GARWARE WALL ROPES AND INDO UNIQUE: THE ROAD AHEAD IN TREATMENT OF ARBITRATION CLAUSES CONTAINED IN UNSTAMPED INSTRUMENTS

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ABSTRACT

The Supreme Court in Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd. (Garware) decided that a court cannot appoint an arbitrator if the arbitration agreement was contained in an unstamped document, unless the deficit stamp duty and penalty was paid. The basis for this decision was an earlier decision in SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd. (SMS Tea). On the other hand, the Bombay High Court in Gautam Landscapes Pvt. Ltd. v. Shailesh S. Shah (Gautaum Landscapes) held that reliefs under Section 9 and Section 11 of the Arbitration and Conciliation Act, 1996 (Act) could be granted even if an arbitration agreement was contained in an unstamped document. The judgment in Gautam Landscapes has been carried in appeal before the Supreme Court and is pending as of July 2020. In the meantime, the Apex Court in N.N. Global Mercantile Pvt. Ltd v. Indo Unique Flame Ltd. (Indo Unique) on 11.01.2021 overruled SMS Tea and referred the decision in Garware to a larger bench.

The issue of enforceability of an arbitration agreement in an unstamped document is specific to India and involves the interplay of two principles: (i) separability of arbitration agreements and (ii) effect of fiscal legislations. Indo Unique considered the first of these principles and doubted the correctness of the decision in Garware. While referring it to the larger bench, this judgment correctly appreciated the separability presumption in view of the amendments introduced to the Act in 2015, particularly after the insertion of Section 11(6A). On the other hand, the Supreme Court in Garware seems to have incorrectly applied the separability presumption and undermined the true legislative intent of the 2015 amendments which was to minimise judicial intervention.

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This article considers the interplay of both these principles and considers the parameters which the Apex Court should bear in mind while deciding the reference in Garware.

I. INTRODUCTION

Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**") confers powers upon the designated court to appoint an arbitrator. The Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**") led to the insertion of Section 11(6A) which provides that the court while appointing an arbitrator has to confine itself to the examination of the *existence of an arbitration agreement*. The rationale for this amendment, as explained in the 246th Law Commission Report ("**Law Commission Report**"), was to undo the effect of a judgment delivered by the Constitutional Bench of the Supreme Court in SBP & Co. v. Patel Engg. Ltd.[1] ("***SBP***"), which considerably expanded the scope of inquiry and intervention by a court while appointing arbitrators. The judgment in *SBP*, as followed by National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.[2] ("***Boghara Polyfab***"), allowed the court to examine, *inter alia*, the following issues:

(i) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

(ii) Whether the claim is a dead (long-barred) claim or a live claim.

(iii) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

This was considered to be excessive judicial intervention by the Law Commission Report and the scope of judicial intervention was sought to be restricted to situations where the court finds that the arbitration agreement either does not exist or is null and void. The question that begs consideration next is, what is the threshold to determine if an arbitration agreement does not "exist". Does the determination of this issue refer to the examination of the intention of the parties to arbitrate, or would it also refer to formal validity of an arbitration agreements such as stamping or registration of arbitration agreements?

1. SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618.
2. National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267.

In SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.[3] ("***SMS***"), the Supreme Court of India held that a court cannot appoint an arbitrator under Section 11 of the Act if the arbitration clause is contained in an unstamped instrument. It was held that before "acting upon" the arbitration clause and appointing an arbitrator, the instrument containing the arbitration clause should be impounded and the deficit stamp duty should be paid. The decision in *SMS* came at a time when the effect of *SBP* and *Boghara Polyfab* was not undone by the insertion of Section 11(6A) to the Act. Thus, even at the Section 11 stage, a court could determine issues beyond examining the existence of an arbitration agreement.

Post the 2015 Amendment, the effect of the insertion of Section 11(6A) on the decision of *SMS* was considered by the Supreme Court in Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engg. Ltd.[4] ("***Garware***"). It was held that insertion of Section 11(6A) did not remove the basis of the decision in *SMS* and an unstamped arbitration agreement could not be acted upon by the court to appoint arbitrators. The reason for this, as discussed in *Garware*, was that the Law Commission Report did not expressly refer to *SMS* while recommending the insertion of Section 11(6A). On the other hand, about a week before the Supreme Court's decision in *Garware*, a Full Bench of the Bombay High Court in Gautam Landscapes (P) Ltd. v. Shailesh S. Shah[5] ("***Gautam Landscapes***"), held that after the insertion of Section 11(6A), the court could appoint an arbitrator even if the arbitration agreement was contained in an unstamped document. The Bombay High Court further held that the non-stamping of a document containing the arbitration clause would have no effect on the powers of the court to grant interim measures under Section 9.

