

**CHIEF JUSTICE'S COURT**  
**HON'BLE THE CHIEF JUSTICE DY CHANDRACHUD**  
**HON'BLE MR. JUSTICE SANJAY KISHAN KAUL**  
**HON'BLE MR. JUSTICE SANJIV KHANNA**  
**HON'BLE MR. JUSTICE B.R. GAVAI**  
**HON'BLE MR. JUSTICE SURYA KANT**  
**HON'BLE MR. JUSTICE J.B. PARDIWALA**  
**HON'BLE MR. JUSTICE MANOJ MISRA**

**COURT NO.1**  
**SUPREME COURT OF INDIA**  
**RECORD OF PROCEEDINGS**

**Curative Petition (C)No. 44/2023**  
**In R.P. (C) No. 704/2021**  
**In C.A. No. 1599/2020**  
**With**  
**Arbitration Case No. 25/2023**

**IN RE: THE INTERPLAY BETWEEN ARBITRATION AGREEMENTS**  
**UNDER THE ARBITRATION AND CONCILIATION ACT, 1996 AND THE**  
**INDIAN STAMP ACT 1899**

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TRANSCRIPT OF HEARING

12-October-2023  
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2 **DARIUS KHAMBATA:** Just to summarize My Lord, there are 3 broad reasons why Your  
3 Lordship should be pleased to leave the issue of determination of stamp objections to the  
4 Tribunal. The first is, the Doctrine of Separability, which is housed in Section 7(2) and 7(5) of  
5 the Arbitration Act, as well as of course, most prominently in Section 16. And the question  
6 whether even if the main contract is null and void, whether an Arbitration Agreement survives  
7 to consider that very question, is directly covered by 16(1)(b) expressly. 16(1)(a) is separate.  
8 The arbitration clause is separate, and 16(1)(b) directly covers the issue. Now very briefly  
9 therefore, whether the first argument is, whether or not it is invalid, it goes to even existence  
10 or whether it is only an irregularity and a curable defect, I'll come to that later. But assuming  
11 it is the worst. it's an invalidity. Even then, my submission is, by virtue of the Doctrine of  
12 Separability and Competence-Competence, which the Act fully now recognizes, these are  
13 issues that must be left to the Arbitral Tribunal and very... and I'm going to save the court's  
14 time. I'm not going to take My Lords through each of the judgments, but I've summarized. My  
15 revised submissions are now found in Volume 1(b), page 2. And from page 7 onwards of  
16 Volume 1(b), I've just extracted some of the major decisions, internationally, as well as ours  
17 on separability, and to which of course I'm going to add one when I show it before My Lords.  
18 Page 1 of Volume 1(b). We added last night. We've uploaded last... now my earlier submissions  
19 were in volume 1. But since we made a change, there's one mistake which was corrected.

20

21 **JUSTICE SANJIV KHANNA:** Over here, its updated submissions.

22

23 **DARIUS KHAMBATA:** Updated submissions. I'm obliged.

24

25 **JUSTICE SANJIV KHANNA:** There are 38 pages in all?

26

27 **DARIUS KHAMBATA:** 38 pages. But that's because I've extracted judgments there. So it's  
28 easier for me to read from their rather than troubling My Lord to go to the actual judgment.  
29 I'll be going to the actual judgments in only two cases which are quite critical

30

31 **JUSTICE J.B. PARDIWALA:** Is it Harbour Assurance Company?

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33 **DARIUS KHAMBATA:** Yes. It starts with that.

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35 **JUSTICE J.B. PARDIWALA:** That's the Queen's Bench decision.

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**DARIUS KHAMBATA:** That's right. It starts with that [UNCLEAR]

**CJI D Y CHANDRACHUD:** Yes.

**DARIUS KHAMBATA:** If My Lords just sees para 9 onwards Harbour Assurance Arbitration Agreement is a self-contained agreement. In [UNCLEAR], it was held that it's a self-contained agreement, which is separable from the main contract, therefore as autonomous existence in our own neochrome, expressly under Section 16, Your Lordships have held that Section 16 accepts the concept that, the main contract and the Arbitration Agreement form two independent contract. And then in para 83, again, the Supreme Court calls the Arbitration Agreement as second contract. *Redfern and Hunter* also speak of two separate agreements, primary or main contract and a secondary contract. Then if we go straight to para 14, *Gary Born*. The Arbitration Agreement may exist and be substantively valid, notwithstanding the nonexistence, invalidity or illegality of the underlying contract, and the Arbitration Tribunal may and must consider challenges to the existence, validity, or legality of the underlying contract, because such challenges do not impeach the Arbitration Agreement. Then *Fiona Trust*. Arbitration Agreement must be treated as a distinct agreement and can be void or voidable only on grounds which delay directly to the Arbitration Agreement. These are very well settled principles. So I'm not troubling... I'll just quickly go through this. My Lords, next page. Again, the validity of the Arbitration Agreement is not undermined as a distinct agreement. The US Supreme Court has also taken the same line in *Buckeye Check Cashing*, which Your Lordships have followed, that despite the invalidity of the underlying agreement as a whole, Arbitration Agreement will continue to be enforceable apart from remainder of the contract. Para 17, page 11 in *Ayyaswamy*, Your Lordships have held that the adjudicatory power of a Tribunal remains unaffected by any objection to the main contract. And in *Vidya Drolia*, which I have not mentioned here, but which I noticed during the hearing, which I'll be showing. Again, paras 173, 174, expressly say Arbitration Agreement is a separate contract in itself. The Singapore position which I have set out from paras 19 to 22... 23, really says the idea is to insulate the Arbitration Agreement, even though it may be integrated into a main contract from objections as to invalidity of the main contract. So, the law of separability is very, very well entrenched in our law. And My Lords will notice that both in *Ayyaswamy* and in *Vidya Drolia*, separability is spoken of as a concept which actually permeates the Arbitration Act. It goes beyond just matters where there is a challenge under Section 16 to a decision of an Arbitral Tribunal. So, although the legal fiction, if I may call it that, in 16, is for the purpose of giving the Arbitral Tribunal jurisdiction to decide its own jurisdiction, it is not restricted to that. It's a wider principle recognized under our law, and

1 under Section 7(2) and 7(5), independently of 16. Now, the only reason I say that is, that with  
2 this, squarely any such issues, whether we call them existential issues, whether we call them  
3 only irregularities or curable defects, must in the first instance, go to the Tribunal. And Your  
4 Lordships are always there at the stage of the award or the order, whether under 37 or 34, to  
5 have a look at how the Tribunal has exercised this jurisdiction. I have also set out at page 14 of  
6 my submission, Section 5 of the Indian Stamp Act. This is really a matter, ultimately, that the  
7 Tribunal will go on to but just for completeness. Section 5 of the Indian Stamp Act recognizes  
8 a position that a single instrument may pertain to several distinct matters, and in which case,  
9 according to the Stamp Act....

10

11 **CJI D Y CHANDRACHUD:** This is a second point you are making.

12

13 **DARIUS KHAMBATA:** It's really part of this separability point. If it pertains to distinct  
14 matters, the aggregate of the stamp duties on each of those distinct matters must be worked  
15 out. Now, if an Arbitration Agreement is separable, then perhaps a Tribunal may be persuaded  
16 to hold that there must be separate stamp duty and all. In other words, separately on the  
17 Arbitration Agreement, which is what Your Lordships have held in *N.N. Global* under the  
18 residuary clause, as well as substantively on the value of the main agreement. This, of course,  
19 is a matter for the Tribunal. I'm not suggesting My Lords should decide this. My Lords have  
20 made it clear, Your Lordships are not deciding chargeability. But I'm only placing it before My  
21 Lords because this is how the issue will come to be decided, and at para 29 of my submissions,  
22 I have referred to Your Lordship's Judgment in Chief Controlling Revenue Authority which  
23 affirms a passage from Halsbury in relation to Section 5 of the Indian Stamp Act, that the  
24 instrument containing or relating to several distinct matters, is to be separately charged, as if  
25 it were a separate instrument. So even under the Stamp Act, there is some concept of  
26 separability. Now it may be that a Tribunal takes the view that, no, stamp is payable only on  
27 the whole. Or, it may be that it takes the view that is payable separately under 8, that's a matter  
28 of chargeability. But that decision in my respectful submission, must be by the Tribunal.

29

30 **JUSTICE SANJAY KISHAN KAUL:** It's the forum, which is an issue Whether it will  
31 happen, will not happen...

32

33 **DARIUS KHAMBATA:** Precisely. Precisely.

34

35 **JUSTICE SANJAY KISHAN KAUL:** The whole purpose is to shift the forum to the  
36 arbitrator so that arbitration proceedings don't get delayed at the threshold. I could go there

1 and then you argue it out. If something is a consequence, it is there. Whether caught in the  
2 11(6) is the only issue, really which we are touching,

3

4 **DARIUS KHAMBATA:** That's it. Now for that purpose, I want to show My Lords two  
5 judgments, which My Lords have seen, but I just want to emphasize certain different aspects  
6 of them. The first is, My Lord's decision in the *Ayyaswamy* case, which My Lords will find  
7 in Volume 5(a) at page 1336. There are three important principles laid down here which I want  
8 to just press into service... 1336 of Volume 5(a). This is (2016) 10 SCC 386. My Lords would  
9 kindly turn to page 1359, para 33. Para 33 says, 'Section 16 empowers the Arbitral Tribunal to  
10 rule upon its own jurisdiction, including ruling on any objection with respect to the existence  
11 or validity of an Arbitration Agreement'. Very important because existence, even assuming  
12 stamp goes to existence, it's housed with the Arbitral Tribunal under 16. 16(1)(b) stipulates  
13 that a decision by the Arbitral Tribunal, that a contract is null and void shall not entail it.

14

15 **CJI D Y CHANDRACHUD:** Yes.

16

17 **DARIUS KHAMBATA:** 16(1)(b) stipulates that a decision by the Arbitral Tribunal that a  
18 contract is null and void, shall not entail *ipso jure* the invalidity of the Arbitration Clause.  
19 Hence, the invalidity of the contract between the parties does not render the Arbitration  
20 Agreement Invalid as a consequence of law. This recognizes as inhering in the Arbitrator, the  
21 jurisdiction to consider whether the main contract,, other than the Arbitration Clause is null  
22 and void. The Arbitration Agreement survives for determining whether the contract in which  
23 the Arbitration Clause is embodied, is null and void, which would include voidability on  
24 ground of fraud. The severability of the Arbitration Agreement is a doctrinal development of  
25 crucial significance, for it leaves the adjudicatory power of the arbitrary tribunal unaffected  
26 over any objection, that the main contract between the parties is affected by fraud or undue  
27 influence. My learned friends, for the Respondents in their submissions have argued long and  
28 hard that the Doctrine of Separability should not be applied to a stamp issue. If that is so, even  
29 then, by virtue of Section 16, that issue must go to the Arbitral Tribunal. The next para is para  
30 46 at page 1366. I'll just read a small portion of it. At page 1366 para 46. My lords have cited  
31 *Fiona Trust*. And then at the bottom, Placitum G, 'Arbitration must provide a one-stop  
32 forum for resolution of disputes. The Court of Appeal held that if arbitrators can decide  
33 whether a contract is void for initial illegality, if there is no reason why they should not decide  
34 whether a contract is procured by bribery just as much as they can decide whether a contract  
35 has been initiated by misrepresentation or nondisclosure'. So the second principle, this is also  
36 accepted in the *Vidya Drolia* judgment, of a one-stop forum for adjudication. 'Deciding a  
37 stamp objection in court before making a reference will violate this principle as well'. And Your

1 Lordships have given the reason, underlying para 46 in para 48, which is 1367. The basic  
2 principle which must guide judicial decision making, is that arbitration is essentially a  
3 voluntary assumption of an obligation by contracting parties to resolve their disputes to a  
4 private Tribunal. The intent of the parties is expressed in the terms of their agreement, where  
5 commercial entities and persons of business enter into such dealings, they do so with the  
6 knowledge of the efficacy of the arbitral process. The commercial understanding is reflected  
7 in the terms of the agreement between the parties. The duty of the Court is to impart to that  
8 commercial understanding, a sense of business efficacy'. So the second one-stop business  
9 efficacy, parties intended that one forum would decide all their disputes, and it would not be  
10 split amongst different courts. And the third principle a more general principle in para 53,  
11 1369. 'The Arbitration Act should, in my view, be interpreted so as to bring in line the  
12 principles underlying its interpretation in a manner that is consistent with prevailing  
13 approaches in the common law world. Jurisprudence in India must evolve towards  
14 strengthening the institutional efficacy of arbitration. Deference to a forum chosen by the  
15 parties as a complete remedy for resolving all their claims, is but part of that evolution.  
16 Minimizing the intervention of courts is again a recognition of the same principle. And the  
17 principle, of course, as we have seen, is housed in Section 5 of the Arbitration Act, which has  
18 a very far reaching *non obstante... non obstante* any other law. So, that is Parliament's  
19 legislative intent, reflected in Section 5. Therefore, these are three principles. Now, these three  
20 principles, and two more, have also been categorically affirmed in the ***Vidya Drolia*** decision  
21 of Your Lordships, which is to be found in Volume 5(a), page 76. The five principles that I rely  
22 on with ***Vidya Drolia*** for, first is Separability. Second is full Competence-Competence. That  
23 is both positive and negative. Third is the *prima facie* test. Fourth is that even under 11(6A),  
24 only the contractual validity of the Arbitration Agreement is to be seen. In other words,  
25 coupled with the *prima facie* test, if the court is *prima facie* satisfied, that there is an  
26 Arbitration Agreement within the meaning of the Arbitration Act, then that is all. Nothing  
27 more is to be seen under 11(6A). And the fifth is these principles of a broad, pro-arbitration  
28 interpretation, to respect party autonomy, and one-stop adjudication, presumption of that.  
29 These are the five principles that have been laid down in ***Vidya Drolia***. And may I quickly  
30 run through the paragraphs? Both the learned judges have decided this. The judgment is found  
31 at page 76, **(2021) 2 SCC 1**. First para 126, if My Lords would kindly go to.

32

33 **CJI D Y CHANDRACHUD:** Which volume is it? 26 is it?

34

35 **DARIUS KHAMBATA:** At Page 182. 5(a), 182 is para 126. First is separability. I'll just show  
36 both the judgments are *ad idem* on this.

37

1 **CJI D Y CHANDRACHUD:** Para?

2

3 **DARIUS KHAMBATA:** Para 126. Page 182 of Volume 5. My Lords, have it?

4

5 **CJI D Y CHANDRACHUD:** Yes.

6

7 **DARIUS KHAMBATA:** Para 126 covers both Separability and Competence-Competence.  
8 We would now examine Principles of Separability and Competence-Competence. 'Clauses A  
9 and B to Sub-section 1 of Section 16 enacts the Principle of separation of the Arbitration  
10 Agreement from the underlying or container contract. Clause A by legal fiction, gives an  
11 independent status to an Arbitration Clause, as if it is a standalone agreement, even when it is  
12 only a clause and an integral part of the underlying or container contract. Clause B, formulates  
13 a legal rule that a decision by the Arbitral Tribunal holding that the main contract is null and  
14 void shall not *ipso jure* entail invalidity of the Arbitration Clause. Successful challenge to the  
15 existence or invalidity or rescission of the main contract, does not necessarily embrace an  
16 identical finding as to the Arbitration Agreement, provided the court is satisfied that the  
17 Arbitration Clause had been agreed upon. The Arbitration Agreement can be avoided only on  
18 the ground which relates directly to the Arbitration Agreement. Notwithstanding the challenge  
19 to the underlying or container contract, the Arbitration Clause in the underlying or container  
20 contract survives for determining the dispute. The principle prevents bootstrapping, as it is  
21 primarily for the Arbitral Tribunal and not for the court to decide issues of existence, validity  
22 and rescission of the underlying contract. Principle of Separation, authorizes an Arbitrary  
23 Tribunal to rule and decide on the existence, validity or rescission of the underlying contract  
24 without an earlier adjudication of the questions by the referable... by the referral court'. Para  
25 173 and 174 are the equivalent findings on separability. In the second judgment, page 200 of  
26 Volume 5(a). 'Arbitration is a creature of consensus. It is completely dependent on party  
27 autonomy and the intention expressed in the agreement. A contract having multiple clauses,  
28 including Arbitration Agreements, can be divided into two parts. The clauses relating to the  
29 commercial relationship i.e. obligations and duties of each party can be referred to as the main  
30 contract. The Arbitration Agreement, so to say, is a separate contract in itself'. And then, as  
31 Lordship finds that separability of the Arbitration Agreement from the main contract,  
32 historically existed even in Roman Law, and later, of course, in German and Swiss  
33 jurisprudence. Now, Competence-Competence. Again para 126 I have shown. Para 129 if My  
34 Lords will also kindly see, is also very instructive. At page 183, 'Principles of Competence-  
35 Competence have positive and negative connotations.

36

1 As a positive implication, the Arbitral Tribunals are declared competent and authorized by law  
2 to rule as to their jurisdiction and decide non-arbitrability questions. In case of express  
3 negative effect, the statute should govern and should be followed. Implied negative effect  
4 curtails and constraints interference by the Court at the referral stage by necessary  
5 implication, in order to allow the Arbitral Tribunal to rule as to their jurisdiction and decide  
6 non-arbitrability questions. As per the negative effect, Courts at the referral stage are not to  
7 decide on merits, except when permitted by the Legislation, either expressly or by necessary  
8 implication such questions of non-arbitrability. Such prioritization of the Arbitral Tribunal  
9 over the courts can be partial and limited when the Legislation provides for some or restricted  
10 scrutiny at the first look referral stage'. Now this is a judgment. I believe it's the first which  
11 divides up even negative Competence-Competence into express and implied, and that is  
12 correct, because very often a Section will not actually say a court should not interfere. But an  
13 interpretation of that Section, given Section 5 of the Arbitration Act, leads to an implied  
14 negative Competence-Competence, or a stepping back, as it were of Your Lordships at the first  
15 stage. Because the whole scheme of the Act, the architecture of the Arbitration Act is geared  
16 not towards front loading, intrusion by a court at the beginning, but towards the scrutiny after  
17 an award is passed. So, it's not the arbitration that is heavily supervised, it's the award that is  
18 looked at, when it is challenged, or, of course, an order under 37, if there's an appeal. And the  
19 same thought permeates through paras 178 and 208. I won't read them.

