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**Validly of Arbitration Clause/Agreement in  
Unstamped/Insufficiently Stamped Agreements**

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### **1. INTRODUCTION**

1.1. Arbitration is one of the most effective and most preferred Alternative Dispute Resolution (ADR) mechanism for corporates and businesses not only in India, but across the globe. As the Courts are overburdened with cases, therefore, the entire process of litigation is very time consuming and the parties not only have to incur huge financial expenses in prosecuting their cases, but at times they also undergo mental and physiological stress due to complex legal procedures and procedural technicalities involved in the cases.

1.2. In modern era since trade and commerce is being carried out both within the country and also across the borders, it is always advisable for the parties that while reducing their rights and obligations arising out of the contract/instrument in writing they must incorporate an arbitration clause/agreement for the speedy resolution of any dispute arising between them.

1.3. However if the agreement/contact/instrument between the parties containing the arbitration clause is either unstamped or insufficiently stamped such contract or agreement will not be admission in evidence as per the provisions of Section 35 of the Indian Stamp Act, 1899 which inter alia provides “*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*”

### **2. ISSUE**

2.1. An instrument which is unstamped or insufficiently stamped is inadmissible in evidence and cannot be acted upon legally. The primary issue that is the subject matter of the present article is “**whether the arbitration clause/agreement incorporated in an insufficiently stamped or un-stamped agreement will also become non-existent, unenforceable, or invalid if the underlying contract is not stamped?**”

2.2. This article makes a sincere attempt to the answer the above-mentioned issue in the light of **7-Judge bench** decision of the Hon’ble Apex court in the case titled as **In Re: Interplay between Arbitration Agreements under The Arbitration and Conciliation Act, 1996 and The Indian Stamp Act 1899** [M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors. 2023 SCC Online SC 1666]<sup>1</sup>

2.3. The Constitution Bench of the Hon’ble Supreme Court, has authoritatively held in the above-mentioned case that “an arbitration clause/agreement incorporated in an unstamped or inadequately stamped agreement does not becomes invalid, and that the defect of non-payment or inadequate payment of stamp duty on such agreement is a curable defect”

### **3. BACKGROUND:**

To better appreciate the judgement passed by the Hon’ble Seven-Judges bench of the Hon’ble Supreme Court, it is important to situate it against the backdrop of earlier cases that have dealt with the issue at length:-

3.1. Earlier a Five- Judges Bench decision of The Hon’ble Apex Court in **M/s NN Global Mercantile Private Limited V/s M/s Indo Unique Flame Limited & Ors<sup>2</sup>**, has held by a 3:2 ratio that an arbitration clause in an unstamped or insufficiently stamped contract/agreement cannot be considered valid until the parties have duly complied with the stamp duty obligations. It was further held in the aforesaid decision that 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. 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.

**3.2. SMS Tea Estates Pvt. Ltd. V/s Chandmari Tea Co Pvt. Ltd** <sup>3</sup> (“**SMS Tea Estates**”): The first such decision was *SMS Tea Estates Pvt. Ltd. V. Chandmari Tea Co*, wherein the Hon’ble Supreme Court held that if a document/agreement containing an arbitration clause is found to be unstamped/insufficiently stamped, the arbitration clause incorporated in it cannot be acted upon as per Section 35 of the Stamp Act. Accordingly, the instrument including the arbitration clause will be admissible in evidence in Court only upon the payment of deficit stamp duty and penalty as per Stamp Act and not otherwise.

**3.3 Garware Wall Ropes Limited V/s Coastal Marine Constructions & Engineering Limited** <sup>4</sup> -: Next, came *Garware Wall Ropes Limited v. Coastal Marine Constructions & Engineering Limited*. In this case, the Hon’ble Supreme Court reiterated the proposition of SMS Tea case (supra) and held that an arbitration agreement in an unstamped instrument does not exist in law, thus, it cannot be acted upon by Courts at the time of appointment of an Arbitrator. The decision was rendered subsequent to the 2015 amendment, when the Section 11 of the Arbitration & Conciliation Act had already been narrowed down.

**3.4 Vidya Drolia V/s Durga Trading Corporation** <sup>5</sup> : Thereafter, a three-Judge Bench of Hon’ble Supreme Court in **Vidya Drolia V/s Durga Trading Corporation** reiterated the position of law as upheld by the Hon’ble Apex court in **Garware Wall Ropes** (supra) for the proposition that an arbitration agreement exists only when it is valid and legal.