The findings on Section 11 in *Gautam Landscapes* were subsequently set aside by the Supreme Court in *Garware*. However, the findings pertaining to the court's powers to grant interim reliefs under Section 9 for unstamped instruments remain undisturbed. The Bombay High Court's decision in *Gautam Landscapes* has been carried in appeal to the Supreme Court,[6] where the matter is presently *sub judice*. The decision in N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.,[7] did not refer to *Gautam*

3. SMS Tea Estates (P) Ltd. v Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66.
4. Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engg. Ltd., (2019) 9 SCC 209.
5. Gautam Landscapes (P) Ltd. v. Shailesh S. Shah, 2019 SCC OnLine Bom 563.
6. Shailesh S. Shah v. Gautam Landscapes (P) Ltd., SLP (C) No. 10232 of 2019.
7. N.N. Global Mercantile (P) Ltd v. Indo Unique Flame Ltd., 2021 SCC OnLine SC 13.

Landscapes, but on the basis of the principle of separability of arbitration agreements, overruled *SMS* and referred the correctness of *Garware* to a larger bench. This principle of separability or the separability presumption treats arbitration agreements as a distinct and separate agreement from the contract in which the arbitration agreement is contained. The separability presumption or the doctrine of separability is well established in civil and common law jurisdictions, regardless of codification in statutes.[8]

SMS and *Garware* took a very restrictive and narrow view of the principle of separability of arbitration clauses. *Garware* restricted the separability presumption to Section 16 of the Act. By doing so, it failed to give effect to the true meaning of the separability doctrine. In addition, *Garware* also failed to appreciate the true legislative intention behind the introduction of Section 11(6A).

It is important to analyse the decisions in *SMS, Garware* and *Gautam Landscapes* to fully appreciate how each case dealt with the issue of separability. Thus, the first part of this article provides an overview of the three judgments. The second part will formulate the premises and consider the interplay of two principles: (i) separability of arbitration agreements and (ii) the effect of fiscal legislations to analyse the issue. This interplay is relevant to consider if non-compliance with a fiscal legislation such as the Stamp Act renders the arbitration agreement non-existent or null and void to the extent contemplated under Section 11(6A) of the Act. The third and concluding part will look at the parameters that the Supreme Court should look at while deciding the reference in *Garware.*

II. OVERVIEW OF THE JUDGMENTS

A. SMS: Arbitration agreement contained in an unstamped instrument cannot be acted upon

The Supreme Court in *SMS* was called upon to decide an application under Section 11 of the Act for appointment of an arbitrator pursuant to an arbitration clause contained in an unregistered lease deed. In this context, the Supreme Court proceeded to decide the following questions, *inter alia*:

i) Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?

8. Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd., (1993) 1 Lloyd's Rep 455.

ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

While the answer to the first question was in the affirmative, the Supreme Court held that an arbitration agreement in an unstamped document could not be acted upon by the court before payment of penalty and the deficit stamp duty. This was because of the difference between the Stamp Act and the Registration Act, 1908 ("**Registration Act**"). Both Section 49 of the Registration Act and Section 35 of the Stamp Act bar an unregistered and unstamped document, respectively, from being taken into evidence. However, Section 49 of the Registration Act has a proviso which allows an unregistered document to be received as evidence of a collateral transaction. An arbitration agreement contained in an unregistered document was held to be a collateral term, in the context of the Registration Act, relating to the resolution of disputes. Therefore, even though contained in an unregistered document, the arbitration agreement could be acted upon by being received in evidence as a collateral transaction for referring disputes to arbitration.

Unlike the Registration Act, the Stamp Act does not provide for any exceptions for the enforcement of collateral terms or transactions relating to an unstamped document. Section 35 of the Stamp Act prohibits the court or any judicial authority from acting upon an unstamped document or receiving an unstamped document in evidence. Thus, the Supreme Court concluded in *SMS* that an unstamped document could not be acted upon at all, and an arbitration agreement contained in such unstamped document could not be enforced unless the penalty and deficit stamp duty is paid.

