

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

M/S BHASKAR RAJU & BROTHERS & ANR Petitioner(s)

VERSUS

M/S DHARMARATNAKARA RAI BAHADUR ARCOT NARAINSWAMY
MUDALIAR CHATTRAM & ORS
Respondent(s)

TRANSCRIPT OF HEARING

11-October-2023

Document Control

Document Name & Date	Transcript of Curative Petition C. No. 44 of 2023 Hearing dated 11.10.2023
Status	Released
Version	1.1
Last Update	16.10.2023
Nature of Update	Original version
Release Date	16.10.2023
Document Owner	Supreme Court of India

10:40 AM IST

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DR. VIVEK SHARMA: Lordship, we have filed a written submission after the due date so kindly allow the nodal officer to forward it to the Court Master and update in the [UNCLEAR].

CJI D Y CHANDRACHUD: But on the time period, this is a little scary because we have a suggested timeline of 12 hours and 45 minutes. I don't think we have the luxury of time, not 12 hours. I don't think we'll be able to spend 12 hours on this...

DR. VIVEK SHARMA: Humble request My Lord.

ARVIND DATAR: It will at least spillover till tomorrow My Lord.

CJI D Y CHANDRACHUD: We are hoping that we complete it today, but if there's a spillover, we'll complete it in any case tomorrow.

ARVIND DATAR: Tomorrow. After the other 7, 9 and 10.

CJI D Y CHANDRACHUD: That won't take very long. We'll just have to pass procedural directions for compilation.

ARVIND DATAR: My Lord, so we take it that if it doesn't get over today, then after those 7 and 9...

CJI D Y CHANDRACHUD: Of course, yes.

ARVIND DATAR: ...this will continue.

CJI D Y CHANDRACHUD: Yes, absolutely.

NIKHIL SAKHARDANDE: We need permission My Lord, to upload 4C and 5B. Volume 4C and 5B.

CJI D Y CHANDRACHUD: You want to add some volumes what are they Mr. Sakhardande?

1 **NIKHIL SAKHARDANDE:** My Lord, in 5B there are two judgments and in 4C there are
2 some enactments.

3

4 **CJI D Y CHANDRACHUD:** Enactments. All right.

5

6 **NAKUL DEWAN:** My Lords, similarly, there are one or two other judgments which we want
7 to cite.

8

9 **CJI D Y CHANDRACHUD:** Give them to the Nodal Counsel so that they can then you know
10 put them together in the right place.

11

12 **DARIUS KHAMBATA:** My Lord, may I also have the [UNCLEAR]. In my submissions, I
13 noticed there's a mistake. I've just corrected it. The wrong case has been cited. May we have
14 the liberty to correct that?

15

16 **CJI D Y CHANDRACHUD:** You can certainly correct that. Tell the Nodal Counsel, he'll
17 replace it.

18

19 **NAKUL DEWAN:** My Lord, there is one more replacement that I would need, is a
20 typographical error that's kept into my written submission. My Lords, I will just email the
21 correct version. Thank you.

22

23 **ARVIND DATAR:** My Lord, at the outset My Lord, I will be dealing only with the Stamp Act
24 and the Contract Act. To save time My Lord, my colleagues, Mr. Sakhardande and Mr. Mehta
25 will deal with the arbitration aspect. Then Your Lordship may decide the sequence, whether
26 the amicus gets into it or Mr. Khambata gets into it, Your Lordship may decide the sequence,
27 but I'll take as little time as possible because focusing only on 11(6A), Stamp Act and the
28 Contract Act in that sequence. Now My Lord, I also wanted to mention that on the curative
29 part, Your Lordship will, seven judges will decide the main issue of the correctness of NNG2,
30 NN Global 2.

31

32 **CJI D Y CHANDRACHUD:** Yes, of course.

33

34 **ARVIND DATAR:** And then, My Lord, whatever Your Lordship verdict, the curative can
35 again go back to the five judges. Then we'll see what is to be done. That's my suggestion,
36 because in this bench, I'm saying, my humble request is let us not go into the curative part
37 because we won't have time also on that.

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CJI D Y CHANDRACHUD: So that may depend on the individual facts of the....

ARVIND DATAR: I want to say this because if Your Lordship holds sets us at NNG2, there are certain consequences. If Your Lordship upholds NNG2...My Lord, Volume 1 of the written module...

SHYAM DIVAN: In our turn My Lord, we'll be addressing Your Lordships on curative jurisdiction, in our turn.

CJI D Y CHANDRACHUD: We are inclined as of now to send the curative issue to a bench of five. We lay down the principles, decide the correctness of NNG2.

SHYAM DIVAN: Anyway Your Lordships will hear us. I don't want to interrupt the flow. I'm going to definitely address Your Lordships on this present jurisdiction, which the Court is exercised.

CJI D Y CHANDRACHUD: Correct.

ARVIND DATAR: My Lord. On the issue of curative, apart from *Ashok Hura*, My Lord, Your Lordship will also take it that there is one more judgment of Justice Dalveer Bhandari, Indian Council for Enviro Legal Action. Depending on what Mr. Shyam Divan says, I'll respond to that My Lord.

CJI D Y CHANDRACHUD: On to that in rejoin?

ARVIND DATAR: In reply. That's all. No, I'll straight away start. Your Lordship has got my written submission, which is in Volume 1. Now My Lord, the first submission I'm making is, if Your Lordship sees section 11(6A) of the Act. Now My Lord...

CJI D Y CHANDRACHUD: Where do we get that, in the compilation?

ARVIND DATAR: We will be using it again and again.

CJI D Y CHANDRACHUD: It would be in Volume 4.

ARVIND DATAR: Volume 4A, bookmark 9.

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CJI D Y CHANDRACHUD: 4A?

ARVIND DATAR: Yes. Page 1210.

CJI D Y CHANDRACHUD: Page 1210.

ARVIND DATAR: Yes. I want Your Lordship to notice one thing at the outset that Section 11 has a marginal note for appointment of arbitrators. And though the law is at marginal note may not necessarily control the interpretation, My Lord, it is definitely an aid to understanding the scope of the section. Just to set the record complete... Yes. As far as marginal note is concerned, I am just two minutes on the law. Earlier view was marginal note cannot be used in interpretation. That was in 2005, the House of Lords completely changed it and said that look, definitely, we can consider what is the scope of this section? What is the intention that's there?

CJI D Y CHANDRACHUD: And the reason, in England was that a marginal note was never part of the original statute when it was enacted in Parliament. In India, margin notes are part of the Draft Bill, which is presented to Parliament.

ARVIND DATAR: Yes. In every finance bill you'll have the marginal note also. So let's take that marginal note. I'm just taking one point.

CJI D Y CHANDRACHUD: It is not conclusive.

ARVIND DATAR: No, not at all. It's persuasive. Even Justice Subbarao in 59 CGS where there's ambiguity we want to understand the scope of the section we'll get it. But for our purposes we can take. My Lord, it is discussed in *GP Singh 15th Edition* at page 133, and 134 the earlier law is mentioned and the later law is mentioned. But due to shortage of time, I didn't want to get into that. My first submission is the section reads Appointment of Arbitrators. Now if Your Lordship goes to 11(6A), 11(6A) is a case where the Supreme Court or the High Court are considering applications under 3 subsections. That is, subsection 4, subsection 5, and subsection 6. And Your Lordship will find that in all these subsections, there is basically a deadlock in the appointment of an arbitrator. Either the parties cannot agree to it, or the two arbitrators cannot agree to a chairperson. Then My Lord, the court has to step and resolve the deadlock and say, let not the arbitration procedure be stymied by this. We are appointing so and so and move on. So, My Lord, my submission is the purpose of 11(6)(a) is

1 to remove the deadlock, so to speak, which arises, which necessitates an application in 4, 5,
2 and 6. So that's the second point I'm making. Now My Lord, comes to the sorry...

3

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

5

6 **ARVIND DATAR:** Now if Your Lordship comes to the main Section 11(6A), which will be the
7 bone of contention here. After referring to these subsections, Lordship will note, the very
8 important point is a *non obstante* clause notwithstanding any judgment, decree or order of
9 any court. So obviously, Parliament knew as per the Law Commission report, **S.B. Patel** and
10 other line of cases, where there was a duty cast upon the court also, not just to see the
11 Arbitration Agreement, but to go further, see issues of validity and so on. Because then they
12 said that there is no point in referring a matter to arbitration which has so many defects. We'll
13 clear it in some kind of a filter process, and then we'll send it. So they first say, notwithstanding
14 any judgment. Therefore, the basis of all the judgments stand removed by the *non obstante*
15 clause.

16

17 **CJI D Y CHANDRACHUD:** It doesn't override any other statute though.

18

19 **ARVIND DATAR:** Pardon me?

20

21 **CJI D Y CHANDRACHUD:** It doesn't override any other statute.

22

23 **ARVIND DATAR:** No, because there is no other statute coming in the way. I'll come to 33(2)
24 later of the Stamp Act. And My Lord, very unusually, the other point I'm making is the Section
25 11(6A) jurisdiction is not an inherent power of the Supreme Court or the High Court. It's a
26 confined jurisdiction. The jurisdiction has been confined by Parliament and the contours of
27 the jurisdiction have been restricted to examination of the existence of an Arbitration
28 Agreement. Now the statement of objects and reasons is set out in the **Garware Wall Ropes**
29 **Judgment** which Your Lordship will find in Volume 5-A My Lord, Volume 5-A, and 5-B
30 contain all the cases My Lord, main cases. And if Your Lordship comes to the **Garware Wall**
31 **Ropes Judgment**, Volume 5-A. It is in page 50. Judgment starts at page 33 of Volume 5-A.

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33 **JUSTICE SANJAY KISHAN KAUL:** 53?

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35 **ARVIND DATAR:** 33 My Lord.

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37 **JUSTICE B.R. GAVAI:** Volume 5-A?

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ARVIND DATAR: 5-A My Lord. Now My Lord, this Judgment has been followed in *N Global* and this judgment is relevant because it is the post 215 case. And if Your Lordship, straightaway comes to para 50.

CJI D Y CHANDRACHUD: Para 50?

ARVIND DATAR: Para 50.

JUSTICE SANJIV KHANNA: Which page number in Volume 5-A?

ARVIND DATAR: Sorry. Page 50, page 50, para. 13. Sorry, my apologies. My Lord, Your Lordships will find till para 13, the statement of Objects starts from para 6 if Your Lordships notes. If Your Lordships sees the actual statement of objects and reasons the earlier paragraph mentions that India is 179 out of 190 countries in the index of doing business. This can't go on. Therefore, we have to simplify the procedure for ease of doing business. That's the earlier part of it. But now come to para 6 at Sub-Clause 4. 'To provide that while considering any application for appointment of Arbitrator, the High Court or the Supreme Court shall examine the existence of a *prima facie* Arbitration Agreement and not other issues.' So they've expressly mentioned not other issues and that is very important when I come to Section 33, Sub-Section 2 of the Stamp Act. For the time being, Parliament is very, very clear and Lordship will note they drop *prima facie* when the actual 11(6)(a) comes, but *prima facie* is continued in Section 8, and in Section 45. But the net result is the courts shall confine itself to the examination of the existence of an Arbitration Agreement and not other issues. Now Your Lordship will also therefore see the *non obstante* Clause, the word confined and only to the existence of an Arbitration Agreement. Now, if Your Lordship just goes to Section 7 for a minute, you can have three possible situations.

CJI D Y CHANDRACHUD: So we go back to?

ARVIND DATAR: Section 7 of the Arbitration Act.

CJI D Y CHANDRACHUD: We go to Volume 4-A which we [UNCLEAR].

ARVIND DATAR: 4-A

CJI D Y CHANDRACHUD: Then Section 7.

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ARVIND DATAR: 1207. May I read My Lord?

CJI D Y CHANDRACHUD: Just one second. Yes.

