

Seven-judge bench overrules SC's judgment on stamping of arbitration agreement

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A seven-judge Constitution bench on Wednesday overruled the Supreme Court's judgment in April, which held that an arbitration clause is void and not enforceable in law if the agreement is unstamped or insufficiently stamped.



The Supreme Court. (ANI)

By 3:2, the majority verdict in April said that a court could go into the aspects of stamping and other compliances before the arbitrator is appointed. This judgment in the NN Global case triggered concerns over delays in the appointment of arbitrators by adding one more layer of scrutiny, besides being seen as contrary to India's pro-arbitration stance.

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Setting aside the verdict, the larger bench, led by Chief Justice of India Dhananjaya Y Chandrachud, on Wednesday declared that agreements that are not stamped or

insufficiently stamped are not rendered void or void ab initio or unenforceable if arbitration agreement prima facie exists between parties.

Although an unstamped or insufficiently stamped agreement is inadmissible in evidence under the Stamp Act, the bench added in its unanimous judgment, it is a curable defect in the law, and therefore, non-stamping or improper stamping does not result in the instrument becoming invalid.

The bench, which also comprised justices Sanjay Kishan Kaul, Sanjiv Khanna, Bhushan R Gavai, Surya Kant, JB Pardiwala and Manoj Misra, clarified that objection as to stamping does not fall for determinations under sections 8 or 11 of the Arbitration Act when a court has to refer parties to an arbitral tribunal. “The concerned court must examine whether the arbitration agreement prima facie exists. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal.”

Experts welcomed the verdict. “It is a landmark verdict that will boost the arbitration ecosystem of India. By removing the cloud over the uncertainty that the previous judgment had ushered in, today’s judgment has not only upheld the legislative intent of the Arbitration Act but also the salutary doctrines of party autonomy, separability as well as the doctrine of kompetenz by approving arbitrators’ power to decide upon their jurisdiction,” said Kunal Vajani, joint managing partner at law firm Fox & Mandal. Vajani is also a Court Member (India), the International Court of Arbitration.

Alipak Banerjee, leader, International Dispute Resolution and Investigations Practice at the Nishith Desai Associates emphasised that the Wednesday ruling will promote India as an international arbitration hub. “The April judgment caused confusion and uncertainty. Several matters where arbitration had been invoked and proceedings were underway hit a roadblock as the parties were being directed to regularise the agreement by paying the deficit stamp duty while the stamp collector had lack of guidance on how to deal with such agreements. Now, the issue stands settled.”

In its judgment on Wednesday, the court underscored that the Arbitration Act is a special law and that one of its objectives was to minimise the supervisory role of courts in the arbitral process. “Courts may only examine whether an arbitration agreement exists on the basis of a prima facie standard of review. The nature of objections to the jurisdiction of an arbitral tribunal on the basis that stamp duty has not been paid cannot be decided on a prima facie basis,” said the bench. It added any such scrutiny by courts at the threshold will defeat the legislative intent underlying the Arbitration Act.

Citing the relevant provisions of the Stamp Act, the court pointed out the statute characterises non-payment of stamp duty as a curable defect. “The Stamp Act itself provides for the manner in which the defect may be cured and sets out the detailed

procedure for it. It bears mentioning that there is no procedure by which a void agreement can be cured.”

The seven-judge bench noted that its judgment does not allow the law to be flouted because the arbitral tribunal continues to be bound by the provision of the Stamp Act, including those relating to its impounding and admissibility, and challenges to the position and jurisdiction of arbitrators.

It delivered its ruling on a curative petition moved against the April judgment. The issue was referred to the larger bench by the top court on September 26, citing the “limitless uncertainty in the area of arbitration” triggered by its previous ruling.

The April judgment came while deciding a bundle of judgments since 2011, taking divergent views on the enforceability of arbitration clauses contained in unstamped or insufficiently stamped agreements. This judgment, by 3:2 majority, relied on the 1899 Indian Stamps Act that required certain agreements to be compulsorily registrable or chargeable to stamp duty when it held that a court could go into the aspects of stamping and other compliances before the arbitrator is appointed.

According to the majority view, a court is bound to examine the instrument at a pre-appointment stage, and if it is found to be unstamped or insufficiently stamped, the instrument is to be impounded at that stage, declaring the arbitration agreement to be void.

The two other judges on the bench, comprising the minority, flagged concerns that the view taken by the majority in the judgment has the propensity of frustrating the objective of the Arbitration and Conciliation Act, as scrutiny on the stamp duty at the threshold can stall the process and will lead to procedural complexity and delay in litigation before courts.

The judgment in the curative plea was reserved on October 12 with the bench expressing its doubt on the correctness of the April ruling. At the time, the seven-judge bench observed that stamping has nothing to do with the validity of an agreement, adding that provisions of the Contract Act will make it clear that any lacuna in the stamping of an agreement does not render the document invalid but can only impact its admissibility as evidence and consequently, its enforceability.

During the proceedings in October, the court clarified that its scope of reviewing the matter will confine to the stage and the correct forum for deciding the validity and enforceability of an arbitration agreement

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