In *SMS*, the Supreme Court held that while exercising powers under Section 11 of the Act, the court would have to impound the document if it is found to be not duly stamped. Once the deficit stamp duty and penalty is paid, the defect with reference to the deficit stamp duty would be cured and the court may then act upon the document and the arbitration clause contained therein. Non-registration of the document would not bar the court from acting on the arbitration agreement and appointing an arbitrator.

An analysis of the judgment in *SMS* would bring out the contradiction in the Supreme Court's findings on separability. In *SMS*, the Supreme Court agreed with and recognised the principle of separability. But, the principle of separability has been erroneously linked with Section 49 of the Registration Act by considering the arbitration agreement as a "collateral transaction" under Section 49. By doing so, the Supreme Court has not given true effect to the principle of separability under the Act and has

sought to support the separability presumption under the Registration Act. If the arbitration agreement is independent from the underlying contract and does not require registration or stamping, it should have been irrelevant if separability is recognised by either the Stamp Act or the Registration Act, as giving effect to a "collateral transaction".

The decision in *SMS* came at a time when the scope of intervention was very wide at the Section 11 stage (owing to *SBP* and *Boghara Polyfab*) and courts had the jurisdiction to decide various preliminary issues such as validity of the arbitration agreement, existence of a live claim, etc. As mentioned above, the extent of this judicial intervention was sought to be minimised through the 2015 Amendment. Thus, it would have to be seen if the judgment in *SMS* would remain unaffected after the 2015 Amendment. This issue was considered by the Supreme Court in *Garware*.

B. Garware: SMS is unaffected by the insertion of Section 11(6A)

In *Garware*, the Supreme Court considered the Law Commission Report and the Statement of Objects and Reasons for the 2015 Amendment, neither of which referred to the decision in *SMS*. Thus, the Supreme Court concluded that Section 11(6A) was introduced because the Law Commission felt that the judgments in *SBP* and *Boghara Polyfab* required a relook, and that the intention behind the 2015 Amendment had nothing to do with *SMS.* The Supreme Court then went to consider the two primary arguments raised before it – first, being the separability of the arbitration agreement, and second, the interpretation of Section 11(6A) and the scope of judicial inquiry thereunder, i.e. the examination of the existence of an arbitration agreement.

As regards the first argument, the Supreme Court considered the observations from *SMS* on the Stamp Act and the inability of the court to act upon an arbitration clause contained in an unstamped agreement. The Supreme Court then relied on *SBP* and noted that the principle of separability was contained in Section 16 of the Act, which does not come into play before a tribunal is constituted. It was held that the independent existence of an arbitration agreement could be recognized for certain limited purposes only and could not be extended to separate the arbitration agreement from an unstamped document. Impliedly, the Supreme Court applied the principle of separability in a restrictive and narrow sense by keeping it limited only to Section 16. This is problematic because not only

has separability been recognized under Section 7 of the Act,[9] it has also been treated as a fundamental principle of arbitration under civil and common law jurisdictions.[10] According to the author, the correct way to consider the separability presumption would have been to separate the validity of the intention to arbitrate, reflected in the arbitration agreement, from the formal requirements of stamping of the main agreement containing the arbitration clause.

Regarding the second argument on the interpretation of Section 11(6A) of the Act, the Supreme Court considered the overall legislative policy of the 2015 Amendment Act. The Supreme Court noted that the mischief sought to be remedied by the introduction of Section 11(6A) was the expansion of the scope of judicial interference by the judgments in *SBP* and *Boghara Polyfab,* and that it was never the Parliament's intention to remove the basis for *SMS.*

These observations of the Supreme Court may be considered as a restrictive and narrow interpretation of the Law Commission Report and the 2015 Amendment. The overall objective of the 2015 Amendment was to minimize judicial intervention at every stage of the pre-arbitral, arbitral and post-arbitral process. It is also important to note that though the Stamp Act is a fiscal legislation to protect revenue, it does not allow parties to raise technical objections.[11] The objective of the Stamp Act could have been satisfied even if an arbitrator were appointed by the court with a consequent direction to ensure the payment of the deficit stamp duty and penalty.