ARVIND DATAR: In this part and Your Lordship will kindly see,- 'Arbitration Agreement actually is defined in 2(a), to mean Arbitration Agreement means an agreement referred to in Section 7.' So the definition shifts the scope of the provision to Section 7. So 2(b) read with Section 7, is the definition of Arbitration Agreement. 'Arbitration Agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.' So My Lord in the small sub-section there are numerous parts which my friends will deal with. 'So Arbitration Agreement is to submit all or certain disputes', so Your Lordship knows there are something called accepted matters, that some matters will not go to arbitration, 'which may arise in respect of a defined legal relationship.' And this the New Zealand Court says, define legal relationship is because we don't want to keep it very very vague and broad, you should have a defined legal relationship. That is the point. 'Whether contractual or not.' So even if it's not contractual and I can only think of say, for example, a quasi-contract under the Chapter 9 of the Contract Act, where it creates relationship of contract. That also is possibly covered with this. Now this can be a simple vanilla clause where there's an arbitration... there is a basic contract which contains an Arbitration Clause. And that perhaps covers 99% of the cases where there is a contract between the parties, it contains an Arbitration Clause. But Lordship will now come to 7(3)...7(2),- 'An Arbitration Agreement may be in the form of a clause in the contract or in the form of a separate agreement.' So you can have a situation where the contract is a mother agreement, so to speak, and the clause is embedded in it. Or you could have a contract. It may have a separate... and if I may just add, whether contractual or not may also impact like in the case of ***Chloro Control***, how far it extends to parties claiming under them, and so and so. So those, strictly speaking, the other party may not be privy to the contract, but it still may be covered with the Arbitration Clause. But we are now basically concerned with stamping. Now, kindly come to an Arbitration Agreement shall be in writing. Now 4 is important. An Arbitration Agreement is in writing, if it is contained. So it's actually a deeming provision. 7(4), in my humble submission, is a deeming provision. It is taken to be in writing in ABC situations. Lordship may just see (A) a document signed by the parties, there is no dispute about that. Now (B) and (C) create problems which are sorted by saying that if there is an Arbitration Agreement in correspondence, telecommunication, it is deemed to be in writing, though the word deemed is not used. My humble submission is Parliament has created a legal fiction to say that an

1 Arbitration Agreement shall be in writing if A, B, C, if it is contained in a document signed to
2 the parties, an exchange of letters, telex, telegrams, or other means of telecommunication,
3 including communication through electronic means which provide a record of the agreement
4 or an exchange of statements of claim and defence in which the existence of an Arbitration
5 Agreement is alleged by one party and not denied. So even by the rule of non-traverse, I don't
6 deny the allegation.

7

8 **CJI D Y CHANDRACHUD:** Actually, the Section 7(4) is inartistically worded. What they
9 meant to say was not that it shall be deemed to be in writing, but there shall be deemed to be
10 an Arbitration Agreement if A, B and C are fulfilled.

11

12 **ARVIND DATAR:** Yes, that there is an Arbitration Agreement, though the parties may not
13 simply say that. Your Lordships see what's the standard clause?

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15 **CJI D Y CHANDRACHUD:** You need not have a contract where both signed the bottom. A
16 sends a letter to B. B responds by email or letter and say I accept your proposal for an
17 arbitration. It's an Arbitration Agreement.

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19 **ARVIND DATAR:** Yes.

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21 **JUSTICE SANJAY KISHAN KAUL:** Need not be in a formatted Arbitration Clause.

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23 **ARVIND DATAR:** Yes, like a template clause. It need not be in the template clause, which
24 says dispute shall be in arbitration. It will be governed by so and so rules.

25

26 **CJI D Y CHANDRACHUD:** I propose that all our disputes about price escalation and
27 damages be referred to arbitration. The other party says, Yes, I agree, subject to my
28 counterclaim before the arbitrator. It's an Arbitration Agreement.

29

30 **ARVIND DATAR:** And the other issue, which doesn't arise...arise in stamping in electronic
31 contracts, which I'll come to when I come to Stamping. You can't possibly stamp the electronic
32 contracts at the moment, I'll come to that. So my humble submission is when you say
33 Arbitration Agreement shall be in writing, now, what is the duty of the Court under 11(6A)?
34 My humble submission is if the Arbitration Clause is embedded in the contract itself, then the
35 court does not need to do anything further than say there is an Arbitration Clause. That's it.
36 You please go ahead and whatever you want to say, say it before the arbitrators. But suppose
37 one party says, I've got an Arbitration Agreement. He files a section, tells the other side appoint

1 an arbitrator. That party says, no, there is no Arbitration Agreement at all. Then you may refer
 2 to statement of claim, non-opposition, correspondence, telecommunication, there could be a
 3 Zoom call which is recorded. You don't know. So then the court will say, yes, there exists an
 4 Arbitration Agreement because of the nature of the correspondence, because of the nature of
 5 the telecommunication, correspondence, and so on. And in my humble submission, the role
 6 of the Court stops there. And Your Lordship will kindly note that 11(6A), Lordship will not
 7 contemporaneously or a bit late 2019 also, when 11(6A) was amended the corresponding
 8 provision for international arbitration was Section 45. And Lordship will kindly come to 45
 9 where the duty of the Court or the jurisdiction of the Court is wider. And if Your Lordship will
 10 come to Section 45, page 1226, there the last part, power of judicial authority to refer to parties
 11 in arbitration. Parties to arbitration, notwithstanding anything contained in Part 1 or the Code
 12 of Civil procedure. Lordship will note here there is a *non obstante* clause, *qua* statutes.

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14 A judicial authority when seized of an action in a matter in respect to which parties have made
 15 an agreement referred to in Section 44, shall, at the request of one of the parties or any person
 16 claiming through or under him, refer the parties to arbitration. Now, this is important unless
 17 a *prima facie* finds that the Arbitration Agreement is null and void inoperative and incapable
 18 of being performed. And one thing, *prima facie* has been brought in, in 2019. Now Lordship
 19 will note that, when the Law Commission report... 246 Law Commission report came, they
 20 wanted to restrict the jurisdiction of the court under 11(6A) to existence and null and void. If A
 21 Lordship sees the Law Commission report, that makes it very clear and it is in paragraph... It
 22 comes with para 22 and para 44 of the judgment of **NNG 2**.

23

24 **JUSTICE SANJAY KISHAN KAUL:** Volume in page...

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26 **ARVIND DATAR:** Yes, it starts at 302 and Lordship will kindly come to para 44, which is at
 27 internal page 57, which should be page 360. Yes. Page 360. Just one minute... 358 of the PDF
 28 page.

29

30 **JUSTICE SANJIV KHANNA:** Paragraph?

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32 **ARVIND DATAR:** Paragraph 44. Now My Lord, the extract from the Law Commission report
 33 the relevant part is para 33. Lordships may just read 32. In relation to the nature of
 34 intervention, the exposition of the law is to be found in the decision of the Supreme Court in
 35 Shin-Etsu, where the Supreme Court has ruled in favour of looking at the issues/controversy
 36 only *prima facie*. 33 is important and it has been italicised. It is in this context, the
 37 Commission has recommended the amendments to Section 8 and 11 of the Arbitration and

1 Conciliation Act 1996. The scope of judicial interventions only restricted to situations where
2 the Court/judicial authority finds that the Arbitration Agreement does not exist or is null and
3 void. Now, My Lord may kindly note, "or is null and void" is not added in the ultimate law
4 which is made by Parliament. 'Null and void' is there in 45 but 'null and void' is not there in
5 11(6A). My humble submission is, if the Law Commission's... Sorry. My humble submission is,
6 if Parliament had chosen to put in 11(6A) both existence and also null and void, then Your
7 Lordship's jurisdiction would have been broader. But by deliberately deciding not to add null
8 and void, they have further restricted the jurisdiction to existence. And this they further
9 emphasized by using the word 'confined'. So now My Lord....

10
11 **CJI D Y CHANDRACHUD:** And actually, when they enacted 6(a), 6(a) came by Act 3 of
12 2016. At that time in Section 45, the word null and void was already in existence.

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14 **ARVIND DATAR:** It was.

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16 **CJI D Y CHANDRACHUD:** Except that *prima facie* came in 2019, so Parliament had before
17 it.

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19 **ARVIND DATAR:** Yes.

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21 **CJI D Y CHANDRACHUD:** The provision of Section 45, where the power of the Court was,
22 in that sense, extended to determining whether the agreement was null and void. And they
23 didn't follow that formula for domestic arbitration.

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25 **ARVIND DATAR:** Yes. And also Section 8. Your Lordships see Section 8, that is also much
26 wider. This is existence of a...

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28 **JUSTICE SANJIV KHANNA:** Mr. Datar there will be difficulty in accepting that argument.

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30 **ARVIND DATAR:** Pardon me, My Lord.

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32 **JUSTICE SANJIV KHANNA:** That Section 8, the power of the Court is wider compared to
33 Section 11.

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35 **ARVIND DATAR:** No, I'm not saying...

1 **JUSTICE SANJIV KHANNA:** Otherwise, fastest finger first, everybody will start filing
2 petitions, Civil suits.

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4 **ARVIND DATAR:** No. At the moment we're only concerned at 11(6A) and Stamp Act.

5

6 **JUSTICE SANJIV KHANNA:** There is some difficulty in this argument also. Existence can
7 be something which is null and void cannot exist.

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9 **ARVIND DATAR:** No, My Lord...

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11 **JUSTICE SANJIV KHANNA:** So there is no... Parliament also when it enacts, it does keeps
12 out redundant words. So confine... Won't it will be better for you to confine yourself to the issue
13 in question?

14

15 **ARVIND DATAR:** 11(6A). Only my... only submission is relating to the issue which I'll come
16 to it later.

17

18 **JUSTICE SANJIV KHANNA:** Relating to the Stamp Act?

19

20 **ARVIND DATAR:** Yes, Stamp Act. Only my submission is which I'll just elaborate it later, if
21 necessary. In a landmark essay called 'Metaphysics of Nullity', where they say nullity and
22 voidness are *de jure* concepts. An agreement can exist in fact, but it could be null and void in
23 law, like a notification, which is *ultra vires*, the act exists in fact. But unless it is struck down,
24 still it exists in fact, but not in law. But at the moment I'll take Your Lordships hint. I'll straight
25 away go to 11(6A). So my submission is... No, I was answering My Lord, the Chief Justice's
26 question.

27

28 **JUSTICE SANJIV KHANNA:** That's fine.

29

30 **ARVIND DATAR:** No, What I'm saying is when the draftsman sat down and prepared 11,
31 6(a) where is judicial intervention? What's the role of the courts? It's in Section 11, it's in 8, it's
32 in 9, it's in 14, it's in 34 and so on. So in the case of appointment of Arbitrator you have 11 and
33 45. 45 has null and void . Here they've dropped null and void. So my submission is if the
34 agreement is null and void, still My Lord, the court can't go into this question on, as for
35 existence is concerned, say no, no there is no Arbitration Agreement at all. It's barred by
36 limitation. I'll come to that because howsoever the court may want to be a sentinel on the
37 [UNCLEAR], so to speak, and filter out meaningless arbitrations nevertheless, in the interest

1 of the Arbitration Law itself, the court must confine itself to what Parliament says. Just see the
2 existence of an Arbitration Agreement. Because 16 talks of validity, Lordship will see Section
3 16 for a moment. Lordship sees Section 16. If I take Your Lordships, 45 is null and void... Page
4 1214.

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6 **CJI D Y CHANDRACHUD:** Which [UNCLEAR] are you referring to?

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8 **ARVIND DATAR:** 4(a) My Lord. Page 1214.

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10 **JUSTICE SANJIV KHANNA:** 1214?

