



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 1430 OF 2019

L & T Finance Limited .. Petitioner

Versus

Diamond Projects Limited and ors .. Respondents

WITH

COMMERCIAL ARBITRATION PETITION NO. 267 OF 2022

Ingram Micro India Pvt Ltd .. Petitioner

Versus

Signy Technologies Pvt Ltd .. Respondent

WITH

COMMERCIAL ARBITRATION APPLICATION (L) NO. 32021
OF 2022

WITH

COMMERCIAL ARBITRATION PETITION (L) NO. 32027 OF
2022

Vedaang Builders LLP .. Petitioner

Versus

Ashwinkumar Liladhar Shah and ors .. Respondents

WITH

ARBITRATION PETITION (L) NO. 9858 OF 2023

WITH

ARBITRATION APPLICATION (L) NO. 9616 OF 2023

Spenta Vintage Pvt Ltd .. Petitioner

Versus

Evershine No.II CHS Ltd .. Respondent

Tilak



WITH
COMMERCIAL ARBITRATION PETITION (L) NO. 11848 OF
2023
WITH
COMMERCIAL ARBITRATION APPLICATION (L) NO. 7227
OF 2023

Manish Sheth .. Petitioner

Versus

Ketan Sheth .. Respondent

...

Mr.Akash Rebello with Lissom Almeida i/b Hubab Sayyed for the petitioner in CARBP 1430/2023.

Mr.Kedar Wagle with Sagar Wagle and Kashyap Samant i/b Ms.Riddhi A. Pandit for the applicant in CARBP 267/2019.

Mr.Rushabh Sheth with Tejas Deshpande and Mr.Ashish Verma i/b Akshay Zantye for the respondent in CARBP 267/2019.

Mr.Vishal Kanade with Ms.Punita Arora, Mr.Puneet Arora, Ms.Janhavee Joshi, Ms.Tanaya Patankar and Mr.Monil Punjabi i/b M/s.Arora and Co. for the petitioner/applicant in CARAPL 32021/22 and CARBPL 32027/2022.

Mr.Anuj Desai with Mr.Rhythm Rathod i/b Mrs.Rashmi Pendse for respondent nos.1 and 2.

Mr.Mayur Khandeparkar with Mr.Umesh Tawari i/b Ms.Swapna Kanade for respondent no.3

Ms.Shanay Shah with Mr.Ameet Mehta, Mr.Nirav Marjadi, Ms.Srushti Mehta, Ms.Nikita Deora and Ms.Tanaya Manjrekar i/b M/s.Solicis Lex for the respondent in ARBPL 9858/2023 and ARBAPL 9616/2023.

Tilak

Mr.Anoshak Daver with Mr.Dhaval Shethia i/b Siddharth Kaka for the petitioner/applicants in CARBPL 11848/2023 and CARAPL 7227/2023.

Mr.Gautam Tiwari with Ms.Tesneem Khatau for the respondent.

...

CORAM: BHARATI DANGRE, J.
RESERVED : 27th JULY, 2023
PRONOUNCED : 27th OCTOBER, 2023

JUDGMENT:-

1 A common question arises for consideration in all the Commercial Arbitration Petitions clubbed together and placed before me, being; whether in the wake of the Constitution Bench judgment in the case of *N.N.Global Mercantile Vs. Indo Unique Flame Ltd. & Ors.*¹, the Court, which is to decide the Petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “Arbitration Act”), seeking relief in form of interim measures, can entertain the same, despite noticing that the Agreement is not stamped or insufficiently stamped and suffers from a legal deficiency.

The Petitions were clubbed together, as they prayed for interim relief under Section 9 of the Act of 1996 and the relief is opposed by the Respondents in each Petition, on the ground that the document/instrument, which is construed as an

1 (2023) 7 SCC 1

Arbitration Agreement or containing an Arbitration Clause is not adequately stamped or it is unstamped.

The contest is between the two set of the counsels; one, specifically arguing that the Constitution Bench has declared that, the bar contained in Section 35 of the Stamp Act applicable to Instruments chargeable to stamp duty, is also applicable to Arbitration Agreements and, therefore, it renders the Arbitration Agreement contained in such a document or a stand alone Arbitration Agreement, on which the stamp duty is payable as being non existent and, therefore, it is not enforceable as long as it remains in the said condition as it has been held that such an Agreement can be validated only by the process contemplated in the Stamp Act. It is argued that the five-Judge Bench in N.N.Global has categorically held that, not every Agreement is a Contract and only those Agreements, which are enforceable, are treated as Contracts, with a further consequence of such a Contract ceasing to be enforceable i.e. Contract being void.

The counsel who have argued against the proposition, premise their submissions, by urging that the “subject Agreement” relating to the “subject matter of dispute in arbitration” or “Arbitration Agreement”, if it is not stamped or inadequately stamped, having regard to the applicable Article in the Maharashtra Stamp Act, 1958 or the Indian Stamp Act, 1899, then such an Agreement has no existence at all. The argument advanced by the respective counsel canvassing that Section 9 Petition, cannot be entertained,

Tilak

in absence of the Arbitration Agreement or a clause in an Agreement, being the basis of relief sought in the Petition, have strenuously asserted that the stamping of the document is a substantive objection and the Court will not come to offer an aid to the Petitioner in case of an invalid document.

However, it is the projection of those, who argue in favour of the Court entertaining Section 9 Petition that, *N.N.Global* deal with the Application under Section 11 of the Act, in contrast Section 9 stand on a different footing, as the former is a part of an evidentiary proceedings i.e. the proceedings that will continue the trial and culminate into an Award, but as far as Section 9 relief is concerned, it is merely in form of interim measure and it is not a stage to ascertain, whether the document is stamped or not.

2 The cleavage in the argument is projected through the learned counsel Mr.Anoshak Davar, appearing in CARBPL 11848/2023 and CARAP 7227/2023, Mr.Kedar Wagle appearing in CARBP 267/2019, Mr.Akash Rebello appearing in CARBP 1430/2023 and Mr.Vishal Kanade appearing in CARAPL 32021/2022 and CARBPL 32027/2022.

Learned counsel Mr.Mayur Khandeparkar, Mr.Rushabh Seth and Mr.Shanay Shah, representing the Respondents and opposing the grant of relief in Section 9 Petition, have asseverated that the Agreement, which is

Tilak

unenforceable on account of the substantive law like the Stamp Act, would not be a Contract, within the meaning of Section 2(g) of the Contract Act, 1872 and, since, the Constitution Bench has now categorically held, that if the Agreement is enforceable, then only it would become a Contract with a necessary implication that it is only if the Arbitration Agreement is valid in law, it would bind the parties, as an existing Contract and as long, it remains unstamped, it is not capable of being enforced in law.

3 In order to appreciate the rival contentions and before I make reference to the contentions advanced by the respective counsel, it is necessary for me to set out the background, as to why this connundrum has arisen.

The Arbitration and Conciliation Act, 1996 an enactment relating to domestic arbitration, international commercial arbitration and providing for enforcement of foreign arbitral awards, is enacted in the backdrop of the United Nations Commission on International Trade Law (UNCITRAL) having adopted Model Law on International Commercial Arbitration in 1985. In order to bring uniformity in the law of arbitral procedure, which specifically refers to the needs of international commercial arbitration practice, the General Assembly of United Nations recommended that all countries give due consideration to the said Model Law. In order to the necessitated amendments in the existing Arbitration Law and even in the recent times, substantial amendments are effective from time to time.

Tilak

For the purposes of the Act, an “Arbitration Agreement” in terms of Section 7, 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. It is permissible to have an Arbitration Agreement in form of an arbitration clause in the Contract or it may be in a form of separate Agreement, but it must necessarily be in writing.

A writing contained in a document, signed by the parties or exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the Agreement or exchange of statement of claim and defence would also fall within the ambit of Section 7.

Section 8 of the Act of 1996 is a power conferred upon a judicial authority before which an action is brought in a matter, which is the subject of an Arbitration Agreement to refer the parties to arbitration unless it finds that *prima facie* no valid Arbitration Agreement exists.

Reading of the lead provisions of the Act, it is evident that whenever any action is brought by any party to an Arbitration Agreement or any person claiming through or under him, arising out of it, then the Court shall refer the matter for arbitration, subject to the stipulation that the proceedings are

accompanied by the original Arbitration Agreement or duly certified copy thereof.

4 One of the most important and significant provision of the Act is Section 9, which is titled as “Interim measures, etc. by Court” and to understand the scope of the provision, I must reproduce the same:-

“9. Interim measures, etc., by Court-

[(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

5 From the reading of the aforesaid, it is evident that the Court has jurisdiction to entertain an application under Section 9, either before the commencement of the arbitral proceedings or during pendency or even after the making of the Arbitral Award, but before it is enforced in terms of Section 36 of the Act. It is well accepted proposition, that the Court under Section 9 is only formulating interim measures, so as to protect the rights under adjudication before the Arbitral Tribunal from being frustrated. The reliefs, which the Court may allow to a party under clauses (i) and (ii) of sub-section (1) of Section 9 flow from the power vested in the Court exercisable by reference to “contemplated”, “pending” or “completed” arbitral proceedings.