20

21 Now the equivalent paragraphs. I won't read them. A paragraph 178 and 208 in Justice  
22 Ramana's judgment. 178 and 208. The third principle, and this I want to place because this is  
23 the *prima facie* test. We have heard a lot about Section 8 is only a *prima facie*. What is the  
24 *prima facie* approach? How does a court apply it? Para 147 point 11, page 194, tells us how to  
25 do that. The second sentence, 'The Court, as the judicial forum of the first instance, can  
26 exercise *prima facie* test jurisdiction to screen and knock down *ex facie* miraculous, frivolous  
27 and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacrities and  
28 efficient disposable... disposal when required at the referral stage'. So something which is *ex*  
29 *facie*, meritless or frivolous. *Ex facie*, there is no Arbitration Agreement. That is something  
30 alone that a court will see under 11(6A). The rest, if there's even a dispute or a doubt, will be  
31 sent to the Tribunal. 'When in doubt, refer' is what this judgment itself says. And a similar  
32 principle. I'll just mention the para number. At para 154.4 at page 196.

33

34 **CJI D Y CHANDRACHUD:** Therefore, we have said, even in the case of limitation. If you  
35 get a case under 11, where if somebody started after 10 years, 20 years, when something doesn't  
36 turn very on a very detailed interpretation.....

37

1 **DARIUS KHAMBATA:** On a demurrer.

2

3 **CJI D Y CHANDRACHUD:** On a demurrer. Justice Narasimha and Justice Pardiwala were  
4 sitting with me while I was sitting with me when we found a case like that. And then the whole  
5 object of sending parties to Arbitration again, defeats the purpose of Arbitration.

6

7 **DARIUS KHAMBATA:** Without much inquiry, without determining some heated  
8 controversy between the two parties, if a court can *ex facie* see it, of course. That is a safeguard  
9 under 11(6A); no one is disputing that. But, stamp will never be such a question, particularly  
10 because, as we have seen, it's a curable defect.

11

12 **JUSTICE SANJAY KISHAN KAUL:** That's the whole thing. This Stamp Act, anything to  
13 do with stamp, if it is a possibility of being curable, let us say, even recognize the possibility of  
14 being curable, then how do you throw it out of a threshold?

15

16 **DARIUS KHAMBATA:** I bow down. My Lord is absolutely correct

17

18 **JUSTICE SANJAY KISHAN KAUL:** In any scenario possibly, Stamp Act requirement in  
19 any formulation of it, any variation of it, I am very doubtful if at all it can be looked into?

20

21 **DARIUS KHAMBATA:** My Lord is right. I want to place a judgment before of Your  
22 Lordships on that immediately after I complete this, showing that it doesn't... irregularity in  
23 stamp or even non-stamping doesn't render a document invalid. Your Lordships have held  
24 that. I'll place that. Very quickly, I'll just give the paras on this. I won't trouble My Lords. The  
25 equivalent para is para 232, Justice Ramana's decision, where he expressly refers to Section 8.  
26 That is at page 234. And he says in paragraph 233, at page 235, that the Defendant has to  
27 establish *prima facie* case of non-existence. It's the other way around the Defendant will show  
28 that *ex facie* there is no Arbitration Agreement. The fourth proposition again, in the interest  
29 of time, I'll just give the paras. Paras 236 to 238, at pages 235, 236, relying on Your Lordship's  
30 *Mayawati* decision. Ultimately says it's only contractual validity of the Arbitration  
31 Agreement that has to be seen under 11. In other words, Section 7, is it complied with on the  
32 face of an *ex facie*? If there's again... even on that, if there's a dispute to be gone into, it will go  
33 to the Tribunal. But an *ex facie*, Your Lordships find there's just no agreement. Of course. And  
34 para 244.5 and para 146, they all go on the basis of this kind of validity. And My Lord, I adopt  
35 Mr. Datar's submission. I'm not going to repeat them, under the Contract Act. What is not a  
36 valid contract, or what is a void contract is only one which is voided under Section 23 or under

1 Section 10. Nothing more than that. Stamp Act doesn't come into that at all. Not even into the  
2 Contract Act.

3

4 **JUSTICE B.R. GAVAI:** You have elaborated on that...

5

6 **DARIUS KHAMBATA:** So I'm not touching that. I adopt that, My Lord. And the fifth will  
7 not set up paras in this judgment. I'll just give the para numbers. Paras 151 to 152, page 195  
8 and para 220 at page 230 is again the principles of a broad pro-arbitration interpretation and  
9 a one stop forum for adjudication.

10

11 **CJI D Y CHANDRACHUD:** What is the latter para?

12

13 **DARIUS KHAMBATA:** Para 151, 152...

14

15 **CJI D Y CHANDRACHUD:** 195.

16

17 **DARIUS KHAMBATA:** ...at page 195 and para 220 at page 230. They speak of a one stop  
18 adjudication presumption. You start from the presumption that everything goes to the  
19 Tribunal. Now applying this to 11(6A), it's not that because the word existence is used,  
20 everything coming under that umbrella of existence has to be gone into. The Legislature set  
21 confined to the existence and given the principles under Section 5, and these very salutary  
22 principles of law a court would restrict by way of an implied negative competence-competence.  
23 Even under 11(6A) to an *ex facie* examination. This is more so because of the next point which  
24 has been argued. I'll just point out what I think is relevant and which has not been shown to  
25 Your Lordships under the Stamp Act. 1) non-stamping or under stamping does not result in  
26 an invalidity or voidness. And 2), it is a curable defect. Now, if My Lords kindly turned to my  
27 written submissions, Volume 1-B at Page 15. I won't...

28

29 **JUSTICE SANJIV KHANNA:** It's also waivable, it can waive it because ...

30

31 **DARIUS KHAMBATA:** And one can wave it. My Lord is right. In fact, there are three, four  
32 sections which I want to just point out. Again, I won't read them. They've been read, barring  
33 one. They've been read to My Lord.

34

35 **JUSTICE SANJIV KHANNA:** Waiver is also by conduct far more liberal. It doesn't have...

36

1 **DARIUS KHAMBATA:** My Lord is absolutely correct and if that is so than under 11(6A),  
2 how will a court go into that? I'm obliged, I'm obliged, may I, My Lord adopted my submission.  
3 I think that's very well put. In fact, Mr. Banerjee also argued, an Eleven court is not even a two  
4 one eCourt. Whether it can take evidence is also a question, but therefore it's impossible to go  
5 into these disputed questions under 11(6A). Despite the use of the word existence that has to  
6 be read purposefully as meaning only *ex facie* if there's nonexistence. There's a probability of  
7 existence, It must go to the Tribunal. Now curable defect and invalidity. The first point Section  
8 35 is very clear it visits a non-stamped or non-duly stamped instrument with only two  
9 consequences. One is it is inadmissible in evidence. And the second is it shall not be acted  
10 upon. And my learned friends have emphasized the second not be acted upon. And they have  
11 tried to elevate those words to unenforceability, leading to voidness and invalidity. I'll  
12 presently show why that can never be so. The curable... where the defect can be cured is Section  
13 36. We have seen where one instrument is already admitted in evidence, no stamp objection  
14 can be taken to its admissibility later. Section 37 and Sections 42, which I don't believe have  
15 been shown, 42.. I don't think has been shown to My Lords. But 42 only allows the collector  
16 on payments of duty and penalty to stamp the document and after stamping then it can be  
17 admitted in evidence, and the shadow, as it were of Section 35 is lifted. In ***NN Global 2*** and  
18 Mr. Datar has pointed this out there's a slight contradiction, because in para 108, it is said this  
19 invalidity is not in the sense of being still born. And but in para 103, it says it's bereft of life.  
20 We leave that aside because in fact, Your Lordships have held very clearly that no invalidity  
21 results. I'll come to that just a little later. I could make two points before I come to that. My  
22 Lords have seen Hindustan Steel, the judgment in Hindustan Steel. I may not have said this  
23 all out in my written submissions pages Paras. 32 to 47. So I'm not going to read at all. I'm  
24 running through this because much of this has been argued. I've set out extracts from the  
25 judgments as well. Paras 32 to 47, starting at page 15. But I want to just make one point.  
26 Hindustan Steel we have seen and it is directly on point about curability. But there's another  
27 aspect Your Lordship may take into account. There's a judgment of Your Lordships in a totally  
28 different context, under FEMA in the ***Vijay Karia*** case, which My Lords will find in Volume  
29 5-A, page 1545. I'm not even asking my notes to go to that. The principle in ***Vijay Karia's***  
30 case is this, I've referred to it at para 37 of my written submission and the judgment is found  
31 at Volume 5-A, Page 1545. Citation is ***2020, 11, SCC, Page 1.***

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33 **JUSTICE SANJIV KHANNA:** Page number?

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35 **DARIUS KHAMBATA:** The page number is 1545, Volume 5-A, and at 1632 is Para 88 where  
36 Your Lordships have laid down a principle as to what happens when something is capable of

1 regularization or post facto permission in the context of FEMA. This is a whole series of foreign  
2 awards coming, it's general problem.

3

4 **JUSTICE SANJAY KISHAN KAUL:** I think a very small niche point which is that looking  
5 to the nature of Stamp Act, are we required to look into Stamp Act at all under 11(6) so it should  
6 be left to its own? Why should we go here and there on this?

7

8 **DARIUS KHAMBATA:** Only to assist that conclusion, that if it's a regularizable curable  
9 defect, then Your Lordships, even in the context of other statutes such as FEMA, which also  
10 have a public policy connotation, have said the transaction is not voided. That's what para 88  
11 says. The transaction is not voided because it's regularized. That's the only principle I want to  
12 call out from *Vijay Karia*. I'm not taking My Lords. I've set out, I'll just give My Lords the  
13 reference in my submissions to the Singapore Position on Stamp expressly My Lord. My Lords  
14 sees paragraph 80 of my submissions. Para 85 onwards, My Lords, Page 33. They have similar  
15 provisions. It's not that they don't. If My Lords see para 86. 51(1) of the Singapore Stamp  
16 Duties Act corresponds to our Section 33, the impounding section and Section 52 in the next  
17 paragraph corresponds to Section 35. Same language, not admissible in evidence, not must  
18 not be acted upon. Identical language. And in para 88, I've referred to one decision of the  
19 Singapore courts, where it is categorically held that this is only a rule of evidence and does not  
20 affect the validity of an unstamped document. That is in this *Mohammad Ameen bin*  
21 *Mohammad Tayyab* Case. The case I'll just state for the transcript is found at Volume 5-B,  
22 page 4678. Even in *NN Global Justice Ravikumar* at para 182, accepts that stamp duty  
23 defects are curable. One other internal piece of evidence to show why the words shall not be  
24 acted upon can never be equated with voidness or invalidity.

25

26 If those words were equated with voidness or invalidity, then there's no question of curing a  
27 void Act, My Lords put it to me. So the fact that you have provisions like 36, 37, 42, itself means  
28 shall not be acted upon, in 35 can never be extended to an infirmity or invalidity of voidness.  
29 That's not what Parliament intended. Now if My Lords, kindly go on, it'll be very quick with  
30 this My Lords, page 19 of these submissions of mine, I've set out reference to a Judgment of  
31 Your Lordships on this. Para 44 of my submissions. In *Thiruvengada Pillai* case Justice  
32 Raveendran's Decision 2008, for SCC 530, and I'll just read paragraph 13, which I've extracted.  
33 It's in Volume 5-A, at page 702, but I'll just read para 13 from here. The Stamp Act is a fiscal  
34 enactment intended to secure revenue for the State, in the absence of any rule requiring  
35 consecutively numbered stamp papers purchased on the same day, being used for an  
36 instrument which is not intended to be registered, a document cannot be termed as invalid  
37 merely because it is written on two stamp papers purchased by the same person on different

1 dates. Then the next sentence, even assuming that use of such stamp papers is an irregularity,  
2 the Court can only deem the document to be not properly stamped, but cannot, only on that  
3 ground hold the document to be invalid. Even if an Agreement is not executed on regular  
4 stamp paper, it is admissible in evidence on payment of duty and penalty under Section 35 or  
5 37. If an Agreement executed..., and the last sentence. But admissibility of a document into  
6 evidence and proof of genuineness of such document are different issues. Your Lordships have  
7 held this under the Stamp Act, and para 45 has set out the instructive Judgment of the Kolkata  
8 High Court, which Mr Banerjee also referred to in *Gulzarilal...* in and the next para... para  
9 46 and number of other Courts, Bombay, Andhra Pradesh, Kolkata have held this. It doesn't  
10 need to voidness or Invalidity. So this is too well settled a proposition. I have just two points,  
11 and I'll be done. One is, we have viewed this matter from the perspective of Section 11(6) Court  
12 appointment of Arbitrators. But there is in existence a huge body of appointment of  
13 Arbitrators by individuals. There's no dispute to start with. There's also increasingly growing  
14 appointment by arbitral institutions. In fact, the policy of the Law is to encourage, the  
15 interposition of arbitral institutions. There's a proposed amendment which is not yet notified.

16

17 **JUSTICE SANJAY KISHAN KAUL:** All those cases will go before the Arbitrator.

18

19 **DARIUS KHAMBATA:** Correct. So I have also said...

20

21 **JUSTICE SANJAY KISHAN KAUL:** Just tell me in 11(6), why take a different view? Then  
22 what would happen in that.

23

24 **DARIUS KHAMBATA:** That's right. I'm obliged. The point I'm making here is Your  
25 Lordship's view on 11(6A) must try to harmonize even appointments by institution.

26

27 **JUSTICE SANJAY KISHAN KAUL:** How arbitration in other areas, other methodologies  
28 takes place?

29

30 **DARIUS KHAMBATA:** So for example, all arbitration institutions have these rules. SIAC  
31 for whom I appear has rules 28.1 and 28.2, which essentially an objection as to jurisdiction, as  
32 to the existence of an Agreement can be initially raised before the full Court. The Court has the  
33 jurisdiction at that stage to knock out a claim, if it is *prima facie* satisfied, again, the *prima*  
34 *facie* test. Otherwise, it sends it to the Tribunal for a fuller decision. And I may only ask My  
35 Lords to mark 5 or 6 paragraphs of Justice Roy's decision in *NN Global*, that is paras 368 to  
36 376, where he surveys the rules of several arbitral, leading arbitral institutions all of them have  
37 a *prima facie* test in the first instance. Paragraph 368, at page 462, of Volume 5-A, up to para

1 376 at page 466. And he also refers to the Justice Shri Krishna Report, which recommended  
2 encouragement of institutional arbitration because if My Lords don't hold the *prima facie* test  
3 in 11(6A) then individuals and institutions will be left in a quandary. What do they do? Because  
4 the observations in **NN Global**, albeit in the context of Section 11, will apply to them as well.  
5 If it is held at an unstamped agreement is void, what do they do? Now one further problem.  
6 Neither individuals nor arbitral institutions are empowered to receive evidence. So they would  
7 not be covered by the bar under Section 35 of the Stamp Act because that only applies to  
8 persons who are authorized to receive evidence either by consent or by law, or indeed, they  
9 would not have the power of impounding under Section 33, so they can't be impound. There's  
10 no bar under 35, but there's Your Lordship's decision in **NN Global** saying void, and non-  
11 existent. So they are in a complete quandary what to do. Therefore, it is important to not decide  
12 this matter holistically because otherwise, a very important segment gets left apparent. There,  
13 I must say, my learned friends, I got a cursory look at their submissions. Mr. Shyam Divan I'll  
14 just make... note it for the transcript. In para 4.7 of his submissions, accepts that arbitral  
15 institutions have no power to impound, but they might be able to appoint a Tribunal. Because  
16 Section 35 is not applicable to them. And Mr. Nakul Dewan at paragraph 23, also says arbitrary  
17 institutions have no power to receive evidence. Equally Mr. Shyam Divan at para 4.7 agrees  
18 that an Arbitral Tribunal has the right to impound a document under Section 33, because it is  
19 authorized to receive evidence by consent of the parties, not by law but by consent of the  
20 parties. And therefore it can impound under 33, which is my submission as well. One more  
21 reason why it should go to a Tribunal. And Mr. Nakul Dewan even in paras 24 and 25 finally  
22 comes round to the same view that even under 11 Your lordships should be pleased to refer it  
23 to the Tribunal. Mr. Shyam Divan raises the point that it may not be convenient for an Arbitral  
24 Tribunal to do this. It doesn't have the infrastructure to impound, send the document to the  
25 stamp authorities, but that's an issue of convenience. It's not an issue of law or jurisdiction.  
26 I'll leave it to my learned friends, to satisfy, why it should not be sent to the tribunal? Now one  
27 point. And then I'll draw my conclusions very briefly, I'll just give the pages because it doesn't  
28 arise before My Lord, but it puts the matter in perspective. Paras. 48 to 58 of my written  
29 submissions. Pages 21 to 24 deal with this whole issue of who is entitled to impose Stamp.  
30 Does it come on the list 1, and therefore, under the Indian Stamp Act?

31

32 **CJI D Y CHANDRACHUD:** You need not go into that direction. May not be required, they  
33 are not required to. We saw those entries therefore we don't have to go into it.

34

35 **DARIUS KHAMBATA:** I really wanted to say one thing I'll be done with this. Under the  
36 State Stamp Act, the Residuary Articles have stamp duty of Rs.50 and Rs.100. Now the process  
37 of arbitration ultimately cannot be held up for 50 and 100 rupees, which can easily be cured.