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12 **ARVIND DATAR:** Yes. 16-1 at page 1214. And I'll go straight away to the Stamp Act. 'The
13 Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with
14 respect to the existence or validity of the Arbitration Agreement, and for that purpose.' So My
15 Lord, this is there from day one, from the 1990s from day one. It gives an hint that the Tribunal
16 has to see existence itself. If there's an arbitration existence, then it may have to go into the
17 issue of validity, because once the Arbitration Agreement exists, it may become invalid on so
18 many other grounds. But there's an Arbitration Agreement. So existence and validity are
19 basically two different concepts. S. B. Patel introduced validity at the appointment stage and
20 that was expressly rejected later. Your Lordship will find S. B. Patel was noticed by the NNG 1
21 and there they say that, no, we will not...

22

23 S. B. Patel expressly says that we will go into validity. Also, the duty of the Court is to go into
24 validity. And that is then taken off by the Amendment. And that Your Lordship will find....
25 Lordship will come to 5-A page... Lordship will just bear with me for a moment. They refer to
26 S.B. Patel. The extract is S.B. Patel, para 38, page 355. Now about the extract para 12 of SBP
27 and Lordship will just come to, above para 39, the italics portion.

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29 **CJI D Y CHANDRACHUD:** Where are you reading Mr. Datar?

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31 **ARVIND DATAR:** Page 353. It starts para 38.

32

33 **CJI D Y CHANDRACHUD:** At Volume 5-A?

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35 **ARVIND DATAR:** Yes, Volume 5-A, yes My Lord. And Lordship will just go to the end of the
36 paragraph which is on the next page and just above para 39, the italics portion. My Lord has
37 got the italics portion? We are inclined to the view that the decision of the Chief Justice on the

1 issue of jurisdiction and the existence of a valid Arbitration Agreement would be binding on
2 the parties when the matter goes to the Arbitral Tribunal and at subsequent stages, except in
3 appeal, so and so and so and so. So in this entire paragraph, they say, the Chief Justice must...
4 above para 39. If Your Lordship wants, come to placitum B of the same page. The question in
5 the context of subsection 7 of Section 11 is, what is the scope of the right comfort to rule upon
6 its own jurisdiction, once the Chief Justice, etc.? Then they say that at the appointment stage
7 under 11, the Chief Justice has to go into the jurisdiction and existence of a valid Arbitration
8 Agreement. And once he decides that it's binding on the Arbitral Tribunal. So I'll just say that
9 as far as 11(6A) is concerned, in 2015 they have made it absolutely clear that you confine
10 yourself to the existence of an Arbitration Agreement. Do not go into validity. Now, one more
11 thing we should note, because whatever Your Lordship decides will impact the further law,
12 because now they are going to delegate the power to institution. That's a proposal which has
13 not yet been notified. Once an arbitral institution is to go into appoint an arbitrator, then that
14 institution has no jurisdiction to go into the issues of other aspects at all. They will simply
15 appoint, and then leave it to the arbitrator to decide.

16

17 **JUSTICE SANJIV KHANNA:** Mr. Datar, therefore, 11(6A) is no longer, it's been 2019 and
18 now...

19

20 **ARVIND DATAR:** It's not been notified. It's not been notified.

21

22 **JUSTICE SANJIV KHANNA:** They'll not be notified because of the institution not being...

23

24 **ARVIND DATAR:** Yes, yes.

25

26 **JUSTICE SANJIV KHANNA:** Otherwise once the institutions are functional.

27

28 **ARVIND DATAR:** Yes...No, I'm saying that all that is part of a scheme.

29

30 **JUSTICE SANJIV KHANNA:** There's no connect between institutionalization in the form
31 [UNCLEAR] and the earlier annexure.

32

33 **ARVIND DATAR:** No. What I'm submitting is Section 11 is the appointment stage, what we
34 call the pre arbitration stage or the pre-referral stage. Now, since Your Lordships asked
35 question, there are clear distinctions. You can't appoint an arbitrator. Therefore, the
36 arbitration cannot start. Court intervenes and says, Justice so and so, or Mr. so and so is the
37 arbitrator or the Chairperson, you start moving. Then you go to Section 16. Before 16 you argue

1 on existence and validity. Now come to 34. I'm saying it's a full scheme. Existence is by the
2 court. Existence and validity is by the Arbitral Tribunal and the correctness of the Arbitral
3 Tribunal on validity is then part of a limited judicial review under 34. So, Lordship see
4 34(2)(a)(ii). So if you now get into validity, you are really rupturing the entire scheme in my
5 humble submission because validity is left to the arbitrator. They decide the validity. The
6 Arbitral Tribunal decision is not final. It's subject to judicial review by a 34 court. Under
7 34(111)222.

8
9 Please come to 34(2)(a)(ii). Sorry. So Lordship, kindly see the arbitration 34(2)(a)(ii) -
10 Arbitration Agreement is not valid under the law, in which so that existence is not part of their
11 only the validity. And I'm just thinking to myself, Lordship, I remember our Law College days.
12 We learned that all contracts are agreements, but all agreements are not contracts. That we
13 studied in the Law College. So I would say use that analogy to say, that every valid Arbitration
14 Agreement exists, but every existing Arbitration Agreement need not be valid. An Arbitration
15 Agreement may be there. And I'll come to Mulla's passage, which is quoted in this. That's why
16 when I come to contract, I'm going to point out the word void contract is an oxymoron. You
17 can't say that, but I'll come to Stamp Act later. So, my submission is I'll conclude my
18 submissions on Section 7, 11, 16 and 34 and say that validity has gone into the Arbitral Tribunal
19 area subject to a check under 34 and of course to an appeal under 37 and 136. Now let me come
20 to straight to the Stamp Act. How does this...

21

22 **CJI D Y CHANDRACHUD:** Yes, sorry.

23

24 **ARVIND DATAR:** Now I am coming straight away to the Stamp Act and Lordship will come
25 to page 394, Volume 5-A. Which is the NNG 2 judgment. And before reading it, I'll just give a
26 broad overview of what I wanted to submit. 394 of Volume 5-A. This is the part of the NNG 2
27 majority judgment.

28

29 **JUSTICE SANJIV KHANNA:** 394. Volume 5-A?

30

31 **ARVIND DATAR:** 5-A. I'm not going to read all the paragraph. I'll just show Lordship what
32 the majority has held. Then I'll just come to the conclusion. My apologies.

33

34 **CJI D Y CHANDRACHUD:** No, no, we apologize.

35

36 **ARVIND DATAR:** Now just I'll tell Lordship broadly what is the view taken by the majority
37 in that. What they say is the Stamp Act to the fiscal enactment. It has got his own importance.

1 It's a source of revenue for the state and under Section 33, when the document is tendered,
2 which is not stamped or inadequately stamped, then the judicial authority or the holder of
3 public office...

4

5 **CJI D Y CHANDRACHUD:** Has to impound it.

6

7 **ARVIND DATAR:** ...has to impound it. Now. My Lord, what is important is 33(2) and 33(2)
8 cast a duty to examine, because as a Lordship knows, it could not be stamped, it could be
9 inadequately stamped. There could be very many situations. Is it coming under which item of
10 the schedule? What's the quantum of Stamp Duty? inadequacy? All these issues are there. That
11 has to be examined in terms of 33(2). And what the majority says is that it is our duty, 11(6A)
12 Is a duty to examine the existence of an Arbitration Agreement, 33(2) cast a duty upon us to
13 examine the correctness of the stamp, so both are in different compartments. The fact that my
14 jurisdiction under 11(6A) is limited to examination does not mean that I cannot confine my
15 duty to 33(2). And in my humble submission, that is an error of the majority because
16 Parliament has decided, you don't worry about stamping in that sense, you just deal with the
17 existence of an Arbitration Agreement. Stamping is a matter of validity. Stamping,
18 registration, limitation... all this goes to validity. Let that be decided. But what the majority
19 says is the document is under our watchful gaze. And if we notice that the document is not
20 stamped, then we necessarily have to 33(2). My humble submission is even if under the
21 watchful gaze, you notice it is not stamped, under 11(6)(a) today you're confined to only
22 existence of an Arbitration Agreement. The statement of objects and reason states, you will
23 not deal with other issues. I don't mean to be disrespectful, but I'm just saying, in a matter of
24 speaking, what Parliament says is let the courts confine to existence, all other issues, let it be
25 relegated to the Arbitral Tribunal. Ultimately, what is the purpose? The arbitration must be
26 fast tracked as much as possible. The judicial pit stop must be very, very limited. Under Section
27 11 or 8, very very limited. Let it go to arbitration because parties have agreed that my dispute
28 will be resolved by arbitration. And in great [UNCLEAR] Your Lordship said, all these are
29 issues which interminably delay the arbitration proceedings. Stamping, registration, validity,
30 limitation. The court need not go into it, but just see the passages.

31

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

33

34 **ARVIND DATAR:** In my humble submission, these require to be overruled is my respectful
35 submission.

36

37 **CJI D Y CHANDRACHUD:** Which is the paragraphs you want us to see?

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ARVIND DATAR: It starts at...

CJI D Y CHANDRACHUD: Just give us the paragraphs first. We'll make a note and then quickly brief those paragraphs.

ARVIND DATAR: Yes. Lordships will just come to para 146 now, My Lord,

CJI D Y CHANDRACHUD: Paras which you think are important so that...

ARVIND DATAR: So I don't need to read it My Lord?

CJI D Y CHANDRACHUD: We'll read them but if you can just tell us which...

ARVIND DATAR: Yes. Para 146 from Placitum D. 146 are the contentions. At page 394 of Volume 5. Now para 147 is important. Then My Lord, the final conclusion is at para 150, 151, 152. Para 146, 147, 150, 151, 152. These are the important paras.

CJI D Y CHANDRACHUD: These are the only paras?

ARVIND DATAR: These are only paras.

CJI D Y CHANDRACHUD: And what about the minority?

ARVIND DATAR: Minority goes into the aspect, both Justice Rastogi and Justice Roy says that, look, it's not our concern to do that at all.

CJI D Y CHANDRACHUD: Can you just give us the paragraph's number later?

ARVIND DATAR: I'll give you the paragraph number. In fact, apart from this, Justice Roy goes into the aspect of Section 5 of the Arbitration Act. His Lordship compares a UNCITRAL model with Section 5. I'm coming to that. So I just finished 33(2). Please see, 33(2). Can I just read this paragraph first? Sorry My Lord? Para 146 at page 394, in Volume 5-A. Heading starts Section 33 'The Court or the Arbitrator to Act'.

