M/S N.N. Global Mercantile Private ... vs M/S Indo Unique Flame Ltd. on 11 January, 2021

Author: Indu Malhotra

Bench: Indira Banerjee, Indu Malhotra, Dhananjaya Y Chandrachud

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 3802 - 3803 / 2020
(Arising out of SLP (Civil) Nos.13132-13133 of 2020)

M/s. N.N. GLOBAL MERCANTILE PVT. LTD. … Appellant

Versus

M/s. INDO UNIQUE FLAME LTD. & OTHERS … Respondents

JUDGMENT

INDU MALHOTRA, J.

1 This case raises interesting issues with respect to the application of the doctrine of separability of an arbitration agreement from the underlying substantive contract in which it is embedded; whether an arbitration agreement would be non-existent in law, invalid or un-enforceable, if the underlying contract was not stamped as per the relevant Stamp Act; and, whether allegations of fraudulent invocation of the bank guarantee furnished under the substantive contract, would be an arbitrable dispute. 1.1 The Respondent No.1-Indo Unique Flame Ltd. ("Indo Unique") applied for grant of work of beneficiation/washing of coal to the Karnataka Power Corporation Ltd. ("KPCL") in an open tender. KPCL awarded the Work Order vide letter of Award No.A1M1B3/Washed Coal/1052 dated 18.09.2015 to Indo Unique.

In pursuance of the Work Order dated 18.09.2015, the Respondent No.1 Company furnished Bank Guarantees for Rs.29.29 crores in favour of KPCL through its bankers, State Bank of India ("SBI"), the Respondent No.2 herein.

1.2 Indo Unique, the Respondent No.1 herein, subsequently entered into a sub-contract termed as a Work Order dated 28.09.2015 with the Appellant Company – M/s. N.N. Global Mercantile Pvt. Ltd.

("Global Mercantile"), for the transportation of coal from its washery at Village Punwat, District Yavatmal to the stockyard, siding, coal handling and loading into the wagons at Pandharpaoni siding, District Chanderpur, Maharashtra.

Clause 9 of the Work Order provided for furnishing a security deposit which reads as :

> "9. Security Deposit : You will submit the Bank Guarantee for Rs.5.00 crores for the average stock of washed coal lying at your stockyard. This Bank Guarantee can be issued from any nationalised Bank/first class bank, initially valid for a period of 18 (eighteen) months." Clause 10 of the Work Order incorporates an arbitration clause, which reads as:
>
> "10. Arbitration : In case of any dispute due to difference of opinion in interpretation of any clause or terms and conditions or meaning of the work or language the decision of the arbitrator appointed with mutual consent shall be treated as final and binding on both the parties." 1.3 As per Clause 9 of the Work Order, Global Mercantile furnished a Bank Guarantee for Rs.3,36,00,000/- on 30.09.2015, in favour of SBI-the banker of Indo Unique.

The Bank Guarantee was extended from time to time, and was last extended on 10.11.2017.

1.4 Under the principal contract with KPCL dated 18.09.2015, certain disputes and differences arose with Indo Unique, which led to the invocation of the Bank Guarantee by KPCL on 06.12.2017.

1.5 Indo Unique, on 07.12.2017, invoked the Bank Guarantee furnished by Global Mercantile under the Work Order.

It is the invocation of this Guarantee which has led to the present proceedings.

1.6 Global Mercantile filed a Civil (Commercial) Suit No.62 of 2017 against Indo Unique, and its banker SBI, as also the banker of the Appellant i.e. the Union Bank of India (Respondent No.3 herein), before the Commercial Court, Nagpur praying inter alia for a declaration that Indo Unique was not entitled to encash the bank guarantee as the Work Order had not been acted upon. It was expressly stated that Indo Unique had not allotted any work under the Work Order, nor were any invoices raised, or payments made by it. Consequently, there was no loss suffered which would justify the invocation of the Bank Guarantee. It was alleged that the invocation of the Bank Guarantee was fraudulent, since it was not in terms of the Work Order, being a conditional guarantee linked to the performance of work.

The Commercial Court vide an ex parte ad interim Order dated 15.12.2017 directed status-quo to be maintained with respect to the enforcement of the Bank Guarantee.

1.7 Indo Unique filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") in Civil (Commercial) Suit No.62 of 2017, seeking reference of disputes to

arbitration.

Global Mercantile opposed the application under Section 8 as being not maintainable since the Bank Guarantee was a separate and independent contract, and did not contain any arbitration clause. 1.8 The Commercial Court vide Order dated 18.01.2018 rejected the application under Section 8, and held that the arbitration clause in the Work Order dated 28.09.2015 was not a general arbitration clause, which would cover the Bank Guarantee. The Bank Guarantee was an independent contract between SBI and Union Bank of India for due performance of the contract. The Court noted the contention of Global Mercantile that neither of the parties had performed any part of the Work Order dated 28.09.2015, and consequently held that the jurisdiction of the Commercial Court was not ousted by the arbitration agreement.

1.9 Indo Unique then filed Civil Revision Petition No.9 of 2018 before the Bombay High Court challenging the Order passed by the Commercial Court.

On an objection being raised on the maintainability of the Civil Revision Petition, the High Court vide Order dated 09.07.2020 permitted the withdrawal of the Civil Revision Petition, with liberty to file a petition under Articles 226 and 227 of the Constitution of India.

1.10 Indo Unique filed W.P. No.1801 of 2020 before the Bombay High Court to quash and set aside the Order dated 18.01.2018 passed by the Commercial Court/District Judge-I, Nagpur in Civil (Commercial) Suit No.62/2017.

The High Court vide the Impugned Judgment dated 30.09.2020 held that it was the admitted position that there was an arbitration agreement between the parties, and therefore the application under Section 8 was maintainable. With respect to the contention that the invocation of the Bank Guarantee was fraudulent, it was held that the allegations of fraud did not constitute a criminal offence which would entail recording of voluminous evidence. The disputes could be resolved through arbitration, and the filing of the Suit before the Commercial Court was not justified. The Commercial Court was not justified in restraining the invocation of the bank guarantee in the absence of any finding on fraud or special equities.

On the issue of the arbitration agreement being unenforceable since the Work Order was unstamped, it was held that the plaintiff/ Appellant herein, could raise the issue either under Section 11 of the Arbitration Act, or before the arbitral tribunal at the appropriate stage. The Writ Petition was held to be maintainable, since there is no absolute bar to entertain a Writ Petition even if an alternate remedy is available. The Writ Petition was allowed vide Judgment and Order dated 30.09.2020, and the Order dated 18.01.2018 passed by the Commercial Court was set aside. On the request of the counsel for the Appellant, the High Court suspended the operation of its Order for a period of one month from 30.09.2020.

1.11 The Review Petition filed by the Appellant was withdrawn vide Order dated 28.10.2020 passed in Review Application (ST) No. 9819 of 2020.

On the request by the counsel for the Appellant, the Order of stay was continued till 20.11.2020.

1.12 Aggrieved by the judgment of the High Court, Global Mercantile has filed the present Special Leave Petition before this Court.