In *Garware,* the Supreme Court also considered Section 11(6A) with Section 7(2) of the Act and Section 2(h) of the Contract Act, 1872, and held that an agreement becomes a contract under Section 2(h) of the Contract Act, 1872 only if it is enforceable by law. It was held that under the Stamp Act, an agreement does not become enforceable unless it is duly stamped, and therefore, an arbitration clause contained in an unstamped document would not exist where the main agreement itself is not enforceable. This finding is again problematic because the Supreme Court adopted a restricted view of the separability presumption. An arbitration agreement fails the test of Section 2(h) of the Contract Act only if the arbitration agreement *itself* is

9. Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1; Ashapura Mine-Chem Ltd. v. Gujarat Mineral Development Corpn., (2015) 8 SCC 193.
10. Harbour Assurance (n 8).
11. J.M.A. Raju v. Krishnamurthy Bhatt, AIR 1976 Guj 72; Jagdish Narain v. Chief Controlling Revenue Authority, 1994 SCC OnLine All 229 : AIR 1994 All 371.

held to be not enforceable by law, *independent* of questions on the validity or enforceability of the underlying agreement. Since an arbitration agreement is not required to be stamped, no question of the agreement being invalid or unenforceable arises if the underlying contract is unstamped.

The Supreme Court referred to the decision in Duro Felguera SA v. Gangavaram Port Ltd.[12] (“***Duro***”) under Section 11(6A), and stated that *Duro* was only a reiteration of the legislative policy for introducing Section 11(6A). The Supreme Court distinguished *Duro* by relying on a three-judge bench decision in United India Insurance Co. Ltd. v. Hyundai Engg. and Construction Co. Ltd.[13] (“***Hyundai***”) and held that an arbitration clause may “exist” between the parties but may not “exist in law” if it is not legally valid or enforceable. In *Hyundai*, the court was considering an arbitration clause in an insurance policy which restricted the reference to arbitration only for the quantification of the amount admitted by the insurer. It was held that in the absence of any admission by the insurer, the arbitration clause would not get activated and as such, would not “exist in law”.

The Supreme Court’s reliance on *Hyundai* to distinguish *Duro* is misplaced because the facts involved in the two decisions were very different. The issue in *Hyundai* was concerned directly with the validity and existence of the arbitration agreement itself and not just the underlying contract. In *Garware*, the validity or legality of the arbitration agreement was not questioned but the issue pertained to the effect of an unstamped document on the arbitration agreement contained therein. Applying the findings in *Hyundai* to the issue in *Garware* amounted to equating the validity of an arbitration agreement contained in an unstamped document to the validity of an independent arbitration agreement. While doing so, the Supreme Court again goes against the separability presumption because it effectively connects the validity of the arbitration agreement with the contract in which it is contained. This is very well explained by *Indo Unique*, according to which 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 agreement is void ab initio. The validity of the arbitration agreement was directly in question in the case of *Hyundai*, but it was not so in *Garware.*

12. Duro Felguera SA v. Gangavaram Port Ltd., (2017) 9 SCC 729.
13. United India Insurance Co. Ltd. v. Hyundai Engg. and Construction Co. Ltd., (2018) 17 SCC 607.

C. Gautam Landscapes: An unstamped document may be acted upon

A Full-Bench was constituted by the Chief Justice of the Bombay High Court in *Gautam Landscapes* to decide if the court could grant reliefs under Section 9 and appoint an arbitrator under Section 11 of the Act when the document containing the arbitration clause was unstamped or not duly stamped. The Bombay High Court in *Gautam Landscapes* took a view which was directly opposed to the Supreme Court's view in *Garware.* The decision in *Gautam Landscapes* preceded the decision in *Garware* and was the first judgment after the 2015 Amendment to have considered the effect of *SMS.* Therefore, it becomes important to understand the differing approach in *Gautam Landscapes* vis-à-vis *Garware.*

The Bombay High Court's judgment in *Gautam Landscapes* discusses three aspects – first, the nature and scope of powers under Section 9 of the Act; second, the interpretation of the Maharashtra Stamp Act, 1958 ("**Maharashtra Act**") and the Stamp Act as fiscal legislations; and third, the scope of Section 11 and the effect of the introduction of Section 11(6A) in the Act.