My humble submission is Lordship will see at page 90, which is page 394. It's sub-paragraph (O), and the question the Court puts to itself is Section 33 and 35 of the Stamp Act,

1 the Court or the Arbitrator to act. And the Court rules that the Court has to act. And in my
2 humble submission, that is against the mandate of Section 11(6A) read with Section 5 of the
3 Arbitration Act and I'll make good my submission in the context of 33(2). May I just read the
4 paragraphs first and then go to the statutory... Please see Para 147. Para 146 is the rival
5 contentions. Now, please come to para 47. We see merit in the contention of the Appellant.
6 Apart from the Court acting in consonance with the law, when it adheres to Section 33 and 35
7 of the Stamp Act, when it applies, in our view, under a watchful gaze of the Court, be it the
8 High Court or the Supreme Court, the issue related to Stamp Duty in a case where there is no
9 Stamp Duty paid is best resolved. So this law is that when the court sees that there is no Stamp
10 Duty paid, it immediately impounds the document and proceeds. Then the question would
11 arise as follows. A document containing the Arbitration Clause may not bear any Stamp Duty.
12 We have already found that even in an Arbitration Agreement on its own may require to be
13 stamped as submitted by the learned amicus. But then the court can proceed on the basis that
14 the amount of Stamp Duty which the Arbitration Agreement contained in an Arbitration
15 Clause would be executable to be extremely meagre. There is very little likelihood of such an
16 Arbitration Agreement not being stamped. Therefore, what the court is to consider is when the
17 contract in which the Arbitration Clause is contained is not duly stamped, then it becomes a
18 duty of the Court to Act under 33 and 35 of the Stamp Act. Then they discuss a background of
19 Section 11(6A). I'll skip that with Your Lordship's permission. Now 150. The question further
20 arises as to whether in view of the power of the Court under Section 11(a) to find only *prima*
21 *facie* the existence of the Arbitration Agreement, it would enable the Court to make a reference
22 and appointment and relegate the issue of impounding the document to the arbitrator. In any
23 shirking of the statutory duty by the Court under Section 11(a), to act in tune with the
24 peremptory authority dictate of the Stamp Act appears to us unjustifiable. Such abdication of
25 its plain duty is neither contemplated by the law giver, nor would it be justifiable as causing
26 the breach of Section 11(6A). Now 152 is the final conclusion. The view that cases under Section
27 11 would consume more time and hinder the timely progress of arbitration, and that the matter
28 must be postponed so that the arbitrator will be more suitably deal with it does not appeal to
29 us. While the Stamp Act is primarily intended to collect revenue and it is not intended to arm
30 a litigant to raise technical pleas, this would hardly furnish justification for the Court, to ignore
31 the voice of the Legislature couched in unambiguous terms. We find that the view expressed
32 in ***SMS Tea Estates*** being reiterated, despite the insertion of 11(6A), would promote the
33 object of the Stamp Act, and yet be reconcilable with the mandate of Section 11(6A). We may,
34 however, qualify what we have said with the caveat. There may be cases where no Stamp Duty
35 has been paid, it paves the way for the unambiguous discharge of the duty under 33 and 34 for
36 the Stamp Act. There may be however cases, where it may be stamped, but the objection is
37 taken by the party that it's not duly stamped. In such cases, no doubt it is ordered as the duty

1 of the Court, to examine the matter with reference to the duty under Section 33(2). If the claim
2 that is insufficiently stamped appears on the... appears to the Court to be on the face of it,
3 wholly without foundation, it may make reference on the basis of existence of an Arbitration
4 Agreement. Otherwise, and then leave it open to the arbitrator, to exercise the power under
5 Section 33, should it become necessary. This approach, just does justice to the word examine
6 in 33(2) of the Stamp Act. While not ignoring the command of Section 11(6A) of the Act. It is
7 not to be confused with the duty to examine *prima facie* whether an Arbitration Agreement
8 exists under Section 11(6A), but is related to the duty to examine the matter under Section
9 33(2) of the Stamp Act. Now this particular passage says, the Court has two duties 11(6)(a) is
10 existence, 33(2) is Stamp And my power under 11(6A), does not take away my duty under
11 33(2). And my humble submission is, that is in the teeth of Section 5, of the Arbitration Act.
12 Now please see 33(2), and please see Section 5. Kindly come to 33(2) of the Stamp Act Volume
13 4-A. The Stamp Act starts at page 324 and 33 is at page 357. And if I may read that, please
14 come to page 357 Volume 4-A. Lordship has got 33(1). May I read now 33(1) and 33(2), then
15 I'll come to Section 5 of the Arbitration. Every person having by law, or consent of parties
16 authority to receive evidence, and every person in charge of a public office, except an officer of
17 police, before who many instruments chargeable in his opinion with duty is produced or comes
18 in the performance of his function shall, if it appears to him that such instrument is not duly
19 stamped, impound the same. Therefore My Lord the jurisdiction is conferred upon authorities
20 who can receive evidence and office people who are holding public office, he shall impound
21 the same. Now 33(2) is important. For that purpose, every such person shall examine every
22 instrument so chargeable and so produced or coming before him in order to ascertain whether
23 it is stamped with a Stamp Duty of the value and description required by the law enforced in
24 India, when such instrument was executed or first executed. Now 33(2) is a very wide duty.
25 You have to examine what, examine whether it is of the proper value, valuation, description,
26 which is classification, is it a license? Is it a lease? Is it a bottom rebond? We had a lot of
27 controversy mortgage by, whether it's what you call mortgage, a conditional mortgage,
28 different types of mortgage. What is the Stamp Duty? Lease license is a common problem. So
29 you have to examine whether it's a value and the description required by a law, when such
30 instrument was executed or so and so. And My Lord, provided all these things are there which
31 says that, nothing contained shall deem to require a Magistrate to examine or impound if it
32 does not so things fit an instrument. But on the limited point of 33(2), I am submitting that
33 the word 33 includes a verb examine. The impounding under 33(1) has to be done after
34 examination under 33(2). So 33(2) comes first, you *prima facie* see there's a document. It's
35 not stamped. Then you exercise, pause under 33(2) and then you... Now please come to Section
36 5 of the Arbitration Act which... 1207 in Volume 4-A. And in that context, I would rather Your
37 Lordship sees the minority judgment of Justice Roy, where his Lordship extracts Section 5,

1 the UNCITRAL model, Section 5 of the Act, so everything will come in one place. Please come
2 to para 341 of the *NNG 2* decisions. Para 341.

3

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

5

6 **ARVIND DATAR:** Page I'll just...455 yes, yes. 455 of Volume 5-A. I'll start with 341. Your
7 Lordships has got 341, 342? Have all Your Lordships got 341, Minority view of Justice Roy. It's
8 very important. Further on reading Article 5 of the Model Law and Section 5 of the Arbitration
9 Act 1996, which cover the provisions for judicial intervention in arbitral proceedings, it is clear
10 that Parliament went beyond Article 5 of the UNCITRAL Model Law and added a *non-obstante*
11 Clause. To substantiate this point, it is pertinent to quote the provisions in full. Article 5 of the
12 UNCITRAL Model Law reads us under, '- Extent of court intervention in matters governed by
13 this law, no court shall intervene except where so provided in this law.' Now please come to 5,
14 'extent of judicial intervention notwithstanding anything contained in any other law for the
15 time being enforced, in matters governed by this part, no judicial authority shall intervene,
16 except when where so provided in this part' which is Part 1.

17

18 **CJI D Y CHANDRACHUD:** So the... Of a *non obstante* Clause covering Statute Law in
19 11(6A), it is really dealt with by this omnibus *Non Obstante* Clause in Section 5.

20

21 **ARVIND DATAR:** No... Yes. I'm grateful. I'm just putting for Your Lordship's kind
22 consideration a further point. Now, 33(2) was already there when the Arbitration Act '96 came
23 in. There's an examination on the correctness of Stamp Duty. There is no doubt that Your
24 Lordship exercising powers under 11(6A) is an authority which can receive evidence. My
25 humble submission is 5 must be read with Section 11(6A). And when so read, it will prevail
26 over 33(2) because these judicial intervention powers of the Supreme Court and the High
27 Court intervention will only be to the extent provided in Part 1. Because it says 'so provided'
28 and the word so provided means only existence of Arbitration Agreement. And the word
29 examine is used in 11(6A) examine is used in 33(2). There are two types of examinations. And
30 the Stamp Act Examination is expressly excluded, Is my humble submission. Your Lordships
31 may kindly consider. Now, while Lordship is on this... Lordship will now come to an interesting
32 paragraph. Now I'm... Yes, I'm now coming to the... I'm now going into the...

33

34 **CJI D Y CHANDRACHUD:** How does the majority deal with Section 5?

35

36 **ARVIND DATAR:** Pardon me?

37

1 **CJI D Y CHANDRACHUD:** How does the majority deal with Section 5 in NNG2?

2

3 **ARVIND DATAR:** No, this is just extracted. But subject to correction only Justice Roy deals
4 with these UNCITRAL Model Law.

5

6 **CJI D Y CHANDRACHUD:** Let's see that. PDF page?

7

8 **COUNSEL:** 388.

9

10 **CJI D Y CHANDRACHUD:** Let's see that right away.

11

12 **ARVIND DATAR:** Yes, I'm grateful. Sorry. I missed this. Section 5, no doubt provides for a
13 *non obstante* clause. It provides against judicial interference, except as provided in the act.
14 The *non obstante* clause purports to proclaim. So despite the presence of any law which may
15 provide for interference otherwise, however this does not mean that the operation of the
16 Stamp Act, in particular 33 and 35 would not have any play we are of the clear view of that the
17 purport of 5 is not to take away the effect of 33 and 35 of the Stamp Act. In my humble
18 submission, where the majority erred is, 33 and 35 is not given a go by. It will be taken up by
19 the Arbitral Tribunal.

20

21 **CJI D Y CHANDRACHUD:** And the object was to really therefore constitute Part 1 as a code
22 in itself.

23

24 **ARVIND DATAR:** Yes, yes, absolutely. And I'm going to come to further 35 and 36.

25

26 **CJI D Y CHANDRACHUD:** So the limits at least in so far as judicial intervention is
27 concerned, the limits of intervention were intended to be exhaustively specified within the
28 ambit of Part 1.

29

30 **ARVIND DATAR:** Otherwise what you're doing is, actually with such a barrier is posed, we
31 are putting a coach and flow through that barrier. We're saying no, no. I have got 11(6A) power,
32 but my power under 33(2) also continue. I'm saying both can't continue. And the idea is, it's
33 not that revenue will be lost or things will go. This will come before the Arbitral Tribunal and
34 Lordship will further come to Section 35 of the Stamp Act and 36. Suppose in the course of
35 arbitration, I tender an agreement and the other side doesn't raise an objection to Stamp.

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37 **JUSTICE SANJIV KHANNA:** Really Stamping is nothing to do with validity as such.

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ARVIND DATAR: Sorry. Nothing to do with validity.

CJI D Y CHANDRACHUD: It deals with taxability.

ARVIND DATAR: It deals with taxability and enforceability.

CJI D Y CHANDRACHUD: An unstamped agreement is not invalid. It cannot be used as an evidence. Therefore, It cannot be cited as an exhibit.

ARVIND DATAR: It will affect its enforceability.

CJI D Y CHANDRACHUD: There is a specific provision in Stamp Act?

ARVIND DATAR: Yes and I may also point out...

JUSTICE SANJAY KISHAN KAUL: The issue is where will it be debated? Is it debated before the [UNCLEAR]. It's a forum issue.

ARVIND DATAR: Yes. So it's not that if the court ignores it, it is going to escape. And I want to make one further submission.

CJI D Y CHANDRACHUD: 35 is very clear. The 35 says, it will not be admissible in evidence. That's all.

ARVIND DATAR: Yes, but you please see Section 36 of the Arbitration Act.

JUSTICE SANJIV KHANNA: Mr. Datar, that's the reason when you are going repeatedly on validity, I didn't want to interrupt you because it's not really a... Stamp Act has got nothing to do with validity.

ARVIND DATAR: Exactly. Exactly. No My Lords, what will happen is I'm going to come to that. When I come, there's a very good passage extracted by the majority from Mulla. Please come to 36.

JUSTICE SANJIV KHANNA: Page 36 of Stamp Act?

1 **ARVIND DATAR:** Of the Stamp Act. That will be page 358... 360. Top.

2

3 **JUSTICE SANJAY KISHAN KAUL:** I think once it is admitted in evidence, it is not cannot
4 be called off.

5

6 **ARVIND DATAR:** Yes, that's going to be because the majority says an agreement not
7 stamped is non existing law, which I'm going to come to later on contract. It's bereft of
8 existence that may not be a correct proposition. If an agreement and that's what
9 **Jhaverchand** says.

10

11 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] on payment of penalties.

12

13 **ARVIND DATAR:** My Lord, I was going to say one thing. I sign an agreement. I don't stamp
14 it. Now I run the risk, if I don't stamp it under Section 17 stage, at execution stage, tomorrow,
15 if I want to enforce it, I have to pay ten times the duty. So I take the risk. I know many cases
16 where the Arbitration Clause is contained on the back of a bill, or it's contained in some letter.
17 Number of contracts take place between multiple parties. I don't want to go every time and get
18 a non-judicial stamp, get Rs. 100, witness, et cetera. I don't need it. I got an agreement. I got
19 a very good agreement. And again, the difficulty of the majority judgment is, suppose you say
20 that it was an Arbitration Clause. It's not denied. How do you stamp that? It's in a
21 telecommunication, electronic record. Now the amendments have been made. That electronic
22 record is a document.