2. The issues which have arisen for our consideration are :

> i. Whether an arbitration agreement would be enforceable and acted upon, even if the Work Order dated 28.09.2015 is unstamped and un-enforceable under the Stamp Act?
>
> ii. Whether allegation of the fraudulent invocation of the bank guarantee is an arbitrable dispute?
>
> iii. Whether a Writ Petition under Articles 226 and 227 of the Constitution would be maintainable to challenge an Order rejecting an application for reference to arbitration under Section 8 of the Arbitration Act?

We will now deal with each of these issues.

3 Validity of an arbitration agreement in an unstamped agreement 3.1 It is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. This is based on the premise that when parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements viz. (i) the substantive contract which contains the rights and obligations of the parties arising from the commercial transaction; and, (ii) the arbitration agreement which contains the binding obligation of the parties to resolve their disputes through the mode of arbitration.

3.2 The autonomy of the arbitration agreement is based on the twin concepts of separability and kompetenz – kompetenz. The doctrines of separability and kompetenz – kompetenz though inter-related, are distinct, and play an important role in promoting the autonomy of the arbitral process. 3.3 The doctrine of separability of the arbitration agreement connotes that the invalidity, ineffectiveness, or termination of the substantive commercial contract, would not affect the validity of the arbitration agreement, except if the arbitration agreement itself is directly impeached on the ground that the arbitration agreement is void ab initio.

3.4 The doctrine of kompetenz – kompetenz implies that the arbitral tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section 16.

The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of kompetenz – kompetenz has evolved to minimize judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the arbitral tribunal. 3.5 The doctrine of separability was expounded in the judgment of Heyman v. Darwins Ltd1 by the House of Lords wherein it was held that English common law had been evolving towards the recognition of an arbitration clause as a separate contract which survives the termination of the main contract.

Lord Wright in his opinion stated that :

> "An arbitration agreement is collateral to the substantial stipulations of the contract. It is merely procedural and ancillary, it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court." Lord MacMillan in his opinion stated that :
>
> "It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract." 3.6 This rule has been affirmed in several cases, including Bremer Vulkan Schiffbau und Maschinefabrik v. South India Shipping Corporation2 in which Lord Diplock cited Heyman as an authority for the assertion that :
>
> 1 [1942] AC 356.
>
> 2 [1981] AC 909.

"The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself." 3.7 In Harbour Assurance v. Kansa General International Insurance,3 the Court of Appeal held that if the arbitration clause is not directly impeached, an arbitration agreement is capable of surviving the invalidity of the contract, so that the arbitrator has the jurisdiction to determine the initial validity of the contract. It was opined that:

> "Once it became accepted that the arbitration clause is a separate agreement, ancillary to the contract, the logical impediment to referring an issue of the invalidity of the contract to arbitration disappears. Provided that the arbitration clause itself is not directly impeached (eg by a non-est factum plea), the arbitration agreement is as a matter of principled legal theory capable of surviving the invalidity of the contract." 3.8 In Lesotho Highlands Development Authority v. Impregilo SpA and others,4 the House of Lords affirmed the view taken in Harbour Assurance (supra), wherein it was held that an arbitration agreement is a distinct and separable agreement from the underlying or principal contract.

"21. It is part of the very alphabet of arbitration law as explained in Harbour Assurance Co v. Kansa General International Insurance, ... spelled out in s. 7 of the Act, that the arbitration agreement is a

distinct and separable agreement from the underlying or principal contract." 3.9 Article 16(1) of the Model Law incorporates the doctrine of separability :

> "Article 16. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." 3 [1993] 1 Lloyd's Rep. 455 (CA).
>
> 4 [2005] UKHL 43 : [2006] 1 A.C. 221 at [21].
>
> 3.10 The French Cour de Cassation recognised the doctrine of separability in broad terms in the Gosset v. Caparelli,5 wherein it was held that:
>
> "In international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always save in exceptional circumstances, ... completely autonomous in law which excludes the possibility of it being affected by the possible invalidity of the main contract." 3.11 The doctrine of kompetenz – kompetenz is based on the premise that the arbitration agreement is separate and independent from the substantive underlying contract in which it is embedded. Equally, an arbitration agreement exists and can be acted upon irrespective of whether the main substantive contract is valid or not.

The Court of Appeal in the seminal decision rendered in Fiona Trust & Holding Corporation v. Privalov,6 held that the allegation of invalidity of the underlying contract, would not preclude the arbitral tribunal from determining the said issue in the first instance, even though the alleged illegality would render the contract void from inception. In this case, the arbitration agreement was contained in a charter party agreement, wherein it was alleged that it had been procured through bribery by the owner's agent, and was invalid from its inception. It was held that only if the arbitration agreement is itself directly impeached, and rendered void or unenforceable on grounds which relate to the arbitration agreement itself, and not merely as a consequence of the invalidity of the underlying contract, 5 Cass. Civ. Lere, 7 May 1963 (Dalloz, 1963), 545.

6 [2007] EWCA Civ 20.

that the courts may refuse reference to arbitration. To discourage parasitical challenges and dilatory tactics in resisting reference to arbitration, the Court of Appeal held in paragraph 38 that :

> "38. ... As we have sought to explain, once the separability of the arbitration agreement is accepted, there cannot be any question but that there is a valid agreement.

> ... If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself, but that will not be the case where there is an overall contract which is said for some reason to be invalid eg for illegality, misrepresentation or bribery and the arbitration agreement is merely part of the contract. ... " 3.12 In the Appeal filed in the Fiona Trust case before the House of Lords, in Fili Shipping Co Ltd and others v. Premium Nafta Products Ltd and others7, Lord Hoffman opined :
>
> "It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement." Lord Hope in his separate opinion, held that :
>
> "The owners' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect."

7 [2007] UKHL 40.

3.13 The law as it stands in U.K. today is that if the court while entertaining a plea to refer the parties to arbitration, is satisfied of the existence of the arbitration agreement, it is incumbent to refer the parties to arbitration, even if objections to the validity of the substantive contract are raised. Where the arbitration agreement is embedded in an underlying contract, the court would not entertain the dispute on the issue of jurisdiction until the arbitral tribunal has ruled on this issue. Lord Hoffman opined that :

> "But that is in my opinion exactly the kind of argument which s 7 was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main

agreement."8 3.14 On the issue of whether a claim of fraud in the inducement of the entire contract is to be decided by the court, or the arbitrator, was considered by the U.S. Supreme Court in Prima Paint Corporation v. Flood & Conklin MFG. CO.,9 The Court held that:

"If the claim is fraud in the inducement of the arbitration clause itself an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally..... In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 8 [2007] 4 ALL ER 951 at 960, at paragraph 19.

9 388 US 395 (1967).

