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SUPREME COURT INVALIDATES UNSTAMPED ARBITRATION AGREEMENT

A. Introduction

The Supreme Court (“SC”), in the *N.N. Global Mercantile* case,¹ adjudicated on April 25, 2023, on the issue pertaining to the validity of an arbitration agreement where the underlying contract is unstamped or deficiently stamped.

B. Brief Facts

1. Karnataka Power Corporation Limited (“**KPCL**”) awarded a work order (“**Work Order**”) to Indo Unique Private Limited (“**Indo-Unique**”) which then entered into a sub-contract with N.N. Global Mercantile Private Limited (“**Global Mercantile**”).
2. Indo-Unique’s Work Order required Global Mercantile to furnish a bank guarantee (“**BG**”) which included an arbitration clause.
3. Due to certain disputes between KPCL & Indo-Unique, KPCL invoked the BG furnished by the latter who, in turn, invoked the BG furnished by Global Mercantile.
4. Indo-Unique’s BG invocation led to a suit by Global Mercantile, which reached the SC in a Special Leave Petition and was considered before a three-judge bench.²
5. In 2021, the bench considered the issue as to whether voidable agreements are arbitrable. However, in view of conflicting judgments,³ it referred the matter to a five-judge bench to settle the matter authoritatively, which has led to its recent decision.

C. SC’s Judgment & Reasoning

The SC, in a 3:2 majority:⁴

1. Held that: “*an Arbitration Agreement, within the meaning of Section 7 of the [Arbitration & Conciliation] Act, which attracts stamp duty and which is not stamped or insufficiently stamped, cannot be acted upon, in view of Section 35 of the Stamp Act, unless following impounding and payment of the requisite*

¹ *N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited & Others* (25.04.2023) – SC: MANU/SC/0445/2023 and available [here](#).

² Reported in (2021) MANU/SC/0014/2021 and available [here](#).

³ *SMS Tea Estates Pvt. Ltd. vs. M/s. Chandmari Tea Co. Pvt. Ltd.* MANU/SC/0836/2011 and *Garware Wall Ropes Limited vs. Coastal Marine Constructions and Engineering Limited* MANU/SC/0511/2019.

⁴ By Jus. KM Joseph for himself and Jus. Aniruddha Bose; concurring judgment by Jus. CT Ravikumar.

*duty, necessary certificate is provided under Section 42 of the Stamp Act.*⁵

2. Further held: “...[T]he provisions of Sections 33 and the bar under Section 35 of the [Indian] Stamp Act, applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Stamp Act, would render the Arbitration Agreement contained in such instrument as being non-existent in law unless the instrument is validated under the Stamp Act.”⁶
3. Held that an unstamped or insufficiently stamped agreement is not enforceable until it is validated, *i.e.*, the defect is cured as per the procedure laid out in the Stamp Act.
4. Reasoned that an arbitration agreement being an agreement in writing,⁷ attracts stamp duty under the Stamp Act⁸ and therefore, the provisions of Sections 33⁹ and 35¹⁰ of the Stamp Act would come into play.
5. Opined that while an arbitration clause is a distinct and separate agreement, allowing an arbitration clause to operate in an instrument which is not stamped / insufficiently stamped, would, therefore, allow the instrument to be used to establish a collateral transaction. Such an interpretation will defeat the mandate of the Stamp Act as there exists, per Sections 33 and 35, a clear bar on the use of an instrument, which is not stamped or insufficiently stamped.
6. Was of the view that such an unstamped/ insufficiently stamped agreement can only be acted upon following its impounding, the payment of requisite duty, and procuring the necessary certificate under Section 42 of the Stamp Act.¹¹

However, the dissenting opinion of the bench¹² took the view that the judicial authority need not examine the issue of stamping and impounding at the pre-reference stage and as such, the unstamped/ insufficiently stamped arbitration agreement is an issue that can be undertaken by the arbitrator/ arbitral tribunal.

D. Comment

This judgment will have wide ramifications for parties who do not stamp/ sufficiently stamp their contracts. Where such contracts contain an arbitration agreement, the disputing party would face impediment in enforcing that agreement unless it resolves the issue of the agreement being unstamped/ insufficiently stamped.¹³

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⁵ Paragraph 114 of the judgment by Jus. KM Joseph.

⁶ Paragraph 115.

⁷ Section 7(3) of the Arbitration & Conciliation Act, 1996.

⁸ The Court referred to Article 5 of the First Schedule of the Stamp Act.

⁹ Examination and impounding of instruments.

¹⁰ Instruments not duly stamped inadmissible in evidence, etc.

¹¹ Endorsement of instruments on which duty has been paid under Sections 35, 40 or 41.

¹² Dissenting judgment by Justices Hrishikesh Roy and Ajay Rastogi.

¹³ Counselence will soon be releasing a detailed commentary on this judgment and its impact on contracting parties.