23

24 **CJI D Y CHANDRACHUD:** Issue that, we are told that now, on the basis of **NNG2**, all
25 existing arbitrations and objections is being raised. How could this?

26

27 **ARVIND DATAR:** I'm coming to that. Because non-existing law, not exist.

28

29 **CJI D Y CHANDRACHUD:** 36 is a clear answer, but once the document is marked in
30 evidence, then, their instrument cannot be questioned on the ground of insufficient stamping.

31

32 **ARVIND DATAR:** That's why in **Jhaverchand**, the Supreme Court points out that the
33 party has to be vigilant. If it does not take the objection at that stage and allows the document
34 to be marked or be normal P1, P7 or whatever it is. Then once it's marked as an exhibit, you
35 can't as the.... says at any stage of the proceeding, you can't then say that, look, it's not stamped,
36 you should not have acted upon it. So my humble submission is, to conclude my submission
37 33(2) examination, *qua* stamping.

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CJI D Y CHANDRACHUD: Just, can you just formulate this, Mr. Datar?

ARVIND DATAR: My humble submission is, the majority judgment on this duty of the court, to impound the document is incorrect because, the majority did not notice Section 5, did not consider Section 5, of the Arbitration Conciliation Act.

CJI D Y CHANDRACHUD: We did not apply Section 5.

ARVIND DATAR: Apply Section 5.

CJI D Y CHANDRACHUD: Because they noticed it.

ARVIND DATAR: Correct, correct. They noticed. I'm sorry. My apologies. Did not apply Section 5. In fact, they say Section 5, doesn't overtake my duty under 33(2). So my submission is because of Section 5 read with Section 11(a), the judicial intervention, so it contemplates that the court notices there is a flaw, there is a defect. But the court says, don't intervene because, it now must go to the Arbitral Tribunal where all these issues will be dealt with. So once judicial intervention is confined to existence of an Arbitration Agreement, the jurisdiction to examine stamping under 33(2) is taken away when Court exercises powers under 11(6A), that's all. And with that I'll come to Contract Act. Now, My Lord, the more than Stamp Act, the difficulty in the *NNG judgment* is to say that if an agreement is not stamped, it is bereft of existence, it is void and the majority says, voidness and enforceability are conflated out together. Which I humbly submit, it may not be a correct interpretation of the Contract Act, because Lordship kindly sees, they take 2(g) and 2(h) of the Contract Act. I'll come to the definitions. And then they say that if an Agreement is not stamped, it is void. In my humble submission, if an Agreement is not stamped, it is not void, it's a curable defect because it's an agreement filed under 2(g), 2(h), Section 10, and Section 23 of the Contract Act. And while on... and 28, also. Permission. I'll read the statutory provision, and then I'll try to submit that the judgment may not be in consonance with what is the statutory provision on Contract Law. Now, what they basically say is, if an agreement is not stamped, it is not a contract, it's not an enforceable contract. And I'll show to Your Lordships, that is not in my humble submission, not the correct view.

CJI D Y CHANDRACHUD: But that's directly contrary with the statute itself.

ARVIND DATAR: That's my submission.

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CJI D Y CHANDRACHUD: Statute merely makes it inadmissible in evidence.

ARVIND DATAR: That's all, and what...

CJI D Y CHANDRACHUD: It's a statute for the collection of revenue. So the cloud and the document on its admissibility, not in the document of the transaction. The cloud on its admissibility is listed by the payment of revenue and the penalty for not having paid it in the first place.

ARVIND DATAR: My Lord, our concern is apart is... as Your Lordship put it, apart from at various stages this point is being raised and everything is come to a standstill.

JUSTICE J.B. PARDIWALA: Should you not fortify your last argument of agreement being void relying on *Hindustan Steel*, para 6 and 7?

ARVIND DATAR: Yes, yes.

JUSTICE J.B. PARDIWALA: Just kindly read it.

ARVIND DATAR: *Hindustan Steel vs Dalip Construction?*

JUSTICE J.B. PARDIWALA: Correct. Kindly read two paragraphs 6 and 7 respectively. That's at page 588. What has just fallen from My Lord, the Chief Justice apropos what you argued the last.

ARVIND DATAR: Yes, yes.

JUSTICE J.B. PARDIWALA: Before you take over Contract Act. The last part.

ARVIND DATAR: At page 588 My Lord?

JUSTICE J.B. PARDIWALA: 588. It's a Three-Judge Bench decision.

ARVIND DATAR: *Hindustan Steel* is actually 1969 (1) SCC 597 at 600.

JUSTICE J.B. PARDIWALA: Correct and it's a part of your paper book.

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ARVIND DATAR: Yes, May I read Paragraphs 6 and 7. I'll read Para 5.

JUSTICE J.B. PARDIWALA: Yes.

ARVIND DATAR: May I read page 588, Volume 5. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer. Section 35 provides that the admissibility of an instrument once admitted in evidence, shall not accept in Section 61, be called in question at any stage of the same or proceeding on the ground that the instrument has not been duly stamped. Relying on the difference in the physiology between 35 and 36, it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because 35 operates as a bar to the admission and evidence of the instrument not duly stamped, as well as to be acted upon and the Legislature by Section 36 in the conditions set out therein, removed the bar only against admission and evidence of the instrument. The argument ignores the true import of 36. By that section, an instrument, once admitted in evidence, shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not provide a challenge.... Does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped. But on that account there is no bar against an instrument not being duly stamped, being acted upon after payment of Stamp Duty and penalty according to the procedure prescribed by the Act. The doubt is, if any, is removed by the terms of 42, which enact in terms unmistakable every instrument endorsed that they collect under 42(1) shall be admissible in evidence, and may be acted upon, if it is duly stamped. 7, I'll read. Stamp was a fiscal measure...

JUSTICE J.B. PARDIWALA: It's more important.

ARVIND DATAR: Yeah... to enact, to secure revenue for the state on certain issues, on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the act are conceived in the interests of the revenue. Once that object is secured according to law, the parties taking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light, the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon. Section 40 provides a procedure for the instruments being impounded. 42(1) provides for certifying that instrument is duly stamped, and 42(2) enacts the consequences resulting of it and they go.

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CJI D Y CHANDRACHUD: [UNCLEAR] High Court to the contrary. As an aside, Justice M.C. Desai, whose judgement was just overruled, was one of those last few ICS judges in the Indian judiciary. Justice Manoj Misra will confirm. I think he was an ICS judge in those days.

ARVIND DATAR: And I think Allahabad had an English judge, Justice Broome, who was there well after Independence. He continued till almost '73, '74. Falshaw was in Punjab. Most of the English judges left, but he continued. Now my submission is this and Your Lordship will take page 369 of majority. They doubt... To answer Justice Pardiwala's question, *NN Global Majority* doubts *Hindustan Steel* at para 69. Lordship will come to page 368... 368, Volume 5, volume 5-A, page 368. Para 69 at page 368 of Volume 5-A. My Lord, in the light of what Justice Pardiwala asked, *Hindustan Steel*, there is a slight doubt expressed on *Hindustan Steel* in the majority judgment of *NNG 2*, which is at page 368, para 69. Though they don't expressly say it's bad law. Para 69 at the bottom of Volume 5-A. Page 368 is very...

JUSTICE SANJIV KHANNA: Here also the power of impounding is only when it is produced before an authority.

ARVIND DATAR: Correct.

JUSTICE SANJIV KHANNA: It's not, if you keep it with yourself, there is no impounding, neither any proceedings under 31, 33, etc, etc. don't apply, 33 is [UNCLEAR].

ARVIND DATAR: I'll just give an example. When I was a junior and had a lot of work in the City Civil Court and what, there was a particular well known company, which had number of agreements with agents, 400, 500 agents. And out of 400, 500, 10 or 15 will default and they were very, very keen on litigation. They would not spare anybody. So they would file suits and only in those recalcitrant agents, they'll pay 10% the Stamp Duty. And the proprietor told me, why should I spend money on every agreement? Everybody's not going to default. Whenever a party defaults, that alone I'll pay ten times the Stamp Duty, and it's a commercial call. Why not? Because 99 agents will comply with the Law, the one person who don't comply is.... I'm also thinking to myself, what about electronic contracts? Now they are also taken as documents. You simply say I agree, Clickwrap, shrink-wrap. There's a dispute, I suppose I don't know how it's going to test it. In those cases where there's a dispute, you take a print out, stamp it. And My Lord, what the majority finds fault is, that they have not taken note of Section 17, which is the taxable event. But Lordship knows, in tax, there's always a difference between taxable event and the actual payment. Here what they say is, you take a risk. You either pay

1 the Stamp Duty at the Section 17 stage, if you miss the bus or if you take a calculated risk of
2 not paying at the Section 17 stage, then when you come to 35, 42, etc. you'll pay ten times the
3 amount with the penalty. And there's also penalty under 62, which says that whatever extra
4 you pay will be adjusted against the penalty. So my only submission is, as My Lord slightly
5 pointed out, this will not make the instrument, it's not fatal to the instrument. The Arbitration
6 Agreement exists, the Contract exists. It only remains unenforceable. So these passages may
7 require to be overruled is my humble submission. Shall I take the section first and then the
8 passage or the passage first and then the section?

9

10 **CJI D Y CHANDRACHUD:** Section first.

11

12 **ARVIND DATAR:** Please come to the Contract Act. Yes My Lord, and one more thing I'll
13 mention, one other argument I'm going to take, but Mr. Sakhardande elaborated, my humble
14 view is that Arbitration Agreement, because Stamp Act uses the word Article 5's Agreement.
15 Can it include an Arbitration Agreement? There's a serious doubt, because there's a residuary
16 clause, Agreements not elsewhere specified. But all these require instruments, now one
17 argument which we'll develop is that, Arbitration Agreement need not be stamped in terms of
18 the Stamp Act. That he will elaborate further.

19

20 **CJI D Y CHANDRACHUD:** We don't need to go into that, here at all.

21

22 **ARVIND DATAR:** No, I'll just leave it to Your Lordships, because *N Global* holds. My Lord,
23 in para 90... Sorry, in para 90. Just to answer Your Lordship's question, which Mr.
24 Sakhardande will deal with. In para 90, they formulate the question and say, is an Arbitration
25 Agreement liable to be stamped? And in fact, in my curative also what's happened is, it's an
26 agreement to lease. If an arbitrate, if an Arbitration Agreement is contained in the larger
27 contract, suppose the main contract stamping is 1000, but it's only an agreement to sell, not a
28 sale *per se*, and there's an Arbitration Agreement. Suppose I put it to Rs. 100, some cases they
29 put Arbitration Agreement stamp. Here Agreement is mentioned in Article 5, and the last is
30 like a residuary clause, Agreement is not elsewhere specified. But the nature of 7(1), 7(2), 7(3)
31 shows that Arbitration Agreement, has not been included in the, for example, in the case of
32 award, Supreme Court has said award doesn't include a Foreign Award, for Stamp Act
33 purposes. So maybe Agreement, that's what we will consider, Your Lordships may decide
34 whether to take it up or not later. So I'll straight away, come to the Contract Act. Now, My
35 Lord, what is the role of the Contract?

36

1 **CJI D Y CHANDRACHUD:** We are really on the narrow issue as to what is the stage at
2 which a dispute about stamping has to be decided, does it arrive at the stage of 11(6)?

3

4 **ARVIND DATAR:** Yes.

5

6 **CJI D Y CHANDRACHUD:** Whether an Arbitration Agreements should or should not be
7 stamped ultimately and we don't have the stakes here before us, so.

8

9 **ARVIND DATAR:** And by humble submission is... the Contract Act in para 152, the majority
10 makes a division. If it is absolutely without foundation, they can step in. If it is partly without
11 foundation, it has to be left to the arbitrator. My humble submission that creates a lot of
12 uncertainty in the law.