1 All the Residuary Articles are low figures. **NN Global**...I'm not going to analyse again. My  
2 learned friends have analysed it. I don't... Now My Lord just my conclusions. First is that Your  
3 lordships should be pleased to adopt a purposive interpretation, to uphold the intent to  
4 arbitrate, in deference to party autonomy. And I've given some cases where Your Lordships  
5 have done that under the Arbitration Act in **Nandan Biometrics**, etc. I've mentioned them  
6 in my written submissions. The second is Section 5 of the Arbitration Act must be given full  
7 effect, it's a very wide, *non-obstante*. And the Arbitration Act is a complete code Your  
8 Lordships in the **Amazon** case and again, I'll just give the para number, para 43, and the  
9 judgment is found in Volume 5-B, at page 623, have held that the new Arbitration Act with the  
10 Amendments is a complete breakthrough from the old position. Therefore every provision of  
11 that act must be interpreted, given the overarching principle of Section 5 and the principle of  
12 an implied negative covenant, Competence-Competence. The third as held in **Vidya Drolia**  
13 that so long as an Arbitration Agreement satisfies the requirements of the Arbitration Act, *ex*  
14 *facie* by adopting the *prima facie* test there's no question of a court holding up the arbitral  
15 process by entering into an examination of whether duty is paid, whether it's under-stamped,  
16 under which article it falls, et cetera, et cetera. The fourth, since a Tribunal is authorized to  
17 receive evidence, Section 33 of the Stamp Act will apply to it squarely. It can impound the  
18 document and start the process of stamp collection. There's no reason why a court, which is...  
19 courts are already clogged with so many matters why they should be clogged up into this?  
20 Fifth, such an interpretation of 11(6A) will also harmonize the process between appointments  
21 by Courts, by individuals and by arbitral institutions. An arbitral institution certainly will take  
22 just a *prima facie* look before the Tribunal is appointed. An individual may not do that. The  
23 one who wants to refer to arbitration will refer. The other one will go to Section 11. So it's  
24 unlikely. But sometimes individuals do because very often these objections are raised halfway  
25 through an arbitration. So it's not unheard of. Then My Lord 6, the trend is towards  
26 encouraging institutional arbitration. The **Amazon** case has said so, and Your Lordships are  
27 familiar with the Sri Krishna Report which has said so. Therefore to leave institutions in a  
28 quandary and to effectively block the process of institutional appointment by saying go into  
29 stamp objections will not subserve this broader public policy objective. And lastly there is also  
30 a trend towards investing Arbitral Tribunals, a parliamentary trend towards investing Arbitral  
31 Tribunals which powers our Court. This is the legislative prescription of Parliament. I'll give a  
32 few examples. The Amendment adding 17(2), which prevents a Section 9 Court, which  
33 effectively prevents a Section 9 court from giving interim relief because under 17(2), the  
34 orders, our Arbitral Tribunal are given the force of law of orders of the court. Corresponding  
35 provision is 9(3). Section 11(6A) itself. Section 8 was amended in 2015 to include *prima facie*  
36 to bring it into line with 45 where under *Shin-Etsu* Your Lordship had held only a *prima facie*  
37 look qua foreign arbitrations. And even 12, under Section 12, even impartiality in

1 independence the first objections must go to the Tribunal itself. So the whole trend is to  
2 empower the Tribunals more and more, in deference to the principle of competence-  
3 competence. And this, in my respectful submission, will subserve the scheme and object of the  
4 Act- minimum interference of courts, party autonomy and one stop adjudication. Ultimately,  
5 in a lighter vein, this might encourage the stream of trade and commerce and ultimately more  
6 Stamp Duty might result as a result of this. Rather than holding it all up for stamp objections  
7 to be decided by court. I am deeply grateful for the time I've been given.

8

9 **CJI D Y CHANDRACHUD:** Who are you appearing for now?

10

11 **PRASHANTO CHANDRA SEN:** My Lords I had been grateful when I was appearing in the  
12 Constitution Bench for inviting submissions. So five to seven minutes My Lord.

13

14 **CJI D Y CHANDRACHUD:** Can we suggest just one thing. We have to wrap up the  
15 proceedings today. It may not be in the interest of anybody that we keep it....

16

17 **PRASHANTO CHANDRA SEN:** Understood.

18

19 **CJI D Y CHANDRACHUD:** So what we will do is, we will look at the submissions of all the  
20 interveners. We'd have much like to hear you all you put in a lot of industry. Please rest  
21 assured, we will read all the submissions of the interveners. If we have something at the end  
22 in response to what Mr. Divan has argued. And since we have heard, Mr. Datar, Mr. Gaurav  
23 Banerji and Mr. Darius Khambata on this side. In rejoinder if we have some queries, we will  
24 put them to the intervenor. That may be better.

25

26 **PRASHANTO CHANDRA SEN:** Two minutes for one aspect.

27

28 **CJI D Y CHANDRACHUD:** We can't give two minutes to everybody. Thank you. Yes, Mr.  
29 Divan. Do this, give us your submissions. Yes Mr. Divan?

30

31 **JUSTICE SANJAY KISHAN KAUL:** We've narrowed down the controversy, therefore,  
32 there's really nothing to be added.

33

34 **PETITIONER'S COUNSEL:** Nothing to repeat. Only then, as it just have pointed out  
35 relevant pages of my written submissions.

36

37 **JUSTICE SANJAY KISHAN KAUL:** That we will read it. Don't worry.

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**CJI D Y CHANDRACHUD:** Thank you. Yes. We will read the submissions. Yes Mr. Divan.

**SHYAM DIVAN:** My Lords, I appear for Respondents. 1, 2 and 4. I appear with Mr Nikhil Nayyar, we will divide our submissions. This is for Respondents. 1, 2 and 4. I will request the Court Master.

**CJI D Y CHANDRACHUD:** You know one thing, since we have now renamed the title of this proceeding. The object was also to assuage your concern, on behalf of your client that we should look into the curative aspect or that you have preliminary objection on curative issue. we will be sending it back to the 9 judge bench.

**SHYAM DIVAN:** After hearing us on curative, Your Lordship may consider whether that's the correct course at all, because in my respectful submission that may not be the correct course.

**CJI D Y CHANDRACHUD:** We really want your assistance on the question of Law.

**SHYAM DIVAN:** I'll do that as much as I can.

**CJI D Y CHANDRACHUD:** But justice...

**SHYAM DIVAN:** But we will do that in two stages.

**CJI D Y CHANDRACHUD:** But justice is planned on facts, whether curatives should be exercised, leave it to the 5 Judge Bench and we are not going to comment....

**SHYAM DIVAN:** You may certainly.

**CJI D Y CHANDRACHUD:** Please, look dismiss this curative because you have no case on merit.

**SHYAM DIVAN:** Ok, so I have understood what Your Lordship is indicating. Now let me contest that position and suggest that there is a better way forward. So let me first, so I am going to be making my submissions very rapidly because of the constraint of time. I will state my points, I will request the Court Master if you consider it convenient to hand over, I have given a list of the Constitution Of India, the Stamp Act, the Arbitration Act physically because

1 it may take less time that way. Let me just, I have two broad sets of submissions. I have two  
2 broad sets of submissions. I am first setting out my points with regard to my first set of  
3 submissions. The first submission is that our Court which is the Supreme Court of India, as  
4 we understand it is a means and ends institution. We are very particular about means and ends  
5 when it comes to Courts below, when it comes to government authorities, when it comes to  
6 citizens and most important when it comes to ourselves, because the reputation, and  
7 credibility of our institution rests on the foundation that we reject expediency. We do not we  
8 have sometimes very honourable objectives. but we do that as the Apex Court in our country,  
9 following, reaching those ends by permissible means, and that is going to be my first point  
10 with regards to means and ends, the importance of means and ends, the importance of the  
11 nature of jurisdiction which Your Lordships is exercising. That's my first point. I now come to  
12 my second point, let me indicate what we are not exercising first. So first and foremost, as Your  
13 Lordship correctly put to me, that look we have relabelled this, and I am very grateful for that  
14 because, I think it really helps because the parties know, individuals who read the judgement  
15 know. So, I think it's very beneficial to have an appropriate caption for the case rather than  
16 this. But the caption and altering the caption, does it alter the nature of the jurisdiction which  
17 you are exercising? So I ask myself a simple question, what are the jurisdictions which this  
18 court indeed does exercise? Are we in the realm of Appellate Jurisdiction? The answer is no,  
19 it is not appellate constitutional, it is not appellate statutory. Is it review jurisdiction? The  
20 answer is again no because review as I will indicate to Your Lordships has been rejected. Are  
21 we in a jurisdiction which is original like 131 or 132? The answer is no. Are we in a jurisdiction  
22 of discussionary appeal? The answer is no. Are we on a jurisdiction on an opinion which The  
23 President of India seeks, by way of a reference? The answer is no. Are we in a transfer  
24 jurisdiction? The answer is no. So then what is our jurisdiction? What is this panel constituted  
25 exercising? There must be jurisdiction. This is the primary function of every court. You must  
26 be satisfied, I won't be saying that, you ought to be, I can't say must be, you ought to be satisfied  
27 that the jurisdiction which you are exercising in a panel of three....

28

29 **JUSTICE B.R. GAVAI:** Divan.

30

31 **SHYAM DIVAN:** I'm sorry.

32

33 **JUSTICE B.R. GAVAI:** We are a 5 Judges Constitution Bench, has found the view taken by  
34 earlier 5 Judges Bench.

35

36 **SHYAM DIVAN:** Yes, yes

37

1 **JUSTICE B.R. GAVAI:** To be *prima facie* not correct.

2

3 **SHYAM DIVAN:** Yes, yes.

4

5 **JUSTICE B.R. GAVAI:** Is the reference to 7 Judges not called for?

6

7 **SHYAM DIVAN:** Yes, so let me answer that straight away. If in an appropriate jurisdiction,  
8 I answer that straight away, if in an appropriate jurisdiction, Your Lordships exercising a  
9 jurisdiction, Your Lordships finds that a 5 Judge Bench is not appropriate *prima facie* or  
10 otherwise by all means you have the power to do so. So I concede and I accept that, but not in  
11 the curative jurisdiction. Now I'll come.. let me answer that question straightaway first.

12

13 **JUSTICE SANJAY KISHAN KAUL:** That doesn't survive.

14

15 **SHYAM DIVAN:** I'm so sorry. There are fundamental issues. I'm sorry.

16

17 **CJI D Y CHANDRACHUD:** That doesn't really survive, subject to what you say.

18

19 **JUSTICE SANJAY KISHAN KAUL:** Because even when you were arguing earlier, we said  
20 this is not a case for curatives.

21

22 **SHYAM DIVAN:** Sorry?

23

24 **JUSTICE SANJAY KISHAN KAUL:** This is not a case for curative.

25

26 **SHYAM DIVAN:** That's my submission, I mean it's ultimately for the Court to prove.

27

28 **JUSTICE SANJAY KISHAN KAUL:** This is not a case for curative. You may be right, you  
29 may not be. We can't say that.

30

31 **SHYAM DIVAN:** Correct, correct.

32

33 **JUSTICE SANJAY KISHAN KAUL:** But you said look don't make curative interpretations,  
34 appreciate these submissions.

35

36 **SHYAM DIVAN:** I'm sorry.

37

1 **JUSTICE SANJAY KISHAN KAUL:** Don't appreciate these submissions or debate these  
2 submissions in a curative petition.

3

4 **SHYAM DIVAN:** Yes.

5

6 **JUSTICE SANJAY KISHAN KAUL:** That was your submission.

7

8 **SHYAM DIVAN:** That's what means and ends is about. You must be exercising a legitimate  
9 jurisdiction. Legitimate meaning, not that it is legitimate to exercise like that, it is curative.  
10 The point I'm making Your Lordships are sitting exercising as a 7 Judge Bench. I have no  
11 problem with a 7 Judge Bench at all or 9 Judge or whatever, but the issue still is the core nature  
12 of your jurisdiction today is curative and nothing else. Which takes us to....

13

14 **CJI D Y CHANDRACHUD:** When a position of Law, when a position of Law, we are a  
15 Constitutional Court. when a position of Law is liable to cause grave public injury, public  
16 uncertainty and grave unsettling in the world of business and investment, surely the point of  
17 time at which the controversy should be resolved should not be left to the vagaries of future  
18 litigations. It's the duty of the court to seize upon the opportunity and [UNCLEAR] ...

19

20 **SHYAM DIVAN:** Yes, answer is yes.

21

22 **CJI D Y CHANDRACHUD:** And at the end of it all, we may still dismiss your, that curative  
23 petition against you.

24

25 **SHYAM DIVAN:** So the answer is yes .

26

27 **CJI D Y CHANDRACHUD:** Because we are equally conscious of the need to do justice to  
28 the facts of that case. So the curative petition can be still dismissed after the decision of this  
29 court is rendered, settling the law correct.

30

31 **SHYAM DIVAN:** Let me just answer that. First and foremost, if this Court finds in an  
32 appropriate jurisdiction and in an appropriate cause, that there is some decision which  
33 requires reconsideration, which is absolutely your function and I would take it higher, even  
34 perhaps your duty to correct the position in Law, it ought to be, as we understand it, in an  
35 appropriate proceeding. So now let me answer the questions which Your lordships have put to  
36 me. There are two ladders here, the first ladder is a curative ladder. As we understand it the  
37 ladder narrows in the sense in our understanding, review jurisdiction is narrower than the

1 main appeal and curative in our understanding is narrower still, than review jurisdiction. If  
2 that be so, then this is a very narrow issue. So I come to my second point. Curative as we  
3 understand it as understood by this court and I'll place those decisions is with regard to doing  
4 justice for a particular individual cause. When we go to *Hurra*, Your Lordships will see, it's  
5 a case in that case to do complete justice. That individual case. The curative jurisdiction, there  
6 may be several situations where you have incorrect law or something which is staring in the  
7 face. We don't accept that that we come to, of course. But it's very important to have to follow  
8 the means and ends test. And I'll tell you Your Lordships, why? *NN Global* ought to, It may  
9 come up on an appropriate separate ladder. Curative is a three rung ladder. As we understand  
10 it, the first rung is the disposal of the case itself the second rung is there must be a disposal as  
11 far as the review is concerned, and the third rung is thereafter a curative petition, with all the  
12 safeguards that the Court has laid out. That's the three rung process of reaching this Court in  
13 curative jurisdiction. Now is the submission. You cannot bypass these three rungs because and  
14 let us remember the curative jurisdiction. Although now in our Supreme Court rules, Your  
15 Lordships have continuously exercised. It's a self-created jurisdiction. It's a jurisdiction  
16 because the demands of justice sometimes stare and an apex institution, like Your Lordships  
17 in the face. And oh my, how have we allowed this to pass? And in a situation such as that for  
18 that individual case, Yes you have created this very, very narrow jurisdiction to yourselves  
19 required an appropriate certification, restricted it to grounds and said that and only in those  
20 cases, even though you don't find any provision in a Statute or the Constitution we will,  
21 because it's our paramount duty. And you trace it to 142, as we understand it. So 142 generally  
22 may be wider. 142 as a source of power for creating curative and for exercising curative as we  
23 understand it, is limited to a cause to a particular individual cause. That cause may, in certain  
24 situations affect a large number of people. I accept that. But here what has happened is now  
25 My Lords. I'm just answering the question, sorry.

26

27 **JUSTICE SANJAY KISHAN KAUL:** Cause, there can be a legal cause and there can be a  
28 factual cause.

29

30 **SHYAM DIVAN:** So...

31

32 **JUSTICE SANJAY KISHAN KAUL:** Just...

33

34 **SHYAM DIVAN:** Yes. Let me answer that...

35

36 **JUSTICE SANJAY KISHAN KAUL:** ... Factual Cause has been segregated as a Chief  
37 Justice put to you.

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**SHYAM DIVAN:** Yes.

**JUSTICE SANJAY KISHAN KAUL:** To keep the curative aspect in a sense, out of it.

**SHYAM DIVAN:** Yes.

**JUSTICE SANJAY KISHAN KAUL:** But we do believe, seven of us do believe, that there is unsettled legal position towards the fact, which has its own ramifications, and as the Chief Justice put it. It becomes the court's duty in its endeavour...

**SHYAM DIVAN:** So I quickly end that, I quickly answer that. My answer is yes. It is the duty of the court. But if you are right on means and ends, then it's the duty of the court when and where. So I'll come to that straightaway. It is the duty of the court when *NN Global* in an appropriate proceeding, is doubted The five judgment. It goes by way of review. And then it is before curative. That is a separate ladder. And it's important to maintain these ladders. It is not permissible. According to us, it's not permissible. It is not desirable. And according to our understanding of the law laid down in the judgment so far, Your Lordships have restricted, curative, continuous. I mean, restricted in a sense, when the justice of the case demands...

**JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR]

**SHYAM DIVAN:** I'm sorry..

**JUSTICE SANJAY KISHAN KAUL:** There's no difference of perception on this issue. The issue is that some way your submission bound to be affected or coloured by the fact why my curative petition.

**SHYAM DIVAN:** Sorry.

**JUSTICE SANJAY KISHAN KAUL:** Why my curative petition? Why are you doing this in my curative petition? That's the bottom line of what you are saying.

**SHYAM DIVAN:** No, that's wrong. There are two elements here. The first element. Your Lordship is right. That it is in my... I'm briefed in this case, so I have to say that please don't upset my apple cart. My agreement, by the way, I mean, this is quite amusing. My Arbitration

1 Agreement is of Your Lordship will not dare suggest the year. It's of 1997. My Arbitration  
2 Agreement is under of 1997 and I was telling...

3

4 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] curative I mean...

5

6 **SHYAM DIVAN:** 26 years down the line, we are thinking of appointing an Arbitrator. I mean  
7 what a joke. Not for a fact that it's a serious question of law, which Your Lordships are  
8 considering.

9

10 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR]

11

12 **SHYAM DIVAN:** Sorry.

13

14 **JUSTICE SANJAY KISHAN KAUL:** I told my Chief Justice on a lighter side, in Chennai,  
15 I've had to refer an arbitration in the year 2015 an application filed in 1999. There was a life  
16 dispute. It was accepted as a life dispute and I had to refer. The unfortunate part was that the  
17 only unfortunate part of the application was not taken up. So therefore, we are not getting into  
18 the facts of it. Therefore, somehow I feel you're more troubled by the fact that why are your  
19 clients being troubled in a curative jurisdiction. Therefore at the threshold itself looking to  
20 your submission on the earlier day...

21

22 **SHYAM DIVAN:** Yes, yes.

23

24 **JUSTICE SANJAY KISHAN KAUL:** ...we thought we had taken care of this issue by not  
25 looking into the curative issue at all.

26

27 **SHYAM DIVAN:** Yes.

28

29 **JUSTICE SANJAY KISHAN KAUL:** And that's something Mr. Datar [UNCLEAR] the  
30 curative will be...

31

32 **SHYAM DIVAN:** The question I've asked in... Of course the Chief Justice can constitute a  
33 panel of seven. What's the jurisdiction this court is exercising today?

34

35 **JUSTICE SANJAY KISHAN KAUL:** It is determining the legality of the view taken by an  
36 opinion...

