

# VALIDITY OF UNSTAMPED ARBITRATION AGREEMENTS – AN ANALYSIS OF THE N.N. GLOBAL JUDGMENT

## INTRODUCTION

Recently, a Constitution Bench of the Supreme Court in *N.N. Global Mercantile Private Limited v M/s Indo Unique Flame Ltd & Ors.* [2023 SCC OnLine SC 495], while determining the validity of an unstamped arbitration agreement, (hereinafter “**Judgment**”), *vide* a 3:2 majority has ruled that any unstamped instrument, exigible to stamp duty, and containing an arbitration agreement cannot be said to be a contract within the meaning of Section 2(h) of the Indian Contract Act, 1872. The Court further held that the provisions of Section 35 of the Indian Stamp Act, 1899 (hereinafter “**Stamp Act**”), would bar the admission of an unstamped or insufficiently stamped arbitration agreement unless a necessary certificate is provided under Section 42 of the Stamp Act.

Through this article, we seek to provide an overview of the findings of the Supreme Court in the Judgment.

## BACKGROUND AND FACTUAL MATRIX

In the case at hand, the arbitration clause was contained in an unstamped work order. An application filed under Section 8 of the Arbitration and Conciliation Act (hereinafter “**Act**”) seeking reference to arbitration, before the

Commercial Court, was rejected on the ground that the arbitration agreement was not enforceable in law as the work order was unstamped. Subsequently, a writ petition, challenging the order of the Commercial Court, was filed by the aggrieved party before the High Court and the same was allowed. Thereafter, an appeal was preferred before the Hon’ble Supreme Court.

The issue was initially decided by a three-judge bench of the Supreme Court in *N.N. Global Mercantile Pvt. Ltd. vs M/s Indo Unique Flame Ltd & Ors.* [2021 4 SCC 379] (hereinafter “**NN-1**”), wherein the Supreme Court had held that the non-payment of stamp duty on the commercial contract would not invalidate the entailing arbitration agreement and render it non-est in law. The Court had arrived on the finding by relying on the doctrine of kompetenz-kompetenz which is based on the premise that an arbitration agreement is independent of the underlying contract. Therefore, the Court in NN-1 had opined that an arbitration agreement can be acted upon even if the main contract is unstamped. In doing so, the Court had overruled the findings of the Court in *SMS Tea Estates (P) Ltd. v Chandmari Tea Co. P Ltd* [2011 14 SCC 66], (“**SMS Tea**”) wherein the Court had ruled to the contrary and opined that the non-payment of stamp duty would render the arbitration

agreement non-existent in law and not enforceable. Moreover, the Court also dissented with opinion of the Court in *Garware Wall Ropes Ltd v Coastal Marine Constructions & Engg. Ltd* [2019 9 SCC 209], (“**Garware**”) that an arbitration agreement contained in an unstamped agreement could not be read in evidence and, therefore, could not be invoked.

The Court in NN-1 had also doubted the correctness of the findings rendered by the Coordinate Bench of the Supreme Court in *Vidya Drolia v Durga Trading Corporation* [2021 2 SCC 1]. In light of the contradictory judgments and opinions of the co-ordinate bench, the issue was referred the matter to the above Constitutional Bench.

## ISSUE

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?

## OVERVIEW OF THE JUDGMENT

The Supreme Court in its Judgment has held that the Stamp Act is a substantive law and an

agreement shall be unenforceable on account of a violation of / non-compliance with such substantive law, on account of non-payment of sufficient stamp duty. Therefore, such an unstamped or insufficiently stamped agreement would not be a contract, under Section 2(h) of the Contract Act and would not be enforceable. Further, such unenforceable agreements cannot be enforced by the Court under Section 11 of Act, when stamp duty has not been paid to the State for it to recognise and enforce the rights of the Parties to an agreement. The Court in clarifying the position of stamp duty vis-à-vis arbitration agreements, held that:

- An instrument containing an arbitration agreement and which is exigible to stamp duty, if not sufficiently stamped as per the Stamp Act shall not be considered as a contract under the Section 2(h) of the Indian Contract Act and hence not enforceable in law.
- The doctrine of kompetenz-kompetenz recognises the existence of the Arbitration Clause / Agreement to be separate from the contract, however, the same would only be enforceable when the stamp duty on the underlying contract is duly paid.
- The powers of the Court while deciding a Section 11 application, includes the power to examine the existence and validity of an arbitration agreement.
- While determining an application under Section 11 of the Act, the Court is duty-bound to act in accordance with Section 33 of the Stamp Act and impound the insufficiently

stamped/unstamped instrument. In light of Section 35 of the Stamp Act, the arbitration agreement cannot be acted upon by the Court.

- Letter, telex or telegrams or other means of communication in writing which result in an arbitration agreement would also have to be properly stamped, in accordance with Section of the Stamp Act.
- The Court however clarified that it could proceed further with the Section 11 Application if the defect in payment of stamp duty is cured as per the provisions of the Stamp Act.
- The Supreme Court in holding the above has overruled *NN-1* and has held the findings of the Court in *SMS Tea* and *Garware* to be the correct positions in law.

*Note: It is pertinent to note that Judgment has not been pronounced with reference to Section 9 of the Act and the Court has limited its scope to Section 11 of the act.*

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