The exercise of the power by the Court under Section 9 is, however, subject to two riders, in form of sub-sections (2) and (3); i.e. when an order of interim measures is made before commencement of arbitral proceedings, the proceedings shall be commenced within a period of 90 days from passing of such order or within such time, as the Court may determine. The second

Tilak

rider, being once the Tribunal is constituted, the Court shall not entertain an application for interim relief, unless circumstances exist to render the remedy under Section 17, inefficacious.

6 Another significant provision, which would warrant attention for the purpose of determining the issue placed before me is, Section 11, which relate to the appointment of Arbitrators.

Section 11 is an entire scheme, which provide for appointment of an Arbitrator, and the parties have the autonomy to agree on the procedure of appointment. However, when under an appointment procedure agreed between the parties, if a party fails to act as required or the parties, or the two appointed Arbitrators, fail to reach an agreement, expected of them under that procedure or if a person, including an institution, fails to perform any function entrusted to him or it, then the appointment shall be effected, 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.

I must, at this stage make brief reference to Section 17 of the Act, which permit a party, during the arbitral proceedings to apply to the Arbitral Tribunal, for securing certain interim measures, similar to the interim measures, which the Court is competent to grant under Section 9 of the Act, and the Arbitral

Tilak

Tribunal is conferred with the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

7 In the Arbitration Petitions that are listed before me, an objection is raised about the Arbitration Agreement or any such document/ instrument, which is sought to be projected as an Arbitration Agreement, since it comprise of an Arbitration Clause, having not been adequately stamped and the learned counsel for the Petitioners have argued that if the case is made out for grant of ad-interim/interim relief under Section 9, the Court ought not to reject consideration of the same, merely on the ground that the Agreement in question needs to be adjudicated for payment of stamp duty, before grant of such relief.

At this juncture, I must refer to the exposition of law on the aspect of inadequacy of stamping of an Arbitration Agreement or the effect of an unstamped Agreement in the context of Section 9 in successiveness.

A learned single Judge of this Court, by order dated 06/09/2018, in the case of *Gautam Landscapes Pvt. Ltd. Vs. Shailesh S. Shah & Anr. (Arbitration Petition No.466 of 2017)*, formulated a question to be placed before the Hon'ble The Chief Justice, for being referred to the Larger Bench for consideration and the order record as under :-

"The question whether this Court under Section 2(e) of the Act can entertain and grant any interim or ad-interim relief in an

Tilak



application under Section 9 of the Act when the Arbitration Agreement is contained in a document that is unstamped or insufficiently stamped, needs to be referred to a Larger Bench for determination. In my view, the Hon'ble Chief Justice can be requested by this Court to refer the said question/issue to a Larger Bench for consideration. The Registry is therefore directed to place the papers and proceedings before the Hon'ble the Chief Justice to enable the Hon'ble the Chief Justice to refer the aforesaid question/issue to a larger Bench for consideration."

A Larger Bench was accordingly constituted and the following issue was framed for consideration :-

"Whether a court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad-interim relief in an application under Section 9 of the said Act when a document containing arbitration clause is unstamped or insufficiently stamped?"

Approximately at the same time, in the case of *Vijay Sharma Vs. Vivek Makhija & Anr. (Arbitration Application No.311 of 2018)*, another single Judge of this Court, by order dated 20/12/2018, referred the following question of law for consideration to the Larger Bench, pertaining to sub-section (6) of Section 11 to the following effect :-

"Whether it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, to await the adjudication by the stamp authorities, in a case where the document objected, is not adequately stamped?"

8 The Larger Bench, headed by Hon'ble The Chief Justice N.H.Patil (As His Lordship was then), framed the following issue for consideration :-



“Whether, inter alia, in view of Section 11 (6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped?”

9 The above reference orders, though divergent in respect of the effect of an unstamped document at the stage of Section 9 and that of Section 11, placed for consideration, found answers in *Gautam Landscapes Private Limited & Ors. Vs. Shailesh S. Shah & Ors.*²

While propounding upon the issue referred to it, the Full Bench made reference to a catena of decisions, which included the decision of the Apex Court in the case of *SMS Tea Estates (P) Ltd. Vs. Chandmari Tea Co. (P) Ltd.*³ as well as the decision in the case of *M/s.Duro Felguera Vs. Gangavaram Port Ltd.*⁴ and distinct views of the single Judges of the Bombay High Court.

On extensive examination of the Act of 1996 as well as the divergent views expressed in the decisions cited before it, the Full Bench recorded its conclusions in the following terms :-

“114. Thus postponing application for consideration, filed under Section 11 or Section 9, to indefinite period till the final decision of the issue raised under the Stamp Act, would also not be in conformity of the legislative policy and intent to provide speedy remedy under Section 11 or Section 9 of the ACA.

² AIR 2019 Bom 149

³ (2011) 14 SCC 66

⁴ (2017) 9 SCC 729



115. *** *** ***

116. *We may thus observe that the Stamp Act is a fiscal statute and its purpose is collection of revenue. The said purpose will be achieved by impounding the document and sending it to the stamp authorities if it is found to be insufficiently stamped. At the same time, the court need not wait for outcome of the said adjudication. It would not be appropriate to put restrictions on the court's powers to exercise its such jurisdiction under the provisions of ACA, if the party deserves such intervention by the court.*

117. *We have also considered the provisions of law under which the Civil Court functions, even if a document is not sufficiently stamped.*

118. *Taking a overall view of the scheme of the ACA, judgments delivered by the Supreme Court, we are of the view that the party need not be put to a disadvantage merely because an objection has been raised in respect of insufficiency of the stamp on the agreement presented before the court. Neither a contesting party could deprive legitimate rights of a litigant in praying for timely intervention of the court by praying for appointment of an arbitral tribunal nor for interim reliefs in the fact situation of a case. That would be rendering a party without any forum and in a given situation the outcome would be, at times, catastrophic and disastrous and the damage could be irreparable one. A balanced approach, keeping in view the legislative intent and the view adopted by the Supreme Court, needs to be adopted, so that the purpose of enacting the provisions of Sections 11 and 9 of the ACA as amended by the Amendment Act is not defeated.*

119. *If an application under Section 11 or under Section 9 is required to be postponed till the order of adjudication is passed by the learned Collector of Stamps with such uncertainty of the time it would take to decide and the hierarchy of remedies after such order, as it would be subject to an appeal or a revision, as the case may be and till such time no order either under Section 11 or under Section 9 should be passed, then the Legislature would not have provided for speedy disposal of the applications under Section 11 or under Section 9 of the Act by inserting sub-Section (13) in Section 11 and sub-Section (2) in Section 9 of the Act.”*

10 It can be thus recapitulated from the decision of the Full Bench of the Bombay High Court that the first question referred to it, whether it is permissible for a Court to entertain and grant any interim or ad-interim relief in a Petition under Section 9 of the Act, when the document containing arbitration clause is unstamped or insufficiently stamped, is answered in the affirmative.

The second issue pertaining to Section 11(6-A) of the Act of 1996, as to whether it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the Stamp Authorities, in case the document is not adequately stamped, was answered in the negative.

The Full Bench, in turn, approved the judgment of the Division Bench in the case of *Universals Enterprises Vs. Deluxe Laboratories Pvt. Ltd.*⁵

11 The Apex Court in the case of *Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engineering Ltd.*⁶ was confronted with a question, whether Section 11(6-A), which was introduced by the Amendment Act of 2015 had removed the basis of it's earlier judgment in the case of *SMS Tea Estates (P) Ltd.* (supra), so that the stage at which the instrument was to be impounded was not, when the Judge was hearing Section 11

⁵ 2017(2) ALLMR 779

⁶ (2019)9SCC 209

Application, but it shall be left to an Arbitrator, who was appointed under Section 11 of the Act.

In depth analysis of the provisions of the Arbitration Act, being juxtaposed against Sections 33 and 34 of the Maharashtra Stamp Act, a reference was made to the Contract Act, 1872, as to what would amount to a Contract. It is held that when an arbitration clause is contained in a “Contract”, the Agreement only becomes a Contract, if it is enforceable by law and under the Indian Stamp Act, an Agreement do not become a Contract, unless it is duly stamped. Holding that reading Section 11(6-A) along with Section 7(2) of the Act of 1996 and Section 2(h) of the Contract Act, a clear position surfaces, to the effect that an arbitration clause in an Agreement, would not exist, when it is not enforceable by law.

The cleavage of opinion through distinct judgments of the High Courts was taken note of and it was held that the law has not been correctly laid down, but reference was made to the Full Bench Judgment of the Bombay High Court in the case of *Gautam Landscapes Pvt. Ltd*, and the answers to the two questions framed in the Judgment were taken note of.

Taking note of the answers to the reference in *Gautam Landscapes Pvt. Ltd*. (supra), Justice Rohinton Nariman (As His Lordship was then) held that question No.2 having answered by the Full Bench of the Bombay High Court, is contrary to its judgment and, therefore, was incorrectly decided.

Tilak

The Appeal was, therefore, allowed, by setting aside the judgment of the Bombay High Court and the observations in the concluding paragraph of the judgment are relevant and, need reproduction:-

“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.”