3.15 The United States Supreme Court in Buckeye Check Cashing, Inc v. Cardegna et. al,10 followed the earlier decisions in Prima Paint and Southland Corp. v. Keating.11 Scalia, J. opined :

"Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of those holdings. Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." 3.16 In Rent-A- Center, West, Inc. v. Jackon,12 the U.S. Supreme Court opined :

"There are two types of validity challenges under § 2: "One type challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." Buckeye, 546 U.S., at 444. In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 US 395, 403-404 (1967); Buckeye, supra, at 444-446; Preston v. Ferrer, 552 US 346, 353-354 (2008). That is because § 2 states that a "written provision" "to settle by arbitration a controversy" is "valid, irrevocable, and enforceable" without mention of

> the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." Buckeye, 546 U.S., at 445; see also id., at 447 (the severability rule is based on §2).
>
> ..... The Court asserts that its holding flows logically from Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), in which the Court held that consideration of a contract revocation defense is generally a matter for the arbitrator, unless the defense is specifically directed at the arbitration clause, id., at 404. We have treated this holding as a severability rule: When a party challenges a contract, "but not specifically its arbitration provisions, 10 US SC 440 (2006).
>
> 11 79 L Ed 2d: 465 US 1 (1984).
>
> 12 561 US 63 (2010).

those provisions are enforceable apart from the remainder of the contract." Buckeye Check Cashing, Inc. v. Cardegna, 546 US 440, 446 (2006).

..... The second line of cases bearing on who decides the validity of an arbitration agreement, as the Court explains, involves the Prima Paint rule. See ante, at

71. That rule recognizes two types of validity challenges. One type challenges the validity of the arbitration agreement itself, on a ground arising from an infirmity in that agreement. The other challenges the validity of the arbitration agreement tangentially—via a claim that the entire contract (of which the arbitration agreement is but a part) is invalid for some reason. See Buckeye, 546 U.S., at 444. Under Prima Paint, a challenge of the first type goes to the court; a challenge of the second type goes to the arbitrator. See 388 U.S., at 403-404; see also Buckeye, 546 U.S., at 444-445. The Prima Paint rule is akin to a pleading standard, whereby a party seeking to challenge the validity of an arbitration agreement must expressly say so in order to get his dispute into court." 4 The Indian Arbitration and Conciliation Act, 1996 is based on the Model Law. Section 16 gives statutory recognition to the doctrine of separability and kompetenz – kompetenz. Section 16 provides :

> "16. Competence of arbitral tribunal to rule on its jurisdiction:
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, —
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." 4.1 The legislative policy of minimal interference is enshrined in Section 5, which by a non-obstante clause prohibits judicial intervention except as specified in Part I of the Arbitration Act. A conjoint reading of Sections 5 and 16 would indicate that all civil commercial matters, including the issue as to whether the substantive contract was voidable can be resolved through arbitration.

4.2 This Court in Uttarakhand Purv Sainik Kalyan Nigam Ltd. v.

Northern Coal Field Ltd.13, speaking through one of us (Indu Malhotra, J.) discussed the application of the doctrine of kompetenz – kompetenz in the Indian legislation, and observed :

"7.7. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the kompetenz-kompetenz principle enshrined in Section 16 of the 1996 Act. The 2015 Amendment Act inserted sub-section (6-A) to Section 11 which provides that:

"(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub- section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement." (emphasis supplied) 7.8. By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in Patel Engg. and Boghara Polyfab, were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

7.9. Reliance is placed on the judgment in Duro Felguera S.A. v. Gangavaram Port Ltd. [Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764. Refer to TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , wherein this Court held that: (SCC p. 759, para 48) "48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement." (emphasis supplied) 7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.

7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise 13 (2020) 2 SCC 455.

judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ)

352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] . If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre- reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator." 4.3 In A. Ayyasamy v. Parmasivam & Ors.,14 Dr. D.Y. Chandrachud, J. in his separate opinion observed that :

> "53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a

recognition of the same principle." 14 (2016) 10 SCC 386.

5. We will now apply the law to the facts of the present case. 5.1 The Appellant-Global Mercantile submitted that the application under Section 8 for reference of disputes to arbitration was not maintainable, since as per Section 34 of the Maharashtra Stamp Act, 1958 the Work Order being an unstamped document could not be received in evidence for any purpose, or acted upon, unless it is duly stamped. Consequently, the arbitration clause in the unstamped agreement also could not be acted upon or enforced since the arbitration clause would have no existence in law, unless the applicable stamp duty (and penalty, if any) is paid on the Work Order. Reliance was placed on paragraph 22 of the judgment in Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited,15 wherein it has been held : ".. that an arbitration clause in an agreement would not exist when it is not enforceable by law". It was submitted that the High Court while allowing the application under Section 8, had enforced a non-existent arbitration clause, which was in violation of Section 34 of the Maharashtra Stamp Act, 1958 and the law laid down by this Court.

It was further contended that since 03.01.2018 to date, the Respondent No.1 had not indicated its willingness to pay the stamp duty, even though the Appellant had raised this objection. There was no justifiable reason to grant any further opportunity to Respondent No.1 to pay the stamp duty, and enforce the clause in view of the judgment of this Court in Naina Thakkar v. Annapurna Builders.16 15 (2019) 9 SCC 209.

16 (2013) 14 SCC 354.

5.2 Indo Unique – the Respondent No.1 submitted that even though the Work Order dated 28.09.2015 is an unstamped agreement, it would be enforceable after it is duly stamped, for which an opportunity must be given to the parties to make up the deficient stamp duty and penalty as may be assessed by the Collector. Non-payment of stamp duty would not render the agreement unenforceable, but was a curable defect. 5.3 Statutory scheme under the Maharashtra Stamp Act, 1958. —

(a) Section 3 of the Maharashtra Stamp Act, 1958 is the charging section, which specifies the instruments which are chargeable to stamp duty of the amount specified in Schedule I of the Act.

Section 3 provides:

> "3. Instruments chargeable with duty. — Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in Schedule I as the proper duty therefore respectively, that is to say—
>
> (a) every instrument mentioned in Schedule I, which, not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act; "

(b) Section 30 provides :

"30.- Duties by whom payable. – In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne, -

(a) in the case of any instrument described in any of the following articles of Schedule I, namely :-

... ... (f-a) in case of instruments of works contract as provided in Article 63 of SCHEDULE I, by the person receiving the contract ;

...

(c) Section 32A provides :

"32A. Instrument of conveyance, etc. under valued how to be dealt with.– (1) Every instrument of conveyance, exchange, gift, certificate of sale, deed of partition or power of attorney to sell immoveable property when given for consideration, deed of settlement or transfer of lease by way of assignment and also any other instruments mentioned in SCHEDULE I chargeable with duty on the basis of market value of the property, presented for registration under the provisions of the Registration Act, 1908, shall be accompanied by a true copy thereof.

Provided that, in case of such instruments executed on or after the 4th July 1980, to the date of commencement of the Bombay Stamp (Amendment) Act, 1985, an extract of the instrument to be taken from the registration record shall be deemed to be the true copy accompanying the instrument, presented for registration for the purposes of sub-section (1). ..."