1. Section 9: Scope and nature

Relying on Firm Ashok Traders v. Gurumukh Das Saluja[14] ("***Firm Ashok***"), the Bombay High Court held that the right conferred under Section 9 of the Act does not arise out of a contract. Therefore, even if the underlying contract is not stamped and cannot be acted upon, the court's powers under Section 9 would remain unaffected. The Bombay High Court gave a broad interpretation to the separability presumption and held that the basic requirement for seeking a relief under Section 9 is that an arbitration clause should exist. Notably, the Bombay High Court rejected the argument that separability was confined only to an application under Section 16 of the Act.

The observation in *Firm Ashok* regarding the nature of the right conferred under Section 9 requires some explanation. The question in *Firm Ashok* was regarding the maintainability of Section 9 proceedings where an arbitration clause was contained in a partnership deed for an unregistered partnership firm. Section 69 of the Partnership Act, 1932 ("**Partnership Act**") bars the enforcement of any right arising out of a contract or from the

14. Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155.

Partnership Act if the partnership firm is unregistered. By stating that the right conferred under Section 9 of the Act does not arise out of a contract, the court implied that the remedy under Section 9 is independent of any right that a party may have had under the Partnership Act or otherwise under any contract.

As regards the applicability of *SMS* to Section 9, the Bombay High Court held that since *SMS* was a decision on Section 11 of the Act, it would not be an authority on the scope of Section 9. Further, not only were the scope and ambit of Section 9 and Section 11 different, the consequences thereunder were also different. An important observation was made regarding the drastic consequences of not granting relief under Section 9 which would cause severe hardship to parties if the court were to wait for adjudication of stamp duty.

2. *Scope and object of fiscal legislations: Stamp Act and Maharashtra Act*

The Bombay High Court considered the objective and scope of fiscal legislations such as the Stamp Act and the Maharashtra Act, and held that the object of these enactments was not to enable parties to raise technical objections. The sole object of the legislations is to increase revenue and its provisions must be construed narrowly, i.e., only to the extent of protecting revenue.[15]

The Bombay High Court noted various judgments[16] in this regard and reiterated that the Stamp Act is concerned with the instrument and not the transaction contained in it. For instance, consider a situation where the parties enter into a sale deed which is not stamped. The court can certainly not act upon the sale deed. However, the transaction of sale may still be established by relying upon the parties' correspondences, consideration receipts, and in certain cases, an agreement to sell. Since the entire transaction does not involve any stamp duty and only the sale deed does, the court can still act upon the underlying transaction of sale *de hors* the sale deed. Similarly, if an arbitration agreement is contained in an unstamped contract, the court can read the contract in a manner so as to uphold the

15. Gautam Landscapes (n 5); N.N. Global Mercantile (n 7).
16. J.M.A. Raju v. Krishnamurthy Bhatt, AIR 1976 Guj 72; Jagdish Narain v. Chief Controlling Revenue Authority, 1994 SCC OnLine All 229 : AIR 1994 All 371; Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655; K.I. Suratwalla and Co. v. Mahmud Bidi Works, 1970 SCC OnLine Bom 110 : AIR 1972 Bom 238; Radhakisan Tijulal Agrawal v. Jayantilal Hargovindas, 1979 SCC OnLine Bom 145 : 1980 Mah LJ 120.

parties' intention to arbitrate. This would also be fortified by the true effect of the separability presumption.

3. Section 11: Scope and applicability of SMS post 2015 Amendment

The Bombay High Court considered the decisions in *SBP, Boghara Polyfab* and *SMS,* the Law Commission Report, and the objects and reasons of the 2015 Amendment which introduced Section 11(6A). In *Garware*, the Supreme Court had interpreted the Law Commission Report restrictively and had held that Section 11(6A) did not remove the basis of *SMS*. The only reason for doing so was that *SMS* did not find any mention in the Law Commission Report. *Gautam Landscapes*, unlike *Garware*, gave effect to the overall legislative policy and purpose of minimising court intervention at the Section 11 stage, as noted in the Law Commission Report.

