

RESEARCH PAPER

**ANALYSING UNSTAMPED ARBITRATION AGREEMENTS IN NN GLOBAL:
DELVING INTO THE STAMP DUTY DILEMMA**

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INTRODUCTION

In a recent landmark ruling by the Supreme Court of India's Larger Bench in the case of *N.N. Global Mercantile Private Limited v Indo Unique Flame Ltd and Others (2023)*, the court, with a majority of 3:2, held that an unstamped document containing an arbitration clause cannot be considered a legally enforceable contract under Section 2(h) of the Indian Contract Act 1872. As a result, it is deemed unenforceable under Section 2(g) of the Contract Act. This decision was reached following a referral to the Larger Bench due to conflicting judgments from different Supreme Court benches.

The ruling also established that Section 33 and Section 35 of the Stamp Act 1899 make the arbitration agreement within such a document legally void unless it is validated according to the Stamp Act's requirements. This decision has significant implications for the arbitration mechanism in India, as any agreement lacking the required stamp cannot serve as evidence in a court of law. Consequently, an unstamped agreement cannot be used to prove the presence of an arbitration agreement, which is essential for initiating arbitration proceedings. This judgment clarifies the enforceability of arbitration agreements in India, emphasizing compliance with stamp duty requirements for their validity. This research paper discusses the said judgment by comparing it to the pre-conditions of this judgment and its impact on the arbitration and stamp duty mechanism in India.

STATE OF AFFAIRS PRECEDING IN THE NN GLOBAL PRONOUNCEMENT

In the case of *SMS Tea Estates (P) Ltd v Chandmari Tea Co.*, the Supreme Court held that the court cannot enforce agreements that lack the necessary stamp duty and penalty payments, even if these agreements contain arbitration clauses. This applies to both unstamped substantive agreements and instruments.

In the *Garware Wall Ropes Ltd v Coastal Marine Construction & Engg* case, the court acknowledged that any insufficiency in stamp duty could be remedied by making the required payment. Once the deficient stamp duty has been settled, the arbitration proceedings can move forward. This decision in the case aligns with the precedent established in the SMS case.

In the case of *N.N. Global Mercantile Private Limited v Indo Unique Flame Ltd and Others* (N.N. Case – I), a three-judge panel of the Supreme Court dismissed the legal principles established in the SMS Tea case and expressed discontent with the findings made in the Garware case.

ISSUE BROUGHT BEFORE THE CONSTITUTION BENCH

In a referral made by a three-judge bench of the Supreme Court, the legal question put forth for consideration by the Constitution Bench was whether, in compliance with the statutory restriction outlined in Section 35 of the Stamp Act, which applies to instruments subject to stamp duty, the arbitration agreement contained within such an instrument would be rendered non-existent, unenforceable, or invalid until the required stamp duty is paid. Additionally, the question pertained to whether a court, when addressing a petition filed under Section 11 of the Arbitration and Conciliation Act 1996 (Arbitration Act), is obligated to assess the validity of such an agreement prior to adjudicating on the Section 11 petition.

RULING DELIVERED BY THE CONSTITUTION BENCH

After conducting a thorough examination of the Issue, the Supreme Court concluded that the legal perspective established in *SMS Tea Estates*¹, followed in *Garware*² and endorsed in *Vidya Drolia*³, accurately represents the correct legal position. The Court also approved the reasoning provided in these cases. To arrive at this decision, the Supreme Court carefully analysed the statutory framework and background of the Indian Stamp Act, 1899 (Stamp Act), the Indian Contract Act, 1872 (Contract Act), and the Arbitration Act.

Under the Stamp Act, an unstamped document is subject to compulsory impoundment as per Section 33 and only becomes enforceable once it is appropriately stamped under Section 42(2). Despite being a fiscal statute, the Supreme Court ruled that the Stamp Act cannot be treated as a procedural law that would consider an unstamped arbitration agreement as a mere "curable defect" or "technicality."

Section 11(6A) of the Arbitration Act stipulates that the Supreme Court or High Court, while considering any application under Section 11, should focus on determining the "existence" of an arbitration agreement. As an arbitration agreement is subject to stamp duty and cannot be enforced without payment in accordance with the Stamp Act, such an arbitration agreement would be considered void under the Contract Act. Since any legal action on an unstamped document is not permissible, an unstamped arbitration agreement is invalid, although it is not null and void. Such an arbitration agreement can be validated by complying with the Stamp Act. Until such compliance takes place, the arbitration agreement would not be considered "legally enforceable" and would not be deemed to exist under the law.

The Supreme Court also observed that the Arbitration Act does not necessitate the production of the original document, and parties seeking arbitration may submit a certified copy of the agreement. However, the Court noted that while it cannot impound a certified copy under Section 33, the prohibition under Section 35 of the Stamp Act would still apply, as the Court can always inquire whether the required stamp duty has been paid.

¹ SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777

² Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324

³ Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549]

CONTRAST VIEW BETWEEN MINORITY AND MAJORITY

The majority opinion, articulated by Justices Joseph Kurian, Aniruddha Bose, and C.T. Ravikumar, asserts that an arbitration agreement contained within an unstamped document lacks enforceability. They justify this stance by highlighting that the Stamp Act of 1899 primarily functions as a revenue-generation fiscal law. According to their perspective, the Arbitration and Conciliation Act, 1996 does not override the Stamp Act, and they reject the application of the separability doctrine in this context.

In contrast, the minority viewpoint, put forth by Justices Ajay Rastogi and Hrishikesh Roy, contends that an arbitration agreement within an unstamped document can be enforced. They underline the primary goal of the Arbitration and Conciliation Act, which is to promote arbitration as a preferred method for resolving disputes. They argue for an interpretation of the Act that Favors arbitration and acknowledge the relevance of the separability doctrine.