12 Pursuant to this decision, Justice G.S.Kulkarni in *Saifee Developers Private Ltd. Vs. Sanklesha Constructions & Ors.*⁷ has noted as under :-

“11. The decision of the Supreme Court in Garware Wall Ropes (supra) is rendered in the context of Section 11 of the Act and not in a proceeding under Section 9 of the Act. The decision of the Full bench in the context of Section 9 of the Act is subject matter of challenge before the Supreme Court in “Shailesh S. Shah -vs- Gautam Landscapes Pvt. Ltd .and anr.” in a Petition for Special leave to Appeal (c) No.10232-10233 of 2019. By an order dated 29th April, 2019, passed by the Supreme Court, on the said petition, while issuing notice to the respondents, the

⁷ CARBPL 627/2019

Supreme Court has not stayed the decision of the Full Bench. The Supreme Court, however, observed that section 9 petition may continue, in the meanwhile judgment delivered thereon shall not be implemented without leave of the Court. Thus, as the judgment of the full bench is binding on this Court, and the same being not stayed by the Supreme Court, it is not possible to accept the contention as urged on behalf of respondent that this Court cannot grant any ad-interim relief.”

13 The three-Judge Bench of the Hon’ble Supreme Court in *M/s.N.N.Global Mercantile (P) Limited Vs. M/s.Indo Unique Flame Ltd. & Ors*,⁸, expounded, on the effect of an Arbitration Clause contained in a Contract, which require stamping under the Stamp Act and clarified that the law, premised on the ‘Doctrine of Separability’ of an Arbitration Agreement, by holding that since arbitration agreement is an independent agreement between the parties, the non-payment of stamp duty on the commercial contract, would not invalidate the Arbitration clause, or render it unenforceable, since it had its independent existence. It was held to be a deficiency curable on payment of requisite stamp duty.

The Bench of three learned Judges in its judgment in *N.N. Global*, 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 to the Maharashtra Stamp Act, 1958, in this regard. Thereafter, it went on to find that whether the work order was chargeable to payment of stamp duty and opined that the non-payment or the deficiency of stamp

8 (2021) 4 SCC 379

duty, on the work order did not invalidate the main contract as the Court found that the arbitration agreement was a distinct and an independent contract and on application of the doctrine of separability, it would not be rendered invalid, unenforceable or non-existent, 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.

14 The prevailing position of law prior to the Three Judge decision in N.N.Global, however, was upset in N.N. Global by holding that there is no legal impediment to the enforceability of the arbitration agreement pending payment of stamp duty on the substantive contract. However, the adjudication of the rights and obligations would not proceed before complying with the mandatory provisions of the Stamp Act.

Dealing with the power to be exercised under Section 11, for appointment of an Arbitrator, it was held that the Arbitration Clause/Agreement, contained in substantive Contract/Instrument, on which the stamp duty has to be compulsorily paid and when such Instrument is unstamped, it shall be impounded by the authority, so that the deficit stamp duty may be paid, in accordance with law and the adjudication of the rights and obligations underlying the substantive Contract, by the Arbitrator can be commenced. As far as interim relief under Section 9 is concerned, it is categorically held that when such

Tilak

Contract/Instrument is unstamped, the Court may grant ad-interim relief to safeguard the subject matter of the arbitration, and the parties concerned be directed to take necessary steps for payment of requisite stamp duty in accordance with the provisions of the Stamp Act, within a time-bound manner.

In yet another decision, the Apex Court in *Weatherford Oil Tool Middle East Limited Vs. Baker Hughes Singapore Pte*⁹, the Bench headed by the Hon'ble the Chief Justice, by referring to the decision of three-Judges Bench in the case of *M/s.N.N.Global Mercantile (P) Limited*¹⁰, noted that the judgment in *SMS Tea Estates (P) Ltd.* (supra) was overruled and, hence, once again referred the issue that had arisen, before the Constitution Bench of five Judges, by formulating the following question:-

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

It is this issue, which came to be answered by the Constitution Bench in the case of *M/s. N.N.Global Mercantile (P) Ltd.*, decided on 25/04/2023.

15 The Constitution Bench on consideration of the provisions of the Arbitration Act, 1996 as well as the exposition

9 2022 SCC OnLine 1464

10 2021(4) SCC 379



of law pursuant to the insertion and deletion of Section 11 (6A) in the Act, the scheme of the Stamp Act and in particular, Sections 35, 36, 38 and 42 discussed the issue threadbare. The relevant observations from the said decision necessarily require a reproduction as the question which arises before me is a fallout of the observations from the Constitution Bench.

“88. As far as the finding In para 28 of N.N. Global that the decision in SMS Tea Estates does not lay down the correct law, when it holds that an arbitration agreement, in an unstamped commercial contract, cannot be ated upon or is rendered unforceable, we are of the view that the finding in N.N.Global does not appear to be correct.

89. On perusal of para 29 would show that the court in N.N.Global proceeded o the basis that the arbitration agreement, being an independent contract is nor chargeable to payment of stamp duty and it would not validate the arbitration clause or render it unforceable, since it had an independent existence on its own, cannot hold good in the view of the admitted position before us that an arbitration agreement, in its own right, is exigible to stamp duty.

90. The whole premise of the court in N.N.Global being that the arbitration agreement, not being exigible to duty and it having a seperate 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 in para 32, for disapproving of Garware in para 22 thereof, that the arbitration clause would be non-existent in law and unforceable till the stamp duty is adjudicated and paid on the substantive contract, is again on the premise that the arbitration agreement is a seperate agreement under the Stamp Act, which is not exigible to stamp duty, which we have found is not the case in law.”

While determining the nature of the Stamp Act, the majority view finds expression in the following words:

“93. The law, as contained in Section 33 read with Section 35 of the Stamp Act, would result in the following conclusions:



93.1 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.

93.3. 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.

93.4. 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.

93.5 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.

93.6. 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.

16 Another relevant observation in the judgment delivered by the Constitution Bench (majority) reads as under :-

“148. The question would arise as follows: 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.

149 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.

150 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.

151. 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).

152. 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.

153. 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.

154. 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.

155. 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.

156. 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. (para 113 and 114)

17 The necessary conclusions are thereafter recorded in the following words :-

Q. CONCLUSIONS

161. 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* 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)*.

162. 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.

163. 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.

164. 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.

165. 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.

166. *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.*

167. *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.*

168. *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.*

169. *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.*

18 It is in the wake of the Five Judges Bench decision, the question has arisen as to whether an application u/s.9 seeking interim measures can be entertained in the wake of the legal deficiency, which is held to exist, when the document is not adequately stamped under the Stamp Act, as per the Constitution Bench in *N.N. Global*, as it would not amount to a contract.

19 Mr. Akash Rebello, the learned counsel, advanced his submission in support of the proposition that the judgment of the Constitution Bench in *N.N. Global* has not altered the ability of

the Court to grant relief in form of interim measures under Section 9, even in the face of an allegation that an Arbitration Agreement or the Agreement containing arbitration clause is not adequately stamped.

According to him, the Constitution Bench was dealing with applications under section 11 and treated them as 'non-evidentiary', however section 9 stand on a different footing, as it is distinct in its scope and its object, being to ensure protection of the subject matter of the arbitration at the distinct stages of the process i.e. before the Tribunal is constituted or during the proceedings before the Tribunal or even after passing of the Award, and a party may require some interim reliefs and this he can obtain through Petition filed under Section 9.

He would submit that the judgment of the Constitution Bench had held that if an Agreement is unstamped, it is not a Contract, but such consequence will follow only after the determination is made about stamping, which is akin to a Contract being valid, until it is declared as invalid. The stage at which this determination is to be made would depend on whether the proceedings are evidentiary or non-evidentiary and according to him, the stage at which the documents come before the Authority/ Court, assumes great significance, as it is only after examining the same, it can be ascertained, whether it require stamping.

Tilak

20 According to Mr. Rebello, an unstamped agreement is not 'stillborn' and it requires the determination of the Court/Authority before it is declared to be unenforceable.

The learned counsel would draw a line of distinction between the evidentiary and non-evidentiary proceedings under the Maharashtra Stamp Act, 1958 and according to him, the legislature itself has provided a distinction between the documents that are tendered in evidentiary proceedings and in other proceedings.

Section 34, according to him, provide the guidance by prescribing that, no authority, which is authorized to receive evidence shall, admit in evidence, an unstamped document and in respect of a document which is not tendered in evidentiary proceedings, no Authority shall act upon it. He would further submit that the distinction has received judicial approval of the Full Bench of the Allahabad High Court in *Bittan Bibi Vs. Kuntula*¹¹, where Justice Lal concurred with Justice Dayal in a difference of opinion between him and Justice Desai and according to him, the said view is not overruled, as suggested by his counter part in *Hindustan Steel Limited Vs. Dilip Construction Co*¹², as paragraph 8 has adversely commented upon the dissenting view of Justice Desai but the majority view is affirmed.

¹¹AIR 1952 Allahabad 996.

¹² 1969 (1) SCC 597,

Mr.Rebello has invited my attention to the decision in N.N.Global, where paragraph 8 of Hindustan Steel is cited with approval in paragraphs 51 and 52.