37

1 **SHYAM DIVAN:** That it opinion or a reference which the reference which the President of  
2 India ought, which is this jurisdiction it is only curative anyway let me just... Sorry, yes.

3

4 **JUSTICE SANJIV KHANNA:** Mr. Divan the basic objection seems to be that while  
5 examining curative petition, the legal ratio raised decided in judgment should not be re-looked  
6 at by a larger bench.

7

8 **SHYAM DIVAN:** I'm sorry My Lord, the last...

9

10 **JUSTICE SANJIV KHANNA:** While examining a curative petition, or while deciding a  
11 curative petition the legal ratio laid down by Five judges Bench or any smaller bench should  
12 not be looked into. That's a larger perspective. But in a given case, where we find that the  
13 business ramification or other issues have arisen which have raised some doubts and issues.  
14 why not examine it? We are not saying that curative petition is going to be examined on facts  
15 itself separately. If there is some doubt or debate on the legal principles laid down, legal ratios  
16 laid down which have wide ramifications impact, why can't we go into that? Why should we...?

17

18 **SHYAM DIVAN:** I'll tell Your Lordships...

19

20 **JUSTICE SANJIV KHANNA:** If really speaking where the means are right. Because if there  
21 is some issue which has arisen, which has led to a lot of disturbance, then it's the right means  
22 to also check it. It's not something that we are usurping a jurisdiction which doesn't list with  
23 us. We are all adjudicators. We have to adjudicate. We keep on re-examining ourselves,  
24 correcting ourselves. That's how it is.

25

26 **SHYAM DIVAN:** So let me just be very brief on this point. And let me give you the page  
27 numbers and the date. May I just indicate it? Please, don't misunderstand me. I'm not saying  
28 that the Seven Judge Bench can't overrule a Five judge Bench. That's not my case. My  
29 submission is, of course you can. But if we are a means and ends institution, then it ought to  
30 be in an approach in an appropriate packaged case and proceeding. And this may not be an  
31 appropriate proceeding for two reasons. Now let me just for several reasons let me just indicate  
32 those... and since Your Lordships, I'll state the points. If Your Lordship wants me to go to it, I  
33 will go to it. But we have the pages here. So the first point is that the ground given. Please just  
34 note this. The first point is that the ground given in so far as the curative petition as contained  
35 in the certificate is that there is a reference which has made, been made to a larger bench in  
36 *NN Global*. So this is the primary ground. This in my respectful submission cannot be a  
37 ground for the purposes of issuing a certificate. Your Lordships have deprecated certificates of

1 this type. And I believe it ought to be deprecated here merely because there's a reference which  
2 has been made to a Three Judge Bench. So that's absolutely no ground. Now, if there is no  
3 ground which is made which is sustainable, insofar as a curative petition is concerned, the  
4 question of igniting the curative jurisdiction does not arise. So this is one primary set of  
5 submissions that I have. If Your Lordships likes, I can give you the.... sorry.

6

7 **JUSTICE SANJAY KISHAN KAUL:** [NO AUDIO] When Five Judges maybe sitting in  
8 curative jurisdiction. He is not denuded of the power to constitute a larger bench to examine  
9 the petition of the law [UNCLEAR].

10

11 **SHYAM DIVAN:** I agree that. I agree with you.

12

13 **JUSTICE SANJAY KISHAN KAUL:** That's all we are doing.

14

15 **SHYAM DIVAN:** May I just say this?

16

17 **JUSTICE SANJAY KISHAN KAUL:** Even there, Mr. ...We did not let them argue in  
18 further... is something which needs to be looked into or delegated to arbitrator. There also,  
19 we've have not permitted them to expand the contour. Some of them have argued...

20

21 **SHYAM DIVAN:** Anyway, Your Lordships have followed my point now. So I'll just give you  
22 the points. So, the first point is

23

24 **JUSTICE SANJAY KISHAN KAUL:** We are giving it to you to fight another day on the  
25 curative petition. We are not dealing with that aspect. We are today, not... please take...

26

27 **SHYAM DIVAN:** Frankly I'm just making a suggestion. If you don't find, if you find or rather  
28 if you do find in my favour that the essential elements for a curative jurisdiction are not made  
29 out, then my respectful submission would be the appropriate cause is to decline to exercise  
30 this jurisdiction because you are exercising no jurisdiction other than curative today, when  
31 you pass the order suggesting that you are clarifying it. Sorry, that's my understanding of the  
32 law. But if Your Lordships finds that there is some other jurisdiction which is also being  
33 exercised over here. I don't find any. Sorry.

34

35 **JUSTICE SANJAY KISHAN KAUL:** We have said repeatedly that so far as the curator  
36 matter is concerned, it will be heard by a Five judges bench, whether they agree, disagree,  
37 dismiss the petition in the facts of the case is a separate matter, but on a general principle of

1 law, Seven judges this court felt, led by the Chief Justice, who exercised his discretion, we have  
2 segregated it yesterday. You've said we are only...

3

4 **SHYAM DIVAN:** Let me just proceed now. I followed the point. So let me just state my  
5 points, and then Your Lordships will consider them appropriately. So my first submission is  
6 that by relabelling it, as In Re, etc., it doesn't alter the nature of the jurisdiction or exercise.  
7 that's my understanding of the law. The nature of the jurisdiction remains that's 1. Point  
8 number two, if you are choosing to exercise curative jurisdiction, which, of course you may,  
9 there are well settled parameters. And I'm just indicating those parameters. I'm just  
10 mentioning them because they are in our submission. I'll list them. Sorry.

11

12 **JUSTICE SANJAY KISHAN KAUL:** Mr. Divan, problem is Mr. Divan that we are not  
13 looking into it. So you're arguing something which we are not looking.

14

15 **SHYAM DIVAN:** But if it's curative? And then Your Lordship says that...

16

17 **JUSTICE SANJAY KISHAN KAUL:** It's a catch 22 situation.

18

19 **SHYAM DIVAN:** It's a catch 22.

20

21 **JUSTICE SANJAY KISHAN KAUL:** You can't do it in a curative because of the restricted  
22 parameters.

23

24 **SHYAM DIVAN:** Okay. Let's keep that aside, let's keep that argument aside.

25

26 **JUSTICE SANJAY KISHAN KAUL:** We are only looking to one proposition of law *dehors*  
27 the curative, whether in case of a 11(6) jurisdiction, stamping is something to be looked about.

28

29 **SHYAM DIVAN:** Okay, so now let's drop this. Now next three sentences. I'll try and not use  
30 the word curative. Suppose even a theoretical situation a very, very wrong judgment comes  
31 out by this court and it is brought to the attention of the Chief Justice of India, or senior judges,  
32 et cetera. That look, this looks extremely wrong and very perilous. The question I ask myself  
33 is that can the Court thereafter constitute a bench of a larger panel, put a label In Re and then  
34 decide the issue to overrule that. I don't believe that is acceptable. That's my understanding of  
35 the law. I believe that can certainly be done in an appropriate case. An appropriate case comes  
36 up. That's what means and ends is about. But that's our understanding.

37

1 **CJI D Y CHANDRACHUD:** The impact of wrong precedent is so severe and as history has  
2 shown, by the time you actually get a case, an appropriate case what you have to ensure is that  
3 you do not confine your arguments only to one or two. Therefore, we have invited a broad  
4 diversity of views on this side, on this side... you have that's the...

5  
6 **SHYAM DIVAN:** Let me so move on. I said I won't use that expression. My understanding  
7 of the law is merely because there is a wrong judgment, our understanding of the institution,  
8 and it's working. Our understanding of this institution and working is that we improve, we  
9 self-correct. But there are methods and ways of doing it. And I am suggesting to Your  
10 Lordships that this may not be the appropriate way of doing it. Your Lordships' answer is we're  
11 keeping your objection alive for another day. Fair enough. But then what's the nature of the  
12 jurisdiction in arriving at this conclusion of whether X is right or whether wrong. It is the  
13 jurisdiction which I said I won't speak about. So that's the very jurisdiction. So now if that's  
14 the jurisdiction, then please follow the parameters. Now I move on. You may just note that in  
15 my case there is a 337 days delay in file. So I've said the certificate isn't there, in terms of Rupa  
16 Hurra. I have respectfully submitted that the agreement itself of which the arbitration Clause  
17 of 1997, so please keep that in mind. There is a 337 days delay and there is a 505 days delay  
18 after the dismissal of the review. A 505 day. And Your Lordships have said that as far as the  
19 curative petition is concerned, it cannot be filed as and when a party considers it. So, this really  
20 ought to be closed. Sorry. I'm sorry.

21  
22 **JUSTICE SANJAY KISHAN KAUL:** I am only saying, you will argue this somewhere else.  
23 That's what I'm saying. So do we understand your point? Why take it up here?

24  
25 **SHYAM DIVAN:** That's really up to the courts to hold as to whether there is a means and  
26 ends, there is something in the means and end submission.

27  
28 **JUSTICE SANJAY KISHAN KAUL:** We've understood your means of this thing.

29  
30 **SHYAM DIVAN:** Yes.

31  
32 **JUSTICE SANJAY KISHAN KAUL:** You feel on there is a procedure which must be  
33 followed. We felt that it is a very large ramification. We should not wait for a particular case to  
34 arise and to be referred to three judges, then to be referred to five judges. That is why, Chief  
35 Justice placed it, we have heard, not the parties alone, we have heard everybody. So this is not  
36 something which is a list being decided *inter se* the parties and that's it. And therefore, the  
37 threshold, we kept it. So to the extent you feel, don't do it in this manner. We've understood it.

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**SHYAM DIVAN:** Yes ought not I said, I'm not saying, don't do it. I am saying, ought not to do it. Why to say don't do it.

**JUSTICE SANJAY KISHAN KAUL:** The lighter side we [UNCLEAR].

**JUSTICE BR GAVAI:** Means the same thing.

**SHYAM DIVAN:** Perhaps, ought not to do it. That's how I'll put it.

**JUSTICE SANJAY KISHAN KAUL:** We have done it now, because in this manner we feel we have to close..

**SHYAM DIVAN:** Your Lordships, have now followed the point. So I now move on to my next point. Now, Your Lordships, have the Arbitration Act with you or should we go to the sections which are mentioned here? Okay let me just indicate to Your Lordships..... I'll take you to the Act, as it appears from the record, I've now kept that whole issue aside. Sorry.

**JUSTICE SANJAY KISHAN KAUL:** I understand you correctly that, as a proposition of Law, you want to canvas that, the issue of a stamping of an agreement, should be looked at in 11(6) itself.

**SHYAM DIVAN:** Yes.

**JUSTICE SANJAY KISHAN KAUL:** Is that the proposition we are advancing?

**SHYAM DIVAN:** Yes.

**JUSTICE SANJAY KISHAN KAUL:** You are in different jurisdiction.

**SHYAM DIVAN:** Okay, so let me now, let me simplify. Let me give you my understanding of the Law. If we take up the Arbitration Act or whatever electronic copy Your Lordships are referring to, there are three situations which are right. So I'll give you my conclusion on all three, the first situation which arises is the Law, as it stands today. If we pick up the Arbitration Act, I'm only on 11(4) at the moment, you could have a Supreme Court/ High Court appointment depending on international or domestic, that is situation one. Situation two, as 11(4) stands today, it could be through an institution which is designated or appointed for the

1 purposes. That's the second situation. So 11(4) as it is applicable post 2015 act today. The third  
2 aspect, the third dimension, is what Mr. Khambata mentioned briefly which is that, look we  
3 now have a 2019 statute, which has not been brought into force, which sends the matter,  
4 Justice Khanna had also mentioned it, which sends the matter into the realm of an institution.  
5 Correct? So first, let me clear my position. If it is to go 11(4) is to go directly to an institution,  
6 in my understanding of the Law, there is no impediment in terms of stamp duty. So the  
7 moment the 29 and that's in fact, one of the reasons why I'm going to request the Court, please  
8 do not exercise such jurisdiction as you are choosing to exercise, because there is already a  
9 statute. The statute refers party straight off to the 2019, under the 2019 amendment to an  
10 institution, it does not require any interference or any intervention by a Court or any  
11 application of mind on the part of the Court. That body will not be a body which is entitled  
12 either by the consent of the parties or under Law to receive evidence. And therefore, the stamp  
13 duty question will completely pale into insignificance. So that's one situation, so it will not  
14 apply. So this problem won't arise. All that is needed is the 2019 Act is brought into force, the  
15 relevant provisions and the problem disappears, that's one. This has multiple dimensions to  
16 it, including whether Your Lordships should even at all, exercise jurisdiction. You'll keep that  
17 at the back of your mind. Now we come to the second situation. The second situation is, Your  
18 Lordships may just go to Section 11 for a moment. Just have a look at Section 11, as it stands  
19 today, you will find it at page 1210 of Volume 4-A. Your Lordships have it? So My Lords, I'm  
20 now reading 11, appointment of Arbitrators. We are on page 1210, appointment of Arbitrators,  
21 a person of any nationality may be an Arbitrator, unless otherwise agreed to by the parties.  
22 Now. Sub-Section 4, if the appointment procedure in Sub-Section 3 applies and the party fails  
23 to appoint an Arbitrator within 30 days from receipt of the request to do so from the other  
24 party or the two appointed Arbitrators failed to agree on a third Arbitrator within 30 days from  
25 the date of appointment, the appointment shall be made upon request of a party by the  
26 Supreme Court or as the case may be, the High court or any person or institution designated  
27 by such court. So again, I'm just indicating to the court our position. If under the law now 2019  
28 Act, I've said that is not brought into force. Even under the law as it stands today, there are  
29 two situations, one which is the one which commonly prevails, which is that the High Courts  
30 and the Supreme Court continue to appoint. But there is also an expression or any person or  
31 institution designated by such court. Now when this went before the High Power Committee  
32 or what Mr. Khambata referred to as the Sri Krishna Committee, they looked at the provision  
33 as amended by the 2015 Act, and they following on the earlier Law Commission report, were  
34 both of the view that even this provision, as it stands today, does require the court to send it  
35 to. So there will be some application of mind of the Court, so therefore they have introduced,  
36 they've recommended the suggestion. They've recommended in terms of what is to happen,

1 moving forward. And the recommendation is once the 2019 Act comes into place, there won't  
2 be any reference to that as well. So I thought I should place this before you.

3

4 **JUSTICE SANJIV KHANNA:** Mr. Divan, even if one looks at the provision as it applies to  
5 the, in fact, none of the High Courts of the Supreme Court has done it. But if we'd passed, the  
6 High Court or the Supreme Court had passed resolution and designated authority or an  
7 institution, all eleven applications would go to that institution. Under the law existing as of  
8 now, once the High Court or the Supreme Court authorizes the institution, then that  
9 institution will appoint an Arbitrator under 11(4). All of it.

10

11 **SHYAM DIVAN:** May I just respond to...?

12

13 **JUSTICE SANJIV KHANNA:** That's a different matter.

14

15 **SHYAM DIVAN:** No. But may I just My Lord... That is a possible, that's a possible view for  
16 Your Lordships to take. So then the situation is that you have a situation where moving forward  
17 post 2019 Act, there'll be no question of such a problem at all. And Secondly, if the *prima facie*  
18 view, which was expressed by Your Lordship just now, a moment ago, is that if there is a  
19 designation by a High Court, then that's another way in which the entire problem may go. But  
20 I thought I should just mention to you that the ***Sri Krishna Committee*** when it made its  
21 recommendations, read this very provision differently, leaning on the earlier Law Commission  
22 report, which also took the view that even as that post 2015 Amendment Act, there is still an  
23 aspect which is left for the Court. But that's really controlling.... Your Lordships left to decide  
24 that aspect.

25

26 **JUSTICE SANJAY KISHAN KAUL:** Law stands today...

27

28 **SHYAM DIVAN:** So look at it only as it stands.

29

30 **JUSTICE SANJAY KISHAN KAUL:** What may happen tomorrow one doesn't know...

31

32 **SHYAM DIVAN:** Yes, But I Just thought...

33

34 **JUSTICE SANJAY KISHAN KAUL:** It happens to be [UNCLEAR] ...seem to have been  
35 having another loop. What form It comes today. Conjecture...

36

1 **SHYAM DIVAN:** Correct. So My Lord, sorry. So focusing on the law, as it stands today, we  
2 have two situations, not the third situation as I mentioned, either High Court... Supreme Court  
3 or High Court and/or institution designated by the Supreme Court or High Court. My personal  
4 view is that if it becomes once there is a designation, and if there is the rules, etc. Is provided,  
5 you go directly to that particular institution, and that institution doesn't have the power to  
6 receive evidence. But it's not by consent of the parties that institution has been given authority  
7 to use evidence etc.. So in a situation such as that again, the problem will disappear.

8

9 **CJI D Y CHANDRACHUD:** Mr. Khambata pointed out, that was your para 4.7 of your...

10

11 **SHYAM DIVAN:** So, quite right. So we accept that position. Problem is actually being  
12 contemplated. There is a solution within which is contemplated.

13

14 **CJI D Y CHANDRACHUD:** [UNCLEAR] High Court or the Supreme Court, as a case may  
15 be, are exercising their power under 11.

16

17 **SHYAM DIVAN:** And yes. So that's the one which we are just now looking at.

18

19 **CJI D Y CHANDRACHUD:** Correct.

20

21 **SHYAM DIVAN:** So now have a look at Section 7, please.

22

23 **CJI D Y CHANDRACHUD:** [UNCLEAR]

24

25 **SHYAM DIVAN:** So there are two, three elements of the Arbitration Act. Then I'll go to the  
26 Stamp Act. just as I, I might just mention I'm just digressing from here. In my case and Your  
27 Lordships, I had mentioned it on the last occasion that the parties I'm representing, one person  
28 in 90, the other person is 89, and it's rather difficult to explain to them why we're here. But I  
29 should mention there is a decree...

30

31 **CJI D Y CHANDRACHUD:** Still on a lighter vein, there may be still a case for the awards of  
32 costs to your clients payable by the petitioners.

33

34 **SHYAM DIVAN:** I just want to mention there is a decree in my case. So I had filed a suit in  
35 2010. In my case, I had filed a suit in 2010. The suit got decreed after a written statement was  
36 filed. So they never objected under Section 8. My suit got decreed. And therefore I don't know  
37 whether Justice Gavai and Justice Surya Kant recall because it's a long time ago that they

1 passed that order. So apart from the Stamp Duty case and Stamp Duty issue in my case. They  
2 examined the case on merits. And they say now on merits also, we don't think there is any  
3 question of arbitration. So the question I asked myself, where is the question of overturning  
4 that decision, in that curative jurisdiction at all, when the court has decided on two footings,  
5 law as well as this... Anyway now let me come back here.

