

# THE SUPREME COURT PROVIDES A STAMP OF APPROVAL TO ARBITRATION AGREEMENTS CONTAINED IN INADEQUATELY STAMPED DOCUMENTS

## Background

The issue of arbitrations arising out of and from inadequately stamped and/or unstamped documents is a vexed issue in law. The Supreme Court of India (“Supreme Court”) has time and again recognized the principle of severability of the arbitration agreement from its underlying contract<sup>1</sup> and held that “*An arbitration clause is a collateral term in the contract, which relates to resolution of disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract*”<sup>2</sup>. As a matter of fact, this position has also received statutory recognition under Section 16 of the Arbitration and Conciliation Act, 1996 (“Act”). Section 16(1) of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, “*has to be treated as an agreement independent of the other terms of the contract, and a decision that the contract*

*is null and void shall not entail ipso jure the invalidity of the arbitration clause.*”

Given this background, the issue that Courts have faced from time to time is determining whether parties can rely upon an arbitration clause contained in an insufficiently stamped and/or unstamped document to seek appointment of an arbitrator under Section 11 of the Act. While the issue is currently pending reference before a Constitution Bench, the Supreme Court in *Intercontinental Hotels Group (India) Pvt. Ltd. and Another v. Waterline Hotels Pvt. Ltd.*<sup>3</sup> has held that arbitration clauses contained in inadequately stamped documents cannot preclude parties from seeking appointment of an arbitrator under Section 11 of the Act.

## Factual matrix

Intercontinental Hotels Group (India) Private Limited, Intercontinental Hotels Group (Asia-Pacific) Pvt Ltd. (“Petitioners”) and Waterline Hotels Pvt. Ltd. (“Respondent”) entered into a Hotel Management Agreement (“HMA”) to run and operate a hotel. Disputes arose between the parties with the Petitioners

<sup>1</sup> See SMS Tea Estates Pvt. Ltd. v. M/s Chandmari Tea Co. Pvt. Ltd., (2011) 14 SCC 66; NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Limited and Ors., (2021) 4 SCC 379; Today Homes and Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust and Anr., (2014) 5 SCC 68; and National Agricultural Coop.

Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692.

<sup>2</sup> National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692, Paragraph 6.

<sup>3</sup> 2022 SCC OnLine SC 83.



contending that the Respondent failed to fulfil its payment obligations under the HMA. The Respondents in turn, unilaterally terminated the HMA, compelling the Petitioners to approach the Karnataka High Court seeking urgent interim and *ad-interim* reliefs under Section 9 of the Act.

By an order dated October 23, 2018, the Karnataka High Court granted *ad-interim* relief to the Petitioners and restrained the Respondent from evicting the Petitioners from the hotel until further orders. The Petitioners alleged that the Respondent failed to comply with the order and subsequently, invoked arbitration under the HMA. The Respondent *inter alia* contended that the arbitration notice was defective and did not merit a response. Thereafter, the Petitioners approached the Singapore International Arbitration Centre (“SIAC”) in terms of the arbitration clause under the HMA and requested SIAC to suggest names of sole arbitrators or invoke the mechanism of appointing a three-member tribunal, as per the HMA, in the event the Respondent did not agree to the name of a sole arbitrator. SIAC accordingly addressed a notice to the Respondent for the appointment of a sole arbitrator. However, the Respondent reiterated that the arbitration notice was defective and not curable and accordingly, did not consent to the appointment of an arbitrator. Aggrieved by the Respondent’s refusal to appoint an arbitrator, the Petitioners approached the Supreme Court under Section 11(6) read with Section 11(12)(a) of the Act, seeking appointment of the sole arbitrator.

## Submissions

At the outset, the Respondent contended that the HMA, which contained the

<sup>4</sup> (2019) 9 SCC 209.

arbitration clause between the parties, was unstamped. Accordingly, relying on the findings in *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.*<sup>4</sup>, (“Garware”) the Respondent contended that an agreement which is not duly stamped cannot be acted upon unless the same is first impounded, and applicable stamp duty is paid. The Petitioners however drew the attention of the Court to clause 22(1)(b) of the HMA to contend that the Respondent has presented a warranty and is under an obligation to ensure that the HMA would be legally valid and enforceable. In any event, the Petitioners submitted that they had subsequently paid the requisite stamp duty on the HMA under the provisions of the Karnataka Stamp Act, 1957 on a without prejudice basis, and as such the Supreme Court ought to appoint an arbitrator. The Respondent however contended that the Petitioners had paid insufficient stamp duty on the HMA and the same ought to be impounded and applicable stamp duty should be paid before an arbitrator is appointed.

## Issue

The issue before the Supreme Court was whether it had the jurisdiction to appoint an arbitrator in terms of the arbitration agreement between the parties, when the underlying document was insufficiently stamped.

