11 judge when the scope of examination is only limited to the "existence" of the arbitration agreement and not *"validity"*.

79.3. Coming back to the evidentiary bar under *Section 35* of the *Stamp Act,1899* it is important to understand that since the scope of a Section 11 judge is limited, the court cannot receive evidence in such cases. Before the 2015 Amendment to the *Arbitration Act,1996*, as per the position laid down in *SBP(supra),* the Chief Justice had wide powers to receive evidence, including affidavits, and get evidence recorded at the stage of appointment of arbitrator. Under the amended Section 11, as noted before, the scope is "confined" to the examination of the "existence" of the arbitration agreement. Thus, post-amendment, it can most certainly not admit evidence. A Section 11 Court is "not an authority to receive evidence" as provided in *Section 35* of the *Stamp Act,1899*. Moreover, it is an undisputed position that *Section 35* of the *Arbitration Act,1996* does not preclude an arbitrator to impound or admit evidence. It states "any person having by law or consent of parties, authority to receive evidence." Thus, the statutory bar under *Section 35* of the *Stamp Act,1899* would not apply when a document is produced at the stage of a Section 11 proceeding of the *Arbitration Act,1996.*

79.4. It is essential to interpret the special law in a way that gives effect to its specific provisions, while also ensuring that it is consistent with the general law to the extent possible. Impounding at the stage of *Section 11* would stall arbitral proceedings right at the outset because of the statutory bar under *Section 35* of the *Stamp Act, 1899*. One way to harmonise *Section 35 of Stamp Act,1899* and *Section 11* of the *Arbitration Act,1996* is for the Section 11 judge to defer necessary stamping and impounding to the arbitrator/collector, as applicable. A plain reading of *Section 35* of the *Stamp Act,1899* makes it clear that it does not preclude an Arbitrator or Collector to impound the unstamped/insufficiently stamped document.

79.5. In this context, even if we are to assume that the *Stamp Act,1899* is a substantive law, the view taken by us is not intended to undermine the *Stamp Act,1899* in any substantial way. This is because the primary objective being revenue generation, could still be achieved even if the collection of stamp duty is deferred to the arbitrator and not at the stage of a judge referring the matter for arbitration. Additionally, if such a contention is raised before the referring judge, she/he can also caution the arbitrator on the aspect of no/deficient stamp duty on the concerned instrument. Such a course will also protect the interest of the revenue and the substantive law.

K. Implication of changing nature of transaction and the advent of the technology

80. As we are proceeding on the basis that an arbitration agreement is liable to stamp duty, this Court cannot also be oblivious of the technological advancements as commercial transactions are going beyond pen and paper agreements. The 2015 amendment to *Section 7* of the *Arbitration Act,1996* which defines arbitration agreement recognizes electronic communication, bringing the process in conformity with Article 7 of the UNCITRAL Model law which was amended in 2006. It modernized and broadened the form of arbitration agreement to conform with international contract practices. The exchange of letters, telex, telegrams or other means of telecommunication *including*

communication through electronic means which provide a record of the agreement are now recognized as valid arbitration agreement.

80.1.Dr. Peter Binder in *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*[64] notes:

"The wording in "exchange of letters,telex, telegrams or other means of telecommunication" indicates Model law's flexibility towards *future means of communication by being geared solely at the "record of the agreement" rather than the strict direct signature of the agreement.* Incidentally, Article 5(Section III) of the Montreal Protocol No. 4 to the Warsaw Convention which concerns the formal requirements of an air waybill, provided the impetus for the wording "Any other means which would preserve a record of the carriage to be performed may, with the consent of the consigner, be substituted for the delivery of an air waybill." The Protocol specifically had electronic means of communication in mind, as the aviation industry was among the first to use this technology in business."

[emphasis supplied]

80.2 What logically follows from the above is that the traditional laws must not render these new forms of agreements unenforceable on insufficient stamping. Recently, the Stockholding Corporation of India Ltd. has been authorised to provide e-stamp services, which allows for the payment of stamp duties for some Indian States. The *Indian Stamp Act(Collection of Stamp-Duty Through Stock Exchanges, Clearing Corporations and Depositories) Rules 2019* as amended through the *Finance Act,2021* has been brought about to build a pan-India securities market and to enhance revenue. It amended the definition of "execution" to include signature even in electronic form.

80.3. However, the definition of "duly stamped" in *Section 2(11*) of the *Stamp Act,1899* remains unchanged:

"'Duly Stamped' 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 the law for time being in force."

[emphasis supplied]

80.4. The penalty for an instrument which is not "*duly stamped"* is provided in *Section 62* of the *Stamp Act,1899.* In this discussion, we must be conscious that the *Stamp Act,1899* was enacted nearly 125 years ago and the lawmakers could not have contemplated the march of law and the myriad issues which would crop up through the advent of technology and also the new enactments such as the *Arbitration Act,1996*. The legal framework pertaining to e-contracts is still at a nascent stage in India.

80.5. Richard Susskind in his book[65], *"The End of Lawyers? Rethinking the Nature of Legal Services,"* suggests that new technologies and processes, such as artificial intelligence and blockchain, may be able to simplify and streamline the arbitration process in the future. We now have the phenomenon of smart contracts and metaverse in the sphere of commercial transactions where technology and artificial intelligence are integrated. The developments in the legal framework must attune to such developing trends in technology and be conscious of their implications today and for the future.