6  
7 **JUSTICE SANJAY KISHAN KAUL:** The Court for arriving at a conclusion whether under  
8 Section 11(6), stamping is something to be done? We will actually not go beyond it. They have  
9 argued, you have argued will not go beyond that.

10  
11 **SHYAM DIVAN:** Alright. So now I just want to emphasize a few elements as far as Section  
12 11... Section 7 is concerned. Just two, three parts. And then I take you to 16. And I'll read 5 as  
13 well at this stage. So just see 7, because there's something which we wish to emphasize. In this  
14 part, Arbitration Agreement means an agreement by the parties to submit to arbitration all or  
15 certain disputes which have arisen or which may arise between them in respect of a defined  
16 legal relationship, whether contractual or not. Two, an Arbitration Agreement may be in the  
17 form of an arbitration clause in any contract or in the form of a separate agreement. And three,  
18 the Arbitration Agreement shall be in writing. Now I will take you to the definition of  
19 instrument which I think Your Lordships have realized that we are relying on the Indian Stamp  
20 Act, not because it may apply to individual cases, but it's the same thing which is borrowed  
21 across the state. *Para materia*. We've emailed a set of comparative provisions. It's all in *Para*  
22 *materia*. So the point here I'm making is it has to be in writing. I don't think there is any  
23 dispute with regard to that. It's required by law to be in writing that's number one, and in our  
24 understanding of the law, if it is required to be in writing, when I take you, take Your Lordships  
25 to the provisions of the Stamp Act, you will find, then it answers the description of an  
26 instrument. So that's all at this stage. Since we are on this page which I believe is page 1207 of  
27 Volume 4-A, please just have a look at Section 5 as well.

28  
29 **JUSTICE B.R. GAVAI:** Mr. Divan, why don't you look at Subsection 4 also?

30  
31 **SHYAM DIVAN:** Yes, of course I'll read it.

32  
33 **JUSTICE SANJIV KHANNA:** Just one minute. If we turn to Clause C, Sub-Section 4 to  
34 Section 7, your exchange of statements of claim and defence in which existence of an  
35 agreement is alleged by one party and not denied by the other. Let's suppose there's a parent  
36 arbitration, underlying contract, under stamped or whatever it is, but a statement of claim is

1 exchanged and defence is also exchanged. Both the parties agreed to an Arbitration  
2 Agreement.

3

4 **SHYAM DIVAN:** Right.

5

6 **JUSTICE SANJIV KHANNA:** You need not, therefore, rely upon the parent clause.

7

8 **SHYAM DIVAN:** That won't be Section 11(6).

9

10 **JUSTICE SANJIV KHANNA:** The fact that the parent agreement is under stamped or non-  
11 stamped is immaterial. In that case for going into the question of existence of an arbitration.

12

13 **SHYAM DIVAN:** You are right, you are right. There's a deeming fiction here. Now I'll read  
14 the whole of 4. I'm grateful. This 4 is very important. So please have a look at it. I'm on Section  
15 7, Sub-Section 4. An Arbitration Agreement is in writing, if it is contained in (A) a document  
16 signed by the parties. B) So, this I believe would answer the description of an instrument  
17 straight away.

18

19 **JUSTICE SANJIV KHANNA:** Correct, correct. You are right.

20

21 **SHYAM DIVAN:** B) An exchange of letters, telex, telegrams, or other means of  
22 telecommunication, including communication through electronic means which provide a  
23 record of the agreement or C) an exchange of statement of claim and defence in which the  
24 existence of the agreement is alleged by one party and not denied by the other. So My Lords,  
25 just coming straight away to Clause 3....

26

27 **JUSTICE B.R. GAVAI:** Exchange of email may also constitute an Arbitration Agreement.

28

29 **SHYAM DIVAN:** It may. It may. It may. Okay. So now I'm just getting a little ahead of the  
30 script, but just let me tell you where the suggestion which we are going to make. There is...  
31 because I think Your Lordship is also looking at it from a practical point of view. I mean, what  
32 happens in a situation. So let me just depart from this section and just provide, supply what  
33 we consider is an appropriate cause. Before a... our understanding of the Scheme under the  
34 Stamp Act is, on execution or before execution stamp duty is payable. That's first point.  
35 However apart from that situation, supposing the contract is being worked there are no  
36 disputes, there are no disputes at all between the parties. The contract is being worked. A party  
37 can all ... and the parties did not, whatever, pay the Stamp Duty at the time of execution or

1 before execution as required by Law, they can always go under Section 31 is our understanding  
2 and have it adjudicated by the Collector. So that's the second clear method by which you can  
3 solve that problem before disputes etc. arise. The third issue is, before you issue a notice  
4 because presumably of arbitration... the sorts of cases my learned friends are all, Singapore  
5 Arbitration Centre, Hyderabad International Arbitrators those kind of cases, ordinarily you'd  
6 go to a lawyer. You would ordinarily require a notice to be sent. You are preparing a Section  
7 11... ordinarily, there will be some individual cases who prefer to do it all by themselves. That  
8 is the stage at which you could conveniently, if you find that the Agreement, whether the  
9 Composite Agreement or the Arbitration separate Agreement hasn't been stamped get it  
10 adjudicated. The moment it is before adjudication, the moment it is before adjudication, no  
11 Court or either the High Court or the Supreme Court, under exercising powers under Section  
12 11, is going to stop or block, because your point will be, I am a compliant citizen. Maybe at the  
13 stage of Section 11, before issuing the notice and before approaching the Court, I have  
14 approached the appropriate Revenue Authority. This is what I think is the amount, I have gone  
15 there, please appoint an Arbitrator, and the Court would not in a situation such as that say,  
16 Oh! I can't look at the document, it's can't be seen, it is pending adjudication. The Court can  
17 also, and I'm going to show Your Lordship because after *NN Global* five Judges, both the  
18 Bombay High Court as well as the and earlier the Delhi High Court have rendered a judgment,  
19 which is given a scheme following *NN Global* which is time bound. But I am just now not  
20 without any intervention of the Court. What is the correct procedure to be followed which is  
21 fair, equitable and doesn't do injustice either to the parties or the statute, because what the  
22 submission over here was that Section 5 is wide enough. I'm going to take you to Section 5 .  
23 It's wide enough to override everything. I don't even think that's constitutionally permissible,  
24 but I'll come to that separately. So the answer to the question is what happens at a practical  
25 level. This is what happens. First stage before you execute or at the time of execution. Second  
26 point surely before you move a court, or before you issue a notice of arbitration, at that stage,  
27 you can go and approach. And the third point, which Your Lordships can clarify very simply,  
28 is that in a situation such as this, where a party has indeed approached the Collector, there is  
29 no question of holding up Section 11 at all, because the party is complying with the mandate  
30 of the Stamp Act, and therefore, please proceed ahead and go ahead and appoint the  
31 Arbitrator, if you are satisfied there be ..... That's a much better balanced, Revenue compliant,  
32 Statute compliant and consistent with our Court's line of reasoning over a decade, which would  
33 meet the ends of justice. So to answer Your Lordship's question, as far as 4(B), you're right, an  
34 exchange of letters, telex, telegrams, and other means of telecommunication, including  
35 communication, which provide a record of the Agreement. So you could have two types of  
36 agreement. You could have either just the Arbitration Agreement through this exchange, or  
37 you would have what I would call the larger Agreement of which the Arbitration Agreement is

1 but a clause. in both situations. Before you initiate the process and approach a court, if you  
2 find that this requires stamping, you take advice. You submit it to adjudication, and that's the  
3 end of it. You cleared the whole hurdle. There's nothing further which is required to be done  
4 at all. We'll come to that. Sorry. I'm sorry.

5

6 **JUSTICE SANJAY KISHAN KAUL:** Mr. Divan, somebody feels the Agreement is properly  
7 stamped. Let us say, another person says the agreement is deficiently stamped.

8

9 **SHYAM DIVAN:** Yeah.

10

11 **JUSTICE SANJAY KISHAN KAUL:** The moment this is done , you are wanting them to  
12 move to the Collector's stamp to get this adjudicated first, whether it's deficiently stamped or  
13 not.

14

15 **SHYAM DIVAN:** Yeah.

16

17 **JUSTICE SANJAY KISHAN KAUL:** The move 11(6A) the concerned Arbitrator will decide  
18 whether it is deficiently stamped, it is properly stamped.

19

20 **SHYAM DIVAN:** I'll come to that, if it's permissible in Law. Of course, that's one, the...

21

22 **JUSTICE SANJAY KISHAN KAUL:** Why shouldn't? Whole issue is in 11(6)... What can be  
23 done by the Arbitrator, it in the Court 11(6)? This is the only issue which is there.

24

25 **SHYAM DIVAN:** I agree with you, but there is, Your Lordships have seen there is a long line  
26 of judgments and there is good. I will, of course, try and develop. And I'll answer, I'm alive to  
27 that issue, which is troubling. In terms of Your Lordship, wants our assistance on what is the  
28 appropriate statutory design today not what is desirable? There may be some situations which  
29 are desirable. Why not go here? And why not go there, but does it lend itself to a possible  
30 interpretation of the type which Your Lordship is suggesting? That's really the question, or do  
31 we go by the rigor of what we believe is the correct position? So Your Lordships have now seen  
32 7. Now My Lords since Your Lordship is just on that very page. Just have a look at Section 5  
33 now. Please just see this and I will just state the point quickly. Extent of judicial intervention:  
34 Notwithstanding anything contained in any other law for the time being in force, in matters  
35 governed by this part, no judicial authority shall intervene except where so provided in this  
36 part. Now My Lord, I would respectfully submit, that the purpose and object of this section  
37 has consistently understood [UNCLEAR] that you don't allow suits to be filed to block

1 arbitrations, applications, which are not contemplated under the Arbitration Act. Some other  
2 type of action which would delay or prevent or stop the process of arbitration from moving  
3 forward. That is the purpose of Section 5. The purpose of Section 5 as we understand it is not  
4 to override a statute such as and a mandate of a statute if we are correct under, say the Stamp  
5 Act. Let me read it again. 'Notwithstanding anything contained in any other law for the time  
6 being enforced and matters govern no judicial authority intervene'. What is the meaning of  
7 judicial authority intervene? You are invited through some sort of an interlocutory application,  
8 through some sort of a suite, through some sort of other action, to block an arbitration  
9 proceeding. That is the intention of this particular statute. Now I just raise a second issue.  
10 Your Lordships correctly flagged the question regarding and Mr. Khambata was also correct  
11 with regard to the.... Your Lordships will just give me a moment. With regard to the legislative  
12 competence of those various entries. So Your Lordship recalls that there is 63, 91... Item 91 of  
13 7th Schedule First List, 63 of Second Schedule. Seventh Schedule, I'm sorry. List 2. An  
14 arbitration comes in the concurrent list. Now the question which I'm posing because I believe,  
15 I believe that the interpretation which is being suggested by them that please use Section 5 to  
16 trump, so to speak, all these Stamp Acts is constitutionally infirmed. And I'll just state my  
17 point why. Stamp Duty, as we have just indicated, falls within the respective legislative realms  
18 for the purposes of taxation or finance, or raising revenue. We don't believe that in exercise of  
19 powers to frame an Arbitration Law, parliament can trench upon an act or a power which is  
20 left with the State Legislatures to impose or an exaction in the form of stamp duty. So Section  
21 5, it would be very dangerous. I mean, there's a submission. It would be incorrect. Let me not  
22 say...

23

24 **CJI D Y CHANDRACHUD:** Entry for arbitration... that is...

25

26 **SHYAM DIVAN:** Arbitration is, I think 13, three...Roman...Sorry, 7th Schedule List 3.

27

28 **CJI D Y CHANDRACHUD:** And Arbitration.

29

30 **SHYAM DIVAN:** Your Lordships have that? Civil Procedure, including the manner included  
31 in the Code of Procedure, the commencement of the Constitution, Limitation and arbitration...  
32 so, this...

33

34 **CJI D Y CHANDRACHUD:** The purpose of the Arbitration Act, is not to prevent the  
35 collection of revenue. The question is what is the state at which it has to be exercised.

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37 **SHYAM DIVAN:** I agree with that...

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**JUSTICE SANJAY KISHAN KAUL:** Ultimately, it's the forum which will determine, nobody is saying state's revenue is to be jeopardized.

**SHYAM DIVAN:** No, that of course, that we'll have to get into the Stamp Act.

**JUSTICE SANJAY KISHAN KAUL:** It balancing it to say, okay let the whole matter proceed to the chosen judge, which is the Arbitrator. Instead of, normally a court would adjudicate it. Now here...

**SHYAM DIVAN:** Whether that can be done, not whether it's desirable, whether under the statute as it...

**JUSTICE SANJAY KISHAN KAUL:** Whether if it is sent to the forum the forum, which is a chosen forum.

**SHYAM DIVAN:** Yes.

**JUSTICE SANJAY KISHAN KAUL:** That forum will determine whether it is deficiently Stamped, unstamped. Does it require stamping, etc. Why under 11(6) detain it? Contrary to the whole concept that you choose a judge in arbitration, and therefore, the chosen judge will decide which way to go. That's all.

**SHYAM DIVAN:** I don't think there's any problem on that at all. The question at least the way I would look at it is, as to whether... let's see the two issues over here.

**JUSTICE SANJAY KISHAN KAUL:** Why? I put it to you all there was....

**SHYAM DIVAN:** First of all, I agree with what Your Lordship is saying, namely, I am not disputing that the arbitrator can't do it. I'm not, For a moment. The question is.....

**JUSTICE SANJAY KISHAN KAUL:** Get to the part. They have argued many issues. We have been trying to say that look, what we are examining is a very limited controversy, given there's 11(6), there is a power. That there are some cases where need to be shut out under 11(7) as Chief Justice put it. But stamping is an issue being curable, and it's a defect, but a curable, revenue related. Yes. Let the arbitrator determine.

1 **SHYAM DIVAN:** So correct. I will just respond to that statement. Sorry.

2

3 **JUSTICE SANJIV KHANNA:** Sorry interrupting, because you also accepting it. The  
4 separation between the severability of the Arbitration Agreement. let's assume the contract is  
5 found to be void. Let's assume the contract. Section 65.

6

7 **SHYAM DIVAN:** A general contract.

8

9 **JUSTICE SANJIV KHANNA:** For some reason. Section 65 of the Contract Act applies.  
10 Then also, you have to compensate. If the Arbitration Agreement is valid, the arbitrator will  
11 then apply Section 65...

12

13 **SHYAM DIVAN:** Right.

14

15 **JUSTICE SANJIV KHANNA:** Of the Contract Act.

16

17 **SHYAM DIVAN:** Yes, yes of course. But provided that...

18

19 **JUSTICE SANJIV KHANNA:** Let's assume so. Suppose for non-stamping...

20

21 **SHYAM DIVAN:** I accept that Your Lordship is right. I agree. It can be done.

22

23 **JUSTICE SANJIV KHANNA:** That answers the question why should we stall the  
24 arbitration?

25

26 **SHYAM DIVAN:** Should I just should I just. First of all, I accept the position. I don't think  
27 anybody is contesting it that as far as the Arbitral Tribunal is concerned, the Arbitral Tribunal  
28 has jurisdiction. The issue is when we are going through a Section 11 route, and the expression  
29 which is used by Counsel on the other side is that Arbitration Agreement, according to us, has  
30 to be seen, before you appoint under Section 11, has to be seen. Now that examination of the  
31 Arbitration Agreement, what is the mandate under the Stamp Act? Does it get in any manner  
32 diluted by when a court looks at it? Does it in any manner get diluted by the provisions of the  
33 Arbitration Act. And is it a situation where only one forum is to look at it? Or is it a situation  
34 where potentially at least you can have or is required. The requirement of law is that the Court,  
35 if it comes up before the court for the first instance, the court ought to look at it. That's the  
36 issue I understand .

37

1 **JUSTICE SANJAY KISHAN KAUL:** Being a curable problem, a revenue generating issue,  
2 that it has to be looked into. Certainly nobody says can't be looked into. Why should under  
3 11(6), which is a very, very minimal intervention deal with this issue. Why should it not go to  
4 an arbitrator? Because...

5

6 **SHYAM DIVAN:** So I follow. The question is what is the law as it stands today? I think Your  
7 Lordships put your.... please just look at 16. Please look at Section 16, which, in terms of the  
8 PDF rather, the volumes you'll find them at 14-A. Volume 4-A. I'm sorry. 4-A. 1214, 1214. Now  
9 just look at competence of Arbitral Tribunal to rule on its jurisdiction. The Arbitral Tribunal  
10 may rule on its own jurisdiction, including ruling on any objections with respect to the  
11 existence or validity of the Arbitration Agreement and for that purpose an Arbitration Clause  
12 which forms part of the contract, shall be treated as an agreement independent of the other  
13 terms of the contract. So this is being used. So as far as severability is concerned, there's no  
14 doubt that the arbitration. However, there is a limited fiction. I'm borrowing Your Lordship's  
15 words. The fiction is for the purposes of Section 16 determination. It's not as if that for all  
16 intents and purposes, this becomes a standout clause, a separate agreement. And if that  
17 agreement is stamped, it is to be regarded separately. No, it is only for that.... please see the  
18 expression, existence of validity of Arbitration Agreement and for that purpose, the Arbitration  
19 Clause, which forms part of the contract shall be treated as an agreement independent of the  
20 other terms of the contract. So I would respectfully submit this is a very limited fiction which  
21 is coming in. The language is very, very clear.

22

23 **CJI D Y CHANDRACHUD:** 11(6) uses the word examine.

24

25 **SHYAM DIVAN:** 11(6). Yes. Let us see 11(6).

26

27 **CJI D Y CHANDRACHUD:** 16 uses ruling. There is a very distinct connotation in law  
28 between an examination and a ruling. A ruling implies a binding determination. Examination  
29 means a scrutiny. So the power of the court... the first look has been very beautifully put in  
30 para 126, is the first look is for examination. It's first level scrutiny. It's not rendering a binding  
31 determination because when the Legislature has used two distinct words, examination in  
32 11(6), and ruling in 16, ruling means actually a binding or a conclusive finding.