13

14 **CJI D Y CHANDRACHUD:** That's why they said if it is not absolutely under stamped, it is
15 insufficiently stamped, then send it to the arbitrator.

16

17 **ARVIND DATAR:** Send it to the arbitrator.

18

19 **CJI D Y CHANDRACHUD:** If you find that there is no foundation. *Prima facie* no
20 foundation in the objection to stamp.

21

22 **ARVIND DATAR:** My humble submission is ...

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24 **CJI D Y CHANDRACHUD:** That's the distinction.

25

26 **ARVIND DATAR:** That's the distinction. I'm saying that should not be made because... My
27 Lord, as Mr. Metha rightly points out, please come to para 166. Para 152 they say sufficiently
28 stamped insufficient. But para 166 and 167 are clear.

29

30 **CJI D Y CHANDRACHUD:** Which page?

31

32 **JAYANT K. MEHTA:** Page 399.

33

34 **ARVIND DATAR:** These are the two observations which... Your Lordships will see 166, 167.
35 All Your Lordships have got it?

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37 **CJI D Y CHANDRACHUD:** At page?

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ARVIND DATAR: At page 399, Volume 5-A, An Arbitration Agreement within the meaning of Section 7 of the act, which attracts Stamp Duty and which is not stamped or insufficiently stamped, cannot be acted upon. In view of Section 35 of the Stamp Act, unless following impounding and payment of the requisite duty necessary certificate is provided under Section 42 of the Act.' So they say, at 11(6A) you stop.

JUSTICE SANJIV KHANNA: Where do they deal with Section 36?

ARVIND DATAR: Next para. They don't deal with Section 36. This is subject to correction. They note it here.

JUSTICE SANJIV KHANNA: But they don't deal...

ARVIND DATAR: I'm coming to that... exactly coming to 36. Next paragraph. 'We further hold that the provisions of 33 and the bar under 35 applicable to instruments chargeable to Stamp Duty under Section 3 read with schedule would render the Arbitration Agreement contained in such instrument as being non-existent law unless the instrument is validated under the Stamp Act'. This is completely in the teeth of 36. If the agreement is non-existent in law, it can't even keep 36. 36...what it says is if you don't take the objection to stamping, you can't question it later. You can't say it's not existing in law. Sorry... To answer Lordship para 108(a).

JAYANT MEHTA: Page 381 Volume 5(a), paragraph 108. Going over the page to 382.

ARVIND DATAR: 381 but it spills out to 182. Yeah, equally Placitum A. Your Lordship has seen that? My humble submission is both para 166 and 167, in my humble submission, do not represent the correct position of law and the correct proposition should be that if the agreement, first of all, under 11(6A), you do not need to look into Stamp Act...

JUSTICE SANJIV KHANNA: The last sentence of paragraph 108. Just read that. Start from one sentence above that... that's an unstamped or insufficient piece..

ARVIND DATAR: Yes. Placitum. B. Now I'll just read it further. Equally under Section 36(1). That's better. My Lord Justice Khanna asked me to point draw attention to para 108 at page 381. All Your Lordships may kindly come to page 382, Placitum A, My Lord. Equally, the third line, under Section 36, in the case of an instrument, not secondary evidence of the instrument

1 which is allowed to be let in evidence without objection, then it would qualify as evidence
2 founding a right. But this is an exception to the rule found in Section 35 of the Stamp Act.
3 Thus, an unstamped or insufficiently stamped instrument representing a case of an agreement
4 which is not being enforceable in the sense that the sanctions in law through a civil action is
5 impermissible in the said sense invalid. It is not invalid or void in the sense of it being still
6 born or null and void or in the sense that life cannot be poured into it. Now, while they say
7 this, I'll show other paragraph where they say once an agreement is not stamped, it is
8 completely void. It is bereft in law. Now, since Your Lordship is seeing that, I'll just with the
9 Court's permission, go to the other paragraphs. Please come to Para 103. I'll just take Your
10 Lordship to 103, and then 109. Lordships will just come to 103, on stamping. May I read 103
11 at page 380? We would find that an agreement which is unenforceable on account of a
12 substantive law, which would include the Stamp Act would not be a contract. Applying Section
13 2(h) of the Contract Act, it is only if the agreement is enforceable that it would become a
14 contract. It is only a contract which should be the Arbitration Agreement which is
15 contemplated in Section 11(6A) of the Act. It may not be apposite to merely describe an
16 unstamped Arbitration Agreement as a curable defect. As long as it remains an unstamped
17 instrument, it cannot be taken notice of for any purpose, as contemplated in Section 35 of the
18 Stamp Act. It remains unenforceable. Section 17 declares the time at which instrument is
19 executed in India must be stamped. The said provision contemplates that stamping of such an
20 instrument must take place before or at the time of execution of the document. No public
21 officer, nor court, nor arbitrator can any... permit any person to ask them to act upon it, or
22 receive it as evidence. In law, it is bereft of life. It is not unenforceable in law. It is not
23 enforceable in law. In the said sense, it also cannot exist in law. It would be void. Our view in
24 this regard is that voidness is conflated with to enforce unenforceability receives fortification,
25 from 2(j) of the Contract Act, which renders a contract which ceases to be enforceable void.
26 What Section 11(6A) contemplates is a contract, and is not an agreement which can be treated
27 as a contract. Now they go further when they use the word Arbitration Agreement. The Court
28 says it is a contract. This is despite the use of the word Arbitration Agreement in 11(6A). In
29 other words, contract must conform to Section 7 of the Act. It must, also, needless to say, fulfil
30 the requirements of Contract Act. Then Lordship will come to 109, 382. We may sum up. An
31 Agreement which is unstamped or insufficiently stamped is not enforceable, as long as it
32 remains in the said condition. Such an instrument would be void as being, not enforceable see
33 2(g). It would not in the said sense exist in law. It can be validated by only the process
34 contemplated in Section 33 and other provisions of the Stamp Act. We find the expression
35 validation used in the decision of the Court in *Hari Om Agarwal*, which we shall refer to in
36 greater detail later. This necessarily means that the Court would not view it as unenforceable...
37 as enforceable and therefore existing in Law. In the sense explained, it would not be found as

1 not void and therefore not invalid. Thus, in the context of the act, the Stamp Act and the
2 Contract Act, we are the view that the opinion of the Court in **SMS Estates** regarded in
3 **Garware** and so and so is correct. Then para 110 is important.

4

5 **JUSTICE SANJIV KHANNA:** In fact I... few days before the judgment was pronounced in
6 this case,

7

8 **ARVIND DATAR:** Your Lordship has clarified that ...

9

10 **JUSTICE SANJIV KHANNA:** Doesn't deal with that issue.

11

12 **ARVIND DATAR:** Career Institute.

13

14 **JUSTICE SANJIV KHANNA:** I don't remember the name.

15

16 **ARVIND DATAR:** Career Institute. Actually Lordship never went into the Stamp Act. Your
17 opening question itself is very clear. Now My Lord please see para 110. 11(6A) cannot be
18 understood as merely predicating for an arbitration existence Agreement existing literally.
19 This means that the mere existence of an Arbitration Agreement for all intents and purposes
20 on the exterior, purporting to project a contract duly executed main, certain situations be
21 insufficient under Section 11. If for the reasons such as it being unstamped, when it is clearly
22 required to be stamped, then it cannot be said to be a case where the arbitration exists or for
23 it would be no existence in law. While we agree, the Court must be careful in selecting contracts
24 where an Arbitration Agreement which is produced is not to be acted upon, for the reason it
25 does not exist in law. All we hold is that an Arbitration Agreement which is not, unstamped
26 does not exist, and an unstamped contract contained in an Arbitration Agreement would not
27 exist, as it has no existence in law. Now that is contrary to the Stamp Act and also contrary to
28 the Contract Act. And I'll take Your Lordship now to the provisions. But before that, since the
29 Lordship is having this thing, the page please see the excellent passage of Mulla at page 102.
30 Para 102 at page 380. Para 102, pertinently My Lord, may I read? Para 102 at Page 380,
31 pertinently we may in the 14th Edition of the Indian Contract at a Specific Relief Act by Pollock
32 and Mulla, note as follows. Unenforceable contracts: Unenforceable contracts are valid in all
33 respects, very important. Unenforceable contracts are valid in all respects, but may not be sued
34 upon by the parties. Enforceability is linked. When do you say a contract has to be enforced?
35 When one party does not perform as part of its obligation, you have to get it enforced. Who
36 will be the agency to enforce? Under our system, the Judiciary's job is to enforce it. It says that
37 but may not be sued upon. So if a contract or an agreement is not stamped, it cannot be sued

1 upon that's all. But it is valid in all respects. Please see further My Lord. Such disability may
2 arise for want of registration or because the time prescribed filing the suit has expired, or
3 because the plaintiff firm has not been registered that Section 69 or the document or
4 instrument does not bear the requisite Stamp Duty, or because a lender of money does not
5 possess a license under money lending laws. Now Lordship of will kindly see what has been
6 held by the learned authors is the correct position and in my humble submission, what is said
7 in para 103, and 109 is contrary to these position of Contract Law. And now let us go to the
8 sections and I'll conclude. We have to get the legal concepts of what is void, what is
9 unenforceable, very clear. And that's why, from Law College, we were taught that you cannot
10 use the word void contract. It's an oxymoron. A contract may become void because of
11 supervening circumstances. It's only a void agreement. And please come to Section 2(g), 2(h),
12 Section 10, and Section 23. Your Lordship will come to the definition of Contract Act. 281...
13 Contract Act is 81 Volume 4-A. May I read My Lord?

14

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

16

17 **ARVIND DATAR:** Your Lordship must first come to 2(e). 'Every promise and every set of
18 promises forming the consideration for each other is an agreement'. Then come to 2(f)
19 'Promises which form the consideration or part of each other are reciprocal promises'. Now
20 2(g) and 2(h) are critical. 'An agreement not enforceable by law is said to be void. An
21 agreement enforceable by law is a contract.' Now Lordship has to see 2(h) and go straight away
22 to Section 10 and 23. 'Those agreements which don't satisfy Section 10 and Section 23, come
23 under 2(g), which are not enforceable by law'. I'll repeat My Lord. 2(h) must be read with 10
24 and 23.

25

26 **CJI D Y CHANDRACHUD:** And those agreements you said?

27

28 **ARVIND DATAR:** Those agreements, which don't satisfy the parameters of 10 and 23 will
29 be agreements not enforceable by law, and which are void. Now, please come to Section 10.
30 This is the origin of the phrase that 'All contracts are agreement, but all agreements are not
31 contracts'. Now, please see Section 10, 'What agreements are contracts?'. See the marginal
32 note, What agreements are contracts? All agreements are contracts if they are made by free
33 consent of parties competent to contract for a lawful consideration and with a lawful object
34 and not... and are not hereby expressly declared to be void. Nothing herein contained shall
35 affect any law enforced in India, and not hereby expressly repeat by way which any contract is
36 required to be made in writing or in the presence of witnesses or any law relating. Your

1 Lordships may just note in margin this nothing is refers to Section 25 of the Contract Act.
2 Promise to pay a time bar debt, agreements.

3 I'll come to 25. I'll just finished sequence. Please come to Section 10. Section... Section 10
4 basically says, 'Free consent and when is consent not free?' Then Your lordship goes to 15,16,
5 17,18 of the Contract Act. 15 is coercion, 15 is undue influence, 17 is fraud, 18 is
6 misrepresentation. If consent is vitiated by these four factors it becomes voidable at the option
7 of the agreed party. So consent is free. Parties competent to contract majority... There must be
8 a majority age. Then if it's a company, it cannot be *ultra vires*. The Objects Clause. For a lawful
9 consideration, lawful object that takes us to Section 23. And I just mentioned not expressly
10 declared to be void.

11

12 **CJI D Y CHANDRACHUD:** Not hereby expressed. Hereby mean, in this act.