**3.5 N.N. Global Mercantile Private Limited V/s Indo Unique Flame Ltd. And Others** <sup>6</sup>: Thereafter, in *N.N. Global Mercantile Private Limited V/s Indo Unique Flame Ltd. And Others (“N.N. Global-I”)*, a Bench of three Judges of The Hon’ble Supreme Court was adjudicating the issue pertaining to the enforceability of an arbitration clause contained in an unstamped work order. The Bench, held that an arbitration agreement, being independent from the underlying contract which is of commercial in nature, would not become invalid, unenforceable, or non-existent. The Court held that the non-payment of stamp-duty is a curable defect and will not affect the validity of the main

contract. Thus, the Hon'ble Bench adopted a view at variance with **SMS Tea Estates** (supra) and **Garware Wall Ropes** (supra). The Bench noted the decision of the co-ordinate Bench in **Vidya Drolia** (supra) and doubted the correctness of the view adopted in **Garware Wall Ropes** (supra) and in **Vidya Drolia** (supra) and made a reference of the following issue to a Bench of five Judges:

“58. [...] Whether the statutory bar contained in Section 35 of the Stamp Act, 1899 applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?”

**3.6. M/s NN Global Mercantile Private Limited V/s M/s Indo Unique Flame Limited & Ors (supra)** (“N.N. Global II”): The Constitution Bench of the Hon'ble Apex Court in N.N. Global II by a majority of 3:2 **overruled** the judgment passed in **NN Global I** and upheld the position of law laid down in **SMS Tea Estates** (supra) and **Garware Wall Ropes** (supra). The conclusions of the majority can be summarized in the following terms:

*1. The view taken in SMS Tea Estates (supra) as followed in Garware (supra) and by the Bench in Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and other Charities v. Bhaskar Raju and Brothers and others 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).*

*2. An instrument, which is exigible to stamp duty, may contain an Arbitration Clause 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.*

*3. 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.*

*4. 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.*

*5. 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.*

*6. 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.*

*7. 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.*

However, Hon'ble Justice Ajay Rastogi & Hon'ble Justice Hrishikesh Roy dissented from the majority opinion and observed that the courts while exercising power under section 11 is called upon to decide only the "existence" of an arbitration agreement and all other issues, including the issue of stamping must be left for the arbitral tribunal to decide under Section 16 of the Arbitration Act. Hon'ble Justice Hrishikesh Roy also held that an unstamped or

insufficiently stamped document does not become invalid because the failure to stamp an instrument is a curable defect. The court also observed that the issue whether a document is insufficiently stamped or not should be left to be decided by the arbitrator. In a nut shell Hon'ble Justice Hrishikesh Roy held that **SMS Tea Estates** (supra) and **Garware Wall Ropes** (supra) do not lay down the correct position of law.

**3.7. In Re: Interplay between Arbitration Agreements under The Arbitration and Conciliation Act, 1996 and The Indian Stamp Act 1899 [M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors 2023 SCC Online SC 1666 (“N.N. Global III”)]:** Having regard to the larger ramifications and consequences of the decision in **N.N. Global II** (supra), a reference came to be made before the Constitution Bench of Seven Judges of the Hon'ble Supreme Court in Curative Petition to reconsider the correctness of the view of the five-Judge Bench and the Constitution Bench of Seven Judges of the Hon'ble Supreme Court has authoritatively set the controversy to rest in **In Re: Interplay between Arbitration Agreements under The Arbitration and Conciliation Act, 1996 and The Indian Stamp Act 1899** [ [M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors. 2023 SCC Online SC 1666](#) ].

#### **4. DISCUSSION**

**4.1. In In Re: Interplay between Arbitration Agreements under The Arbitration and Conciliation Act, 1996 and The Indian Stamp Act 1899 [M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors. 2023 SCC Online SC 1666 (“N.N. Global III”)]**, the Constitution Bench of the Hon'ble Supreme Court analysed the purpose and objective of the Indian Stamp Act, 1899, Indian Contract Act, 1872 and their harmonious construction with the Arbitration and Conciliation Act, 1996. On the purpose of Stamp Act, 1899 the court held that The Stamp Act, 1899 is a fiscal measure with the object to secure revenue for the State on certain classes of instruments. The Stamp Act is not enacted to arm the litigant with a weapon of technicality to meet the case of his opponent. A fiscal statute does not bar the entertainability

of a lis, except where the statute specifically so prescribes. The Stamp Act does not prescribe a bar on the entertainability of a lis. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. On the aspect of harmonious construction the court observed that The Arbitration Act is a special law and the Indian Contract Act and the Stamp Act are general laws therefore, arbitration act will have primacy over the Stamp Act and the Contract Act in relation to arbitration agreements for multiple reasons.