Dealing with the determining factor, as to whether the stage of Section 9, is 'evidentiary proceeding', as per the learned counsel, the time to ascertain the adequacy of stamp duty do not arise at the stage of Section 9, but it would arise later, at the evidentiary stage. It is his submission that Section 9 is akin to proceedings under Order 39 Rule 1 or Order 38 Rule 5 of CPC, and in his view, the judgment in N.N. Global do not preclude grant of Section 9 relief, pending the determination of adequacy of stamping.

21 Taking the submission of Mr.Rebello ahead, Mr.Vishal Kanade, would highlight on the object of Section 9 of the Arbitration Act, being, to (a) protect interest of a minor/person of unsound mind who is party to arbitral proceedings and (b) to make an order as an interim protection of 'subject matter' of the arbitration agreement.

According to Mr.Kanade, the Court has wide powers under Section 9, and it is not only traceable to the Arbitration Act, but it is also relatable to the Code of Civil Procedure, 1908. He would emphasize upon the last part of Section 9 which has applied the following words "and the Court shall have the same

power as it has for the purpose of, and in relation to any proceeding before it”.

He has also placed reliance upon 176th Law Commission of India Report, to underscore that the said Act never intended to exclude the wide powers which were conferred in the 1940 Act. According to him, a Court while exercising the power under section 9 can draw sustenance from the Code and in particular, Order 39, which empower the Court to pass interim reliefs, where case is made out on the basis of ‘affidavit’ or otherwise. Thus, drawing an analogy, he would submit that the power to grant interim relief will not be affected, even if a document containing an arbitration clause is unstamped or is insufficiently stamped, inasmuch as the parties seeking interim relief in civil suits are required to make out a *prima facie* case without the requirement of the subject agreement being stamped.

It is the submission of Mr.Kanade that an anomalous position would be created, if a plaintiff who approach the civil court, without having the document, on the basis of which he claim the relief, either not being stamped or insufficiently stamped, and he may be afforded an opportunity to cure the lacunae, at a later point of time, before the document is admitted in evidence, but in case of a Court exercising the power under section 9 of the Arbitration Act, he shall be precluded from seeking interim relief. According to him, the consequence of not

Tilak

paying the stamp duty or insufficiency in its payment is a curable defect and assuming that the agreement which comprise of an arbitration clause is unenforceable, once the stamp duty is affixed, it would regain its enforceability.

He would rely upon the decision of the Division Bench in case of *Asha Pura Minechem Ltd. Vs. Pacific Basin IHX (UK) Limited*,¹³ when an argument on behalf of the respondent that the provisions of Arbitration Act, do not specifically incorporate or for that matter, exclude the application of the general procedure in law, contained in the Code, was put to rest. While answering the said issue, reference is made to the decision of the Apex Court in case of *ITI Ltd Vs. Seimens Public Communications*,¹⁴ and the decision in case of *Adhunik Steels Ltd Vs. Orissa Manganese and Minerals (P) Ltd*,¹⁵

The Division Bench speaking through Hon'ble Justice Dr. D.Y. Chandrachud (as his Lordship was then), held that they are unable to subscribe to a broad submission that provisions of the Code, are inapplicable to the proceedings before a Court, when it exercise its jurisdiction under the Arbitration Act. The relevant observation reads thus :-

“The Arbitration and Conciliation Act, 1996 does not provide a special procedure that must be followed by a Court while exercising the jurisdiction which the Act confers. Undoubtedly, since the Act is a complete Code in itself, the exercise of jurisdiction must conform strictly to the parameters laid down by

¹³ 2013(4) Mh.L.J 103,

¹⁴ 2002(5) SCC 510

¹⁵ (2007) 7 SCC 125.

the Act. The intervention of the Court in arbitral proceedings and awards must be scrupulously confined within the limits laid down by the Act and conform to the legislative policy of minimising judicial intervention. On matters of procedure, the principles which are traced to the procedural provisions of the Civil Procedure Code are not alien, subject to the caveat that the provisions of procedural law cannot widen the nature of the jurisdiction that is conferred on the Court by the Act of 1996. Hence, where the Arbitration and Conciliation Act, 1996 makes a specific provision regarding the exercise of power, that provision cannot be overridden by taking recourse to a more general power which is conferred by the Civil Procedure Code.”

22 Advocate Anoshk Davar also joined hands with Mr.Kanade and Mr.Rebello, when he draw a distinction between the two proceedings i.e. a petition filed under section 9 of the Act, which is aimed at preserving the subject matter of the Arbitration until formation of the Arbitral Tribunal, or even after declaration of the award, but before its enforcement.

Relying upon the decision in case of *Firm Ashok Traders Vs Gurumukh Das Saluja*,¹⁶, he would submit that the relief sought in an application under Section 11 is neither in a Suit nor a right arising from a contract, but the Court under section 9, is only formulating interim measures so as to protect the rights under adjudication before the Arbitral Tribunal, from being frustrated. According to him, the legislature has always treated the provision differently from an application under section 11 and

¹⁶ 2004 (3) SCC 155

necessarily, what holds good qua it, may not necessarily govern Section 9, which is a special provision for grant of interim measures, in aid of final relief and ultimately, according to him, the object of exercise of such power is, protection of the property, being subject matter of arbitration proceedings, so that the proceedings are not rendered infructuous and the Arbitral Award passed on culmination of such proceedings, do not merely remain a paper award with no potential of it being enforced.

Mr.Davar has taken me through the position of law, which existed prior to the decision of the Constitution Bench in case of N.N. Global, and in seriatim, he would refer to the judgment in case of *SMS Tea Estates Pvt Ltd Vs. Chandmari Tea Co. Pvt. Ltd*,¹⁷ full Bench of the Bombay High Court in Gautam Landscapes, *Garware Wall Ropes (supra)*, etc, which had expounded the scope of an arbitration agreement along with an arbitration clause contained in a document/instrument with reference to the Stamp Act and it's provisions for levy of stamp duty as per the Schedule annexed thereto.

According to him, it is authoritatively held that the Court shall before admitting any document in evidence or acting upon such document, examine, whether it is duly stamped and if it is an instrument, which is to be compulsorily registered, and if the document is found to be not duly stamped, the bar under section 35 of the Stamp Act would sprung into action and the

¹⁷ (2011) 14 SCC 66

Arbitration clause therein, cannot be acted upon and the Court should then proceed to impound the document under section 33 and follow the procedure under section 35 and 38 of the Stamp Act.

Mr.Davar has analyzed the decision of the Constitution Bench in N.N. Global and he would submit that the scope of Section 9 is not taken away by non-stamping of the document and such an agreement is not an enforceable contract but, it merely remains in suspended animation till the Stamp duty is paid. According to him, the substantive reliefs in arbitration proceedings may not be granted in an unstamped or inadequately stamped agreement, but interim relief under section 9, merely for the purpose of securing the subject matter of the dispute, need not await stamping of the instrument/agreement in question.

23 I have also heard Mr. Kedar Wagle for the petitioner, who has also advanced his argument on the merits of the matter and he has propounded upon the judgment of the Constitution Benches in case of N.N. Global and has analyzed its impact on the petitioner under section 9 of the Act. It is his specific submission that the decision of the Constitution Bench *inter alia* has held that the judgment in case of Garware Wall Ropes (supra), is correctly decided and hence, the Constitution Bench has refrained itself from examining the effect of unstamped agreement in the context of Section 9 of the Act. He would also place reliance upon the Division Bench decision of the High

Tilak

Court in case of M/s. *Universal Enterprises Vs. Deluxe Laboratories Pvt. Ltd.*¹⁸ where it is held by the Division Bench that the parties cannot be rendered remedyless at the stage of Section 9 merely because the stamp duty on the document in question is not paid fully and one party has raised the objection of insufficiency of the stamp duty. He would specifically rely upon the following observations in the said decisions

“If the argument of the learned counsel for the respondent no.1 is accepted, then in many cases, the respondent would merely to avoid any urgent relief to be granted to the petitioner, raise the issue of inadequate stamp duty and avoid urgent ad-interim order being passed”.

24 Contesting the aforesaid argument, Mr. Mayur Khandeparkar would submit that his argument has to be appreciated on five distinct planks; the foremost being Section 9 issue is not at all considered when the Constitution Bench answered the reference and attempt is made to fall out, of the answer to the reference. He would submit that the issue is not about the matter of exercise of power, but once the Constitution Bench held such an agreement to be void/invalid, and as such, there can be no cure to it, for all purposes, the interpretation must prevail.

According to him, stamping is a substantive objection and as per the Supreme Court, the arbitration contract is independent, as it would survive even after the main agreement is

¹⁸ 2016(5) Mh.L.J 623,

terminated and hence, no Court nonetheless, the Court exercising power under section 9, shall come to the aid of an invalid document as, the exercise of power under section 9 definitely postulate existence of 'a valid agreement'.