13

14 **ARVIND DATAR:** In this Act. Yes. Now, Your Lordship will kindly come to Section 23, which
15 is at page 286. May I read My Lord? 23. What consideration... the consideration or object of
16 an Agreement is lawful unless it is forbidden by law is of such a nature if permitted, to defeat
17 the provisions of any law is fraudulent, involves or implies injury to any person, property, or
18 one another, or the court regarded as immoral or opposed to public policy. In each of these
19 cases, the consideration or object of an agreement is said to be unlawful. Every agreement of
20 which the object of consideration is unlawful, is void. And my humble submission, stamp is
21 never the object or consideration of an agreement. Stamp is an incidental part. Object is what
22 is what we call parties are *ad idem*. Consideration is in 2D of the contractor, when at the desire
23 of a promisor, the promisee, etc. as follows. So my humble submission is now taking the
24 Contract Act with the Stamp Act, reading 2(g) with 10 and 23, even if an instrument is not
25 stamped, it is not void under the provisions of the Contract Act but it becomes unenforceable
26 in view of the Stamp Act. Yes. As my friend points out, it is not even voidable.

27

28 Now Lordship will kindly come to 24 just to complete what they say if any part of a single
29 consideration for one or more objects or any one part of several considered single object
30 unlawful, the agreement is void. So you can't apply severability there. Just like the one drop of
31 poison which spoils the milk. Now come to Section 28 at page 288. Exception 1. 28(a), every
32 agreement, by which any party, thereto is restricted absolutely from enforcing his rights under
33 or in any in respect of any contract, by the usual legal proceedings in the ordinary Tribunals,
34 or which limits the time within which he may thus enforce his right, or which extinguishes the
35 rights of any party thereto, or discharges any party from enforcing liability under on respect
36 of any contract on the expiry for specified period, so as to restrict any party from enforcing his
37 right is void to that extent. So basically, if you say you shall not approach the court, or you

1 can't approach the court after a particular period, then that is void. Exception 1 is important.
2 2). This section shall not render illegal, a contract by which two or more persons
3 agree that any dispute which may arise between them in respect of any subject or class of
4 subjects, shall be referred to arbitration, and that only the amount awarded in such arbitration
5 shall be recoverable in respect of the dispute so referred. Exception 2, nor shall this section
6 render illegal any contract in writing by which two or more persons agree to refer to
7 arbitration, any question between them which has already arisen or affect any provision of any
8 law in force for the time being as references to arbitration. Now, Lordships will kindly note,
9 very, very important. The agreement between two parties that they shall refer the dispute is a
10 contract. 28 does not require that that contract should be stamped. It can be oral. Now come
11 to 2(g). An agreement not enforceable by law is said to be void.

12

13 **CJI D Y CHANDRACHUD:** So stamping really is not part of submission?

14

15 **ARVIND DATAR:** It is not part of submission. And most important, Section 23, because the
16 Court says, if you don't stamp it non-existing in law. No. And I'm submitting that the existence
17 of an agreement has nothing to do with voidness. An agreement may exist. All that happens is,
18 it's unenforceable for what the majority, in my humble submissions here is did they say that
19 which is not stamped is void and unenforceable. They say that both voidness and enforceability
20 are synonymous. What para 108 says, the Lordship kindly comes para 103. Our view in this
21 regard that voidness is conflated with unenforceability receives fortification at page 103,
22 italics...380. That's very important because this goes far beyond the realm of Stamp Law. A
23 bench of five Judges, when it holds this. It affects every other Agreement, even beyond the
24 Stamp Act. They'll say, look, this is Article 141 if you don't stamp it, it is void. And it may not
25 be, I may not be only bothered about the arbitration, I cannot enforce it in a proper Civil Court
26 also. We are concerned with arbitration. What they say is my agreement is not stamped it is
27 void. And one more thing, there is an inherent contradiction. There's no question of
28 resurrection. What they say if it is void, then where is the question of it springing back to life
29 after Stamp Duty is paid.

30

31 **CJI D Y CHANDRACHUD:** And it's still gone.

32

33 **ARVIND DATAR:** Still gone, it's gone, it's not like The Doctrine of Eclipse.

34

35 **CJI D Y CHANDRACHUD:** I was just going to say [UNCLEAR] Justice KK Mathew.

36

1 **ARVIND DATAR:** Yes, *Bhikaji Narain Dhakras*, that once the eclipse is removed, it
2 assumes force *proprio vigore*, all that is not there. There's no resurrection. So My Lord, the
3 proper test of the Law will be this. I'll summarize my proposition to say that the Contract Act,
4 the validity of a contract is independent of the requirement of any stamping. As Mulla says,
5 even an unstamped contract is valid in all respects, but you can't sue upon it. Then My Lord,
6 the last point I'd like to make is that, on this question of original and certified copy, para 137,
7 141.3 and 144.

8

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

10

11 **ARVIND DATAR:** Page number yes, para 132, 388.

12

13 **CJI D Y CHANDRACHUD:** 37 is at page 388?

14

15 **ARVIND DATAR:** 391.

16

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

18

19 **ARVIND DATAR:** Starts at 132. My Lord the heading is interesting at page 87. *Amicus*
20 springs a surprise. That is Mr. Banerjee, My Lord. I don't know what he's going to do in this
21 bench.

22

23 **CJI D Y CHANDRACHUD:** Suddenly Googly ball by Mr. Banerjee.

24

25 **ARVIND DATAR:** Now My Lord, my humble submission is at page 131... para. 131, at page
26 388. I'll read My Lord. This Court pointed out the existence of the scheme, prepared by the
27 Supreme Court in exercise of powers under 111(10), para 2(a) of the scheme *inter alia* reads as
28 follows. Submission of request: the request of the Chief Justice under sub section 4, or sub
29 section 5 of sub section 6, shall be made in writing and shall be accompanied by the original
30 Arbitration Agreement, or a duly certified copy thereof. Thereafter, when the curtains were
31 about to be wrung down by the hearing, on the hearing, the learned *amicus* brought the
32 following aspect to the notice of the Court. He pointed out that under the scheme, the applicant
33 need produce only the certified copy of the Arbitration Agreement. He would draw support
34 from the judgments of *Jupudi Kesava versus Pulavarthi Venkata Subbarao*, and
35 *Hari Om Agarwal* to contend that even applying Sections 33 and 35 by the court at the
36 stage of Section 11, the certified copy cannot be impounded. He thus sought to take the wind
37 out of the sail of the Appellant's contention, by continuing most of the cases, since certified

1 copies alone are being filed and they cannot be impounded. And as reference to the arbitrator
2 based on certified copy, the arbitrator is competent under Section 33 and 35 to do the needful.
3 This Court may bear this aspect in mind. Thereupon Shri Gagan Sanghi would point out that
4 even the certified copy, the factum of payment must be entered this [UNCLEAR]. My Lord,
5 my humble submission is please come to para 137... yes 391. I'll read 137 and 141.3.

6

7 137 - 'The submission appears to be that the scheme provides for a certified copy of the
8 Arbitration Agreement and the Arbitration Agreement is part of the contract, which is neither
9 which is either not stamped or insufficiently stamped and since it cannot be impounded under
10 Section 33, cannot be validated. All that the court has to look into is whether the Arbitration
11 Agreement exists'. What it meant is whether the Arbitration Agreement duly stamped, exists.
12 What that ultimately mean, though they don't say so in so many words. 141 is the interplay of
13 Evidence, para 141 interplay of Evidence Act, Stamp Act and Registration Act. Then they
14 conclude this. My submission is this, as far as certified copy is concerned this Supreme Court
15 Scheme is pre 2015. After 2015, when I make an application under Section 11(6A) that is rules
16 can't be contrary to the Act, my humble submission is the registry will be bound to receive the
17 application because the court's jurisdiction is only to see the existence of the Arbitration
18 Agreement. So there's no... And suppose it's exchange of letters. Suppose it... of course, letter
19 also...the proviso says any one letter can be stamped, but suppose it is electronic,
20 telecommunications. What do you do?

21

22 **CJI D Y CHANDRACHUD:** After 2015, you said when the application under Section 11(6A)
23 is filed. The registry...?

24

25 **ARVIND DATAR:** There's no need to produce the original or certified copy. I can just file a
26 copy, any copy it need not be certified. It can be a true copy but

27

28 **JUSTICE SANJIV KHANNA:** So you're...My Datar, your propounding then is that, only a
29 [UNCLEAR] in the petition should be made.

30

31 **ARVIND DATAR:** With a copy of the agreement If it is there. Or suppose if its agreement is
32 there....

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34 **JUSTICE SANJIV KHANNA:** The reason why they don't ask for the original is because it
35 may be with the other side.

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37 **ARVIND DATAR:** With the bank or something else.

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JUSTICE SANJIV KHANNA: Obviously, to certify copy is always been... whether it's High Court, it's been always the Act does not say certified copy or anything like that. So it leaves it as a matter of procedure. So this is the reason why the rules... Several High Courts also the rules provide you have to give the certified form.

ARVIND DATAR: Many High Courts don't provide that also. Many High Court in fact...

JUSTICE SANJIV KHANNA: No, we have been insisting in Delhi High Court also that when we were there, that the certified copy should be there. Sometimes it's there in the parent contract like in general conditions of contract, there is a provision.

ARVIND DATAR: Yes Your Lordships. My learned friend did some research. Delhi, Karnataka, Orissa, MP, Gujarat don't require either the original or certified copy. But now my submission 11(6A). The jurisdiction is so limited, I can tender my agreement and say this is a copy of the agreement. It need not be certified. It need not be original.

JUSTICE SANJIV KHANNA: Probably, what I could make out from this judgment is, they've said, certified copy refers to public documents.

ARVIND DATAR: Yes.

JUSTICE SANJIV KHANNA: Certified copies is a public documents.

ARVIND DATAR: No. What they say certified copy or true copy is, the xerox copy must show that stamp has been paid. What was argued was the xerox copy will show stamping.

JUSTICE SANJIV KHANNA: But then they have not overruled *Hari Om Aggrawal* and...

ARVIND DATAR: No, no. They have not, they have not. My only submission is 11(6A) must be given a full play. And now there is no need to get into original, certified copy and so on.

JUSTICE SANJIV KHANNA: Because holding that would have meant the whole case law, which has been build up over the years.

1 **ARVIND DATAR:** Yes, that would have again not necessary also. So I'll just conclude
2 because....

3

4 **CJI D Y CHANDRACHUD:** Just apropos what both my learned friend and colleagues said
5 we can title this proceeding as In Re: The interplay between the Indian Stamp Act and the
6 Arbitration and Conciliation Act, 1996'.

7

8 **ARVIND DATAR:** Or **In Re:** Section 11(6A) of the Arbitration Act,

9

10 **CJI D Y CHANDRACHUD:** But 11(6A) will become very broad. We are considering the
11 stamp issue.

12

13 **ARVIND DATAR:** Very well.

14

15 **MALVIKA TRIVEDI:** [UNCLEAR]

16

17 **ARVIND DATAR:** I was about to ask because I've dealt with 11(6A). I have finished. If Your
18 Lordship wants me to just read briefly on the impact of Stamp Act *qua* Section 8 and Section
19 9. I'll make my submission. Then I'll finish My Lord.

20

21 **DARIUS KHAMBATA:** Then refer, say the interplay between an Arbitration Agreement and
22 the Stamp Act. Because for institutions 11(6A) would not even arrive.

23

24 **ARVIND DATAR:** My Lord, It'll be interplay Arbitration Agreement, Stamp Act and
25 Contract....

26

27 **CJI D Y CHANDRACHUD:** Arbitration Agreements under the Arbitration and Conciliation
28 Act 1996 and the Indian Stamp Act...

29

30 **ARVIND DATAR:** 1899, and the Contract Act.

31

32 **CJI D Y CHANDRACHUD:** Contract Act is an argument.

33

34 **ARVIND DATAR:** Okay. Very well. Should I deal with Section 8 and 9 for five minutes after
35 lunch, or shall I leave it at the moment? Because we're doing 11(6A) per se...