80.6. Noticing the emerging trends, the Chief Justice of India in a recent conference observed[66] that legal professionals across the globe are recommending smart contract

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[64] Supra at note 40; P. 67-68

[65] Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, Oxford University Press, 2010

[66] Dr D.Y. Chandrachud, International Conference: Arbitration in the Era of Globalization (4th Edn., Dubai, 19-3-2022).

arbitration. Describing smart contracts and how arbitration can be used to resolve disputes, Chief Justice DY Chandrachud commented:

"Technology and artificial intelligence are integrated into commercial transactions. One such example of integration of technology and contracts is a smart contract, where the terms and conditions of the contract are encoded. A breach in the terms of the contract would automatically enforce the contract.

80.7. Modern arbitration law focuses on substance over form[67]. Learned Counsel, Mr. Ramakanth Reddy appearing for Respondent No. 1, referred to a judgment delivered in 2008 in *Great Offshore Ltd. v. Iranian Offshore Engineering and Construction Company*[68] where the Court speaking through Dalveer Bhandari J. held as under:

"59. The court has to translate the legislative intention especially when viewed in light of one of the Act's "main objectives": "to minimise the supervisory role of Courts in the arbitral process. [See: Statements of Objects and Reasons of Section 4(v] of the Act].*If this Court adds a number of extra requirements such as stamps, seals and originals, we would be enhancing our role, not minimising it.* Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties' intention to arbitrate would be foiled by formality.Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties' intention to arbitrate is upheld. Adding technicalities disturbs the parties' "autonomy of the will" (l' autonomie de la volonti), i.e., their wishes. [For a general discussion on this doctrine see Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Street & Maxwell, London, 1986 at pages 4 and 53].

60. *Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want - an efficient, effective and potentially cheap resolution of their dispute.* The autonomie de la volonti doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. [See Preamble to the Act]. *The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts directions should be to achieve the legislative intention."*

[emphasis supplied]

80.8. Relying on the above case, in *Trimex International FZE vs Vedanta Aluminum Limited, India*[69], this Court held that the implementation of a contract cannot be affected merely because offer and acceptance was made via email.

80.9. In the context of the evolving law, it is important to observe that although an arbitration agreement is liable to stamp duty under the residuary entry, the technicality of stamping places hurdles in ensuring efficiency and efficacy in arbitration proceedings. An arbitration agreement does not even mandatorily require signature for it to be valid as per *Section 7* of the *Arbitration Act,1996*. The *Stamp Act,1899* is rooted in the past and does not take into account the changing nature of transactions and enactments such as the *Arbitration Act,1996*. This is an aspect which would require the attention of the legislature.

J. Doctrine of Separability

81. It appears that the Court in *Garware(supra)* rejected the concept of separability when it held:

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[67] Supra at Note 59; P. 274
[68] (2008) 14 SCC 240
[69] 2010 (1) SCALE 574

"15. .....it is difficult to accede to the argument made by the learned counsel on behalf of the respondent that Section 16 makes it clear that an arbitration agreement has an independent existence of its own, and must be applied while deciding an application under Section 11 of the 1996 Act."

81.1. Historically, an arbitration agreement was treated as an accessory to the main contract[70]. Even if the main contract was found to be invalid or unenforceable, the arbitration agreement contained therein was also considered void[71]. This diminished the effectiveness of arbitration as a dispute resolution mechanism since it made the enforceability of arbitration agreements *dependent* on the validity of the underlying contract. Arbitration clauses are uniformly regarded in almost every jurisdiction as separate from and not "an integral part" of the parties' underlying contract. It is regarded as a general principle reflected in International Arbitration Conventions, national arbitration legislations, judicial decisions, institutional arbitration rules and arbitral awards[72]. The early statutory recognition of the separability doctrine has also been recognized in United States with the separability presumption being a matter of substantive federal arbitration law.[73] Even in English law, the principle of separability stands codified under *Section 7* of the *English Arbitration Act, 1996*. It has been identified as one of the cornerstones of arbitration in multiple jurisdictions.

81.2 The argument advanced by the learned Counsel, Gagan Sanghi for the Appellants that the doctrine of separability is a legal fiction, should not be accepted in light of the well-established jurisprudence in India as this doctrine has been consistently upheld by this Court[74]. Moreover, it stands codified in *Section 16(1)* of the *Arbitration Act,1996* which reads as under:

"16(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, –

(i) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(ii) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

81.3 This Court in *NN Global(supra)* discussed judgments in US, UK and France, noting the importance of this principle in modern and contemporary arbitral jurisprudence:

"4. It is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. This is based on the premise that when parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements viz. (i) the substantive contract which contains the rights and obligations of the parties arising from the commercial transaction; and, (ii) the arbitration agreement which contains the binding obligation of the parties to resolve their disputes through the mode of arbitration."

81.4 My learned Brother, Justice K.M. Joseph in the majority opinion notes that the entire basis of the reference stands removed since we are proceeding on the basis that even a

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[70] Gary B. Born, International Commercial Arbitration (3rd ed., Kluwer Law International 2014) P. 380
[71] Union of India v Kishorilal Gupta & Bros (1959) 1 SCR 493
[72] Supra at note 70; Page 379-380.
[73] Buckeye Check Cashing Inc. v. Cardegna, 2006 SCC OnLine US SC 14
[74] National Agricultural Co-operative Marketing federation India Ltd. v Gains Trading Limited (2007) 5 SCC 692; Naihati Jute Mills Ltd. v Khayaliram Jagannath AIR 1968 SC 522; P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corporation & Ors (2009) 2 SCC 494

standalone arbitration agreement is liable to stamp duty. His opinion that the objective behind the principle of treating an arbitration agreement as a separate agreement is to create a mechanism, wherein, the arbitral agreement survives the Contract so that the disputes falling within the Arbitration Agreement can be resolved, is correct. But I'm unable to agree with the proposition that is canvassed that since an arbitration agreement is liable to stamp duty, the separability presumption doesn't take us further in this case. Let me set out the reason for my disinclination to accept such proposition.