(d) Section 33 provides:

"

CHAPTER IV

Instruments not duly stamped

33. Examination and impounding of instruments.–

(1) Subject to the provisions of section 32A, every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, or any other officer, empowered by law to investigate offences under any law for the time being in force, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall, if it appears to him that such instrument is not duly stamped, impound the same irrespective whether the instrument is or is not valid in law. (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was

executed or first executed:

> Provided that—
>
> (a) nothing herein contained shall be deemed to require any Magistrate or Judge of Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973;
>
> (b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf." Section 33 casts a statutory obligation on every person empowered by law, or holding a public office, or a person who by consent of parties (which would include an arbitrator) is empowered to receive evidence, to examine the instrument presented before him, and ascertain whether the instrument is duly stamped. This would include the court being an authority empowered to receive an instrument in evidence. In view of the statutory interdict, the bar against the admissibility of an unstamped instrument, is absolute in nature, including for a collateral purpose.17 The phrase "duly stamped" implies that the instrument must be stamped with the requisite amount of duty determined in accordance with the Schedule to the Act.18 If it is found that the instrument is not stamped, or inadequately stamped, it is mandated by law to impound the instrument, and deal with it in accordance with provisions of the Stamp Act.
>
> (e) Section 34 operates as a statutory bar from receiving any instrument in evidence, or relying on it for any purpose whatsoever, or being acted upon, or registered, or authenticated, by any such person or public officer, unless the instrument is duly stamped.

Section 34 provides:

> "34. Instruments not duly stamped inadmissible in evidence, etc.—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 or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument:
>
> Provided that— 17 Avinash Kumar Chauhan v. Vijay Krishna Mishra, (2009) 2 SCC 532. 18 Black Pearl Hotels (P) Ltd. v. Planet M. Retail Ltd., (2017) 4 SCC 498.

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of—

(i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and

(ii) a penalty at the rate of 2 per cent of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument:

> Provided that, in no case, the amount of the penalty shall exceed double the deficient portion of the stamp duty.
>
> (b) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp; the contract or agreement shall be deemed to be duly stamped;
>
> (c) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973;
>
> (d) nothing herein contained shall prevent the admission of any instrument in any court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act;
>
> (e) nothing herein contained shall prevent the admission of a copy of any instrument or of an oral admission of the contents of any instrument, if the stamp duty or a deficient portion of the stamp duty and penalty as specified in clause (a) is paid."
>
> (f) Section 35 provides that:
>
> "35. Admission of instrument where not to be questioned.—Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."
>
> (g) Section 36 provides that:
>
> "36. Admission of improperly stamped instruments.—The State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution."
>
> (h) Section 37 provides that:
>
> "37. Instruments impounded how dealt with.-

> (1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 34 or of duty as provided by section 36, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

(2) In every other case, a person so impounding the original instrument shall prepare an authentic copy of such instrument and where it is a true copy or an abstract referred to in section 31 or true copy referred to in section 33A, he shall send such authentic copy or, the true copy or, as the case may be, an abstract to the Collector, for the purpose of taking action on the authentic copy or a true copy or, as the case may be, an abstract as if it were the original instrument and endorsing thereon a certificate with reference to the instrument under clause (a) of sub-section (1) of section 39 or under sub-section (1) of section 41, as the case may be. On receipt of the authentic copy, the true copy or, as the case may be, an abstract with the certificate as aforesaid endorsed thereon, the person who has impounded the original instrument shall copy on the original instrument the certificate endorsed on the authentic copy and shall authenticate such certificate; and where it is a true copy or an abstract on which the certificate as aforesaid is endorsed, the registering officer who has forwarded the true copy or an abstract shall make appropriate entries in respect of the instrument of which it was a true copy or an abstract, in the relevant register maintained by him and on an application made in this behalf issue under his signature a certificate to the effect that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect of that instrument, and the name and residence of the person paying such duty and penalty." Once the duty (and penalty, if any) leviable under Schedule I is paid on the instrument, and the instrument is duly endorsed by the Collector, the instrument shall be admissible in evidence, and acted upon as provided by Section 41 of the Maharashtra Stamp Act.

(i) Section 41 provides :

" 41. Endorsement of instruments on which duty has been paid under section 34, 39 or 40 – (1) When the duty and penalty (if any) leviable in respect of any instrument (not being any instrument referred to in sub-section (1) of section 32A), have been paid under section 34, section 39 or section 40, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) Subject to the provisions of section 53A, every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on the application in this behalf, to the person who produced it or to the person from whose possession it came into the hands of the Officer impounding it, or to any other person according to the directions of such person:

Provided that –

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 34, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate;

(b) nothing in this section shall affect the provisions of rule 9 of Order XIII in Schedule I of the Code of Civil Procedure, 1908."

(j) Section 58 provides that :

"58. Revision of certain decisions of Courts regarding the sufficiency of stamps.— (1) When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure 1973, makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under section 34, the Court to which appeals lie from, or reference are made by, such first mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration.

(2) If such Court, after such consideration is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 34, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require,-

i. the party or person concerned to make the payment of the proper duty or the amount required to make up the same, together with a penalty under section 34, or payment of a higher duty and penalty than those paid, to itself or to the Collector; and ii. any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and, where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(3A) When the duty and penalty leviable in respect of any instrument in accordance with, the declaration made under sub -section (3) and required to be paid thereunder are paid to the Court or to the Collector, then the Court or, as the case may be, the Collector shall certify by endorsement thereon that the proper duty and penalty, stating the amount of each, have been le-vied in respect of such instrument, and the name and residence of the person paying the same. (3B) Every instrument so endorsed shall thereupon be delivered, on an application in this behalf, to the person from whose possession the instrument came in the possession of such Court, or as such person may direct, to any other person authorised by him.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under section 41, or in section 42, prosecute any person for any offence against the stamp law which the Collector considers him to have committed in respect of such instrument:

Provided that –

(a) no such prosecution shall be instituted where the amount including duty and penalty, which, according to the determination of such Court, was payable in respect of the instrument under section 34 ,is paid to the Court or the Collector, unless the Collector thinks that the offence was committed with an intention of evading payment of the proper duty;

(b) except for the purposes of such prosecution no declaration made under this section shall affect the validity of any order admitting any instrument in evidence or of any certificate granted under section 41."

(k) Item No. 63 of Schedule I of the Maharashtra Stamp Act, 1958 provides that :

	Description of instruments	Proper Stamp Duty
63	WORKS CONTRACT, that is to say, a contract for works and labour or services involving transfer of property in goods (whether as goods or in some other form) in its execution and includes a sub-contract,-	
	(a) where the amount or value set forth in such contract does not exceed rupees ten lakh.	Five hundred rupees
	(b) where it exceeds rupees ten lakh.	Five hundred rupees plus 0.1 per cent. of the amo above rupees ten lakh subject to maximum of rupees twenty-five lakhs

5.4 The Stamp Act is a fiscal measure enacted to secure the revenue of the State on certain classes of instruments specified in Schedule I of the Act. The stringent provisions of the Stamp Act have been framed to protect the interest of the revenue of the State. Section 34 of the Maharashtra Stamp Act, 1958 operates as a statutory bar to an unstamped instrument being admitted in evidence, or being acted upon, for any purpose, by any authority having by law or consent of parties, the power to receive evidence, unless such instrument is duly stamped. The proviso to Section 34 states that upon payment of the requisite stamp duty, the instrument may

be admitted in evidence.