The finding that *SMS* would no longer apply after the 2015 Amendment was bolstered by the interpretation of Section 11(6A) in Duro and TRF Ltd. v. Energo Engg. Projects Ltd.[17] The Bombay High Court concluded that reliance placed on the principles in *SBP* and *Boghara Polyfab* was incorrect. After the introduction of Section 11(6A), the ambit of inquiry was confined to examination of the existence of an arbitration agreement between the parties. If such an agreement were to exist, the tribunal should be constituted and the issue on insufficiency or otherwise of the stamp duty should be left to the tribunal.

III. THE REFERENCE IN GARWARE: CONSIDERATIONS BEFORE THE APEX COURT

Garware and *Indo Unique* were judgments by the Supreme Court delivered by a bench of three judges each. Despite following the *dicta* in *SMS,* the correctness of *Garware* has been doubted by *Indo Unique, de hors* the introduction of Section 11(6A). *Indo Unique* referred *Garware* to a larger bench by holding that *Garware* had not correctly applied the separability presumption. It analysed a plethora of provisions under the Act but did not restrict separability to any one of them. Therefore, the parameters which need to be considered by the Supreme Court while deciding the reference in *Garware* are as follows:

(i) The principle of separability as a fundamental principle of international commercial arbitration;

17. TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377.

(ii) The meaning of *prima facie* existence of an arbitration agreement under Section 11(6A); and

(iii) Nature of fiscal legislations and public policy considerations

A. Separability

As has been pointed out earlier, the decision in *Garware* has impliedly restricted the doctrine of separability to Section 16 of the Act. The basis for this was a similar observation made in *SBP. Gautam Landscapes*, on the other hand, rejects the argument of separability being confined to Section 16 of the Act. *Indo Unique* goes a step further, and after considering international precedents, held Section 16 to be a reflection of separability as a basic principle of commercial arbitration.

In my view, the Bombay High Court in *Gautam Landscapes,* and the Supreme Court in *Indo Unique* had taken the correct approach to the separability presumption. The separability presumption is well-established in judicial decisions and legal scholarship in both common law and civil law jurisdictions, regardless of whether the respective arbitration legislations expressly provide for the doctrine.[18] For example, in Germany, much before the UNCITRAL Model Law had been adopted, the independent existence of an arbitration clause had been recognised by judicial decisions. As early as the turn of the 20th century, Swiss courts held that the invalidity of the underlying contract did not affect the arbitration agreement.[19] In United States, despite the early statutory recognition of the separability doctrine, the separability presumption has been recognised as a matter of substantive federal arbitration law.[20]

Under English law, the principle of separability is codified under Section 7 of the English Arbitration Act, 1996. Some of the early decisions by English courts had taken a narrow view of the separability presumption. It was held that claims of non-existence, voidness or illegality of the underlying contract would also affect the validity of the arbitration clause.[21] But, this

18. Harbour Assurance (n 8).
19. Gary B. Born, *International Commercial Arbitration* (3rd ed., Kluwer Law International 2014) 349-471.
20. Buckeye Check Cashing Inc. v. Cardegna, 2006 SCC OnLine US SC 14 : 163 L Ed 2d 1038 : 546 US 440 (2006) at 445.
21. Smith, Coney & Barrett v. Becker, Gray & Co., (1916) 2 Ch 86; Dalmia Dairy Industries Ltd. v. National Bank of Pakistan, (1978) 2 Lloyd's Rep 223; Heyman v. Darwins Ltd., 1942 AC 356.

approach changed with the decision in Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co.[22] ("***Harbour Assurance***") which held as follows:

> *"...the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask ... whether the rule strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties. This may be especially true of contratsd'adhésion in which the arbitrator is in practice the choice of the dominant party.*
>
> *In deciding whether or not the rule of illegality also strikes down the arbitration clause, it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule…"*

The above extract from *Harbour Assurance* is important because it stresses upon two aspects – first, that the separability presumption would get defeated only if the issue of voidness, invalidity or illegality went to the root of the arbitration agreement. Second, the Court of Appeal underlines the importance of upholding arbitration clauses unless they come into conflict with public policy considerations.

There are two different aspects of invalidity of an arbitration agreement. One, where the issue goes to the root of the matter or the intention to arbitrate, and second, public policy considerations like fraud which would invalidate the agreement. The issue in *Garware* (or even *SMS* for that matter) was not about the validity of the arbitration agreement in itself. Rather, it was about the validity and legal enforceability of the unstamped underlying contract and whether the non-stamping of the underlying contract would affect the arbitration agreement. In this context, the decision in *Garware*, erred in conflating the issue of validity of the arbitration agreement with that of the unstamped contract.