Mr. Khandeparkar would stretch his argument further in submitting that a cause of action projected to be emanating from a document, which is inadequately stamped or unstamped, the cause is stillborn, and definitely do not deserve to be entertained as the rights which would otherwise have been available, had the agreement been stamped, would remain frozen or rather they do not exist. According to him, the words 'enforceable in law' or 'not enforceable in law' understood in the context of Section 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 it enforced, the same would be vouched unsafe and the Civil Court as well as the public authorities shall refrain from giving effect to an such a document.

25 He would also submit that a contract must confirm to Section 7 of the Arbitration Act, and it must satisfy the requirements of the Contract Act, 1872 and such an agreement which is not enforceable, do not exist in law, and it can be validated only by the process contemplated under section 33 of the Stamp Act. According to him, SMS Tea Estates, Garware Wall Ropes have correctly laid down the position of law.

Tilak

Mr. Khandeparkar would further submit that the Stamp Act is a law enacted with a definite purpose and it deserve enforcement. The plea of insufficiency of stamp duty cannot be brushed aside merely as a technical issue, but according to him, the Court shall necessarily ensure compliance of the statutory duty to follow the regime of Section 33 and 35 of the Stamp Act.

It is his specific submission that there is a paradigm shift in the context of approach relating to unstamped/insufficiently stamped instruments and it is no more a fiscal or technical objection, but has been construed, as one that relates to it's enforceability. Such an agreement is not a 'contract' under section 2 (g) of the Contract Act, and such an instrument, according to him, is *non-est* and do not exist in law, and the Court exercising its power under section 9, shall not render assistance to enforce it or grant any relief, flowing from it.

As per Mr. Khandeparkar, it cannot be possibly suggested that the Court exercising power under Section 9 of the Arbitration Act, 1996, can possibly abstain from deciding the issue, concerning existence of a valid arbitration agreement or legality of an agreement, *albeit*, at prima facie stage, in case such an objection is raised by the opposing party and it would not only be a jurisdictional issue, but also a duty cast upon a Court under section 33 and 34 of the Stamp Act, to examine the instrument to ascertain whether necessary stamp duty has been paid on an

Tilak

instrument. According to him, except in cases of unstamped instruments, the Court is not expected to engage in a threadbare exercise, but is empowered to prima facie examine the pleadings and the instrument in question and assess, whether the stamp duty is adequate or not, in the context of the relevant article applicable to such an instrument in question and upon such exercise being carried out, if it is found that the instrument is not adequately stamped, then the Court would compulsorily have the document/instrument impounded by following the process under the Stamp Act.

In short, it is the submission of Mr. Khandeparkar that in order to make out a prima facie case, a petitioner who approaches the Court under section 9 of the Arbitration Act, 1996 is required to demonstrate the existence of a valid arbitration agreement, which is legally enforceable. The cause of action to file and maintain such a petition, according to him, arises in relation to a valid agreement, which is capable of being redressed in proceedings under section 9 and this is a 'pre-condition', in maintaining an arbitration petition under section 9, though the remedy conferred is not the one arises out of a contract, but available under a statute.

26 Mr. Rushabh Seth, the counsel who represent the respondent in CARBP No. 267/2022, has also painstakingly taken me through the provisions of Maharashtra Stamp Act, 1958 as well as Indian Stamp Act, 1899 and he would submit that the

Tilak

Stamp Act is a taxing statute to ensure payment of revenue to the Government on transactions entered between the parties. The provision of impounding of a document and sending it for adjudication, according to him, is a step to negate loss of revenue to the State ex-chequer.

Mr. Seth would submit that the Constitution Bench has now held that the arbitration agreement is a separate and distinct agreement from the underlying contract, and for the purposes of stamping, it has to be adjudicated separately, though Schedule 1 of the Maharashtra Stamp Act, does not specifically cover the duty payable on arbitration agreements, but in absence of the specific article, according to him, it would be covered by Article 5(h)(b) of Schedule-I of the Act. Mr. Seth has also invited my attention to the series of decisions on the issue in question and in order to substantiate his argument, he would draw parity with Section 69 of the Indian Partnership Act, 1932, which provide that no suit to enforce a right arising from a contract or conferred by the Act, shall be instituted in any Court by, or on behalf of any person, suing as a partner in a firm against the firm or any firm alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm. According to him, the effect of non-registration is clearly provided and a person who is otherwise entitled to claim relief, in the wake of the said provision is barred from even instituting the

Tilak

proceedings if he has failed to register the firm, which is a requirement in law.

It is, therefore, submitted that the payment of stamp duty, if it is a requirement of law, failure to abide by the same, will disentitle the party for any relief, till such situation is remedied in the manner prescribed. Similarly, he would also draw parity with a condition precedent giving a right to the party to sue under section 138 of the Negotiable Instrument Act 1881. Thus, according to Mr. Seth, when a pre-condition is imposed before exercise of any right, then it must be fulfilled and there can be no escape from adhering to the same.

27 The learned counsel Mr. Shanay Shah representing the respondent in Arbitration Petition (L) No. 9858/2023, adopt the submissions advanced to the above effect and according to him, the substratum of any interim measure prayed under Section 9 of the Act, is a pre-existing cause of action. He would invoke the observations of the Apex Court in case of *Adhunik Steels Limited (supra)* and according to him, in terms of the decision of the Constitution Bench, it is inconceivable 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. He would rely upon para-117 of the said judgment and according to him, when the Court entertain a petition u/s.9, based on a pre-existing cause of action, which relate to the contract, falling

Tilak

within the ambit of Section 7 of the Arbitration Act, in the wake of paradigm shift in law, one must look at the contract itself to find out whether, the contract is enforceable in law or not. According to him, when the agreement which is insufficiently stamped or unstamped is 'still born' owing to non-payment of the requisite stamp duty, it do not come to life, merely for the purpose of Section 9, but it continue to remain 'stillborn' till the applicable stamp duty, under the fiscal statute is paid and it is only then, the agreement would attain enforceability.

28 Advocate Anuj Desai, representing the respondent in Commercial Arbitration Petition (L) 32027/2022, would also submit that the substratum of the judgment in Gautam Landscapes has been taken away by the ruling of the Supreme Court in N.N. Global, as Gautam Landscapes has concluded that a petition under Section 9 is maintainable, despite the contract containing the Arbitration Agreement being unstamped or insufficiently stamped, as Arbitration Agreement is severable and not required to be stamped. However, according to him, the Constitution Bench has ultimately held that an Arbitration Agreement is non-existent in law until the stamp duty is paid.

29 Though at the outset, while referring to the issue placed before me in the backdrop of the rival contentions advanced, I had extensively referred to the Arbitration Act, 1996, the reference to the Maharashtra Stamp Act, which is a paramateria statute with the Indian Stamp Act is also imperative.

Tilak

The law relating to stamps and stamp duties regarding documents fall within the province of List I of Schedule VII of the Constitution. Specified documents like bill of exchange, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts are some of the documents exigible to stamp duty. List II empowers the State to enact laws for rates of stamp duty in respect of the documents other than the one specified in List I.

The Stamp Act and in this case, since we are concerned with the Maharashtra Stamp Act is a fiscal legislation, enacted for the purpose of levying stamp duty on certain documents/instruments. The stamp duty is levied as a tax and the object of the enactment is to collect proper stamp duty on an instrument or conveyance on which such duty is payable. The obligation is cast on the authorities assigned under the said statute with a duty to collect the stamp duty, to properly ascertain the true value of the transaction. The Stamp Act which is a fiscal measure enacted to secure revenue for the State from certain class of instruments through several provisions as set out the manner in which the stamp duty shall be adjudicated and paid.

30 The charging section, Section 3, provide, that subject to the exemptions in Schedule I of the Act, the instruments shall be chargeable with duty of the amount indicated in the Schedule, as the proper duty therefor, and it provides for the two relevant stipulations :-

Tilak



(a) every instrument mentioned in Schedule I, which not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act;

(b) every instrument mentioned in Schedule I, which not having been previously executed by any person, is executed out of the State on or after the said date, relates to any property situate, or to any manner or thing done or to be done in this State and is received in this State;

31 Chapter IV of the Maharashtra Stamp Act, 1958 provides for Adjudication of stamp duty and Section 31 contemplate that, when an instrument, whether executed or not, and whether previously stamped or not, is brought before the Collector, by one of the parties to the instrument and such person seek an opinion as to the duty with which the instrument is chargeable, the Collector shall determine the duty which shall be levied. For the said purpose, the Collector may require to be furnished with a true copy or abstract of the instrument and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or amount of the duty with which it is chargeable are truly and fully set forth and the evidence to that effect has been furnished accordingly.

When such duty is determined by the Collector, the person liable to pay the stamp duty, shall pay the same within 60 days from the date of service of the notice of demand. If such person fails to pay the stamp duty so demanded, within the period prescribed, he shall be liable to pay a penalty @ 2% of the

Tilak

deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument, or as the case may be.

32 Section 32 of the Stamp Act, 1958 has set out the procedure for certifying the document, by the Collector upon payment of stamp duty, as prescribed, and the Collector shall certify an endorsement on the instrument, that full duty with which the instrument is chargeable, has been paid, and subsection (3) of Section 32, stipulate that any instrument upon which an endorsement has been made under this Section, shall be deemed to be duly stamped or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped.