The words "for any purpose" occurring in the Indian Stamp Act was interpreted by the Privy Council in Ram Rattan v. Parma Nand,19 wherein it was held :

> " That the words 'for any purpose' in Section 35 of the Stamp Act, should be given their natural meaning and effect and would include a collateral purpose (and that) an unstamped partition deed cannot be used to corroborate the oral evidence for the purposes of determining even the factum of partition as distinct from its terms." 5.5 Section 41(1) of the Maharashtra Stamp Act, 1958 provides that after the instrument is duly stamped, it would be endorsed by the Collector. Once the object of payment of Stamp Duty is satisfied, the party making a claim on the basis of that instrument, will not be defeated, on the ground of the initial defect or irregularity. Section 41(2) of the said Act provides that upon payment of Stamp Duty and endorsement by the concerned Collector, the defect of admissibility and legality of such instrument would stand cured.
>
> 19 (1945-46) 73 IA 28: AIR 1946 PC 51.

5.6 This Court in SMS Tea Estates Pvt. Ltd. v. M/s. Chandmari Tea Co. Pvt. Ltd.20 considered the issue whether an arbitration agreement in an unregistered and unstamped lease deed, which required compulsory registration under Sections 17 and 19 of the Registration Act 1908, was valid and enforceable, being a part of the said lease deed which was invalid and unenforceable. A two-judge bench of this Court considered the following two issues :

> (i) Whether an arbitration agreement contained in an unregistered (but compulsorily registerable) instrument is valid and enforceable?
>
> (ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

With respect to the first issue, the Court held as follows :

> "11. Section 49 makes it clear that a document which is compulsorily registerable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registerable) is a collateral transaction, in respect of which such unregistered document can be

received as evidence under the proviso to Section 49 of the Registration Act.

> 12. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts—one in regard to the substantive terms of the main contract and the other relating to resolution of disputes—had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or 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.

20(2011) 14 SCC 66.

Followed in Naina Thakkar v. Annapurna Builders, (2013) 14 SCC 354.

13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registerable—are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer.

...

16. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to Section 49 of the Registration Act read with Section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration." With respect to a contract or instrument which is voidable at the option of a party (as by way of illustration u/S. 19 of the Indian Contract Act, 1872) in paragraph 15 of the judgment, it was held that the invalidity which attaches itself to the main agreement, may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. Paragraph 15 reads as follows :

> "15. But where the contract or instrument is voidable at the option of a party (as for example under Section 19 of the Contract Act, 1872), the invalidity that attaches itself to the main agreement may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. For example, if a person is made to sign an agreement

> to sell his property under threat of physical harm or threat to life, and the said person repudiates the agreement on that ground, not only the agreement for sale, but any arbitration agreement therein will not be binding." With respect to the second issue of whether an arbitration agreement in an unstamped contract can be acted upon, it was held as follows :
>
> 19. Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.
>
> ...
>
> 21. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence." (emphasis supplied) 5.7 The judgment in SMS Tea Estates was passed on an application filed u/S. 11 of the Arbitration Act, for reference of disputes to arbitration prior to the 2016 Amendment being passed. At that time, the law as it prevailed, as expounded in the Constitution Bench decision in SBP & Co. v. Patel Engineering Ltd.21, and other cases like National Insurance Co. v.

Boghara Polyfab22, Master Construction Company v. Union of India23 etc. held that at the pre-reference stage in an application u/S. 11(6), the Court may determine certain threshold issues, such as whether the claim was time-barred, a stale claim, or whether there had been accord and satisfaction, which would preclude the necessity of reference to arbitration. 5.8 Section 11 was amended by the 2016 Amendment Act, which inserted clause (6A), which now provides that notwithstanding any judgment, decree or order of any Court, the examination would be confined only to the existence of an arbitration agreement. The amendment of 2016 legislatively overruled the position with respect to the jurisdiction u/S. 11 of 21 (2005) 8 SCC 618.

22 (2009) 1 SCC 267.

23 (2011) 12 SCC 357.

the Arbitration Act, and confined the examination only to the existence of an arbitration agreement. In Duro Felguera v. Gangavaram Port Ltd.24 it was held that the legislative intent was clear that at the pre-reference stage, there must be minimal judicial intervention, and the only issue to be decided would be the existence of the arbitration agreement, and nothing more. This position was affirmed by a three-judge bench in Mayavati Trading Private Limited v. Pradyuat Deb Burman.25 5.9 The issue whether an arbitration clause in a document / agreement / conveyance which requires compulsorily to be stamped under the relevant Stamp Act, but is not duly stamped, would be enforceable after the insertion of clause (6A) in Section 11, came up for consideration before a two-judge bench of this Court in Garware Wall Ropes Ltd. (supra).

In Garware Wall Ropes Limited (supra), the Court held as under:

> "19. It will be seen that neither in the Statement of Objects and Reasons nor in the Law Commission Report is there any mention of SMS Tea Estates. This is for the very good reason that the Supreme Court or the High Court, while deciding a Section 11 application, does not, in any manner, decide any preliminary question that arises between the parties. The Supreme Court or the High Court is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect revenue. SMS Tea Estates has taken account of the mandatory provisions contained in the Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11.
>
> A close look at Section 11(6-A) would show that when the Supreme Court or the High Court considers an application under Sections 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to 24 (2017) 9 SCC 729.
>
> 25 (2019) 8 SCC 714.

by Raveendran, J. in SMS Tea Estates when it comes to an unregistered agreement or conveyance.

However, the Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11(6-A) does not, in any manner, deal with or get over the basis of the judgment in SMS Tea Estates, which continues to apply even after the amendment of Section

11(6-A).

...

22. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6-A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that SMS Tea Estates has, in no manner, been touched by the amendment of Section 11(6-A).

...

29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , as followed by us.

....

37. One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time-frame provided by Section 29- A of the 1996 Act." (emphasis supplied) 6 We have carefully perused the provisions of the Maharashtra Stamp Act, 1958 and Schedule I appended thereto, which enlists the

instruments specified in Section 3, on which stamp duty is chargeable. We find that an arbitration agreement is not included in the Schedule as an instrument chargeable to Stamp Duty.

Item 12 of Schedule I to the Maharashtra Stamp Act, 1958 includes an Award passed by an arbitrator to be chargeable for payment of Stamp Duty, which reads as follows:

Description of Instrument Proper Stamp Duty

12. AWARD, that is to say, any decision in writing by an arbitrator or umpire, not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit-

(a) where the amount of value of the property to which The same duty as a Bond the award relates as set forth in such award does not (No. 15) for such amount. exceed Rs. 1,000;

(b) in any other case Five rupees.

Exemption

Award under the Bombay District Municipal Act, 1873, section 81, or the Bombay Hereditary Offices Act, 1874, section 18.

In Shriram EPC Limited v. Rioglass Solar SA,26 this Court held that the payment of Stamp Duty is applicable to awards made in India, but does not include a “foreign award” which has not been included in the Schedule to the Stamp Act, 1899.

6.1 The issue which has arisen in the present case is whether the arbitration agreement incorporated in the unstamped Work Order dated 26 (2018) 18 SCC 313.

28.09.2015, would also be legally unenforceable, till such time that the Work Order is subjected to payment of Stamp Duty. Undisputedly, the Work Order is chargeable to payment of Stamp Duty under Item No. 63 of the First Schedule to the Maharashtra Stamp Act, 1958.