ISSUES OVERLOOKED BY SUPREME COURT

In the majority ruling, the Supreme Court failed to consider the following significant issues:

1. The applicability of the NN Global II judgment in terms of whether it should apply retrospectively or prospectively.
2. Whether the stamping requirement should be extended to arbitration cases that are already in progress.
3. Whether the intrusion into the restricted scope of court intervention outlined in Section 11 of the Arbitration Act aligns with the intended purpose and boundaries of that provision.

**NN GLOBAL'S OBSERVATIONS REGARDING SECTION 36 OF THE STAMP ACT
AS AN AMBIGUOUS AND FLEETING COMMENT:**

While the SC thoroughly examined the pertinent sections of the Stamp Act in the NN Global case, it did not explicitly tackle the issue of how Section 36 affects the enforceability of an unstamped or inadequately stamped agreement that has already been accepted as evidence. The only allusion to this concept can be found in paragraphs 51-52 of the judgment, and even there, it's presented as a somewhat unclear side remark. Given this situation, it is essential for us to evaluate this matter both theoretically and in light of past legal precedents.

SECTION 33 AND SECTION 35 OF THE STAMP ACT:

In its interpretation of Section 33 of the Stamp Act, the court explained that whenever an authority is presented with a document or instrument, it becomes their responsibility to examine whether the correct stamp duty has been paid. If it is determined that the instrument does not conform to the stamping requirements laid out in Section 33(2), the authority is obligated to confiscate the document in question. Regarding its understanding of Section 35 of the Stamp Act, the court clarified that if an instrument is initially deemed inadmissible due to either being unstamped or having insufficient stamping, it can still be rendered admissible by later paying the required stamp duty along with a penalty. This illustrates that the stipulation outlined in Section 35 is not inflexible and can be rectified at a subsequent stage. An instrument that lacks proper stamping does not automatically lose all validity; instead, it can be regularized and utilized as evidence once the conditions specified in the proviso to Section 35 are met.

FLAWED INTERPRETATION THWARTING THE ORIGINAL PURPOSE:

The fundamental aim of the NN Global judgment was to effectively protect government revenue and ensure that parties involved in agreements fulfil their legal obligations under the Stamp Act by paying the required dues. Allowing an incorrect interpretation of Section 36 of the Stamp Act, as seen in the *ARG Outlier case*⁴, could undermine the initial objective of safeguarding government revenue based on a simple technicality, namely the failure of a party to raise objections regarding the admission of evidence. Therefore, considering the theoretical and precedent-based considerations mentioned earlier, it is advisable that both arbitral tribunals and courts refrain from entertaining such a misinterpretation of Section 36 of the Stamp Act, in order to adhere to the legal principles established in the NN Global case.

⁴ M/s. Arg Outlier Media Private Limited v/s HT Media Limited (2023 SCC Online Del 3885)

RETROSPECTIVE OR RETROACTIVE APPLICATION OF NN GLOBAL II

In the case of *Securities and Exchange Board of India v. Rajkumar Nagpal*,⁵ the Supreme Court made a distinction between the concepts of retrospectivity and retroactivity. It reaffirmed the principles established in the *Vineeta Sharma case*⁶, defining a retroactive statute as one that operates in the future but is based on events or requirements from the past. In contrast, retrospectivity refers to a statute that operates from the past and applies to events that have already occurred.

Considering this legal precedent, the NN Global II judgment should ideally apply retroactively, meaning it should be relevant to agreements signed before the judgment but submitted to arbitration after the judgment. However, the Supreme Court has clarified in various rulings that judicial decisions are to be applied retrospectively. This is because judicial decisions merely interpret existing law and provide clarification, unlike statutes or legislation that can affect vested rights. In the case of *Asst. Commissioner v. Saurashtra Kutch Stock Exchange*⁷, the Supreme Court upheld the retrospective application of a judicial decision, emphasizing that judges clarify existing law rather than creating new law. Therefore, the correct legal principle is to apply NN Global II retrospectively.

⁵ Securities and Exchange Board of India v. Rajkumar Nagpal 2022 SCC OnLine SC 1119.

⁶ Vineeta Sharma v. Rakesh Sharma (2020) AIR 3717 (SC)

⁷ ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227/12 DTR 346/219 CTR 90/173 Taxman 322 (SC)

CONCLUDING REMARKS

The NN Global judgment aimed to safeguard government revenue and ensure compliance with the Stamp Act by parties in agreements. Allowing an incorrect interpretation of Section 36, as in the ARG Outlier case, could undermine this goal based on a technicality - a party's failure to object to evidence admission. In light of theory and precedent, it's crucial for arbitral tribunals and courts to avoid entertaining such an interpretation to bypass NN Global. Clarification from the Supreme Court is needed to reduce confusion from ARG Outlier, preventing harm to ongoing arbitrations.

In *ARG Outlier v. HT Media*,⁸ Delhi High Court ruled that once an agreement with insufficient stamping supports an arbitral award, it can't be challenged under Section 34 of the Arbitration Act. Section 36 of the Stamp Act bars questioning an instrument's admissibility once accepted, except under Section 61. Even if Section 61 applies, the court's authority is limited to referring the document to the Collector of Stamps for stamp duty and penalty determination, without affecting the award's validity.

Hence, NN Global's recent ruling has implications for substantive contracts and arbitration clauses. Parties must comply with Stamp Act stamp duty diligently, and enforcing remedies after fixing stamping defects remains uncertain. This may impact institutional arbitration in India unless government intervention occurs.

⁸ ARG Outlier v. HT Media (2023 SCC Online Del 3885).