## Findings

- i. On the jurisdiction of a Section 11 Court:

The Supreme Court, relying on the findings in *Vidya Drolia v. Druga Trading Corporation*<sup>5</sup> (“Vidya Drolia”) observed that post the

<sup>5</sup> (2021) 2 SCC 1.



amendments to the Act in 2015, the jurisdiction of a Court while entertaining an application for appointment of an arbitrator is very narrow and limited. The Supreme Court held that Courts are only to take a “*prima facie view on issues relating to existence of the arbitration agreement*”. The only exception to the “*prima facie*” rule was that the Court could adjudicate the existence of the arbitration agreement to “*cut the deadwood*”. Ultimately, the guiding principle for Courts while examining the existence of the arbitration agreement is “*when in doubt, do refer*”.

ii. On the legal position on validity of unstamped arbitration agreements:

At the outset, the Supreme Court observed that *Vidya Drolia* had referred to the findings in *Garware*, which held that an arbitration agreement cannot “*exist*” until the same had been duly stamped. However, the Supreme Court also noted that in *NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*<sup>6</sup>(“*NN Global*”), the *Garware* position was questioned and it was held that “*the utility of the doctrine of separability overrides the concern under the respective Stamp Acts*”. Therefore, any concern of non-stamping or under-stamping would not affect the validity of the arbitration agreement. However, the Court in *NN Global* had found it appropriate to refer the issue for authoritative settlement by a Constitution Bench

in light of *Vidya Drolia* referring to the ratio in *Garware*.

iii. On appointment of an arbitrator pending stamping of the underlying document:

The Supreme Court observed that although there is a need to constitute a larger bench to settle the jurisprudence in respect of the instant subject matter, considering the “*time-sensitive*” nature of arbitrations, all matters at the pre-appointment stage cannot be left in limbo until the larger bench settles the issue. In view of the same, the Supreme Court held that pending the decision by a larger bench, arbitrations must be carried on unless the issue before the Courts “*patently indicates the existence of deadwood*”.

On the issue of insufficient stamping, the Supreme Court relied on Clause 22(1)(b) of the HMA (i.e. the warranties given by the Respondent that the agreement is legally valid and enforceable) to observe that “*it is a matter of adjudication whether the Respondent could have raised the issue of validity of the arbitration agreement/substantive contract in view of the warranty. This aspect clearly mandates that the aforesaid issue is not deadwood*”. Accordingly, the Supreme Court held that the issue of an *estoppel* operating against the Respondent in respect of raising the contention of unenforceability of the HMA and/or whether the HMA is insufficiently stamped can be finally decided at a later stage.

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<sup>6</sup> (2021) 4 SCC 379.



Further, relying upon *Vidya Drolia*, the Supreme Court held that “*the issue of existence and/or validity of the arbitration clause would not be needed to be looked into herein, as payment of stamp duty, sufficient or otherwise has taken place herein. If it was a question of complete non-stamping, then this Court might have had an occasion to examine the concern raised in NN Global, however, this case is not one such scenario*”. In view of the above, the Supreme Court referred the matter to arbitration and appointed a sole arbitrator to adjudicate the issues.

### Author’s Comment

At first blush, this appears to be a welcome judgement by the Supreme Court in expediting arbitrations at the pre-appointment stage and clearing the path for the appointment of an arbitrator, pending adjudication on issues pertaining to insufficient payment of stamp duty. It further recognizes the principle of *kompetenz - kompetenz* and underlines that an arbitration agreement is separate and independent from its underlying contract.

However, the findings of the Supreme Court have the potential of opening a Pandora’s box and allowing unscrupulous litigants to abuse the process of law. It is *trite* law that under the provisions of the Indian Stamp Act, 1899 (“Indian Stamp Act”), when a document is presented before the appropriate authority under the provisions of the Indian Stamp Act, and such a document is insufficiently stamped, the appropriate authority has to impound the document and adjudicate the proper stamp duty payable on the instrument, along with a penalty, before

the same is considered to be a valid instrument under law and becomes admissible in evidence<sup>7</sup>. The *Garware* position effectively reiterates this position, holding that since the jurisdiction of a Section 11 Court is to examine both ‘existence’ and ‘validity’ of an arbitration agreement, unless the instrument is properly stamped, the same cannot be admitted into evidence and acted upon by the parties.

It would be pertinent to note that as of date, the *Garware* position holds the field. Even though *NN Global* has referred the issue for adjudication by a constitutional bench, it has only ‘doubted’, the findings in *Garware* and not set aside or overruled the same. In the instant case, the Respondent alleged that the Petitioner has not paid adequate stamp duty on the instrument and has *suo motu* paid the penalty, without having the same adjudicated and/or assessed by the relevant authority under the provisions of the Indian Stamp Act. Therefore, by allowing the instant petition for appointment of an arbitrator, the Supreme Court has effectively opened the floodgates for unscrupulous litigants to deliberately make insufficient payment of stamp duty and misuse the narrow and summary jurisdiction of a Section 11 Court to commence arbitration on an invalid and non-existent document

The Supreme Court further appears to have contradicted its own finding when on one hand, it holds that a Section 11 Court ought not to delve into the merits of a dispute while referring parties to arbitration but conversely, unravels the substantive document between the parties to observe that the warranties and covenants provided by the Respondent under the HMA might preclude it from

<sup>7</sup> See Sections 33, 35 and 38 of the Indian Stamp Act, 1899.



raising an objection on insufficient payment of stamp duty. In the author's opinion, considering the ambiguity that exists on the issue at the moment, the Supreme Court ought to have directed the Petitioner to either have the instrument adjudicated and/or assessed by the concerned authority under the Indian Stamp Act and/or pursue other remedies available under law. By allowing arbitrations to go on pending the decision by the constitutional bench, the Supreme Court appears to have tilted the balance in favour of serial litigants who may now summarily invoke arbitration at the drop of a hat, even in the absence of a valid, subsisting, and enforceable agreement.

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