6.2 In our view, the non-payment or deficiency of Stamp Duty on the Work Order does not invalidate the main contract. Section 34 provides that an unstamped instrument would not be admissible in evidence, or be acted upon, till the requisite stamp duty is paid. This would amount only to a deficiency, which can be cured on the payment of the requisite stamp duty. 6.3 The point for consideration is whether the non-payment of Stamp Duty on the Work Order, would render the arbitration clause invalid, non- existent, or unenforceable in law, till the stamp duty is paid on the substantive commercial contract.

6.4 The arbitration agreement contained in the Work Order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which provides the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of Stamp Duty, unlike various other agreements enlisted in the Schedule to

the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, un-enforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of Stamp Duty.

6.5 A three-Judge Bench of this Court in Hindustan Steel Limited v.

M/s. Dilip Construction Company27 held that :

> "4. The award, which is an "instrument" within the meaning of the Stamp Act was required to be stamped. Being unstamped, the award could not be received in evidence by the Court, nor could it be acted upon. But the Court was competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. On the instrument so received the Collector may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. If the duty and penalty are paid, the Collector will certify by endorsement on the instrument that the proper duty and penalty have been paid.
>
> 5. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.
>
> 6. Relying upon the difference in the phraseology between Sections 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and may be acted

upon as if it has been duly stamped.

7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. 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 27 (1969) 1 SCC 597.

instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification." (emphasis supplied) 6.6 In our view, there is no legal impediment to the enforceability of the arbitration agreement, pending payment of Stamp Duty on the substantive contract. The adjudication of the rights and obligations under the Work Order or the substantive commercial contract would however not proceed before complying with the mandatory provisions of the Stamp Act. 6.7 The Stamp Act is a fiscal enactment for payment of stamp duty to the State on certain classes of instruments specified in the Stamp Act. Section 40 of the Indian Stamp Act,1899 provides the procedure for instruments which have been impounded, and sub-section (1) of Section 42 requires the instrument to be endorsed after it is duly stamped by the concerned Collector. Section 42(2) provides that after the document is duly stamped, it shall be admissible in evidence, and may be acted upon. 6.8 In our view, the decision in SMS Tea Estates does not lay down the correct position in law on two issues i.e. (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as u/S. 19 of the Indian Contract Act, 1872.

We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it un-enforceable, since it has an independent existence of its own. The view taken by the Court on the issue of separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the Stamp Act. The non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite Stamp Duty.

6.9 The second issue in SMS Tea Estates that a voidable contract would not be arbitrable as it affects the validity of the arbitration agreement, is in our view not the correct position in law. The allegations made by a party that the substantive contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue. These issues can certainly be adjudicated through arbitration.

We overrule the judgment in SMS Tea Estates with respect to the aforesaid two issues as not laying down the correct position in law. 6.10 The Garware judgment has followed the judgment in SMS Tea

Estates. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration clause would be non- existent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract.

We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying substantive commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.

6.11 We notice that the judgment in Garware Wall Ropes Limited has been cited with approval by a co-ordinate bench of this Court in Vidya Drolia & Ors. v. Durga Trading Corporation.28 Paragraph 92 of the judgment reads thus :

> "92. We now proceed to examine the question, whether the word 'existence' in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence'. However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of 'existence' requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law. We would proceed to elaborate and give further reasons :
>
> (i) In Garware Wall Ropes Ltd., this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to 'existence' and 'validity' of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing paragraph 29 thereof :

> "29. This judgment in Hyundai Engg. case is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the 28 Delivered on 14.12.2020 in C.A. No. 2402 / 2019.

subcontract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case, as followed by us." Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement." 6.12 We doubt the correctness of the view taken in paragraph 92 of the three-judge bench in Vidya Drolia. We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall Ropes Limited, which has been affirmed in paragraph 92 of Vidya Drolia, to a Constitution Bench of five judges.

7 The next issue which arises is as to which authority would exercise the power of impounding the instrument under Section 33 read with Section 34 of the Maharashtra Stamp Act, in a case where the substantive contract contains an arbitration agreement.

7.1 In an arbitration agreement, the disputes may be referred to arbitration by three modes.

a) The first mode is where the appointment of the arbitrator takes place by the parties consensually in accordance with the terms of the arbitration agreement, or by a designated arbitral institution, without the intervention of the court. In such a case, the arbitrator / tribunal is obligated by Section 33 of the Indian Stamp Act, 1899 (or the applicable State Act) to impound the instrument, and direct the parties to pay the requisite Stamp Duty (and penalty, if any), and obtain an endorsement from the concerned Collector.

This would be evident from the provisions of Section 34 of the Stamp Act which provides that "any person having by law or consent of parties authority to receive evidence" is mandated by law to impound the instrument, and direct the parties to pay the requisite stamp duty.

b) The second mode of appointment is where the parties fail to make the appointment in accordance with the arbitration agreement, and an application is filed under Section 11 before the Court to invoke the default power for making the appointment.

In such a case, the High Court, or the Supreme Court, as the case may be, while exercising jurisdiction under Section 11, would impound the substantive contract which is either unstamped or inadequately stamped, and direct the parties to cure the defect before the arbitrator / tribunal can adjudicate upon the contract.

c) The third mode is when an application is filed under Section 8 before a judicial authority for reference of disputes to arbitration, since the subject matter of the contract is covered by an arbitration agreement. In such a case, the judicial authority will make the reference to arbitration. However, in the meanwhile, the parties would be directed to have the substantive contract stamped in accordance with the provisions of the relevant Stamp Act, so that the rights and obligations emanating from the substantive contract can be adjudicated upon.

7.2 In the case of an application under Section 9 of the Arbitration Act, 1996 the situation would be different. If an application for urgent interim reliefs is filed under Section 9 before the Court, and it is brought to the attention of the Court that the substantive contract is not duly stamped, the Court would grant ad-interim relief to safeguard the subject-matter of the arbitration. However, the substantive contract would then be impounded, and the concerned party be directed to take the necessary steps for payment of the requisite stamp duty in accordance with the provisions of the relevant Stamp Act, within a time-bound period.

It is made clear that the payment of Stamp Duty on the substantive contract as assessed by the Collector, would however be subject to the right of revision / appeal available under the relevant Stamp Act. 8 Whether the fraudulent invocation of the Bank Guarantee is arbitrable? 8.1 In the present case, the Appellant-Plaintiff in the Commercial Suit inter alia submitted that the Bank Guarantee was furnished to ensure due execution of the Work Order dated 28.09.2015. It was submitted on behalf of the Appellants that the invocation of the bank guarantee was fraudulent, since the agreement had never been acted upon. There was no invoice raised or payment received under the Work Order. In the absence of any legal liability for payment under the Work Order, the invocation of the bank guarantee was fraudulent.

8.2 The High Court held that the allegations of fraud made in this case are simple, which do not in the normal course constitute any criminal offence, nor are the allegations so complex in nature which would entail extensive evidence being led, hence the disputes could be resolved through arbitration.