81.5 As earlier stated in this opinion, the separability doctrine protects the arbitration clause even if the validity of the main contract is attacked. Therefore, if an arbitration agreement remains unaffected even if the main contract is null/void on issues of fraud or misrepresentation, it should not logically render an arbitration agreement, *void* on a technicality/formality, like stamping. The underlying rationale behind the principle of separability would then be made nugatory. The idea that an arbitration agreement is separate and independent with its own validity requirements, is to ensure that there is no hindrance to the enforceability of an arbitration agreement. This doctrine is also important to reduce circumstances in which the arbitral process may be halted/delayed. In *SMS Tea(supra)*, it was noted that the doctrine of separability can extend to an unregistered document, but not to an unstamped document as the bar under Section 35 is absolute. As I have noted above, the bar under Section 35 can be cured and the stamp duty can be collected at a later stage. Thus, *NN Global(supra)* rightly overruled *SMS Tea(supra)* on this aspect. Historically, the separability doctrine was introduced in order to protect the arbitration clause which, in turn, enabled arbitrators to adjudicate on the validity of the main contract[75]. Even though the doctrine of separability and *Kompetenz Kompetenz* are distinct as noted in *NN Global(supra),* reconciling the two principles would ensure that an arbitrator can rule on the objections of validity, existence as well as necessary stamping, if required. The doctrine of *Kompetenz Kompetenz* is discussed in greater detail in the next section.

82.Turning to the decision in *Garware(supra)*, it appears that the Court in *Garware(supra)* rejected the concept of severability only by relying on *SBP(Supra)* when it held:

"15. In view of the law laid down by seven-Judge Bench,[*SBP(Supra)]* it is difficult to accede to the argument made by the learned counsel on behalf of the respondent that Section 16 makes it clear that an arbitration agreement has an independent existence of its own, and must be applied while deciding an application under Section 11 of the 1996 Act."

83. In *SBP(Supra)*,as we have noticed earlier in this opinion, stood legislatively overruled as a judge at the Section 11 stage could conduct detailed adjudication and make a conclusive determination at the pre-referral stage without deferring it to the arbitrator. As highlighted above, *Section 16* and *Section 11* of the *Arbitration Act,1996* indicates that there is an overlap when it comes to the word "existence". As Section 16 specifically deals with both existence and validity whereas Section 11 only deals with existence, the former should be given more weight. As such, the doctrine of *Kompetenz Kompetenz* comes into play as the arbitrator can decide on the validity of an agreement and the referral judge needs to confine his scrutiny to the existence of the arbitration agreement. However, in *SBP(supra*) it was generally held that the referral judge should decide on all aspects. If such a view is to be applied for answering the present reference, a mini-trial will have to be conducted by the referral judge. The question to be asked here is should we then push

[75] HM Holtzmann and JE Neuhaus,*A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation The Hague 1989) 485

the Section 11 judge to deal with so many things that he/she left in a situation like Little Alice in the play Alice in Wonderland as described in *Praveen Electricals(supra)*?

84. In the referral order in *NN Global(supra),* the paragraph 29 in Garware(supra) was doubted. In the *Garware(supra)* decision, this Court relied on *United India Insurance Co. ltd. v. Hyundai Engg. & Construction Co. Ltd.* [76]*(for short "Hyundai Engg.).* The paragraph 29 is extracted below for the discussion to be followed thereafter:

"29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607: (2019) 2 SCC (Civ) 530] 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 sub-contract 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 [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] . as followed by us."

84.1. In *Hyundai(supra)*, the issue of stamping was not at all a matter of consideration and the Court decided on the arbitrability of the dispute and whether it was an excepted matter and in that process, held that the arbitration agreement would not "exist-in-law", as the arbitration clause was contingent on whether the insurer accepted liability. In these circumstances, the application of the proposition in *Hyundai Engg(supra)* to deal with the issue of unstamped document in *Garware(supra)* appears to be an incorrect approach. This is because in *Garware(supra)*, the Court found that the issue of stamping would go into the existence of the arbitration agreement *in law.* This was done by erroneously importing the principle enunciated in *Hyundai(supra)* and therefore the earlier *Hyundai(supra)* which had nothing to do with the stamping of the document, should have been distinguished. At this point, we may also notice the argument of the Learned Amicus who argued that the Court in *Hyundai Engg(supra)* relied on *Oriental Insurance Co. Ltd. v. Narbheram Power and Steel (P) Ltd*[77] which never had the occasion to interpret Section 11(6A). For these reasons, I am of the considered view that applying the *Hyundai(supra)* principle to *Garware(supra)* is not acceptable. Consequently, the finding of the Court in Para 147.1 in *Vidya Drolia(supra)* placing reliance on the above paragraph viz. Para 29 in *Garware(supra)* also appears to be incorrect. The proposition of law in *NN Global(supra)* is therefore found to be correct.