22. Harbour Assurance (n 8).

B. Prima facie existence of an arbitration agreement under Section 11(6A)

The Supreme Court in *Duro* had clarified that the court will confine itself to examining the existence of an arbitration agreement at the Section 11 stage. As discussed above, the scope of examination of the existence of the arbitration agreement should be restricted to the *Harbour Assurance* principle, i.e., unless the question of existence or validity goes to the root of the arbitration clause itself, the court must act upon it.

The scope of inquiry under Section 11(6A) is to be on a *prima facie* basis as laid down under Section 45 and Section 8 of the Act. Section 8 makes it mandatory upon any judicial authority to refer parties to arbitration unless there is *prima facie* finding that no valid arbitration agreement exists. Section 45 makes a similar provision for referring parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. While there are differences in the language of the two provisions, the underlying objective remains the same, i.e., the court must refer parties to arbitration unless the arbitration agreement is non-existing owing to voidness, inoperability or incapability of performance.

Section 8 of the 1996 Act was amended vide the 2015 Amendment on the basis of the Law Commission Report. The Law Commission Report has observed that "judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration". The Law Commission Report while referring to the recommended amendments in Sections 8 and 11 noted the following:

> *"33. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to*

> *arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie."*

The Law Commission Report on amendment to Section 8 explains the process of determination in a Note which states as follows:

> *"...the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void."*

The Law Commission Report applied the same process of determination under Section 8 to Section 11(6A) as well. Therefore, the amended provision, limits the intervention by judicial authority to only one aspect i.e., when it finds that *prima facie* no valid arbitration agreement exists.[23] The Law Commission Report does not explain how to ascertain *prima facie* the validity of the arbitration agreement. Borrowing from the separability presumption and *Indo Unique*, *prima facie* examination would be restricted to examining the issue of voidness, invalidity or illegality of the arbitration agreement, to the extent that the arbitration agreement may be *void ab initio*, null and void, inoperative or incapable of being performed.

The words 'null and void', 'inoperative' and 'incapable of being performed' under Section 45 of the Act have been borrowed from Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**"). In the context of the Convention, 'null and void' refers to a situation where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to

23. Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751; Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678.

misrepresentation, duress, fraud or undue influence. 'Inoperative' refers to those cases where the agreement ceases to have effect, such as revocation by parties. The words 'incapable of being performed' would seem to apply to those cases where the arbitration cannot be effectively set into motion.[24] The explanation to these terms takes us back to the *Harbour Assurance* understanding – to consider if the root of the issue relates to the existence of the arbitration clause itself and not just the underlying contract.

The Supreme Court in *Garware* did not refer to the observations in the Law Commission Report on Section 8, which are also relevant for understanding the scope of inquiry after the introduction of Section 11(6A). It is clear from the said Report that Section 11(6A) requires a *prima facie* view on the existence of the arbitration agreement. The only situation where the court should refuse to appoint an arbitrator is when it finds on a *prima facie* view that the arbitration agreement itself did not exist. Thus, as long as the arbitration agreement existed, was not null and void, inoperative or incapable of being performed, non-stamping of the underlying contract or any other issue of invalidity associated with the underlying contract would be irrelevant for the purpose of Section 11 or Section 8.

C. Fiscal legislations and public policy considerations

A decree of the court becomes executable only after it is duly stamped under the Stamp Act. However, non-stamping of a decree does not mean that the decree is non-existent or unenforceable. This is because a decree comes into "existence" the moment the judgment is pronounced and the decree becomes enforceable the moment a judgment is delivered.[25] It has been held while executing decrees and orders of the court that affixing appropriate stamp duty on a decree would only render the decree executable but that does not mean and imply that the enforceability of the decree would remain suspended until furnishing of the stamped paper.[26] The decree does not become null or void if it is not stamped. In the context of the Act as well, it has been held that non-stamping of an arbitral award would not make the award susceptible to a challenge under Section 34. The issue of stamping would become relevant only when the award is sought to be executed under Section 36 of the Act.[27]

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24. World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639.
25. Chiranji Lal v. Hari Das, (2005) 10 SCC 746.
26. Hameed Joharan v. Abdul Salam, (2001) 7 SCC 573.
27. M. Anasuya Devi v. M. Manik Reddy, (2003) 8 SCC 565.