33

34 **SHYAM DIVAN:** So, My Lords just have a look at Section 11(6A). Now we are going back, I  
35 made my point, it's for a very limited purpose, that Section 16 preaches. So Your Lordship is  
36 going back to Section 11, which is on page 1210. Please have a look at 6A. The Supreme Court,  
37 or as the case may be High Court, while considering any application under Sub-Section 4 or

1 Sub-Section 5 or Sub-Section 6, shall notwithstanding any judgment, decree, or order of any  
2 court, confine to the examination of the existence of an Arbitration Agreement.

3

4 **JUSTICE SANJAY KISHAN KAUL:** Very limited scope.

5

6 **SHYAM DIVAN:** Very limited.

7

8 **CJI D Y CHANDRACHUD:** We will come back.

9

10 **P C SEN:** My Lord, one thing which will cut short judicial time, Section 33 (2)(b). Stamp Act  
11 itself provides for delegation of those duties to an officer, an Arbitrator would include that My  
12 Lords. That provision may cut short a lot of conflict between the two Acts.

13

14 **COUNSEL:** Section 35 will have to be...

15

16 **CJI D Y CHANDRACHUD:** Roughly how long would you take? Because there's another  
17 matter. That's why... not otherwise to stop you in the ranks or anything. So that we'll, adjust  
18 that other matter. Reference to a three judge bench.

19

20 **SHYAM DIVAN:** I'll try and wrap in another half an hour... I'll take half. But Mr. Nayyar  
21 will take half....

22

23 **MR. NAYYAR:** I'll take half an hour. 15- 20 minutes. half an hour... whatever I can get.

24

25 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] I thought you have restricted yourself.  
26 You are for an intervener.

27

28 **NAKUL DEWAN:** No. That's correct. But like, Mr. Khambata. [UNCLEAR] Hyderabad  
29 centre. [UNCLEAR] because my proposition is actually going to be based on separability.  
30 Which My Lords in fact I have a different position to take from what Mr. Khambata has taken,  
31 because in my respectful submission, you cannot expand separability beyond section. But at  
32 the end of the day, I still come back.

33

34 **CJI D Y CHANDRACHUD:** There's a three judge bench between me, Justice Pardiwala and  
35 Justice Manoj Misra. It's a difference of two Judges on that medical termination of pregnancy.  
36 We'll take that up at sharp 02:00, and we'll come back in a combination of seven the moment  
37 that gets over.

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**DEBESH PANDA:** Before my learned senior begins, just one point only. A lot of submissions were made on the fact that, this is not a live matter. We haven't addressed Your Lordships at all on facts, because we are before Seven and therefore...

**CJI D Y CHANDRACHUD:** Yes, yes, absolutely.

**DEBESH PANDA:** I don't want Your Lordships to carry any impression. It's not live. We haven't uttered any submissions on facts.

**CJI D Y CHANDRACHUD:** Absolutely. Yes. Mr. Divan?

**SHYAM DIVAN:** No, no, it's very much not a live matter. And I'm going to request Your Lordships...

**JUSTICE SANJAY KISHAN KAUL:** Sir, it is live or it is dead...

**SHYAM DIVAN:** Sorry?

**JUSTICE SANJAY KISHAN KAUL:** We decided somewhere else, whether it is live or it is dead, we decide it somewhere else.

**SHYAM DIVAN:** Sir, we just had the opportunity during lunch to reflect upon this, because we believe, this means and ends issue, is something which will reflect on later. I'm not saying that I'm going to develop it right now. What is this court doing? What this court is seeking?

**JUSTICE B.R. GAVAI:** Mr. Divan you have already argued on that...

**SHYAM DIVAN:** No, no, on another aspect...

**JUSTICE B.R. GAVAI:** You had started on merits...

**SHYAM DIVAN:** Yes, yes, but I'm now deviating and I'm going back to a very important aspect, which I want to emphasize, because Your Lordships are saying that you will reflect on it. What I would like Your Lordships to reflect on, is it's essentially providing an intra court appeal without an appeal, without an appeal, it's going from Five to Seven, without there being

1 an appeal, without there being a process, without there being a procedure. So it's something  
2 to reflect on. I'm not saying no. I'm sorry?

3

4 **CJI D Y CHANDRACHUD:** An appeal would arise, if we were to reverse the view, insofar  
5 as your Client is concerned. We have...the purpose of this....[UNCLEAR]...

6

7 **SHYAM DIVAN:** No even on law, even on law, you see, I was just, anyway I will now go on  
8 the Stamp Act, but I want Your Lordships to very seriously consider, because if you had in the  
9 future, if you have in the future, some judgment comes which XYZ doesn't like. Can the Chief  
10 .... The question I ask myself, is, can the Chief Justice of India, constitute a larger Bench, then  
11 just put it before that Bench without having a Live List or decide whether there's a Live List  
12 and then do it? I don't believe it can be done. But anyway, that's for Your Lordships to reflect  
13 on. Sorry. I'm sorry?

14

15 **COUNSEL:** All I want there is...

16

17 **CLAIMANT'S COUNSEL:** There is a second matter, which is listed before My Lords...

18

19 **CJI D Y CHANDRACHUD:** The Section 11?

20

21 **CLAIMANT'S COUNSEL:** The Section 11 is listed before My Lord. And that was placed  
22 before Five. Certainly, My Lord, the Chief Justice of India, in Dawoodi Bohra, can constitute a  
23 Bench of the relevant strength. Right? Seka Dobrik is listed before My Lord. All this My Lord  
24 may be there in the first matter, there is a second live matter which Your Lordships have  
25 listed...

26

27 **SHYAM DIVAN:** There is no live matter, at least that I am aware of. There is some live  
28 matter, then that's the appropriate case. Then I completely agree with the amicus. In that case,  
29 an appropriate order can be passed.

30

31 **JUSTICE B.R. GAVAI:** I'm sorry it's becoming a little excessive on this issue.

32

33 **SHYAM DIVAN:** It's a very serious issue My Lord, It's a very serious issue.

34

35 **JUSTICE SANJAY KISHAN KAUL:** You are entitled to your view, I'm not saying this. It  
36 has been repeated...

37

1 **SHYAM DIVAN:** Because it's about the institution. And if this becomes a precedence...

2

3 **JUSTICE B.R. GAVAI:** We have already... on that.

4

5 **JUSTICE SANJAY KISHAN KAUL:** We have already said, we may agree, we may not agree  
6 on that.

7

8 **SHYAM DIVAN:** So My Lords, now let us go to the Indian Stamp Act, which is where I want  
9 to...

10

11 **DEBESH PANDA:** All I...

12

13 **JUSTICE SANJAY KISHAN KAUL:** ...both sides have argued.

14

15 **DEBESH PANDA:** Absolutely.

16

17 **JUSTICE SANJAY KISHAN KAUL:** What I'm personally finding in all these Constitution  
18 Bench matters, things go here, there, everywhere. Everybody wants to have a chance.  
19 Everybody wants to sell something, instead of deciding what the issue is before us. That's the  
20 problem.

21

22 **CJI D Y CHANDRACHUD:** Now we are clear, there is a second matter...

23

24 **JUSTICE SANJAY KISHAN KAUL:** On a lighter side, just because the Chief is liberal to  
25 listen to all this doesn't mean that this goes on.

26

27 **DEBESH PANDA:** I am so grateful My Lord.

28

29 **CJI D Y CHANDRACHUD:** And we have a second matter and we have a second matter,  
30 which was of Section 11, directly before us...

31

32 **MALVIKA TRIVEDI:**... because My Lord, we were the main..

33

34 **CJI D Y CHANDRACHUD:** Have you filed your written submission? We will look at the  
35 written submission. No, difficulty.

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37 **CLAIMANT'S COUNSEL:** [UNCLEAR]

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**CJI D Y CHANDRACHUD:** Please this will not be permitted, I assure you, that if you argue for another five minutes...

**CJI D Y CHANDRACHUD:** That you argue for another five minutes. We'll be washing out...

**CLAIMANT'S COUNSEL:** No sir. Within half a minute I can complete.

**CJI D Y CHANDRACHUD:** Listen to me sir, you did that in the previous matter also, in *Sita Soren* the other day. If you argue for another 5 minutes you will be washing out the impact of the argument of the lawyers who have argued before you. So in your interest, please allow the other side to argue.

**CLAIMANT'S COUNSEL:** I have a small request, since I appeared before the Constitution for *NN Global* has also given three judges, led by Mr. Raman, would Your Lordships care to hear me for five minutes?

**CJI D Y CHANDRACHUD:** We will see how much time you have at the end. Because we have to conclude by 4 o' clock today.

**CLAIMANT'S COUNSEL:** Nothing more than that.

**NAKUL DEWAN:** Mr. Khambata appeared for SIAC and I am appearing for the Hyderabad Centre. There are certain institutional points that we want to make.

**JUSTICE SANJAY KISHAN KAUL:** In institutional points I just wanted to clarify what you will address. Are you saying that the 11(6) must address the issue of limitation first. Is that the institution's view?

**NAKUL DEWAN:** No. And the point I want to make...

**JUSTICE SANJAY KISHAN KAUL:** That's the only issue we are deciding.

**NAKUL DEWAN:** That's right.

**JUSTICE SANJAY KISHAN KAUL:** What my institution will say, what another institution will say is not relevant.

1

2 **NAKUL DEWAN:** The only point I want to make. In fact Khambata sort of hinted on it. And  
3 my respectful submission is that Your Lordship should, in fact, looking at effective parity, take  
4 the view that under Section 11, Your Lordships can't take evidence. If Your Lordships takes  
5 that view, then the entire Section 33 of the Stamp Act becomes inapplicable. And that's really  
6 what I want to make good. That's one point.

7

8 **CJI D Y CHANDRACHUD:** You're really on this side, Mr. Dewan.

9

10 **NAKUL DEWAN:** My Lords on the point of 11 if I may... Mr. Khambata pointed out but on  
11 the...

12

13 **CJI D Y CHANDRACHUD:** Your physical situation [UNCLEAR]

14

15 **NAKUL DEWAN:** The reason why I am here is because on the doctrine of separability, my  
16 respectful submission is going to be that, no, they're not separable documents for the purposes  
17 of the Stamp Act. And to that extent, the five judges are correct because you can't expand the  
18 doctrine of separability beyond Section 16 and that's the other point which I'll make good. I  
19 don't need more than ten minutes on these. That's it because Mr. Khambata has addressed  
20 Your Lordship suggesting.... what Mr. Khambata suggested is that expand the doctrine of  
21 separability. My respective submission is...

22

23 **JUSTICE SANJAY KISHAN KAUL:** We are not going to that issue. It was narrowed down.

24

25 **NAKUL DEWAN:** Correct. Why are you treating....

26

27 **JUSTICE SANJAY KISHAN KAUL:** After narrowing of issues, still everybody wants to  
28 address everything on this earth which is possible to be said under the Earth.

29

30 **NAKUL DEWAN:** The entire genesis of *NN Global 1* was the doctrine of separability.  
31 Suggesting that because of the doctrine of separability, the document didn't have to be  
32 stamped. *NN Global 2* goes and says, no, it is not separable. They are all part of the same  
33 agreement. The argument made by the other side is, expand the doctrine of separability. That  
34 is going to be inconsistent with our act. It's going to be inconsistent with the entire line of  
35 English law decisions which we've continued to follow, which have clearly said that it is  
36 separable only for the perspective of invalidity, not from the perspective of every other matter.  
37 It is still a part of the bundle.

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**CJI D Y CHANDRACHUD:** It's not necessary for us to see what are the outer limits of the doctrine of separability here at all. We have to mainly only here decide as to whether the stage of Section 11 (6A), the court is required to examine whether they instrument has been insufficiently stamped.

**NAKUL DEWAN:** What my respectful submission is that the way out of this canon gate is by taking the view that Your Lordships cannot take the evidence under Section 11(6) because Your Lordship is not a court under to 2(1)(E). If you're not a court under 2(1)(E) because the appointment goes either...

**CJI D Y CHANDRACHUD:** Alright let's hear Mr. Divan.

**SHYAM DIVAN:** So very quickly, may I just take you, please, directly to page 329 of Volume 4(A). So now I am on the Stamp Act. So I'll just make a few comments and a few provisions. So first, Your Lordships may go to page 329 of Volume 4(A) where you will find the definition in 212 of executed and execution. Executed and execution used with reference to instruments mean signed and signature, and includes attribution of electronic records within the meaning of Section 11 of the Information Technology Act. Then just please read a little further 214. Instrument includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished, or recorded. b) A document electronic or otherwise created for a transaction in a stock exchange or depository by which any right or liability is or purports to be created, transferred, limited, extended, extinguished, or recorded. So My Lords I want to just tie up these two definitions with the definition under Section 7 of the Arbitration Act. Arbitration Act is required to be in writing. We are writing that's common ground. Please link that to the definition of the word instrument. I think I believe there is no escape from the fact that the Arbitration Agreement is an instrument broadly covering covered by this definition. Now please move on Section 3, Your Lordship knows is the charging section. So I'm not taking you to that. Please go directly to Section 17. Section 17, which you will find at page 348, same Volume 348.

Now this is the point which you alluded to in the morning. Instruments executed in India. All instruments chargeable with UT and executed by any person in India, shall be stamped before or at the time of execution. Now this is the clear mandate of the law. So My Lords, I recall. Mr. Datar was mentioning that he had his client in the old Madras City Civil Court days, who used to only stamp 50% of the documents. All right, you take the run the risk. But the law mandates that you must execute at the time or before, before or at the time of execution, you ought to

1 pay the Stamp Duty. So this is something which the court will keep in mind, that's the time  
2 when you do it. But that's not all. So Section 18 is for instruments, other than bills, notes  
3 executed out of India. So My Lords, with your permission, I'm going to skip that. Please. Now  
4 go to Section 31. This is important for my purposes. You will find it at page 355. Now this is  
5 the route which we suggest to the court. This is the correct way out. What happens when a  
6 Section 11 application is filed and there is some dispute with regard to it. So I am suggesting,  
7 I'll read Section 11(1), and then I'll just make this short submission, adjudication is to proper  
8 stamp. When any instrument, whether executed or not, and whether previously stamped or  
9 not, is brought to a collector, and the person bringing it applies to have the option to have the  
10 opinion of the officer, as to the duty, if any, which may be chargeable and pays a fee, such  
11 amount not exceeding Rs. 5 or not less than so, and so as the collector may, in each case direct,  
12 the collector shall determine the duty, if any, with which the judgment, the instrument is  
13 chargeable, with which in his judgment the instrument is chargeable. So this is in short, the  
14 root we are suggesting, first on or before execution. If not, on or before execution, surely before  
15 you make a Section 11 application, just as you get your pleading draft or before you issue a  
16 Section 11 notice.

17

18 **JUSTICE SANJIV KHANNA:** Mr. Divan?

19

20 **SHYAM DIVAN:** I'm sorry?

21

22 **JUSTICE SANJIV KHANNA:** You are right. This is a provision.

23

24 **SHYAM DIVAN:** Yeah, this is a provision. And this is the correct way.

25

26 **JUSTICE SANJIV KHANNA:** One minute...

27

28 **SHYAM DIVAN:** I'm sorry..

29

30 **JUSTICE SANJIV KHANNA:** In practical terms, if we apply, it'll be chaotic, it'll be chaotic,  
31 to say the least.

32

33 **SHYAM DIVAN:** No. Why would it be chaotic? That's what law requires.

34

35 **JUSTICE SANJIV KHANNA:** Because you don't know what happens, if you apply over  
36 there, how much time it takes.

37

1 **SHYAM DIVAN:** So to that I am making, so therefore I'm making another suggestion...

2

3 **JUSTICE SANJIV KHANNA:** ... Orders, which are passed... again...

4

5 **SHYAM DIVAN:** I'm just making a suggestion to the court. This is possibly, Your Lordship's  
6 experience is right.

7

8 **JUSTICE SANJIV KHANNA:** And it's not mandatory in law. It's not mandatory in law that  
9 we have to go under 31.

10

11 **SHYAM DIVAN:** My Lords, may I just say this as far as this order...

12

13 **JUSTICE SANJIV KHANNA:** Don't make it mandatory by a judgment of this court.

14

15 **SHYAM DIVAN:** No, no. I am saying that first, what's mandatory is what is mandatory is, at  
16 the time of execution or before execution. That's the mandate of...

17

18 **JUSTICE SANJIV KHANNA:** That is [UNCLEAR]

19

20 **SHYAM DIVAN:** Stamp Duty part. Second, it's not as if a party is hobbled and has to wait.  
21 He or she can before issuing the notice under Section 11 Arbitration Notice or may before  
22 making an application, you can follow this route. I'm not putting it any higher than that. And  
23 Your Lordships while moulding the relief or issuing directions, may issue appropriate  
24 directions. And in a case where the matter is pending, adjudication Section 11 can proceed.  
25 That's all. Now I go to the next point. Now look at 33. Look at 33, please look at 33, which Your  
26 Lordships will find at 357. Now examination and impounding of instruments. Every person  
27 having by law or consent of parties authority to receive evidence and every person in charge of  
28 public office, except an officer or a police, before whom an instrument chargeable in his  
29 opinion, with duty is produced or comes in the performance of his functions, shall, if it appears  
30 to him, that such instrument is not duly stamped, impound the same. For that purpose, every  
31 person shall examine every instrument so chargeable, and so produced, or coming before him  
32 in order to ascertain whether it is stamped with a stamp of the value of the description required  
33 by the law enforced in India, when such instrument was executed or first executed. So here I  
34 make just two points. Your Lordship said that we can look at marginal notes, at least to judge  
35 the drift, et cetera of the section. This uses the expression examination, and then the second is  
36 impounding. I believe that I have no doubt following Your Lordship's judgment, that when in  
37 Section 11 clause is applying its mind, Your Lordships have held it's not mechanical. There is

1 an application of judicial mind. And therefore the expression is examination. And this would  
2 cover a situation where a court is looking at it under Section 11. This is one aspect. Now please  
3 go. Your Lordships will just move on to Section 35. Section 35, which is on page 359. Now  
4 please see this. Here, we have, there's a slight difference, at least on construction. We see this  
5 as four distinct points, but Mr. Khambata mentioned that there are two buckets. Please see.  
6 'Instrument not duly stamped, inadmissible in evidence, etc.'