L. Kompetenz Kompetenz and the issue of Judicial Logjam in India

85. Legal scholars have noted that the principle of *Kompetenz Komptenz* has been adopted in various forms in different countries[7879]. *Article 16* of the UNCITRAL Model Law adopted the principle of *Kompetenz Kompetenz* providing that an arbitral tribunal has the jurisdiction to investigate and rule on its own jurisdiction. In a recent decision of the US Supreme Court in *Henry Schein, Inc. v Archer and White Sales, Inc*[79], it was held that where an arbitration clause delegates the decision of arbitrability to arbitrators, Courts

[76] (2018) 7 SCC 607
[77] (2018) 6 SCC 534
[78] John J. Barcello III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective,* Vanderbilt Journal of Transnational Law, Vol. 36, No.4, October 2003
[79] 2019 SCCOnline US SC 1

should have no say even if they consider the argument in favour as "wholly groundless". Justice Brett Kavanaugh opined:

"Just as a Court may not decide a merits question that the parties have delegated to an arbitrator, a Court may not decide an arbitrability question that the parties have delegated to an arbitrator."

Proceeding further, *Section 16(1)* of the *Arbitration Act,1996* reads 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."

85.1. It is clear from *Section 16(1*) of *Arbitration Act,1996* which uses the word "including" that an arbitral tribunal can not only rule on its own jurisdiction but also "any" objections on existence or validity. This Court in *Weatherford Oiltool Middle East Limited vs Baker Hughes Singapore PTE*[80] where the issue concerned the validity of an unstamped document, noted as under:

"8. The bare reading of the afore-stated provision makes it clear that arbitral tribunal is competent not only to rule on its own jurisdiction but to rule on the issue of the existence or validity of the arbitration agreement. It further clarifies that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

85.2. Discussing the *Kompetenz Kompetenz* principles in *NN Global(supra)*, it was noted:

"4.3. The doctrine of kompetenz – kompetenz implies that the arbitral tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the 8 Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by subsection (6) of Section 16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. *The doctrine of kompetenz – kompetenz has evolved to minimize judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the arbitral tribunal."*

[emphasis supplied]

85.3. Justice Thakker emphasized this in his dissenting opinion in *SBP(supra)* where it was held that the legislature intended to allow the tribunal to rule on its own jurisdiction and the function of the Chief Justice under *Section 11(6)* was only to "appoint an arbitrator without wasting any time."

85.4. At this point we may benefit by referring to George A. Bermann whose article titled *"Role of Courts at the threshold of Arbitration"*[81] would have some relevance in this discussion:

"Positions at the polar ends of the spectrum of judicial involvement are not especially attractive. A system that permits plenary judicial enquiries into all aspects of enforceability of arbitration

[80] 2022 SCC OnLine 1464

[81] George A. Bermann, *The Role of National Courts at the Threshold of Arbitration,* 28 American Review of International Arbitration 291 (2017) Available at https://scholarship.law.columbia.edu/faculty_scholarship/3012

agreements prior to arbitration risks inviting costs, delay and judicial involvement in a very big way, contrary to arbitration's basis premises. On the other hand, a system that treats access to a court for these purposes as wholly offlimits, irrespective of the seriousness of the challenge, risks exacting too great a price in terms of arbitral legitimacy. Efficacy may be achievable through less drastic means."

85.5. Specific to the Indian context, while discussing *Kompetenz Kompetenz*, the overburdened judiciary and huge pendency of cases in our Courts cannot also be overlooked. The intent behind preferring arbitration would stand defeated, if the Court is expected to deal not only with the issue of existence but also validity of the agreement, at the stage of appointment of the arbitrator. In this context, the following observations were made in the *246th LCI report*(supra) noted:

"22. Judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration. Two reasons can be attributed to such delays. First, the judicial system is over-burdened with work and is not sufficiently efficient to dispose cases, especially commercial cases, with the speed and dispatch that is required. *Second, the bar for judicial intervention (despite the existence of section 5 of the Act) has been consistently set at a low threshold by the Indian judiciary, which translates into many more admissions of cases in Court which arise out of or are related to the Act."*

[emphasis supplied]

85.6. Considering the large pendency of cases as noted by the *246th LCI Report*(supra), it is essential that *Section 16* of the *Arbitration Act,1996* is given full play. Discussing the history of arbitration law in India, the *246th LCI Report*(supra) quoted the observations of Justice D.A. Desai in *Guru Nanak Foundation v Ratan Singh and Sons*[82] where commenting on the working of the *Arbitration Act, 1940*, it was noted that the challenge to arbitral proceedings in Courts have made "lawyers laugh and legal philosophers weep". The situation is not different today as was recently observed by this Court in *M/s Shree Vishnu Constructions v. The Engineer in Chief Military Engineering Service and others*[83] where it was noted that several applications under section 11 were decided and disposed of after a period of four years which defeated the very purpose of the amended *Arbitration Act,1996*. Such observation was made on a detailed report/statement on the number of pending *section 11* applications before the Telangana High Court. This Court noticed that even an application filed in the year 2006 was still pending. The High Court Chief Justices across the country were accordingly requested to ensure that applications under section 11, be decided within a period of six months.

85.7 This Court in the recent judgment in *Intercontinental Hotels Group (India) Private Ltd. v. Waterline Hotels Pvt. Ltd*[84] on the issue of insufficiently /incorrectly stamped documents, proceeded to appoint the arbitrator under *Section 11(6),* considering the time-sensitivity while dealing with arbitration. It left open the issue of stamping to be decided at a later stage.