These principles on execution of decrees and Stamp Act may be used to draw an analogy to the meaning of "existence of arbitration agreement" under Section 11(6A). It could be argued before the larger bench of the Supreme Court in the *Garware* reference that the arbitration agreement comes into existence the moment parties agree and intend to refer disputes between them to arbitration. The act of stamping the underlying contract would only make the arbitration agreement "executable", and would not otherwise affect the validity or the existence of the arbitration agreement.

The Supreme Court in *Indo Unique* noted that the objective of the Stamp Act was to secure revenue for the State which formed an important public policy consideration. This needs to be balanced with the competing public policy of minimising judicial intervention in the arbitral process. "Public policy" in the context of arbitrations and the Act refers to very narrow grounds - fraud or corruption, contravention of fundamental policy of Indian law, and conflict with most basic notions of morality or justice. These grounds are codified under Section 34 and Section 48 of the Act, which refer to setting aside of arbitral awards and refusal to enforce foreign awards. It has been held time and again by courts that a mere violation of an Indian law will not qualify as a public policy ground.[28] Contravention of a fundamental policy of law is required to set aside or refuse enforcement of an arbitral award on public policy grounds.[29]

In this backdrop, the question that begs consideration before the larger bench is – "Are there any larger public policy considerations which require that an arbitration agreement contained in an unstamped agreement should not be given effect to?" To answer this, one may have to consider the effect of an unstamped document. Non-stamping of a document does not make the document *void ab initio*. The consequence of non-stamping is only that the court or any judicial authority cannot act on it. This means that the court cannot decide anything on the basis of that unstamped document. But the parties can always pay the deficit stamp duty and penalty to rectify this problem. If non-stamping of an arbitral award is not a ground to set aside the award, there seems to be no compelling public policy reasons for courts to restrain themselves from giving effect to an arbitration agreement contained in an unstamped document. The only relevant consideration

28. Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644; Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1.
29. Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India, (2019) 15 SCC 131.

here should be if the parties never intended to arbitrate or if the arbitration agreement itself did not existed.

IV. CONCLUSION

As has been discussed above, the decision in *Garware* has expanded the scope of judicial intervention in the arbitral process and has ignored the true intent behind the 2015 Amendments and the separability presumption. Now that the decision has been referred to a larger bench, the Supreme Court must consider and balance the operation of the Stamp Act *vis-à-vis* the Act and the basic principles of arbitration jurisprudence. One alternative is to restrict the findings in *Garware* to only the application of Section 11. A court's power to grant interim reliefs under Section 9 of the Act is not restricted only to the Act. It allows the court to go beyond the Act and grant reliefs based on the well-recognized principles governing the grant of interim injunctions.[30] On the other hand, a court under Section 11 is acting upon the arbitration agreement and within the confines of the Act. Thus, it could be possible for the Supreme Court to conclude that the decision in *Garware*, would only apply to Section 11, and would not otherwise restrict the court's power under Section 9 or under any other provision of the court.

The Stamp Act mandates that if an unstamped document comes before any court, it must be impounded. This would mean that even if the court were to act on the severed arbitration agreement, it will have to mandatorily impound the document for payment of stamp duty. Moreover, once parties go before the arbitrator, they may not be able to raise any claims on the basis of the unstamped contract since it can't be received in evidence by any judicial authority, including tribunals! Therefore, a mechanism needs to be put in place to ensure that the State's revenue is protected and stamp duty is paid appropriately. The SCI has powers under Article 142 of the Constitution of India to lay down appropriate guidelines in any matter.[31] Using this power, the Supreme Court could say that when an arbitration agreement is contained in an unstamped document, courts must impound the document and send it for affixation of stamp duty, but the payment of stamp duty should not be a pre-condition to the grant of reliefs. Parties must not be disallowed from seeking reliefs for the lack of stamp duty on the underlying document. Disregarding arbitration agreements in unstamped documents would do violence to the scheme of the Act, and to the separability presumption.

30. Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corpn., (2007) 6 SCC 798; Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125.
31. Asian Resurfacing of Road Agency (P) Ltd. v. CBI, (2018) 16 SCC 299.