4.2. The Hon'ble Apex Court said that the admissibility of an instrument in evidence is distinct from its validity or enforceability in law. Section 2(g) of the Contract Act provides that an agreement not enforceable by law is said to be void. The admissibility of a particular document or oral testimony, on the other hand, refers to whether or not it can be introduced into evidence. An agreement can be void without its nature as a void agreement having an impact on whether it may be introduced in evidence. Similarly, an agreement can be valid but inadmissible in evidence. The Hon'ble Court observed that Section 35 of the Stamp Act is unambiguous, it renders a document inadmissible and not void. The effect of not paying stamp duty or paying an inadequate amount renders an instrument inadmissible and not void. Non-stamping or improper stamping does not result in the instrument becoming invalid. The Stamp Act does not render such an instrument void. The non-payment of stamp duty is accurately characterised as a curable defect. The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it. It bears mentioning that there is no procedure by which a void agreement can be "cured."

4.3. The court further noted that one of the main objectives behind the enactment of the Arbitration Act was to minimize the supervisory role of Courts in the arbitral process. Party autonomy and settlement of disputes by an arbitral tribunal are the hallmarks of arbitration law. Section 5 gives effect to the true intention of the parties to have their disputes resolved through



arbitration in a quick, efficient, and effective manner by minimizing judicial interference in the arbitral proceedings. The Arbitration Act is a self-contained code inter alia with respect to matters dealing with appointment of arbitrators, commencement of arbitration, making of an award and challenges to the arbitral award, as well as execution of such awards. When a self-contained code sets out a procedure, the applicability of a general legal procedure would be impliedly excluded. Being a self-contained and exhaustive code on arbitration law, the Arbitration Act carries the imperative that what is permissible under the law ought to be performed only in the manner indicated, and not otherwise. The corollary is that it is not permissible to do what is not mentioned under the Arbitration Act. Therefore, provisions of other statutes cannot interfere with the working of the Arbitration Act, unless specified otherwise.

4.4. Moreover the Hon'ble Court also ruled that the doctrine of competence-competence has both negative and positive connotations. As a **positive implication**, the Arbitral Tribunals are declared competent and authorised by law to rule as to their jurisdiction and decide non-arbitrability questions. In case of expressed negative effect, the statute would govern and should be followed. Implied negative effect curtails and constrains interference by the court at the referral stage by necessary implication in order to allow the Arbitral Tribunal to rule as to their jurisdiction and decide non-arbitrability questions. As per the **negative effect**, courts at the referral stage are not to decide on merits, except when permitted by the legislation either expressly or by necessary implication, such questions of non-arbitrability.

#### 4.5. Summarised Conclusions Reached in the Judgment:

- i) Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable.
- ii) Non-stamping or inadequate stamping is a curable defect.
- iii) An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The Court concerned must examine whether the arbitration agreement prima facie exists.

- iv) Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal.
- v) The decisions in NN Global-II (5 Judge Bench) and SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66, were overruled. Further, Paragraphs 22 and 29 of Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 were overruled to that extent.

Justice Sanjiv Khanna (as his lordship then was) authored a separate but concurring judgment, providing additional justifications for the conclusion reached in the main judgment.

## **5. CONCLUSION**

Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of Stamp Act, 1899 and such agreements are not rendered void or void ab initio or unenforceable. A "void ab initio" instrument, which is stillborn, has no corporeality in the eyes of law. It cannot confer or give rights, or create obligations. However, an instrument which is "inadmissible" exists in law, albeit cannot be admitted in evidence or be registered, authenticated or be acted upon by a public officer till it is duly stamped. Therefore, even if the underlying contract containing the arbitration clause is unstamped or insufficiently stamped, it does not render the arbitration clause invalid or unenforceable as non-stamping or inadequate stamping is a curable defect.

## **6. DISCLAIMER**

This article is for information purposes only. Laws, Rules and Regulations are subject to judicial interpretation which may vary and evolve as per the peculiarity of every case. It is strongly recommended to seek professional advice on any specific issue.

**LIST OF SOURCE/REFERENCES:**

1. In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act, 1899, 2023 SCC OnLine SC 1666.
2. M/s NN Global Mercantile Private Limited V/s M/s Indo Unique Flame Limited & Ors, (2023) SCC Online SC 495.
3. SMS Tea Estates Pvt. Ltd. V/s Chandmari Tea Co Pvt. Ltd, (2011) 14 SCC 66.
4. Garware Wall Ropes Limited V/s Coastal Marine Constructions & Engineering Limited, (2019) 9 SCC 209.
5. Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1.
6. N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. And Others, (2021) 4 SCC 379.