33 Another important provision in the statute is Section 33, which prescribe the procedure for impounding of instrument and it read thus :-

“33 Examination and impounding of instruments

(1) Subject to the provisions of section 32-A, every person having by law or consent of parties authority to receive evidence and every person in charge of a public offence, except an officer of police or any other officer, empowered by law to investigate offences under any law for the time being in force, 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 irrespective whether the instrument is or is not valid in law.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before in

order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed:

34 The effect of the instruments, which are duly stamped, is provided in Section 34 and the provision read thus :

“34 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 or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument.*

Provided that,—

[(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of—

(i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and

(ii) a penalty at the rate of 2 per cent. of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument :

Provided that, in no case, the amount of the penalty shall exceed [four times] the deficient portion of the stamp duty;

(b) 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;

Section 35 provide that, when an instrument has been admitted in evidence, such admission shall not, except as provided in Section 58, be called in question at any stage of the suit or proceedings on the ground that the instrument has not

Tilak

been properly stamped.

Section 36 and Section 37 are further relevant for the discussion on the issue and the relevant portion reads thus :-

36 Admission of improperly stamped instruments

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”

37 (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 34 or of duty as provided by section 36, 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.*

35 In light of the statutory framework, the moot question that arises for consideration is, as to the stage at which the admissibility of the documents shall be looked into.

As per Section 33, every person having, by law, or by consent of the parties, authority to receive evidence and every person in-charge of a public office, before whom any instrument chargeable, with duty is produced in performance of his functions, a duty is cast upon him to impound the same on noticing that it is not duly stamped. For exercising the aforesaid power, the person/ authority shall examine the instrument to ascertain whether it is stamped with the stamp of the value and

Tilak

description required by law for the time being in force.

The provision itself carve out a distinction between the documents that are tendered in 'evidentiary proceedings' and those which are tendered in 'other proceedings'. The statute contemplate, that no Authority, who is authorized to receive evidence shall, "admit in evidence" a document which is not sufficiently stamped and as regards other proceedings, no Authority "shall act upon it".

36 The two stages are distinct in its concept are distinct, as the proviso appended to Section 34 carve out an exception for admission of documents in evidence, but it do not provide an exception in acting on the documents. If both standards were to apply, a "person authorized to receive evidence" under the proviso, could permit admission of a document in evidence, upon compliance of the contemplation stipulated, but not act upon it. The first proviso appended to Section 34, permit any instrument to be admitted in evidence on payment of the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped on payment of the deficit duty and the penalty prescribed. Upon such steps being taken, the defect stand cured and the document then is ready for being admitted in evidence.

This succinct distinction is noticed by Justice Desai, a third Judge to whom a reference was made in the wake of the

Tilak

cleavage of opinion of two Judges, who delivered a judgment in case of *Bittan Bibi Vs. Kuntula*,¹⁹ when the scope of Section 35 and 36 of the Stamp Act, 1899, was considered and the consequences of admitting an unstamped document in evidence by the trial Court, and a decree passed thereupon, fell for consideration.

Referring to Section 36 of the Act which debar an Appellate Court from excluding from considering a document not duly stamped, which has been wrongly admitted in evidence by the lower Court, it was held that once a document has been admitted in evidence, the Appellate Court has no power to prevent it being used for all purposes, and even though the trial Court has erroneously admitted in evidence, an unstamped promissory note or agreement, the Appellate Court is debarred from setting aside the decree on the ground that the documents should not have been acted upon.

The third Judge Justice Brij Mohan Lal, on a closer scrutiny of Section 35, discerned the intention of legislature, to the following effect :-

“43 It will appear from the language of s. 35 that it imposes two kinds of prohibitions, viz. that a document shall not be "admitted in evidence" and shall not be "acted upon." Section 36 prevents an appellate Court from challenging the admission in evidence of such a document. The argument which has appealed to Desai J. is that since s. 36 does not, in express language, debar the appellate Court from questioning the "acting upon" of a document, the said Court may, while keeping the document admitted in evidence,

¹⁹ AIR 1952 Allahabad 996,



refuse to act upon it. The argument is plausible. But a close scrutiny of the provisions of the aforesaid two sections will make it clear that this was not the intention of law.

[44] A document may be filed either as evidence or otherwise. In the former case, it is treated as an exhibit in the case and it must, of necessity, be filed before a Court or any other person who by law or consent of parties has authority to receive evidence, e. g. an arbitrator or a commissioner. Instances of documents filed otherwise than as evidence are security bonds filed by an appellant for the costs of the respondent, security bonds filed by a judgment-debtor for obtaining stay of execution, security bonds filed by Nazirs, on their appointment as such, for the due discharge of the duties of their office and sale deeds presented for registration before the Sub-registrar. The intention of law is that all such documents are not to be taken into consideration and no action is to be taken on them if they are not properly stamped. The Legislature expressed this intention by classifying the documents in the aforesaid two categories and by saying in respect of the former that they shall not be admitted in evidence and by laying down in respect of the latter that they shall not be acted upon. One phrase alone could not govern both classes of documents. Had the Legislature simply stated that documents not duly stamped shall not be admitted in evidence, the second class of documents could not be excluded from consideration. The Nazir could easily say that he was not filing any evidence and therefore his security bond, though not duly stamped, should be acted upon. For similar reasons other persons enumerated above could insist that their security bonds should not be excluded from consideration.

[45] The Legislature could not exclude all such documents by simply using the phrase "(shall not) be acted upon." Had that clause stood alone, the party producing in evidence a document, not properly stamped could argue that, although his document might not be acted upon in the sense that no decree could be passed on its basis, it could be used for some subsidiary purpose. But the intention of the law was that such a document should not be used "for any purpose." Therefore, it is obvious that the use of the clause "(shall not) be acted upon" also would not have covered all documents. The Legislature consequently felt the need of using the phrase "(shall not) be admitted in evidence for any purpose" in respect of documents produced in evidence and the clause "(shall not) be acted upon" in respect of other documents. It was considered unnecessary to use both clauses, viz. "not admitted in evidence" and "not acted upon" in respect of documents produced



in evidence because if the documents were not admitted in evidence, they could not possibly be acted upon.”

37 Section 33 of the Stamp Act cast a duty upon every Court to examine every document chargeable with stamp duty and if it is noticed that it is not duly stamped, the Court is debarred from admitting it in evidence.

‘Admitting in evidence’, means an act of reading the document as a part of evidence; it must be letting in as a result of judicial determination of the question “*whether it can be admitted in evidence or not*” because is it not stamped. In other words, the Court shall admit it in evidence, after applying its mind consciously and on determining whether the document is admissible or not.

38 This distinction find a further elaboration by the Apex court in case of SMS Tea Estates Pvt. Ltd (supra) when the question that arose for consideration before the Apex Court was formulated to the following effect :-

“(ii) Whether an arbitration agreement in a document compulsorily required to be stamped, is not duly stamped, is valid and enforceable”

On examining the scheme of the Stamp Act, 1899 and in particular, Sections 33 and 35, as against the Scheme of appointment of Arbitrators, an application under section 11 of the Arbitration and Conciliation Act, 1996, it was noted that an

Tilak

application u/s.11 to be accompanied by the original Arbitration Agreement or duly certified copy thereof, is a requirement found in the scheme/rules of almost all High Courts, and if it comes to the notice of the Court that the purported arbitration agreement is not properly stamped, in such a case, it should be impounded and dealt with, in the manner specified under section 38 of the Stamp Act, as the Court cannot act upon such a document or the arbitration clause contained therein, but once the lacunae is removed i.e. deficit duty and penalty is paid, in the manner provided the document is permitted to be acted upon or admitted in evidence.

Since the lacunae/defect is curable one, it is conclusively held that if the document is found to be not duly stamped, it cannot be acted upon and consequently, the arbitration clause therein, will not tick-in and the Court shall then impound the document and follow the prescribed procedure, but once the document is duly stamped, either before the Court or before the Collector, and the defect as regards deficit stamp is cured, the Court may treat the document as 'duly stamped'.

39 With this exposition propounded in SMS Tea Estates P. Ltd, the question is whether the same principle shall be made applicable at the stage of entertaining a petition under section 9 of the Arbitration Act seeking interim measures based on an arbitration agreement, which is not duly stamped or contained in a document which is not sufficiently stamped.

Tilak

For this purpose, it will be necessary to understand the difference in the scope of the two provisions; both being the quintessence of the Act of 1996, Section 9, being a provision for protecting the interest of the party, so that the arbitral proceedings are not frustrated and Section 11, a provision for appointment of an Arbitrator, for honouring the decision of the parties to adopt the Alternate mode of resolution of dispute.

Section 9 provision could be availed by a party who may, before or during arbitral proceedings, or at any time of making of the arbitral award, but before it is enforced in accordance with Section 36 apply for certain interim measures or protection which are specifically set out from clauses (a) to (e) in clause (ii) and in granting such interim measures, the Court shall exercise the same power of making orders, as it has for the purpose of, and in relation to, any proceedings before it.

Applications for interim relief are inherently applications which are required to be disposed off on expeditious basis as they act in aid of final relief.