85.8 Importantly, *Section 11(13)* of the *Arbitration Act,1996* provides that appointment of Arbitrators should be made within 60 days and such a provision makes it amply clear that substantive adjudication cannot be done by Courts, at the pre-referral stage. This was canvassed in *Garware(supra)* but the Court instead set a deadline for 45 days for adjudication and 15 days for appointment of arbitrator with the following observation:

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[82] (1981) 4 SCC 634
[83] SLP(C) No. 5306/2022 dated 1.4.2022
[84] 2022 SCC OnLine SC 83

"37. One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time frame provided by Section 29A of the 1996 Act." 85.9 The above enunciation in *Garware(supra)* as is apparent goes against the legislative mandate which had prescribed the deadline of 60 days for appointment of arbitrators under *Section 11(13)* of the *Arbitration Act, 1996.* The criticism that a deadline of 45 days would be impractical, cannot also be brushed aside lightly.

N. Discussion on *Vidya Drolia*

86. This case was concerned with the arbitrability of landlord-tenant disputes and the forum before which the issue of arbitrability must first be raised. The paragraph 146 as quoted below may require a relook in the context of the issue under consideration.

"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 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."

86.1. As can be seen, the Court equated existence and validity and it was held that a contract only exists if it is valid. And it is valid only if it is enforceable. As far as the issue in the present case is concerned, the authors' Comments in *Russell on Arbitration*[85](24th Edition) in the context of English law provide useful pointers in this context:

"**Existence and Validity of the arbitration agreement.** .. the Court draws a distinction between existence of the arbitration agreement, which is likely to be a matter for the Court(unless a stay under the inherent jurisdiction is granted) and its validity, which wherever possible should be left to the arbitrators."

[emphasis in original]

[85] Supra at note 58; Chapter 7, P. 369

86.2. I have already discussed that in the Indian regime, the Arbitrator under Section 16 has the jurisdiction to decide on "existence" and "validity". A plain reading of *Section 11(6A)* would show that the examination by Court is confined only to "existence" and not even "validity". Moreover, in the present reference, we are only concerned with the formal requirement of stamping and not arbitrability. Applying contextual interpretation to render an arbitration agreement void on the formal requirement of stamping would defeat the very purpose of the *Arbitration Act,1996.* A document cannot be rendered invalid or unenforceable especially if the defect is curable under the *Stamp Act,1899* as noted earlier. Moreover, none of the provisions in the *Stamp Act, 1899* have the effect of rendering a document invalid. Thus, we find the position in *Vidya Drolia(supra)* to the extent that it relies on *Garware*(supra) to be incorrect.

O. Conclusion

87. Harking back to Charles Evans Hughes with whose words we began the judgment, let us conclude with the following quote of the same judge reflected in *Prophets By Honor*[86]:

"There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgement. Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity, which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect on public opinion at the time. This is so because what must ultimately sustain the court in public confidence of is the character and independence of the judges."

87.1. The practice of dissent in judicial decision-making process plays a critical role in revealing constitutional commitment to deliberative democracy. Allowing judges to express differing views and engage in a dialogue about the law and its interpretation can potentially lead to a more nuanced and refined understanding of the law, as the Court grapples with competing interpretations and seeks to reconcile them in a principled manner.

87.2. Confronted with a similar situation which is confronting us today where the present opinion is the minority one, Justice Stephen Breyer of the US Supreme Court in his dissenting opinion[87] in a question in the context of *Federal Arbitration Act (FAA)* spoke of interpreting not only the purpose of the Statute but also the likely *consequence*:

"When interpreting a statute, it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation. Otherwise, we risk adopting an interpretation that, even if consistent with text, creates unnecessary complexity and confusion."

87.3. The objective behind the enactment of the *Arbitration Act,1996* was to, *inter alia*, avoid procedural complexity and the delay in litigation before Courts. Impounding and stamping at the Section 11 stage would frustrate the very purpose of the amended *Arbitration Act,1996* as the enforcement of arbitration agreements would be stalled on an issue, which is capable of being resolved at a later stage. To defer stamping to the stage of the arbitrator would in my view achieve the objective of both the *Arbitration Act,1996* and the *Stamp Act,1899*.

87.4. The contours of the jurisdiction of the judge referring matters for arbitration, cannot be permitted to suffer from confusion and ambiguity. As can be seen, the present 5 judge-Bench could not provide clarity on the issue referred to us, on account of the fractured

[86] Alan Barth, *Prophets with Honor*,1974 Ed. P 3-6
[87] Badgerow v. Walters, *596 U.S. 2022*

verdict, leading to legal uncertainty. The constitution of a larger Bench in this Court is certainly not commonplace as the last occasion when 7 judges assembled was in the year 2017. Around 5 matters as I am informed, are already awaiting the attention of 7 judges Bench. In such backdrop, the interplay between the Acts and how its objective is to be achieved in the course of Arbitral proceedings either at the referral stage or thereafter is much too important to be left lingering for a clarificatory verdict by a larger Bench. Therefore, I would appeal to the legislative wing of the State to revisit the Amendments which may be necessary in the *Stamp Act,1899* in its application to the *Arbitration Act,1996.* The State might put into place a convenient mechanism which would efface the inconsistencies in both the *Arbitration Act,1996* and the *Stamp Act,1899.* If we look at the legislative intent of the *Arbitration Act,1996* and what our country is hoping to be as the destination of choice for Arbitration, I'm of the considered opinion that it would be appropriate to interpret the statutory interplay in a constructive manner without defeating the legislative intent and thwarting the speedy referral to arbitration.