8.3 Under the Arbitration Act, the earliest decision on the issue of arbitrability of allegations of fraud was considered by a two-judge bench in N. Radhakrishnan v. Maestro Engineers.29 In this case, the applicant had made serious allegations against the respondents of having committed malpractices in the account books, and manipulation of finances of the partnership firm. An application under Section 8 was filed by the respondents for reference of disputes to arbitration. The Court took the view that since the issues involved detailed investigation into the allegations and production of elaborate evidence, it could not be properly dealt by an arbitrator, and ought to be settled by a court of law. This decision relied on the judgment in Abdul Kadir v. Madhav Prabhakar,30 which was passed under the 1940 Act. The judgment in Abdul Kadir in turn relied upon an English judgment rendered in Russel v. Russel,31 wherein it was held that a party against whom an allegation of fraud is made, has the right to defend himself in a public forum.

8.4 The judgment in N. Radhakrishnan (supra) is based on an outdated view of the law propounded in Russel v. Russel, which ante-dates even the first English Arbitration Act of 1899. Arbitrability of

fraud is no longer an issue 29 (2010) 1 SCC 72.

Followed in Ivory Properties & Hotels Pvt. Ltd. v. Nusli Neville Wadia, 2011 (2) Arb LR 479 (Bom); See also article by Justice D.R. Dhanuka (Retd.) reported in Journal Section of 2010 (2) Arb LR 13; RRB Energy Ltd. v. Vestas Wind System & Ors., (2015) 219 DLT 516. 30 AIR 1962 SC 406: [1962] 3 SCR 702.

31 [1880] 14 Ch. D 471.

relating to the competence of the arbitrator, or dealing with voluminous evidence. Arbitrators are competent to deal with allegations of civil fraud. The judgment in Russel is obsolete, which would be evident from the various enactments of the English Arbitration Act. Under Section 24(2) of the 1950 Act, the court could revoke the authority of a tribunal to deal with claims involving issues of fraud. This provision was repealed by Section 107(2) of the English Arbitration Act, 1996 Act. Russel in his Commentary on Arbitration observed that an arbitral tribunal does not have the jurisdiction to impose criminal sanctions on a party, its power is limited to the civil consequences of fraud.32 8.5 In Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra,33 a two-judge bench took a different view by holding that at the pre-reference stage under Section 11, the court is not required to examine the allegations of fraud and forgery. The scope of examination is only the existence of a valid and enforceable arbitration agreement as a condition precedent for making a reference. The ground that allegations of fraud, forgery and fabrication are likely to involve recording of evidence, or involve some delay in disposal, were not relevant grounds to be considered at the pre-reference stage. 8.6 The legislature amended sub-section (1) of Section 8 to provide that a judicial authority shall refer the parties to arbitration, 'unless it finds that prima facie no valid agreement exists'. The amended Section 8 reads :

> "8. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the 32 Russel on Arbitration, Pg.72, para 2-083, and Pg.83, para 2-107. 33 (2012) 2 SCC 144.

arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. (2) ... (3) ... " The issue of arbitrability of fraud was subsequently considered by a two-judge bench in A. Ayyasamy v. A. Paramasivam & Ors.34. The Court held that Section 8 mandates reference to arbitration, unless the arbitration agreement is found to be invalid. It has been recognised that certain categories of disputes which are of public nature, are not capable of adjudication and settlement by arbitration, which is a private forum constituted by consent of parties.

The Court made a distinction between cases where there are allegations of serious fraud and fraud simplicitor. Mere allegations of fraud simplicitor are not a sufficient ground to decline reference to arbitration. Parties may be referred to arbitration where allegations of fraud pertain to disputes

between parties inter se, and have no implication for third parties. The courts may, however, refuse to make a reference to arbitration only in those cases where there are very serious allegations of fraud, which make a virtual case of criminal offence of fraud, or where allegations of fraud are so complicated, that it becomes absolutely essential that such complex issues be decided only by the civil courts on appreciation of voluminous evidence. This would also include those cases where there are serious allegations of 34 (2016) 10 SCC 386.

forgery or fabrication of documents, or where fraud is alleged with respect to the arbitration clause itself, or where the fraud alleged is of such a nature that it permeates the entire contract, including the agreement to arbitrate. The judicial authority must carefully sift the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It was opined that the Arbitration Act must be interpreted to bring it in consonance with the prevailing arbitration jurisprudence in the common law world.

8.7 The judgment in Ayyasamy (supra) was followed in Rashid Raza v.

Sadaf Akhtar,35 wherein the twin test laid down in para 25 of Ayyasamy was followed i.e. : (i) does the plea of fraud permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (ii) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.

8.8 In the subsequent decision of Ameet Lalchand Shah & Ors. v.

Rishabh Enterprises & Anr.,36 allegations of fraud arising from criminal breach of trust and misrepresentation regarding the equipment procured and leased for the setting up and operating of a Photovoltaic solar plant were made. A civil suit was filed praying for a declaration that all the agreements were vitiated by fraud and misrepresentation. An application was filed under Section 8 seeking reference of the disputes to arbitration under all the four agreements. This Court held that only where the court is 35 (2019) 8 SCC 710.

36 (2018) 15 SCC 678.

satisfied that the allegations of fraud are serious and complicated in nature, would it be more appropriate for the court to deal with the subject matter of the disputes, rather than relegate the parties to arbitration. It is the duty of the court to impart a sense of business efficacy to commercial transactions, and mere allegations of fraud would not be sufficient to decline reference of disputes to arbitration.

8.9 In a recent judgment delivered in Avitel Post Studioz Ltd. & Ors. v.

HSBC PI Holdings (Mauritius Limited),37 which pertains to an international commercial contract, the issue of arbitrability of fraud arose for consideration. This Court held that the same set of facts may have civil as well criminal consequences. If it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject matter of a proceeding under Section 17 of

the Indian Contract, 1872, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter, would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.

This view has been affirmed by a co-ordinate bench in Deccan Paper Mills v. Regency Mahavir38 and Vidya Drolia & Others v. Durga Trading Corporation39.

8.10 In our view, all civil or commercial disputes, either contractual or non-

contractual, which can be adjudicated upon by a civil court, in principle, can 37 (2020) SCCOnLine SC 656.

38 (2020) SCCOnLine SC 655.

39 Civil Appeal No.2402 of 2019 decided vide Judgment dated 14.12.2020. be adjudicated and resolved through arbitration, unless it is excluded either expressly by statute, or by necessary implication. The Arbitration and Conciliation Act, 1996 does not exclude any category of disputes as being non arbitrable. Section 2(3) of the Arbitration Act however recognizes that certain categories of disputes by law may not be submitted to arbitration.40 In all jurisdictions, certain categories of disputes are reserved by the legislature, as a matter of public policy, to be adjudicated by a court of law, since they lie in the realm of public law.

8.11 Traditionally, disputes relating to rights in rem are required to be adjudicated by courts and / or statutory tribunals. A right in rem is a right exercisable against the world at large. Actions in rem refer to actions which create a legal status such as citizenship, divorce, testamentary and probate issues, etc. A lis in rem is not arbitrable by a private tribunal constituted by the consent of parties. Actions in personam determine the rights and interests of parties to the subject matter of the dispute, which are arbitrable.