The legislature has made it clear, that a Court exercising the power in granting interim measures, shall exercise the power by applying three fold test in determining whether an interim measure, as prayed for, deserve to be granted on the touch stone of (a) good prima facie case, (b) balance of convenience in favour of grant of interim relief and (c) irreparable injury or loss

to the applicant if the relief is not granted.

There can be no quibble over the proposition that when the parties amicably decide to chose a forum for settling their disputes and agree to be referred to an arbitral tribunal, before they initiate the proceedings, some interim measures are necessitated for protecting the subject matter, when the Arbitral Tribunal is not yet constituted, or even if constituted, the necessary application is not filed before the Tribunal seeking the interim measures, then the party may approach the Court for reliefs under section 9, if the relief under section 17 before the Arbitrator is not efficacious one.

40 In *Firm Ashok Traders Vs Gurumukh Das Saluja*²⁰, the Apex Court culled out the scope of Section 9 of the Act of 1996, in the following words :

“13 An application under Section 9 under the scheme of the Act is to a suit. Undoubtedly, such application results in initiation of civil proceedings, and the time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceeding, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings.

.....The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral tribunal; the Court under Section is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated.”

20 2004 (3) SCC 155

41 In exercising the power under section 9 of the Act, the Court is competent to protect interest of a minor/person of an unsound mind who is party to the arbitral proceedings, by appointing a guardian and this is a relief which may be prayed and granted much before the initiation of the arbitral proceedings and would be construed as an interim measure. It is also competent for the Court to make an order as an interim protection of “subject matters” of arbitration agreement and while the Court exercise this power, with the necessary indication, that it shall be akin to the power for making orders, as the Court has, for the purpose of, and in relation to any proceedings before it, necessarily invoke the provisions of the Code of Civil Procedure, 1908. The Court shall draw sustenance from the Code of Civil Procedure and in particular, Order 39 thereof, which empower the Court to pass interim relief, when a case is made out on the basis of ‘affidavit or otherwise’.

42 In case of *Adhunik Steels Ltd Vs. Orissa Manganese and Minerals (P) Ltd*, the principles applicable for exercise of the said powers are held to be somehow similar to the power of a Civil Court granting interim prohibitory injunction or interim mandatory injunction and the comparison between the two is clearly proffered in the following words :-

“11 It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such

interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any a proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

43 In short, Section 9 enable the Court to exercise its jurisdiction and pass such orders, as are required to maintain substratum of the subject matter of the arbitration, though the Court may not return a finding on the merits of the claim made or a dispute raised by the parties before the Arbitrator. Section 9 of the Act, of 1996, has been often clothed as a discretionary power in the Court, to be exercised sparingly and cautiously in consonance with the object of the statutory provision.

44 As against the provision in form of Section 9 when one have a look at Section 11 of the Act, which is a provision of

appointment of arbitrators, which contemplate an agreed procedure amongst the parties themselves or through a scheme formulated through the Chief Justice of the concerned High Courts to designate arbitral institutions, and appoint the arbitrators when there is a failure of the parties to agree on the name of the arbitrator, by stepping in, as permitted by subsection (6) of Section 11 and appointing an Arbitrator to resolve the dispute between the parties.

While exercising the power under section 11, or for that matter, under Section 8 of the Arbitration Act, what is required to be examined is the existence of a valid Arbitration Agreement.

45 Petition under section 9 of the Act, praying for interim measures definitely deserve a different treatment than the application under section 11, seeking appointment of an Arbitrator, as the legislature intended these provisions to operate in distinct fields.

In contrast to the applications for appointment of Arbitrator which must necessarily satisfy the test of existence of an Arbitration Agreement by examining either the original or certified copy of the instrument, Section 9 petition praying for interim reliefs or ad-interim reliefs is to be judged on the parameter of a three fold test and not on the determination of the existence and validity of the agreement.

This is the specific reason when the Five Judge

Constitution Bench, in N.N.Global (supra), while answering the reference in its majority judgment, have clarified that they have not pronounced on the matter with reference to Section 9 of the Arbitration Act, and it merely pronounced upon the power of the Court to be exercised under section 11 by virtue of an arbitration agreement, within the meaning of Section 7 of the Act, which attract stamp duty, but which is not stamped or insufficiently stamped and has ruled that such an agreement 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 u/s.42 of the Stamp Act.

46 Reference to SMS Tea Estate Pvt Ltd is clearly referable to the scheme of appointment of Arbitrator by the Chief Justice of Guwahati High Court in form of an application under section 11 and the pronouncement is restricted to Section 11 of the Act.

On the other hand, the Bombay High Court clearly touched the aspect of maintainability of Section 9 petition in an unstamped document, in case of Universal Enterprises Vs. Deluxe Laboratories (supra), when it was categorically held that the Court was not required to note the existence of an arbitration agreement, even at the prima facie stage before passing any ad-interim/interim relief under section 9 of the Act.

Considering the ambit and purpose of Section 9, the

party relying upon an arbitration agreement is entitled to invoke the jurisdiction of the Court, for interim protection and/or injunction even before invoking before the arbitration clause, and even if the issue is raised about the insufficiency of the stamp and/or related aspects and if the documents/instrument is forwarded for adjudication of stamp duty, still the fact of existence of an arbitration agreement shall continue to exist.

In *Universal Enterprises v. Deluxe Laboratories Pvt. Ltd.* the Division Bench has succinctly notified this aspect as under :-

“10 Considering the scheme of the Arbitration & Conciliation Act and specifically Section 9, it is clear that if a case is made out "the Court" is empowered to pass appropriate ad- interim/interim order even before invocation of Arbitration, in view of the agreement between the parties. There is no issue that existence of arbitration agreement is required to be noted even at prima facie stage by the learned Judge before passing any ad-interim relief under section 9 of the Act. The issue, if any, even of jurisdiction can be adjudicated subsequently before deciding section 9 Application finally. But if a case is made out for ad-interim relief, the Court cannot reject to consider the same merely on the ground that the agreement in question needs to be adjudicated on the issue of payment of stamp duty, as is done in the present case. This is for the simple reason that the issue of less stamp duty and/or agreement can be adjudicated considering the scope and purpose of stamp duty at later stage. There is no issue that the parties are under obligation to make the full payment so far as the stamp duty is concerned, if the document falls within the ambit of the Act. The deficiency of stamp duty as per law itself can be considered by the concerned authority at appropriate stage and appropriate order and/or direction can be issued including impounding of such document. The concerned authority will adjudicate upon the same in

Tilak

accordance with law. This itself, in our view, at this prima facie stage contemplates the existence of agreement between the parties, which includes the arbitration clause. The existence of agreement and the arbitration clause, in our view, is prima facie sufficient to consider the case for ad- interim reliefs as sought for. The parties, in our view, cannot be rendered remediless at this stage merely because the stamp duty on the document in question is not paid fully. Merely because one party has raised the objection of insufficient stamp duty being paid on the Agreement would not preclude the learned Judge from considering the grant of ad-interim relief If the argument of learned Counsel for the Respondent No. 1 is accepted, then in many cases, the Respondents would merely to avoid any urgent relief being granted to the Petitioner, raised the issue of inadequate stamp duty and avoid urgent ad-interim order being passed.”

47 Even the Full Bench of the Bombay High Court in case of *Gautam Landscapes Pvt. Ltd. Vs. Shailesh S. Shah & Anr.* (supra) while deciding the reference made over to it, as to whether in view of Section 11 (6A) inserted by Amendment Act of 2016, it would be necessary for the Court before passing the final orders, to await the adjudication by stamp authorities in a case where document objected is not adequately stamped additionally, decide the issue whether the Court can entertain and grant any interim relief or ad-interim in a petition filed under section 9 of the Act, when a document containing arbitration clause is unstamped or insufficiently stamped, on due deliberation, has answered the reference as under :-

"66. It is, therefore, held that the arbitration clause being a separate agreement from the main contract and accordingly it is only the arbitration agreement which would have relevancy for the purpose of an application under section 9 of the ACA. In our view, the judgment of the Supreme Court in the case of Firm Ashok

Traders (*supra*) would squarely apply to the facts and situation at hand”

67. The respondents pressed into service the bar under section 34 of the Maharashtra Stamp Act while entertaining an application under section 9 of the ACA. We are inclined to accept the submission of Dr. Sathe, the learned Senior Counsel, that for the purpose of granting interim measures, whether by way of interim or ad-interim, under section 9, the said relief is not arising out of a contract containing an arbitration agreement. We are, therefore, of the view that even if the main agreement containing arbitration agreement is not stamped or insufficiently stamped, there could not be any bar against the Court hearing the application under section 9 of the ACA for interim measures to grant ad-interim or interim relief to a party.

68. We are not inclined to accept the submission of Mr. Dani, learned Senior Counsel appearing for respondent in Arbitration Application No. 246 of 2016 that for the purpose of interim measures, the Court has to act upon the main agreement containing arbitration agreement and, thus till such time, such an agreement is stamped in accordance with the provisions of the Maharashtra Stamp Act, 1958 irrespective of the urgency and though case is made out for grant of ad interim or interim relief, the Court does not have power to grant any such relief. This clearly for the reason that the Court in considering a relief under section 9 is acting upon the arbitration agreement only, and not the main contract. An arbitration agreement would not require any stamping.