88. Following the above discussion, my opinion on the referred issue are as follows:

i) The examination of stamping and impounding need not be done at the threshold by a Court, at the pre-reference stage under *Section 11* of the *Arbitration Act, 1996.*

ii) Non-stamping/insufficient stamping of the substantive contract/instrument would not render the arbitration agreement *nonexistent in law* and *unenforceable/void,* for the purpose of referring a matter for arbitration. *Garware(supra)* wrongly applied the principle in *Hyundai(supra)* to hold that an arbitration agreement would not *exist-in-law* if it is unstamped/insufficiently stamped. An arbitration agreement should not be rendered *void if* it is suffering stamp deficiency which is a curable defect. To this extent, *Garware(supra)* and *Hyundai(supra)* do not set out the correct law.

iii) The decision in *SMS Tea(supra)* stands overruled. Paragraphs 22 and 29 in *Garware (supra)* which were approved in paragraphs 146 and 147 in *Vidya Drolia (supra*) are overruled to that extent.

89. The invaluable assistance rendered by Mr. Gourab Banerjee, learned Senior Counsel as the *Amicus Curiae* deserves a special mention in finalizing this opinion.

C.T. RAVIKUMAR, J.

1. I have had the advantage of reading the erudite opinion of my learned brother Justice K. M. Joseph, for himself and learned brother Justice Aniruddha Bose, and the separate opinion of learned brother Justice Hrishikesh Roy, concurring with the opinion of learned brother Justice Ajay Rastogi, but disagreeing with the opinion of learned brother Justice K.M. Joseph. Regretfully, I record my inability to agree with the opinion of learned brother Justice Ajay Rastogi as also with the concurrent opinion of learned brother Justice Hrishikesh Roy. While fully endorsing the opinion of learned brother Justice K. M. Joseph, to which my learned brother Justice Aniruddha Bose has concurred, I wish to add a concise addendum as under, in respect of some of the issues, of course, only in support of findings returned thereon.

2. The issue(s) under reference, the modification of the referred question and the allied questions cropped up for consideration have been elaborately dealt with and answered in the erudite draft judgment of my learned brother Justice K.M. Joseph and hence, it is absolutely unessential to refer them. While considering the power of the Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 it is to be noted that the position of Section 11(6) before and after the amendment and Section 11(6A), inserted by Act 2 of 2016 with effect from 23.10.2015 have been referred to in all the three opinions. Hence, I do not think it necessary to extract those provisions to avoid the risk of repetition. Certainly, the powers conferred under Section 16 of the Act often referred to as 'Kompetenz-Kompetenz' make it clear that the Arbitral Tribunal is empowered and thus got competence to rule on its own jurisdiction, including on all jurisdictional issues and existence or validity of the arbitration agreement. This provision would have its full-play when appointment of the arbitrator takes place, on consensus, by the parties, in accordance with the terms of the arbitration agreement or by designated arbitration institution, without the intervention of the Court. But then, the provision under Section 11 (6) of the Act applies when the procedures envisaged under the arbitration agreement have not worked and an application is filed for invocation of the power thereunder before the Court for making appointment of the Arbitrator(s). The controversy in regard to the nature of the function to be performed under Section 11 (6) has been set at rest by the Seven-Judge Bench decision in ***SBP & Co. v. Patel Engg. Ltd.***[153] by holding that it is 'judicial'. It continues to be 'judicial' despite the amendment brought to the said section and even after the insertion of Section 11 (6A) in the Act. An application for 'Appointment of Arbitrators' is filed, by one party asserting the existence of an arbitration agreement or arbitration clause in an 'instrument' executed between the parties concerned. Therefore, invariably what is to be decided, in invocation of the said powers, is the asserted factum of existence of arbitration agreement or arbitration clause in the said instrument and invariably, in this regard the party who invoked the said power under Section 11(6), has to produce that very relied on instrument for inspection. The question is whether while passing an order the Court exercising the power under Section 11 (6) receives any evidence, for the limited purpose of ascertaining the truth of the assertion that the document thus produced is an arbitration agreement or an instrument containing arbitration clause. In this regard it is only apposite to refer to the meaning ascribable to the term 'evidence'. As per ***Peter Murphy*** in ***'A Practical Approach to Evidence (Second Edition), 1985***, **'**evidence' may be defined as any 'material' which tends to persuade the Court of the truth or probity of same fact asserted before it. As noted hereinbefore, in such an application under Section 11 (6), invariably the fact to be asserted would be the existence of 'arbitration agreement' and in

[153] (2005) 8 SCC 618

proof thereof the material viz., the document would be produced. I will refer to the relevant provision in the statutory scheme viz., the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, later. Now, when that is received, it is nothing but receiving evidence to that limited purpose for deciding the question whether the 'instrument' produced is one executed between the parties is an arbitration agreement or whether the instrument contained an arbitration clause. Necessarily, if the answer is in the affirmative, an order appointing Arbitrator(s) would be passed and an answer in the negative would be the end of such proceedings. In that view of the matter, it can safely be said that what is to be decided while performing the function under Section 11 (6) is relating a 'jurisdictional aspect' as only on returning a finding that there exists an arbitration agreement or arbitration clause, in the material so produced, that arbitrator(s) would be appointed. The answering of that question, on receiving the 'instrument', is the performance of the function describable as "acting upon" the document thus produced. In other words, as discernible from the statement of law by M.C. Desai, J. in ***Mt. Bittan Bibi & Anr. v. Kuntu Lal & Anr.***[154], (the relevant paragraph 8 extracted in the opinion of learned brother Justice K.M. Joseph), 'acting upon' is not included in the act of admitting an instrument, though it can be acted upon, later, subject to permissibility in law therefor.