7

8 'No instrument chargeable with duty shall be admitted in evidence for any purpose, by which  
9 person having by law or consent of parties authority to receive evidence or shall be acted upon,  
10 registered, or authenticated by such person or by any public officer unless an instrument is  
11 duly stamped.' So there are four. One, as Your Lordships correctly said, receiving evidence,  
12 admitting an evidence. That's one. Second, acted upon. Third, registered and fourth,  
13 authenticated. So there are four distinct situations which Section 35 envisages, admitting in  
14 evidence is one of them. Section 11, I would respectfully submit, is not an admission of  
15 evidence stage, it's a stage of 'acting upon'. I don't think there can be any... I mean... that's our  
16 submission. I don't believe there's any doubt, at least in our mind with regard to the fact that  
17 the Section 11 court is required to 'act upon'. Now, if this is the mandate of the law in terms of  
18 Section 35, I've already read the embargoes etc. with regard to the Section 10. The scheme of  
19 the statute, at least to us appears to be, that before a court under Section 11, If this issue is  
20 raised under Section 11, however narrow the jurisdiction, because undoubtedly it's a narrow  
21 jurisdiction, this would be within the duty and obligation of the Court. Now My Lords, there  
22 are six characterizations which Your Lordships have used recently, in terms of this. So I'll just  
23 mention them. We have put them in our written submission. One is Your Lordships have said  
24 Section 11 is not 'Mechanical'. That's one way. The second expression used is Your Lordships  
25 have said it is not 'Ministerial', but it is performing a 'Judicial Function'... so that's in **Vidya**  
26 **Drolia** as well. The third, Your Lordship's recent judgment is, it's restricted to the 'Eye of the  
27 Needle'. A fourth expression Your Lordships have used in **Vidya Drolia** and other judgments  
28 is to 'Cut the Deadwood'. The fifth is, it's a very narrow jurisdiction on 'Existence and Validity',  
29 which is the 'Magic Eye Judgment', and of course, when in doubt refer. So, having regard to  
30 the conspectus of these tests, which are really different ways of saying that it's a narrow  
31 jurisdiction, nevertheless, according to us, just on a reading of the Stamp Act, and I have made  
32 my submissions on Section 5 of the Arbitration Act, there doesn't appear to be to be any reason  
33 or justification to exclude the operation of the Stamp Act at the Section 11 stage. Now My  
34 Lords, we are fortified in this. And here, I'm just requesting you to please... I'll just request you  
35 to turn to, if you would, to Volume 2, page 6, please. So Volume 2 is my submissions. Volume  
36 2, page 6, please just go to page 6. It'll just save me a lot of time. Would Your Lordships have

1 para 1.4? Sorry My Lords, I'm on page 6. Do you have para 1.4? Now I just want to spend... I'll  
2 just address the court.

3

4 **CJI D Y CHANDRACHUD:** Section 35 will apply because of the.. and shall or shall be acted  
5 upon.

6

7 **SHYAM DIVAN:** Yes. Acted upon. So...

8

9 **CJI D Y CHANDRACHUD:** Acted upon is also qualified by any such person. Now any such  
10 person means who having by law or consent of parties authority to receive evidence. Acted  
11 upon is also qualified by any such person. Any such person means a person referred to earlier.

12

13 **SHYAM DIVAN:** Right.

14

15 **CJI D Y CHANDRACHUD:** So there is a word public officer. That I mean I don't know  
16 [UNCLEAR] public officer.

17

18 **SHYAM DIVAN:** But we are a court.

19

20 **CJI D Y CHANDRACHUD:** Possibly the court is a public officer.

21

22 **SHYAM DIVAN:** No I mean this is astonishing.

23

24 **CJI D Y CHANDRACHUD:** But a Section 11 court may be a public officer for that.

25

26 **PRASHANTO CHANDRA SEN:** Here I may just draw attention to 33(2)(b). There's an act  
27 of delegation with the Stamp Act itself envisages. if the High Court can delegate this function  
28 of examining and impounding to an officer, which includes an arbitrator. He is authorized to  
29 take evidence.

30

31 **NAKUL DEWAN:** In fact, my submissions deal with this very point, saying that all of this  
32 goes to the arbitrator if you read 33, 35 because what parties have done is that by consent...My  
33 Lords even in the terms of the Arbitration Act by consent, parties have agreed that as far as  
34 their disputes are concerned, it is the arbitrator who takes in evidence. That happens because  
35 of Section 19 of Arbitration act. So when you harmonize both the provisions...

36

1 **SHYAM DIVAN:** May I just make my... Sorry, I'll just summarize it how we understand it.  
2 We believe, if we are correct, that if it's going to an institution of any sort, this embargo under  
3 Section 35 won't apply under the scheme under which it presently applies. That's our  
4 understanding.

5

6 **CJI D Y CHANDRACHUD:** Yes.

7

8 **SHYAM DIVAN:** That's one. Equally we have no doubt that if it is the High Court or the  
9 Supreme Court, then it would be covered and under Section 35, and it would be covered not  
10 in the sense of taking evidence, because Your Lordship may not be at that time admitting it to  
11 evidence, but certainly it is to be acted upon. That's why we sought to link acted upon with  
12 your other judicial responsibility, judicial application of mind to satisfy yourself on existence.  
13 However, confine that jurisdiction may be. That's the short hand submission. So we believe 35  
14 does apply to a Section 11 court, and it does apply to whatever to the High Court or the Supreme  
15 Court, as the case may be. That's where we are and the language is wide enough. Otherwise it  
16 might be rendering this otiose. So that's it. So I was now on if Your Lordship recalls Volume 2  
17 page 6, please. Page 6. May I state the point?

18

19 **CJI D Y CHANDRACHUD:** Yes.

20

21 **SHYAM DIVAN:** So we are on para 1.4. I'm drawing attention to 1.4 because of the constraint  
22 of time. What I want to just mention is that look, we've had not just one stray judgment, in  
23 fact, to one judgment, Justice Gavai and Justice Surya Kant are a party. That's the present  
24 judgment. We've had a series of judgments which we have encapsulated in paragraph 14.  
25 There's a total of about twelve of our judges who've looked at this over the years from 2011  
26 onwards, and the narrowest **SMS**, which is the 2011. That Justice, I think Raveendran and  
27 Justice Patnaik, they looked at it from the Stamp Act point of view and they said that look, this  
28 is clear to us and therefore having regard to that and they placed it on that. Then after just  
29 have a look. Now I'll read 1.4. It is submitted that this Honourable court in **SMS Tea** so that's  
30 the first one. Then we've got **Naina Thakkar versus Annapurna Builders**, because  
31 that's also two learned judges. **Black Pearl Hotels versus Planet M Retail Limited**.  
32 That is, three learned judges. Your Lordship has that? My Lords I am on para 1.4, page 6. So  
33 I'm just to save time just reading this. So we have **SMS Tea**. That's the leading judgment. I  
34 mean in first in point of time, then we have **Naina Thakkar versus Annapurna**, which  
35 Your Lordship may note, is two learned Judges. Then we have **Black Pearl Hotels versus**  
36 **Planet M Retail Limited** that I believe is three learned Judges. Then the judgment referred  
37 to **Garware Wall**, Justice Nariman and Justice Vineet Saran's Judgment. **Garware Wall**

1 is mentioned. And the present impugned judgment, which was also by three learned judges.  
2 So what the suggestion which we are making is that what has come about in the Five judge  
3 bench . I'm not saying that there no. There was a reference to the Five judge bench judgment.  
4 There is a concern there. But when you have a long line of judgments spanning more than a  
5 decade in a situation such as this and on an issue such as this, this, I believe it is an eminently  
6 possible interpretation. The question before the Court also is, as to whether because when  
7 there is in a commercial field, a long standing set of precedents and understanding of our  
8 court, we don't believe it ought to be lightly upset. Rather, I'm suggesting that Your Lordship  
9 is not going to consider this very fully. But I am just suggesting to the Court that please do not  
10 upset this because we've given you a way out. The way out is not to give a premium on  
11 dishonesty, of some person who decides for 50%, I am going to go to pay stamp duty for only  
12 half my cases, I'll take a chance. That's hardly the situation. The law requires you to pay stamp  
13 duty, pay it. If you don't pay it, the law gives you another chance before you approach Section  
14 11. And if not, now I come to the if not, what is to happen. Now, here, just please go to page  
15 36, same written suggestions, please. 36 please. Now, here... now just have a look at two  
16 judgments referred to here and Mr. Nayyar will expand on this. Your Lordships have para 4.5?  
17 4.5 Your Lordships have? So I'll just sum it up. So after our Five Judge Bench judgment, in  
18 **NN Global**, both the Delhi High Court as well as the Bombay High Court, had occasion to  
19 examine, how are we going to do this? So there are two judgments **Splendor Landbase** and  
20 there is a further one called I think it's **John Cockerill**. Yes. That's been mentioned in 4.6  
21 correct. And they have given a streamlined process. So I am commending that with whatever  
22 further suggestions which Your Lordships may feel appropriate, for the purposes of how to  
23 move forward, sustaining **NN Global**. So this is another point which I thought we would make  
24 this wraps up the correct scheme. Now I want to make one for the final set of submissions with  
25 regard to the Contract Act. Now, may I just make that submission very quickly? Now please  
26 just take up the Contract Act. Yes. And Your Lordship will find that at page 280 of Volume 4-  
27 A. Volume 4-A.

28

29 **JUSTICE SANJAY KISHAN KAUL:** Which provision are you referring to Mr. Divan?

30

31 **SHYAM DIVAN:** No, much was made of those definition clauses, etc. Now, I just want to  
32 point out what is the contract at saying, and the whole thing is void, etc. That's not the case at  
33 all, since we are straying, I'm meeting this because much time was spent on these particular  
34 definitions and how the Constitution Bench has done it, and how Justice Nariman in  
35 **Garware** dealt with it. So I want to just explain it. The standard the original template, which  
36 was used by our court was founded on **SMS Tea**, which Your Lordship see Stamp Act.  
37 Thereafter, the Bench felt in **Garware** that there may be another perspective. Now, what is

1 that perspective? Let me just place it. So Your Lordship has now page 280. So just now, see  
2 the Interpretation Clause, Section 2, please on that page. In this Act, so first of all, it's in an  
3 Interpretation Clause. Then it says, in this Act, the following words and expressions are used  
4 in the following senses unless a contrary intention appears from the context. Now, please go  
5 on to what was emphasized, g, 2(g). Now let's see what this. First let's read it and then the  
6 context, and then see whether it has any reason to deviate from the Five Judge Bench. g) An  
7 agreement non enforceable by law, is said to be void, is said to be void, it's not, it is void, it is  
8 said to be void for the purposes of this act. Now see the next one. An agreement enforceable  
9 by law is a contract. And then please see j). A Contract which ceases to be enforceable by law  
10 becomes void, when it ceases to be enforceable. So the entire ambit of the expression in Section  
11 2 of the Contract Act is enforceability and relative to enforceability, whether an agreement is  
12 void or not. That is how this is to be understood. It's not to be understood oh, the whole  
13 agreement is void, nothing can be done. That's absolutely a wrong way of looking at it. What  
14 the court is saying in *Garware* , etc. is that once you remove this taint, or you remove the  
15 shadow, as Your Lordship said, or the cloud, as Your Lordship said, when it becomes fully  
16 enforceable. So for all intents and purposes, your contract upon being appropriately stamped  
17 becomes enforceable, there is no peril to commerce, as is being suggested, that the whole entire  
18 the country and commerce is going to come to a grinding halt if this judgment is allowed to  
19 sustain. A line of judgments which has held the field since 2011. So, my respectful submission  
20 is, there is no justification on that. And when Your Lordships recall for example, commonly,  
21 what do we understand, that if there is a fraud for example, everything is void because fraud  
22 vitiates everything. But that's not how the Contract Act looks at it. The Contract Act says that  
23 if there is a fraud, it is voidable at the interest of the counterparty, who was induced. So for the  
24 purposes of the Contract Act, what is void, what is voidable is much more nuanced than what  
25 has been suggested by the other side. And it ought to be understood in this restricted context.  
26 My Lords, I'm very grateful. Thank you.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Thank you Mr. Divan. Yes Mr. Nayyar.

29

30 **NIKHIL NAYYAR:** Very briefly My Lord, because most of it has been covered. My Lords the  
31 aspect that really My Lords, what we have heard my learned friends argue, nobody has to my  
32 mind contested the fact that Section 35 has to be given play. That is not in dispute. I don't  
33 think anybody has contended that Section 35 has no role whatsoever in an Arbitration or in a  
34 Contract. The only question is, at what stage will it trigger. Will it trigger at an 11 stage? Or do  
35 we My Lords, if I can call it that, if I can call their argument 'the kick the can' argument My  
36 Lord, that should we send it down to the Arbitrator, and then that the Arbitrator or the  
37 Arbitrator Tribunal deal with it. Now My Lords, the 11(6A) Point My Lords, as I, primarily Mr.

1 Datar contended, was based on three facets because 6A My Lords, can be construed two ways.  
2 One is either what is the width of the jurisdiction that is intrinsic in 6A or an efficacy argument,  
3 that it is not efficacious at this stage, that we are delaying arbitration that is not in the interest  
4 of ADR etc., so let us send it down back to the arbitrator because anyway 16 has some kind of  
5 mechanism. I'll focus first My Lords on the 6A part. Three aspects My Lords that were  
6 highlighted in 6A. One My Lords, was the use of the word 'confined'. It says, 'confined' to the  
7 existence of. The second part was 'existence', and some My Lord's, emphasis was laid My  
8 Lords, on the *non-obstante* clause. Saying My Lords, that because of that *non-obstante* clause,  
9 we should now construe it to mean that other statutes or earlier judgments have now kind of  
10 been diluted. Now for each one My Lord, I'll just give few references. As far as the width of 6A  
11 is concerned, post 6A. In fact My Lords, interestingly in our case, I don't want to get into the  
12 merits of that curative etcetera. Actually 6A does not arise. Mine is an 11(6) case. Because the  
13 notice came earlier, etc., etc.

14

15 **JUSTICE SANJAY KISHAN KAUL:** Before the other Bench.

16

17 **NIKHIL NAYYAR:** Yes, but in 6A My Lord, Your Lordships have consistently held that  
18 'existence' means 'validity'  
19 as well... consistently. I'll just give those references My Lords. I don't want to read them.  
20 **Garware**, which is at page 33 of Volume 5-A para 29... in **Drolia** My Lords, which is page  
21 73, Volume 5(A) para 153 and 154.4, and My Lords, **NTPC versus SPML**, that is page 1806,  
22 in Volume 5-A, at para 25 My Lord, where My Lord, this 'eye of the needle' test has been  
23 propounded and specifically held, that the primary inquiry is about 'existence and validity'. So  
24 My Lords, as far as that aspect of 6A is concerned, my submission is that 'validity' is a  
25 legitimate exercise under 6A . Because Mr. Banerji suggested reading various authorities and  
26 the UNCITRAL Model, that perhaps we should... it has to be a very restricted and narrow  
27 approach to 6A, virtually My Lords, taking us back to pre **SBP** and **Konkan**, etc. But no, that  
28 has not been to our understanding the interpretation given by Your Lordships, even after 6A.  
29 'Existence' includes 'validity'.

30

31 Secondly My Lords, as far as the notwithstanding argument is concerned. The most detailed...  
32 In fact, there's a reference in **Duro Felguera** that the amendment in 2015 because the 6(A)  
33 comes in 2015, that it was intended only to overcome **SBP** and **Boghara Polyfab. SMS** was  
34 known to the Legislature at that point. If the intention had been to Whittle down the scope of  
35 6(A) and take out this dispute of stamp, there would have been appropriate language used.  
36 And in **Garware**, because that contains the most detailed discussion as to the legislative  
37 history of 6(A), including referring to the Law Commission report, etc. Lordship may just note

1 paras 12 to 14, 19 and 22. And it is clear My Lord, that the legislative history was such that it  
2 only intended to take care. Perhaps the Legislature felt that as a result of **SBP** and **Boghara**  
3 **Polyfab**, that too many issues were being gone into at the stage of 11 to restrict the scope. But  
4 in my submission, that restricted scope does not take away the fact that you can get into  
5 validity and therefore consequently, this issue of stamping, which I will separately deal with.  
6 This one thing I want to show, why the word examine will or could encompass the examination  
7 on the question of Stamp? Kindly just have **SMS** one paragraph in **SMS**, Lord, that is in  
8 Volume 5-A, page 8 at para 22.1. The conclusion starts at 22. I just want to read 22.1. I'm sorry.  
9 It's page 16 of the running page.

10

11 **JUSTICE SANJAY KISHAN KAUL:** Talking of Volume 5-A.

12

13 **NIKHIL NAYYAR:** Yes, Volume 5-A. It is the second tab at page 16 para 22.1. Starting at 22.  
14 May I read?

15

16 **JUSTICE SANJAY KISHAN KAUL:** Yes.

17

18 **NIKHIL NAYYAR:** We may therefore sum up the procedure to be adopted, where the  
19 Arbitration Clause is contained in an agreement which is not registered but compulsory  
20 registerable, and which is not duly stamped. The Court could before admitting any document  
21 into evidence or acting upon such documents, examine, please note the word My Lord.  
22 Examine such... examine whether the instrument document is duly stamped, and whether it  
23 is an instrument which is compulsorily registerable. Now, the word examine, Your Lordship  
24 will find in 33(2) of the Stamp Act. That is the extent of the duty My Lord. 33 Sub-clause 2.  
25 The word used there is examine. After the impounding...

26

27 **JUSTICE SANJAY KISHAN KAUL:** I also says the Court should before admitting in a  
28 document in evidence.

29

30 **NIKHIL NAYYAR:** Or acting upon.

31

32 **JUSTICE SANJAY KISHAN KAUL:** Yes together.

33

34 **NIKHIL NAYYAR:** Correct My Lord.

35

36 **JUSTICE SANJIV KHANNA:** Say there's difficulty. One difficulty. We accept this  
37 proposition.

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**NIKHIL NAYYAR:** Yes.

**JUSTICE SANJIV KHANNA:** If we accept that the Arbitration Agreement is severable. Even if the parent contract or the underlying contract is held to be bad, is to be impounded. Section 65 and 70, what restitution as quantum merit will apply. Cannot then it be argued that this issue can be gone into by the arbitrator as well as civil court?