The broad categories of disputes which are considered to be non arbitrable are penal offences which are visited with criminal sanction; offences pertaining to bribery / corruption; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody and guardianship matters, which pertain to the status of a person; testamentary matters which pertain to disputes relating to the validity of a Will, grant of Section 2(3). This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

probate, letters of administration, succession, which pertain to the status of a person, and are adjudicated by civil courts.

Certain categories of disputes such as consumer disputes41; insolvency and bankruptcy proceedings; oppression and mismanagement, or winding up of a company; disputes relating to trusts, trustees and beneficiaries of a trust42 are governed by special enactments.

This Court in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.43 has recognized some examples of disputes which are not arbitrable, and held that :

> "36. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and
>
> (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes." 8.12 The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself. Another category of cases is where the substantive contract is "expressly declared to be void" under Section 1044 of the Indian Contract Act, 1872 where the agreement is Emaar MGF Land Limited v. Aftab Singh, (2019) 12 SCC 751.

42 Vimal Kishor Shah & Others v. Jayesh Dinesh Shah & Others. (2016) 8 SCC 788. 43 (2011) 5 SCC 532.

44 Section 10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

entered into by a minor (without following the procedure prescribed under the Guardian and Wards Act, 1890) or a lunatic, which would be with a party incompetent to enter into a contract.

8.13 The civil aspect of fraud can be adjudicated by an arbitral tribunal.

The civil aspect of fraud is defined by Section 17 of the Indian Contract Act, 1872 as follows :

> "17. Fraud defined. – Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his [agent], or to induce him to enter into the contract:
>
> (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it; (4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent." 8.14 We will now consider whether voidable agreements are arbitrable.

Voidable agreements are defined by Section 19 of the Contract Act as :

"19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true. Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party of whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable." Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Section 11. Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

In the case of voidable agreements, such disputes would be arbitrable, since the issue whether the consent was procured by coercion, fraud, or misrepresentation requires to be adjudicated upon by leading cogent evidence, which can very well be decided through arbitration. Until it so proved and upheld as per Sections 2(i) and (j) of the Indian Contract Act, 1872 such an agreement would remain enforceable, and is not void.

8.15 In Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee,45 a single judge (exercising powers u/S. 11) opined that when a plea is taken to avoid arbitration on the ground of the underlying contract being void, the court is required to ascertain the true nature of the defence. Often, the terms 'void' and 'voidable' are used loosely and interchangeably. The court ought to examine the plea by keeping in mind the provisions of the Indian Contract Act, 1872. In cases where the court comes

> to a conclusion that the contract is void without receiving any evidence, it may be justified in declining the reference to arbitration in a few isolated cases. These would be cases where the court can readily conclude that the contract is void upon a meaningful reading of the contract document itself. However, it would not be permissible to circumvent arbitration where the defence taken is that the contract is voidable, which are cases covered under circumstances mentioned inter alia in Sections 12, 14, 15, 16, 17, 18 of the Indian Contract Act, 1872.

Even though Swiss Timing Ltd. was a decision of a designate of the Chief Justice under Section 11 of the 1996 Act (prior to the Amendment), and 45 (2014) 6 SCC 677.

would have no precedential value in view of the judgment of this Court in State of West Bengal v. Associated Contractors,46 the reasoning in Swiss Timing Ltd. has been cited with approval by this Court in Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius Limited)47. 8.16 The ground on which fraud was held to be non arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration practice, arbitral tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law.48 8.17 In the present case, the allegations of fraud with respect to the invocation of the Bank Guarantee are arbitrable, since it arises out of disputes between parties inter se, and is not in the realm of public law. 9 Maintainability of the Writ Petition 9.1 We are of the view that the Writ Petition filed by the Respondent No. 1 to challenge the Order dated 18.01.2018 passed by the Special Commercial Court / District Judge-I in Commercial Dispute No. 62/2017 was 46 (2015) 1 SCC 32.

47 (2020) SCCOnLine SC 656.

48 Malhotra's Commentary on the Law of Arbitration, [4th ed., Wolters Kluwer (2020)], p.339, Volume I. not maintainable, since a statutory remedy under the amended Section 37 of the Arbitration Act is available. Section 37(1) has been amended by Act 3 of 201649. Section 37(1)(a) provides for an appeal to be filed against an Order refusing to refer the parties to arbitration.

Section 37(1)(a) reads as :

> "37. Appealable orders. – (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-
>
> (a) Refusing to refer the parties to arbitration under section 8; ..." 9.2 Since the judgment and order of the Commercial Court dated 18.01.2018 refusing to refer the parties to arbitration was an appealable order under Section 37(1)(a) of the

Arbitration Act, the Writ Petition was not maintainable. The appeal would lie before the Commercial Appellate Division of the High Court under Section 13(1A) of the Commercial Courts Act, 2015. Section 13(1A) read as :

"13. Appeals from decrees of Commercial Courts and Commercial Divisions.–(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of 60 days from the date of judgment or order.

(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."

49 which came into effect on 23.10.2015.

In view of the availability of a statutory remedy, the judgment of the High Court passed under Articles 226 and 227 of the Constitution is liable to be set aside on the ground of maintainability.

10 In the present case, since both parties have admitted the existence of the arbitration agreement between the parties, as recorded in the judgment of the High Court, and even before this Court during oral submissions, parties may either appoint a sole arbitrator consensually; failing which, an application u/S. 11 for appointment of the arbitrator may be made before the High Court.

11 In view of the discussion hereinabove, we hold that :

(i) The impugned judgment and order dated 30.09.2020 in W.P. No. 1801 of 2020 passed by the Bombay High Court is set aside;

(ii) We direct the Secretary General of this Court to impound the Work Order dated 28.09.2015, and forward it to the concerned Collector in Maharashtra for assessment of the Stamp Duty payable on the said instrument, to be completed within a period of 45 days from receipt of the same;

(iii) On determination of the Stamp Duty payable, the Appellant / Plaintiff is directed to make the payment assessed by the Collector u/S.30(f-a) of the Maharashtra Stamp Act, 1958 within a period of four weeks from the date of receipt of communication of the Order;

The Stamp Duty assessed by the Collector will, however, be subject to the statutory right available to file a revision / appeal under the Maharashtra Stamp Act.

(iv) With respect to the invocation of the Bank Guarantee, the Appellant may seek interim relief u/S. 9 of the Arbitration and Conciliation Act, 1996.

We extend the stay granted by the High Court for a further period of eight weeks.

12 We are of the considered view that the finding in SMS Tea Estates and Garware that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and un-enforceable, is not the correct position in law.

In view of the finding in paragraph 92 of the judgment in Vidya Drolia by a co-ordinate bench, which has affirmed the judgment in Garware, the aforesaid issue is required to be authoritatively settled by a Constitution bench of this Court.

We consider it appropriate to refer the following issue, to be authoritatively settled by a Constitution bench of five judges of this Court :

> " Whether the statutory bar contained in Section 35 of the Indian 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, un- enforceable, or invalid, pending payment of stamp duty on the substantive contract / instrument ? " In light of the same, the Registry may place this matter before the Hon'ble Chief Justice of India for appropriate orders / directions.
>
> ……..……J. (Dr Dhananjaya Y Chandrachud) .....J. (Indu Malhotra) .....J. (Indira Banerjee) New Delhi;
>
> January 11, 2021