3. The cleavage in opinion occurs on the issue as to whether the Court called upon to invoke the power under Section 11 (6) should or could exercise the power coupled with duty under Section 33 of the Indian Stamp Act, 1899, when the document carrying the arbitration agreement or arbitration clause is found unstamped or insufficiently stamped or without going into such matter, should it confine its exercise of power in the matter of appointment of Arbitrator(s) only and refrain itself from proceeding further in view of the mandate under Section 33 of the Indian Stamp Act, 1899. I have already recorded my agreement with the opinion of my learned brother K.M. Joseph that exercise of power coupled with duty under Section 33 of the Stamp Act cannot be accused of judicial interference in contravention to Section 5 of the Act and further that it shall not be confused with examination whether an arbitration agreement or arbitration clause in the said instrument, exists so as to appoint arbitrator in invocation of the power under Section 11(6) of the Act. In that view of the matter, the provisions under Section 11(6A) or 16 of the Act cannot act as a rider for the exercise of the said power under Section 33 of the Stamp Act.

4. In the aforesaid context, it is relevant to refer to Sub-sections (1), (2) and clause (b) of Sub-section 2, of Section 33 of the Indian Stamp Act, 1899. They read thus:-

"33. Examination and impounding of instruments. —

(1) 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.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in 2 [India] when such instrument was executed or first executed: Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (V of 1898);

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[154] ILR [1952] 2 All 984

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

5. I have already found that receiving the very 'instrument' which is carrying the arbitration agreement or containing an arbitration clause from the party who asserts its existence is essentially an act of receiving the evidence, in that limited sense. Therefore, how can the Court, which is having authority and competence to receive evidence, for the purpose of invoking the power under Section 11 (6), abstain from proceeding further in terms of Section 33 if it appears to it that such instrument produced before it, though required to be stamped, is unstamped or is not duly stamped. According to me, in terms of the mandate under Sub-section (2) of Section 33, for that purpose, the Section 11 Judge who received evidence shall 'examine' the instrument so chargeable and so produced 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. Proviso (b) which is extracted hereinbefore, would only permit a Judge of the High Court for delegation of the duty of examining and impounding any such instrument to such officer as the Court may appoint in that behalf. Thus, it only gives discretion to a Judge of the High Court to delegate the duty of examining and impounding any such instrument in the manner mentioned under the said proviso if he chooses not to proceed in the manner provided for impounding the instrument in accordance with the relevant provision, by himself. When that be the provision under Section 33 (1) and (2), a conjoint reading of which obviously makes it mandatory for the Court exercising the power under Section 11 (6) to proceed in terms of the mandate under Section 33 when the circumstances legally invites its invocation. A contra view, according to me, would render Sub-section (2) of Section 33 and proviso (b) redundant and would defeat the very soul of the provisions as relates their application in respect of application filed under Section 11(6) of the Act.

6. The Bar under Section 35 of the Stamp Act on admission of instruments not duly stamped in evidence, as is evident from proviso (a) to it, is not permanent and is curable by following procedures provided thereunder and making an endorsement as provided under Section 42(1) of the Stamp Act. Sub-section (2) of Section 42 makes it clear that every such instrument so endorsed shall thereupon be admissible in evidence and be acted upon and authenticated as it had been duly stamped. The upshot of the discussion is that being unstamped or insufficiently stamped, the agreement would not be available to be 'admitted in evidence' and 'to be acted upon', till it is validated following the procedures prescribed under the provisions of the Stamp Act and till then, it would not exist 'in law'.

7. Another point which I intend to make in addition to the opinion of my learned brother Justice K. M. Joseph, is with respect to the meaning ascribable to the expression 'certified copy' which is permissible to be produced along with the application for appointment of Arbitrator(s) in terms of paragraph 2 (a) of the scheme framed by the Hon'ble the Chief Justice of India, in exercise of power under Section 11(10) of the Act, namely, the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996. Paragraph 2 and subparagraph (a) thereof read thus:-

2. <u>Submission of Request</u>:- The request to the Chief Justice under Sub-section (4) or Subsection (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.

8. In the opinion of my learned brother Justice K. M. Joseph this issue has been elaborately considered from paragraphs 77 to 89. While concurring with the conclusions and findings thereof, I would like to give my own reasons as to why the expression 'certified copy' should be understood with reference to Section 74 and 76 of the Indian Evidence Act, 1872, (hereinafter referred to as 'Evidence Act') and why the said form of secondary evidence is available to be 'acted upon' without formal proof of existence and execution of the original document.

9. Section 62 defines 'primary evidence' thus:-

***62. Primary evidence**. — Primary evidence means the document itself produced for the inspection of the Court. Explanation 1. —Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Explanation 2. – – Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.*

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

10. Section 63 of the Indian Evidence Act defines secondary evidence which reads thus: -

***"63. Secondary evidence.** — Secondary evidence means and includes —*

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it."