**NIKHIL NAYYAR:** The question. Severability? Mr. Divan has a more elaborate argument on that but...

**JUSTICE SANJIV KHANNA:** Quantum merits are decided by the...

**NIKHIL NAYYAR:** They can certainly decide but the question.... My Lord, the question is this... the question is this. The argument of severability does it extend beyond the purpose In 16(1)(B). Yes. Because our submission is the purpose of the argument of severability is limited to that. It does not preclude My Lord. Yes.

Why not? Of course, they can My Lord. But the question is, is the court precluded under 11. No My Lords, 35. Kindly see, what is the language of 35. 35, first is mandatory. It says, shall. There is no option there really speaking, it shall and shall not act upon both, now, what at that stage My Lord, I don't... I am sorry My Lords. No. But since Your Lordship mentioned about no, the point I was trying to make is, I'm sorry... now 33. The point I was trying to make My Lord is... My Lord the word used in **SMS** was examine. They were conscious while making the amendment the words used in para 22.1 is examine. The language in the Stamp Act is examine. The language in 6A is examine. It is not My Lords, that there is any greater degree of inquiry that is required. So examine My Lords, will encompass. An examination is to whether a document or an agreement is properly stamped or not. [NO AUDIO]. Sorry?

**JUSTICE SANJAY KISHAN KAUL:** Anything else?

**NIKHIL NAYYAR:** Sorry. Not... just 2-3 short points, My Lords. The second aspect on Section 5 My Lord. Section 5 My Lords, is not a bar, because Section 5 only says My Lords, notwithstanding, and under as per this part...

**CJI D Y CHANDRACHUD:** That Mr. Divan has made a point. The object of 5 was to prevent suits being filed... to delay Arbitration...

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**NIKHIL NAYYAR:** Correct, but once there is a jurisdiction, once there is a jurisdiction under 11 or 9 or My Lords 34 or 37, the width of that jurisdiction is not controlled by 5. Just one judgment My Lord, that Your Lordships may note it, I don't have the time to read it. That's [UNCLEAR], My Lord, it's in Volume 5(B) My Lord... at page 547. Sorry 522 at My Lords, paras 38 and 39, at 547. That 5 My Lords, will not control the actual width of the jurisdiction.

**CJI D Y CHANDRACHUD:** I'm sure a lot of other States have this. Under the Revenue Law, in Maharashtra, if a certain point arose before a Civil Court, you had to refer it to the Revenue Authorities for determination. What used to happen then is, the moment you got the Revenue Authorities, everything then went into a series of procedural remedies, revision, a statement of case, an appeal. So what the experience was that the entire process before the Civil Courts was stalled, because until a finding was reached by Revenue Authority and exactly that's what's going to happen here. The moment we read the Stamp Act provisions to the 11(6A) stage, or the 11(6) stage, the net consequence is going to be, that the entire gamut of remedies under the Stamp Act will have to be exhaustive, and that never comes to an end. It goes on for years.

**NIKHIL NAYYAR:** No My Lord. There I have two submissions, My Lord. One is My Lord, there is assumption implicit in this that the Arbitral Tribunal will handle it better. And that the Arbitral Tribunal will be able to control the stamp proceedings equally well. That's an assumption I would say, with respect My Lord, because if the Court is not able to control it My Lords, as Your Lordships are observing My Lord...

**JUSTICE SANJAY KISHAN KAUL:** Why will the courts control it? It is not.....

**NIKHIL NAYYAR:** No, it's not controlling. That I'll deal with separately...

**JUSTICE SANJAY KISHAN KAUL:** ...No the intent of an Arbitration Act, very basic summary nature of preceding 11(6). Why is it detailed under threshold... whether they control it better or not control it better. The arbitrator...

**NIKHIL NAYYAR:** ...if the concern is...

**CJI D Y CHANDRACHUD:** 2019 Amendment though not enforced...

**NIKHIL NAYYAR:** Yes.

1 **CJI D Y CHANDRACHUD:** ...gives us an idea about the mind of the Legislature...

2

3 **NIKHIL NAYYAR:** Correct...

4

5 **CJI D Y CHANDRACHUD:** ...which is to continuously constrict or constrict or confine the  
6 intervention of the Court at the first look stage. By taking it away completely, if the  
7 Amendment were to be enforced.

8

9 **NIKHIL NAYYAR:** Yes My Lords, therefore My Lords, what we had suggested was, kindly  
10 just have the order of the Judgment of the Delhi High Court in *Splendor*, because My Lords,  
11 it sets out a whole scheme as to how to control...

12

13 **CJI D Y CHANDRACHUD:** That you have made a point... Delhi and Bombay..

14

15 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] Constitution Bench judgement whether  
16 everything should be left in a limbo, or they devised the method...

17

18 **NIKHIL NAYYAR:** Actually My Lord, it's not a case of limbo... because they've actually  
19 devised the method to expedite it and control time frames. In fact, in the Bombay case, they  
20 found that the difference was Rs.44/-.

21

22 **CJI D Y CHANDRACHUD:** They were implementing the Constitution Bench.

23

24 **NIKHIL NAYYAR:** It's a workable solution is what I'm saying. What I'm suggesting was it's  
25 a workable solution. It's not a solution that can't work, My Lord.

26

27 **CJI D Y CHANDRACHUD:** Thank you, Mr. Nayyar. Thank you very much.

28

29 **NIKHIL NAYYAR:** only one sorry answer. One last point My Lords was on this on the  
30 question of 35. It says 'for any purpose'. In *Avinash Kumar Chauhan*, Your Lordships have  
31 said My Lords, if it is not stamped, unlike 49 of the Registration Act, it cannot be reused, even  
32 for a collateral purpose... that is *Avinash Kumar Chauhan* My Lords, is in Volume 5-B  
33 page 104 at para 22 to 25, page 110. I'm grateful.

34

35 **NAKUL DEWAN:** I am supposed to take not more than 10 minutes. So that my learned  
36 friends also...

37

1 **CJI D Y CHANDRACHUD:** What are your submissions, Mr. Dewan? Are you now mentally  
2 on that side you're still on this side?

3

4 **NAKUL DEWAN:** I have always, I am appearing for an institution. My difficulty with as far  
5 as the Challenge to the *NN Global* judgment is this. We affirm *NN Global* the five Judges  
6 on the basis that the doctrine of separability is limited and that the Arbitration Clause save  
7 and except for matters under Section 16, is part and parcel of the main contract. So to that  
8 extent, we affirm *NN Global 2*. The little leg which stands on that side, which is in fact the  
9 practical leg that under Section 11 an arbitration need not be stalled, if an Arbitration  
10 Agreement is inadequately or not stamped at all, or the main contract is not stamped. Now,  
11 why is the doctrine of separability relevant?

12

13 **JUSTICE SANJAY KISHAN KAUL:** That is the only point we are deciding.

14

15 **NAKUL DEWAN:** That's correct. In fact, you're not just heard Mr. Khambata at length on  
16 the doctrine of separability where he suggested...

17

18 **JUSTICE SANJAY KISHAN KAUL:** I've been saying repeatedly, and I think on behalf of...  
19 people have gone here there in many places.

20

21 **NAKUL DEWAN:** That's right.

22

23 **JUSTICE SANJAY KISHAN KAUL:** We have repeatedly, I think at cost of repetition, the  
24 Chief Justice, all of us have been repeating what we are deciding. If we are repeating what we  
25 are deciding what's the point of saying. He said, this. so I'm saying this. So and so said this so  
26 I'm saying this.

27

28 **NAKUL DEWAN:** I appreciate. Why is the doctrine of separability relevant? I won't take  
29 more than a minute to explain to My Lords. If Your Lordships holds that today the parent  
30 agreement and the Arbitration Agreement are fused for all purposes save and exception for  
31 Section 16, then the challenge, as far as inadequacy of stamping really goes to the challenge as  
32 far as the main agreement is concerned and where there could be... where the level of  
33 stamping, the quantum of stamping becomes a matter of dispute. It's a matter of...

34

35 **JUSTICE SANJAY KISHAN KAUL:** We are not dealing... submitting before us. Even if...  
36 The point is if you are debating it, I agree. You have a right to say, but we are not dealing with  
37 it. We have said so 20 times. We are not. We are saying the only issue we're dealing with is

1 should at this stage, Mr. Divan addressed it. He felt that no, at 11(6) stage itself in the first  
2 blush we should look into it. Now they are saying, no don't look into it. That's all.

3

4 **NAKUL DEWAN:** My Lords I have no difficulty. My written submissions are there. In case  
5 Your Lordships go into the doctrine of separability. My submissions are there that it must be  
6 restricted. That's all. Now I come to the second point. And the only point that I will then  
7 address my points on, which is in relation to Section 11. And whether should an arbitration be  
8 stalled? If Your Lordships has Section 33 of the Stamp Act.

9

10 **JUSTICE SANJAY KISHAN KAUL:** I thought you were on the side of the...

11

12 **NAKUL DEWAN:** On their side.

13

14 **JUSTICE SANJAY KISHAN KAUL:** Then there is nothing to add.

15

16 **NAKUL DEWAN:** No. The only difference My Lords is this. Mr. Datar seemed to suggest  
17 that a Section 11 court could perhaps take evidence. He said. I'm not arguing that they can't  
18 take evidence. Mr. Khambata said, perhaps they cannot take evidence. My position...

19

20 **CJI D Y CHANDRACHUD:** Why do we have to go into these?

21

22 **NAKUL DEWAN:** Because the Section 33 of the Stamp Act. And I will tell Your Lordships  
23 why. If Your Lordship has Section 33 of the Stamp Act, what does 33 set out. What 33 sets out  
24 is that every person by having by law or consent of parties authority to receive evidence. My  
25 Lords that's the starting point. Now, by my respectful submission is this. Once parties have  
26 chosen arbitration as a mechanism for resolving disputes, they have by consent under the  
27 Arbitration Act authorize the Arbitral Tribunal to be the body which receives evidence. And  
28 that becomes evident from Section 19.

29

30 **JUSTICE SANJAY KISHAN KAUL:** Thank you. That's exactly what I said before. You have  
31 a chosen judge, you have an arbitrator, the arbitrator will take a call.

32

33 **NAKUL DEWAN:** And the consent. So therefore, as far as the second part of Section 33 is  
34 concerned, it doesn't arise because by consent you've said the Tribunal receives evidence. Now  
35 My Lords what about the first part? Every person having by law authority to receive evidence.  
36 Now, that is where Your Lordships has to consider the Arbitration Act and Section 11. There  
37 my respectful submission is this. Under Section 11 Your Lordships is only appointing an

1 arbitrator. Your Lordships is not the Court under 2(1)(e). That's the first point. Apropos to  
2 what followed from the Honourable the Chief Justice, which is that all you are doing is  
3 examining the existence of an Arbitration Agreement. My respectful submission is that that  
4 power is constrained only to examination of the existence. Now, when a Party comes to a court,  
5 under Section 11 and says, please don't act on the agreement, because it is not inadequately  
6 stamped. That's not a dispute which goes to existence. Because the agreement exists, the Party  
7 accepts that it signed the agreement in writing in terms of Section 7, because all that Section 7  
8 requires is an agreement in writing which is signed by the parties, or perhaps exchange in  
9 other forms. Now, if the agreement exists, but cannot be enforced, then under Section 11, the  
10 Court has no power to go ahead and impound a document or even look into the Stamp Act.  
11 And therefore, in my respectful submission, really the way out.... And that's really the end of  
12 my submission is this. The way out for the Court is to say we are constrained because we are  
13 not a court under 2(1)(e) and Section 11 Court has no power to receive evidence. If it doesn't  
14 receive evidence, it looks to see whether there's an Arbitration Agreement in existence. If it is,  
15 it refers the matter to arbitration, because the defence is not that there is an inexistent  
16 agreement. The defence is not that I've not signed the agreement.

17

18 **CJI D Y CHANDRACHUD:** You are therefore supporting that submission.

19

20 **NAKUL DEWAN:** To that extent, I support that position because that's the long and short  
21 of all that I have. That all of this has been set out in my written submissions.

22

23 **CJI D Y CHANDRACHUD:** Thank you Mr. Dewan.

24

25 **RESPONDENT'S COUNSEL:** I am at 707.1....

26

27 **CJI D Y CHANDRACHUD:** No one second, Mr. Khambata? How do you read that one part  
28 of Section 35? Just a couple of questions really which... 1) What is the object of Section 5? I'll  
29 come to that in a moment. Section 35... 35 says in Stamp Act, no instruments chargeable if  
30 duty shall be admitted in evidence for any purpose, by any person having by law or consent of  
31 Party's authority to receive evidence, right?

32

33 **DARIUS KHAMBATA:** Yes My Lord.

34

35 **CJI D Y CHANDRACHUD:** The court under 11 is not that part. That's fair enough. Now, or  
36 shall be acted upon, registered or authenticated by any such person. Now any such person  
37 means the person referred to earlier..

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**DARIUS KHAMBATA:** The first part...

**CJI D Y CHANDRACHUD:** Who is authorized to receive evidence. But now what follows is, or by any public officer. Now would a Court technically under 11, not be a public officer? Because now see 33 for a moment.

**DARIUS KHAMBATA:** Yes. 33 has a slightly different language. Person in charge of a public office.

**CJI D Y CHANDRACHUD:** Of public office.

**DARIUS KHAMBATA:** But I would, with respect will not say a Section 11 court is a Public Officer. It's a court under Section 11, for the purpose of Section 11, it's not a public officer. Public Officer is an officer who's, of the executive, discharge administrative functions, et cetera. Therefore, Section 11 Court may not be covered by 33 or 35,

**GOURAB BANERJI:** 33 and 35 were dealt with by Justice Roy, and this expression acted upon was dealt with by him in about seven or eight paragraphs.

**CJI D Y CHANDRACHUD:** What did Justice Roy hold on acted upon?

**GOURAB BANERJI:** My Lord, what he says is, Your Lordship will see, 35 is a consequence of 33. 35 is not a standalone.

**CJI D Y CHANDRACHUD:** Absolutely.

**GOURAB BANERJI:** 33, the 33 has two parts. 33(1) the operative part is, My Lord, I'm not going to the first part, my learned friend has addressed Your Lordships on that. Shall, if it appears to him that such instrument is not duly stamped. So that is an examination which is wider than the 11(6A) examination. So the 11(6A) court is constricted in its examination as compared to, any assuming it's a Public Officer. It's a case of concentric circles My Lords...

**CJI D Y CHANDRACHUD:** So your submission really is that the scope of the inquiry in 11(6) court is much more limited. Or a 11(6A) court.

1 **GOURAB BANERJI:** And that is why My Lords, just see Joseph's Judgment, which is  
2 summarized in paragraphs 161 to 169. His two reasons are he has to then go to the extent of  
3 saying that it does not exist in law, that's the error in the judgment. He did not need to, if that  
4 leap was required to bring it within 11(6A). So My Lord if 33(1) doesn't apply, 33(2) doesn't  
5 apply, then My Lord 35 doesn't apply. Justice Roy has taken a slightly different approach as  
6 well, that 35, 36 has to be read and My Lord, there is a case on limitation, where there is a  
7 decree. A decree is enforceable even though unstamped. So on that basis he says, a decree is  
8 My Lord, the word acted upon, it's not an absolute bar, it's a curable defect. That is how, he  
9 has got around it. I can mention paragraph...

10

11 **CJI D Y CHANDRACHUD:** We will have a look at it.

12

13 **NAKUL DEWAN:** My Lord there is one decision...

14

15 **GOURAB BANERJI:** So My Lord, there are various ways of getting around 33 and 35, we  
16 can put in a note on...

17

18 **NAKUL DEWAN:** My Lord, there is one decision of Your Lordship, in fact defines, public,  
19 which deals with the word Public Officer. In the context of Section 33 read with Section 73 of  
20 the Stamp Act.

21

22 **CJI D Y CHANDRACHUD:** What is the citation? What does it say?

23

24 **NAKUL DEWAN:** No the citation is **(2005) 1 SCC 496**, it's not on record My Lord, we have  
25 just taken this out now. And that My Lords at paragraph 3, looks at a Public Officer as one who  
26 would be somebody under Section 73 of the Stamp Act. Which says, every Public Officer having  
27 in his custody any registers, books, records, papers, documents or proceeding etc., etc...the  
28 inspection of which...So My Lords there were category of public, there were Public Officers  
29 having in their custody, the registers etc., were My Lords used by Your Lordships, in this  
30 decision to say, the term Public Officer having in his custody, as occurring in Section 73, can  
31 be defined by having regard to the expression, Public Officer...

32

33 **CJI D Y CHANDRACHUD:** To 73?

34

35 **NAKUL DEWAN:** It appears to be, as it says, the term Public Officer, as occurring in 73, can  
36 be defined by having regard to the expression Public Office as occurring in Section 33. And  
37 then it says that the Central Legislation including 73 took care to see how the power to inspect

1 was only confined to documents etc., etc...That appears My Lords to be one possibility.

2 [UNCLEAR]

3

4 **CJI DY CHANDRACHUD:** Thank you very much.

5

6 **SHYAM DIVAN:** Just one point. At least our position, we believe that the High Court and  
7 the Supreme Court is covered by the opening part, every person having by law, a consent of  
8 Party's authority to receive evidence.

9

10 **DEBESH PANDA:** My Lords just one request.

11

12 **SHYAM DIVAN:** We are covered by that, we don't need to really go in...

13

14 **DEBESH PANDA:** Just one request My Lord. Mr. Datar is not here. Just in a note we had  
15 made. We wanted to just hand it over. This covers our points in rejoinder on 5. Just I'm  
16 handing over the note. Your Lordship may see it.

17

18 **MALVIKA TRIVEDI:** On the interpretation of *Hindustan Steel* which is in Para 65 and  
19 70 of the Constitution Bench Judgment because what happened there was after stamp paper  
20 [UNCLEAR] Then it was being stated that it should not be [UNCLEAR]. So, My Lord, that is  
21 also analysed. Therefore, to say that the *Hindustan Steel* Judgment will actually have an  
22 impact, My Lord, is not correct. Because what actually can be acted upon can only be  
23 enforceable.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Alright. Thank you.

26

27 **DARIUS KHAMBATA:** May I put in a short note on Public Officer. Just a short one.

28

29

30

***END OF THIS PROCEEDING***