



ARBITRATION AND CONCILIATION

NN Global Mercantile Limited v. Indo Unique Flame Limited and Ors. – The Minority View

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The decision passed by the Hon'ble Supreme Court ("the SC") on 11th January, 2021^[1] by the three-judge bench comprising of Justice D.Y. Chandrachud, Justice Indu Malhotra and Justice Indira Banerjee in *NN Global Mercantile Limited vs. Indo Unique Flame Limited and Ors.* ("NN Global") had *inter alia* held severability and separability of an arbitration agreement from the underlying substantive agreement in which it may be embedded, thereby stating that non-stamping or insufficient stamping of the substantive agreement does not render the underlying arbitration agreement as void and unenforceable.

On making reference to the Constitution Bench of 5 judges comprising of Justice K.M. Joseph, Justice Annirudha Bose, Justice Ajay Rastogi, Justice Hrishikesh Roy and Justice C.T. Ravikumar^[2], the said decision of the three-judge bench in NN Global was declared as not in accordance with the law. On 25th April, 2023, the SC, by a 3:2 majority held that an agreement containing an arbitration clause which is chargeable to stamp duty and is unstamped or insufficiently stamped, cannot be enforced as per sections 2(g) and 2(h) of the Indian [Contract Act](#), 1872 thereby rendering such contracts non-existent in law and incapable of being acted upon.

The SC further held that the courts must adjudicate upon the appropriate stamp duty payable in accordance with the applicable stamp acts; in this case Indian Stamp Act ("the Stamp Act") on the principal agreement containing the arbitration clause while entertaining application under S.11 of the Arbitration and Conciliation Act, 1996 ("the Act") for the appointment of the arbitrator(s). i.e if the court finds that there is a discrepancy with respect to the stamp duty payable on the agreement and the same is in contravention to the provisions of [the Stamp Act](#), the instrument is liable to be impounded at that stage itself.

The decision of the majority upholds the judgments passed in [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Limited](#) and [Vidya Drolia v. Durga Trading Corporation](#).

MINORITY'S VIEW

Justice Ajay Rastogi and Justice Hrishikesh Roy concurred that the court may abstain from examining the stamp duty at the pre-referral stage as deciding it at the outset would add to the procedural complexity thereby causing unnecessary delay in litigation before the court. Further, it was noted that, issue of stamping is a curable defect in accordance to the Stamp Act, hence it does not render the arbitration agreement void or unenforceable.

Justice Hrishikesh Roy while expressing his inability to agree with the majority held that in arbitration, party autonomy must prevail and courts must limit its intervention in accordance to the provisions of the Act. He further stated that S.11(6) of the Act provides for appointment of arbitrators *only* when the parties fail to mutually agree on the name of an arbitrator or appoint an arbitrator in terms of the arbitration agreement, thereby limiting the scope of judicial intervention while passing an administrative order which is not a judicial order per se.

The minority stated that all contentious issues must be raised and adjudicated before arbitrator(s) in light of S. 16 of the Act as the said provision empowers the arbitrator(s) to adjudicate upon the existence and validity of the arbitration agreement which includes examination of stamp duty payable as per the provisions of the Act. Therefore, the minority view prevents undue delay while initiating proceedings.

CONCLUSION

The SC while interpreting both the legislatures, upheld the supremacy of Indian Stamp Act over the Arbitration Act. The stand of the court is inconsistent from its previous ones which have so far encouraged arbitration. The majority judgment opens up a new avenue for judicial intervention, which is contrary to the fundamentals of arbitration which otherwise restricts judicial intervention in accordance with the Arbitration Act. At the outset itself, it delays disposal of the section 11 application as the party relying on the agreement would have to first cure the defect of stamp duty payable to obtain relief from the court.

This judgment is anticipated to cause resistance on the pro-arbitration image that India is endeavouring to create globally over the last decade by promulgating legislative amendments such as Arbitration Act (Amendment), Act 2015 and 2019. It may delay the judiciary in promoting a speedier and more efficient arbitration process as scope of judicial intervention now stands enlarged as it is likely to act as an impediment for seeking urgent interim reliefs and enforcing emergency awards.

To avoid such anticipated resistance, the time has arrived to propel appointment of the arbitrator(s) by designated arbitration institutions. And now that India has adequate arbitration infrastructure such as the India International Arbitration Centre, Mumbai Centre for International Arbitration, Indian Council of Arbitration, International Arbitration Center at the GIFT City, International

Arbitration and Mediation Centre and the Nani Palkhivala Arbitration Centre, appointment of arbitrators and issues on point of the existence of the arbitration agreement can be effectively dealt and decided by arbitrators appointed through these institutions. This will thus give much needed impetus to India's evolving image as arbitral institution will align to achieve time and cost-effective arbitral proceedings.

[1](2021) 4 SCC 379

[2]2023 SCC OnLine SC 495