70. The entire purpose of granting interim measures is to protect the matters set out specifically under section 9(1)(ii)(a) to (e) during the pendency of the arbitral proceedings and even after making of the arbitral award before it is enforced in accordance with section 36 of the Act, would be defeated if we accept the interpretation placed on the provisions by the learned Senior Counsel Mr. Dani. If an objection about insufficiency of stamp is entertained and accepted at the stage of hearing of the application under section 9 for interim measures, a party who has good chances of succeeding in the arbitral proceedings finally and if not granted interim measures to protect the subject-matter of such proceedings, there would be gross injustice to such party.

48 In *Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engineering Ltd (supra)*, the Supreme Court

Tilak

once again focused its attention upon Section 11, when it noticed a decision of the Full bench of Bombay High Court, in Gautam Landscapes and held that the first question answered by the Division Bench, as regards a petition for interim or ad-interim relief being entertained under section 9 of the Act, even if the document containing the arbitration clause being unstamped or insufficiently stamped, which was decided in the affirmative, but the answer to the second issue about entertaining the application under section 11(6) shall await the decision of adjudicating authorities, which was answered in the negative, was held to be incorrectly decided.

49 The Bombay High Court pursuant to Garware (supra) in *Saifee Developers Pvt.Ltd Vs. Sanklecha Constructions*, rejected the argument advanced that Gautam Landscapes was overruled by the Supreme Court and in para-11, it express itself to the following effect :-

“11 The decision of the Supreme Court in Garware Wall Ropes (supra) is rendered in the context of Section 11 of the Act and not in a proceeding under Section 9 of the Act. The decision of the Full Bench in the context of Section 9 of the Act is subject matter of challenge before the Supreme Court in "Shailesh S. Shah -vs- Gautam Landscapes Pvt. Ltd and Anr" in a Petition for Special leave to Appeal (c) No.10232-10233 of 2019. By an order dated 29th April, 2019, passed by the Supreme Court, on the said petition, while issuing notice to the respondents, the Supreme Court has not stayed the decision of the Full Bench. The Supreme Court, however, observed that section 9 petition may continue, in the meanwhile judgment delivered thereon shall not be implemented without leave of the Court. Thus, as the judgment of the full bench is binding on this Court, and the same being not stayed by the Supreme Court, it is not possible to accept the contention as urged on behalf of

respondent that this Court cannot grant any ad-interim relief.”

50 In *Vidya Drolia Vs. Durga Trading Corporation*,²¹ the Supreme Court affirmed the decision in *Garware*, which again is a pronouncement on the exercise of power under sub-section (6) of Section 11 and not an exposition of law as regards Section 9 petition.

51 In *Intercontinental Hotel Groups (India) Pvt Ltd. Vs. Waterline Hotels Pvt. Ltd.*, while the answer to the reference placed for consideration before larger Bench was awaited, the two Judges Bench categorically held that until the larger bench decides on the inter-play between Section 11(6) and Section 35, the arbitrations should continue to be carried on, unless the issue before the Court patently indicates existence of dead wood, and by relying upon *N.N. Global (supra)*, the Three Judges Bench, it was held that there is no legal impediment to the enforceability of the arbitration agreement pending payment of stamp duty on the substantive contract.

Further, in case of *Weatherford Oil Tool Middle East Limited Vs Baker Hughes Singapore PTE*, the Division Bench relying upon the doctrine of separability encompassed in arbitration jurisprudence, relied upon the decision of Three Judges Bench in *N.N. Global (supra)* which has clearly identified that an arbitration agreement is a distinct and separate agreement, independent from the substantive commercial contract in which it

²¹ (2021) 2 SCC 1

is embedded and it is based on the premise that when the parties entered into a commercial contract containing an arbitration clause, it gives birth to two separate agreements ie one the substantive contract which enumerate the rights and obligations of the parties and two, the arbitration agreement which contain a binding obligation of the parties to resolve their dispute through the mode of arbitration.

Holding that there is no legal impediment to the enforcement of the arbitration agreement, pending payment of stamp duty on the substantive contract, while the issue was pending for consideration before the Constitution Bench, it was held that at a pre-appointment stage, the fate of the proceedings cannot be left hanging and considering the time sensitivity in the arbitration cases, the petitions were entertained and the sole arbitrator was appointed.

52 In light of the aforesaid, the submission advanced on behalf of the respondent's and in specific, by Advocate Anuj Desai, Mr.Khandeparkar, Mr.Rushabh Seth and Shanay Shah that the substratum of the judgment of the High Court in Gautam Landscapes is taken away by ruling of the Supreme Court in N.N. Global, the Constitution Bench is not a sustainable argument.

What has been held in N.N. Global is the exigibility of arbitration agreement to stamp duty and that the agreement is non-existent in law, unless the stamp duty is paid. It is the

Tilak

argument on behalf of the respondents that an arbitration agreement cannot be severed or read in isolation from its parent contract for the purpose of Section 11 of the Application and the aspect that an arbitration agreement is independent, is only to ensure and preserve its existence from the point of view of it being invoked for adjudication, despite the subject agreement being terminated and what is canvassed before me, is that for the purpose of attracting the stamp duty, the aspect of it being an independent contract, is wholly irrelevant.

This argument, when tested against the power of a Civil Court to grant injunction under Order 39 Rule 1 and 2 of the Code of Civil Procedure, and considered from a view point that if the Civil Court is not debarred from granting the injunction/interim relief, even if the agreement from which the rights are flowing or claim to be flowing is unstamped/insufficiently stamped, then, without looking into the said aspect, on a *prima facie* case being made out, the injunction may be granted in favour of the plaintiff. However, the party which chose arbitration as the mode of dispute resolution, would suffer a setback, as before it even invoke the arbitration, and though intend to get the documents adequately stamped in due course of time, would be refused an interim relief on the ground of insufficiency of the stamp duty, whereas if he approaches the Civil Court, the non-stamping or insufficient stamping of the document, will never pose an obstacle for him.

Tilak

The consequence of such a scenario would ultimately discourage the parties from invoking arbitration as a mode of dispute resolution, as in the Civil Suit filed by a party, he will not face an obstruction at the stage when he seek the interim relief in form of an injunction, and rather it is only at the time when the document is to be admitted in evidence, it will be imperative for him to get it adequately stamped, as the document shall not be permitted to be read in evidence, in case, if it suffers from deficiency of stamp duty.

53 While considering a petition, under Section 9 of the Arbitration Act, which seek interim measures, the Court exercising the power akin to that of the Civil Court under the Code of Civil Procedure, shall not examine whether it is sufficiently stamped, but if at the stage when the document is produced for being admitted in evidence and it is found to be insufficiently stamped, then the Court can impound the document and recover the required stamp duty. For considering the relief under Section 9, the Court cannot be stopped in its track if it is satisfied that case has been made out by the petitioner for grant of interim relief. It is only at the stage when the document is admitted in evidence and being marked as Exhibit, the embargo created on part of the Authority, empowered to receive evidence, shall be triggered as the Stamp Act provide that no instrument chargeable with duty shall be admitted in evidence or any purpose, unless such instrument is duly stamped.

Tilak

However, upon evidence of payment of the necessary stamp duty, it is permitted to be admitted in evidence.

Considering this aspect, denying the interim relief/measure, at a pre-arbitral stage, only on the ground that the document is not stamped, will be too onerous upon a party as it may not necessarily intend to avoid the payment of stamp duty, but intend to seek interim relief at a very nascent stage.

The Full Bench of the Bombay High Court in case of *Hemendra Rasikla Ghia Vs. Subodh Mody*²² etc, has ruled upon an issue, as to the stage when the objection to the admissibility and/or proof of document should be raised; considered and decided by the Court. Broadly classifying the admissibility of documents in evidence into three classes, the first relating to the insufficient stamping and the objection raised to that effect, it is held that the Court before which the objection is taken, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit, and once the document is exhibited, Section 36 of the Act come into operation.

Definitely, it is thus indicative of the stage when the non-payment of stamp duty can be located as a deficiency in reading the document in evidence.

54 In the wake of the aforesaid decision, I am of the

²² (2008) SCC Online Bom 1017

considered view that an inadequately/insufficiently stamped instrument/document/agreement shall not preclude the party from seeking interim measures as contemplated under Section 9 of the Arbitration Act and it is definitely not the stage when there can be a determination of the sufficiency/non-sufficiency of stamp duty as distinguished at the stage of Section 11 when the Constitution Bench has clearly pronounced that when the document, either in original or a certified copy is produced, it is duty bound to act under Section 33 of the Stamp Act, as it has been held that the provision of Section 33 and the bar u/s.35 of the Stamp Act, would render the Arbitration Agreement contained in such instrument as being non-existent in law, unless it is validated under the Stamp Act.

On recording that the petitions filed u/s.9 deserve consideration on merits, despite the Arbitration clause contained in an agreement, or an independent arbitration agreement, not having been sufficiently stamped, I have directed listing of the petitions for consideration on merits on 9th November, 2023 at 2.30 p.m.

(SMT. BHARATI DANGRE, J.)

Tilak