11. Thus, the definition 'secondary evidence' means and includes what are mentioned in clauses '1 to 5'. Though, the inclusive definition speaks of different kinds of secondary evidence, such as, mentioned under clauses '1 to 5', a careful scanning of the Evidence Act would reveal that copies which fall under clause (1) of Section 63 alone carry the presumption of genuineness and correctness, by virtue of the provision under Section 79 of the Evidence Act. Section 79 reads thus:-

*"**79. Presumption as to genuineness of certified copies.** — The Court shall presume [to be genuine] every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer [of the Central Government or of a State Government, or by any officer [in the State of Jammu and Kashmir] who is duly authorized thereto by the Central Government]:*

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper."

12. Thus, it can be said that the genuineness and correctness of copies falling under clause 1 of Section 63 shall be presumed under Section 79 of the Evidence Act. The definition of 'shall presume' is defined under Section 4 of the Evidence Act, thus:-

*"**Shall presume**".—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.*

13. Section 79 proceeds upon the maxim '*omnia praesumuntur rite esse acta*, i.e., all acts are presumed to be done rightly and regularly. When the acts of official nature went through the process, the presumption arises in favour of the regular performance.

14. Section 65 of the Evidence Act, in so far as, it is relevant reads thus:-

65. Cases in which secondary evidence relating to documents may be given.—*Secondary evidence may be given of the existence, condition, or contents of a document in the following cases: —*

……

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

15. In terms of the provisions under Section 79 of the Evidence Act a certified copy of a document allegedly carrying an arbitration clause is produced and that document can be received in evidence for the purpose of Section 11 (6) of the Act and by virtue of Section 79 of the Evidence Act, the Court shall presume the genuineness of the document which could be accepted as evidence and shall presume the genuineness of the contents of the document unless the presumption is not rebutted by other evidence. Thus, it can be seen that besides permitting to produce the original document which is primary evidence in terms of Section 62 of the Evidence Act, despite the existence of different kinds of secondary evidence, under paragraph 2 (a) of Scheme framed by the Hon'ble the Chief Justice of India, only certified copy alone is permitted to be adduced, purposefully, as by virtue of Section 79 of Evidence Act presumption of genuineness and correctness of the certified copies of the documents mentioned under Section 63 (1) of the Evidence Act shall have to be presumed. In other words, the other modes of production of secondary evidence would not permit the Court to draw the presumption of genuineness and correctness and that is why in paragraph 2(a) of the scheme framed in terms of the provisions under Section 11 (10) provides only for production of certified copy of the primary evidence to act upon for the purpose of applying for appointment of Arbitrator under Section 11 (6) of the Act, in the alternative of production of the original instrument.

16. As already found the nature of exercise of power under Section 11 (6) is 'judicial' and therefore, it was thought only fit to permit to exercise such power only on the original instrument or else, on its certified copy, to be understood with reference to Section 63 (1) read with Section 74 and 76 of the Evidence Act. When once the intention behind paragraph 2(a) of the scheme is understood in that manner with reference to the provisions under Section 63 (1), 74, 76 and 79 of the Evidence Act, the expression 'certified copy' employed in paragraph 2(a) of the scheme framed under Section 11(10) of the Act cannot be interpreted to mean any other kind of copies provided under Section 63 of the Evidence Act other than under Section 63 (1) of the Evidence Act.

17. Learned brother Justice K. M. Joseph, after explaining as to how the expression 'certified copy' must be understood, held that the Court exercising the power under Section 11 (6) has to exercise the power under Section 33 of the Indian Stamp Act when the

original is produced before the Court. In other words, according to me, it is rightfully held that when the original document carrying the arbitration clause is produced and if it is found that it is unstamped or insufficiently stamped, the Court acting under Section 11 is duty bound to act under Section 33 of the Indian Stamp Act as held in the draft judgment.

18. I am also concurring with the view that what is permissible to be produced as secondary evidence i.e., other than the original document in terms of Section 2(a) of the scheme framed under Section 11(10) of the Act, is nothing but certified copy as mentioned earlier. But such a certified copy, would not be available to be proceeded with under Section 33 of the Stamp Act if it is unstamped or insufficiently stamped. In such circumstances, such certified copy shall not be acted upon.

19. In the contextual situation, to understand the difference between 'certified copy' and 'a copy certified to be true copy', it is only appropriate to refer to Rule 1 of Order VIII of the Supreme Court Rules, 2013, framed invoking the power conferred by Article 145 of the Constitution of India. Rule 1 of Order VIII reads thus: -

"1. The officers of the Court shall not receive any pleading, petition, affidavit or other document, except original exhibits and certified copies of public documents, unless it is fairly and legibly written, type-written or lithographed in double-line spacing, on one side of standard petition paper, demy-foolscap size, or of the size of 29.7 cm x 21 cm, or paper which is ordinarily used in the High Courts for the purpose. Copies filed for the use of the Courts shall be neat and legible, and shall be certified to be true copies by the advocate-onrecord, or by the party in person, as the case may be." (Emphasis added)

20. It cannot be presumed that despite the conspicuous difference in the said expressions, under paragraph 2 (a) 'certified copy' alone was permitted to be appended along with the application under Section 11 of the Act, unintentionally. I am of the considered view that it was so prescribed, fully understanding the nature of exercise of power under Section 11 (6) of the Act and also the presumption of genuineness and correctness of 'certified copy' available by virtue of Section 79 of the Evidence Act.

With this addendum, I fully endorse all the conclusions and findings in the judgment of my learned brother Justice K. M. Joseph.