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37 **MALVIKA TRIVEDI:** It's important, because in the 20....

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ARVIND DATAR: All right, then I will deal with in ten minutes.

CJI D Y CHANDRACHUD: We'll consider whether to expand the angle. We are now almost wrapping up so just 5 minutes...

And this side we request today end of the day is a deadline.

ARVIND DATAR: We discussed among ourselves at lunch. Initially my brief was to confine to 11 (6A), but to save time, I think Jayant Mehta and Nikhil will deal with Section 8 and 9 and Stamp Act. They can argue.

CJI D Y CHANDRACHUD: Thank you very much.

ARVIND DATAR: Very grateful for a patient hearing to all Your Lordship's time.

NIKHIL SAKHARDANDE: I'm going to make three or four submissions. The first of it is and I'll straight away formulate it My Lord without wasting much time because Lordship knows the background. The first it My Lord is that the Arbitration Agreement...

CJI D Y CHANDRACHUD: Just one second.

NIKHIL SAKHARDANDE: My Lord, my first submission is that the Arbitration Agreement is not chargeable to Stamp Duty. Because the original question, which was referred to the five judges, if My Lord just has a look at the original question that was referred to the five judges and that is at page 293 of Volume 5(A). Which I submit was the correct question. Page 293, Volume 5(A), which My Lord, I submit was the correct issue. Paragraph 58. We consider... May I read it?

CJI D Y CHANDRACHUD: Yes.

NIKHIL SAKHARDANDE: We considered appropriate to refer the following issue to the authoritative settled by a Constitution Bench of five judges. Whether the statutory bar contained in 35 of the Stamp Act applicable to instruments chargeable to Stamp Duty under Section 3 read with the schedule of the Act would also render the Arbitration Agreement contained in any such instrument which is not chargeable to payment of Stamp Duty as being non-existent, unenforceable or invalid. Pending payment of Stamp Duty on the substantive contract instrument. This was My Lord the original...

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CJI D Y CHANDRACHUD: What sense does these words Mr. Sakhardande which is not chargeable to the payment of Stamp Duty. Does that postulate that an Arbitration Agreement is not chargeable to Stamp Duty?

NIKHIL SAKHARDANDE: Yes My Lord, that would be my submission. And what happened before the five judges is....

JUSTICE SANJAY KISHAN KAUL: Did they...

NIKHIL SAKHARDANDE: reformulate. I want to...

JUSTICE SANJAY KISHAN KAUL: Reformulated the question?

NIKHIL SAKHARDANDE: On the basis of a concession made. The reformulated question if I may just pose for Your Lordship's consideration, is at 352 of Volume 5(A). And I will just make three short propositions on why it is not chargeable to Stamp Duty. Page 352, Volume 5(A) is the reformulated question based on the concession by the Amicus, learned Amicus Curiae. Paragraph 32 My Lord. May I read it? In view of the submission made by the learner Amicus Curiae, the Court in *NN Global* was an error in proceeding on the basis that the Arbitration Agreement would not be exigible to Stamp Duty. The very premise of the order of reference would stand removed. The reformulated question sums the words which is not chargeable to payment of Stamp Duty, and words unenforceable or invalid would therefore be as follows. Whether the statutory bar contained in 35 of the Stamp Act applicable to instruments chargeable to Stamp Duty under 3, read with the schedule would also render the Arbitration Agreement contained in such an instrument as being non-existent pending payment of Stamp Duty on the substantive...

CJI D Y CHANDRACHUD: It's a correct reformulation of the question, for the reason that the words which is not chargeable to payment to Stamp Duty is a hypothesis. So if you begin with the hypothesis that it is not chargeable because payment of Stamp Duty, then what are you deciding? So what they decided? They just deleted that part, which was a premise. The premise was which is not chargeable to Stamp Duty.

NIKHIL SAKHARDANDE: Which, My Lord, in my respectful submission, was the correct premise. It was the correct premise for this reason...

1 **CJI D Y CHANDRACHUD:** It can't be a premise. It's a question, it has to be answered.

2

3 **NIKHIL SAKHARDANDE:** But so far as My Lord, today the question is...

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5 **JUSTICE SANJAY KISHAN KAUL:** The question is reframed as a question of law.

6

7 **NIKHIL SAKHARDANDE:** Yes, sir.

8

9 **JUSTICE SANJAY KISHAN KAUL:** And that is the question of law which is sought to be
10 answered. We'll have to proceed on the premise of that question of law.

11

12 **NIKHIL SAKHARDANDE:** But if the correctness of the judgment is now under review by
13 a bench of a larger bench...

14

15 **JUSTICE SANJAY KISHAN KAUL:** You want us to reformulate the question of law itself
16 in the same sense.

17

18 **NIKHIL SAKHARDANDE:** I don't want Your Lordships to reformulate. But if the basis of
19 this judgment is that it is chargeable to Stamp Duty...

20

21 **CJI D Y CHANDRACHUD:** No, it is not. That's not the basis of the judgment. But the basis
22 of the earlier question was that it is not chargeable to Stamp Duty...

23

24 **NIKHIL SAKHARDANDE:** Which is correct.

25

26 **CJI D Y CHANDRACHUD:** But that's an argument.

27

28 **NIKHIL SAKHARDANDE:** That's an argument. That's an argument.

29

30 **JUSTICE SANJIV KHANNA:** Probably our only contention is the question of law was as
31 framed was, if the parent contract underlying contract is not properly stamped, will it affect
32 the arbitration laws contained in that contract? That may be your contention, same answer
33 but much bigger.

34

35 **NIKHIL SAKHARDANDE:** So far as an Arbitration Agreement is concerned now, after
36 applying the doctrine of separability, they have My Lord, separated the Arbitration Agreement
37 and may not said that under Article 5 residuary clause, it is now taxable under the residuary

1 clause. Now, my submission for Your Lordship's consideration on chargeability is that when
2 you are applying the doctrine of separability to a stamping...

3

4 **CJI D Y CHANDRACHUD:** Mr. Sakhardande, how did the issue of chargeability arise at
5 all? The question was the state in a proceeding under Section 11(6A). Does the court go into a
6 question of whether the agreement is stamped or otherwise? That is the issue not whether
7 Arbitration Agreements are per se, subject to Stamp Duty or not clearly did not arise, and it
8 may depend upon the nature of the underlying contract.

9

10 **NIKHIL SAKHARDANDE:** But even then, even so, as a proposition of law...

11

12 **CJI D Y CHANDRACHUD:** Suppose the underlying contract is an agreement to sell
13 immovable property and together with, I am just throwing you an example, possession is
14 delivered. Now, as a matter of fact, I know in the Bombay Stamp Act, the Maharashtra Stamp
15 Act, it is treated for Stamp Duty as it were a sale agreement.

16

17 **NIKHIL SAKHARDANDE:** Yes.

18

19 **CJI D Y CHANDRACHUD:** So it will depend very much on what facts are before you in that
20 case.

21

22 **NIKHIL SAKHARDANDE:** I'm not saying that the main contract need not be stamped or
23 should be stamped. That can be gone into an E.

24

25 **CJI D Y CHANDRACHUD:** But should be go into it here, before seven?

26

27 **NIKHIL SAKHARDANDE:** That would be required for this reason that if I'm in a position
28 to convince Your Lordship, that an Arbitration Agreement which is made chargeable to Stamp
29 Duty is based on a legal fiction which doesn't apply because it's based on the doctrine of
30 separability. The doctrine of separability was evolved for the purposes of saving an Arbitration
31 Agreement. If that fiction is something which was created for that purpose, namely the
32 Arbitration Act....

33

34 **CJI D Y CHANDRACHUD:** It will apply to the Stamp Act also.

35

36 **NIKHIL SAKHARDANDE:** It would not apply to the Stamp Act because it will not have an
37 extended application. Now, if not, that legal fiction for which this legal fiction was incorporated

1 in Section 16, namely, the Arbitration Act. If that fiction has to be restricted for the purpose
2 for which it was created the stretching of that fiction to something outside the purpose is not
3 permissible...

4

5 **CJI D Y CHANDRACHUD:** So the consequence would be then, that the Arbitration
6 Agreement should be treated as an integral part of the original contract.

7

8 **NIKHIL SAKHARDANDE:** Correct. Now after that...

9

10 **CJI D Y CHANDRACHUD:** It is in your submission... in your submission.

11

12 **NIKHIL SAKHARDANDE:** In my submission. Correct. Now, My Lord, if that is so, so let
13 us then say that it comes under one document with an Arbitration Agreement. Then My Lord,
14 the provisions of Section 5 of the Stamp Act would apply, for the purposes of stamping. For
15 the purposes of stamping the agreement, the Arbitration Agreement, not the main contract.
16 Now when we go to...

17

18 **CJI D Y CHANDRACHUD:** No but, once you treat the Arbitration Agreement as not
19 severable, and an integral part of the main contract, then the entirety of the contract has to be
20 stamped?

21

22 **NIKHIL SAKHARDANDE:** But My Lord, therefore, therefore, that so far as that part is
23 concerned, the Arbitration Agreement would also have to be stamped provided it is a distinct
24 matter under Section 5 of the Stamp Act, not of the arbitration, of the Stamp Act. Now, would
25 Your Lordship just have a look at Section 5.

26

27 May I just show to Your Lordships first, the Constitution Bench My Lord, paragraph 88 to 90.
28 Which is why I'm... if your Lordships sees paragraph 88 to 90, page 374, paragraph, Volume
29 5(A), paragraph 89... a perusal... may I read My Lords?

30

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

32

33 **NIKHIL SAKHARDANDE:** A perusal of paragraph 29 would show... My Lords 88, if Your
34 Lordships doesn't mind... 'As far as the finding in paragraph 28 *NN Global* that the decision
35 in SMS does not lay down the correct law when it holds in an Arbitration Agreement in an
36 unstamped commercial contract cannot be acted upon or is rendered unenforceable, we are of
37 the view that a finding in *NN Global* does not appear to be correct. A perusal of para 29 would

1 show that the Court in *NN Global* proceeded on the basis of the Arbitration Agreement being
2 an independent contract, is not chargeable to payment of Stamp Duty, and it would not
3 invalidate the Arbitration Clause or render it unenforceable, since it had an independent
4 existence of its own, cannot hold good in view of the admitted position before us that an
5 Arbitration Agreement in its own right is exigible to Stamp Duty. Now My Lord, para 90... 'The
6 whole premise of the Court in *NN Global* being that the Arbitration Agreement not being
7 exigible to duty, and it's having a separate existence, a commercial contract in which the
8 Arbitration Agreement is contained, being unstamped, would not impact the Arbitration
9 Agreement cannot hold good. The reasoning in *NN Global* in Para 32 for disapproving of
10 *Garware*, in paragraph 22 thereof, that the Arbitration Clause would be non-existent in law
11 and unenforceable till the Stamp Duty is adjudicated and paid on the substantive contract is
12 again on the premise that the Arbitration Agreement, is a separate agreement under the Stamp
13 Act, which is not exigible to Stamp Duty, which we have found is not the case in law. Now, my
14 issue My Lord is, 'Separate agreement under the Stamp Act', is something where the legal
15 fiction My Lord of separability, which is to be confined only for the purposes of the Arbitration
16 Act has been applied to the Stamp Act and therefore My Lord, the Arbitration Agreement has
17 been made 'stamp-able', which My Lord, in my respectful submission is not permissible.

18
19 Now My Lord, if Your Lordships now turn to the Stamp Act for a minute. So, this is the first
20 reason why My Lord, the Arbitration Agreement is not subject to Stamp Act. The second
21 reason My Lord, would be if you're on the reading of Section 5, if My Lord just has a look at
22 Section 5. I'm arguing this today before Your Lordship, because the premise of the
23 Constitution Bench that the Arbitration Agreement is stampable is in my respectful
24 submission, erroneous. Now, if My Lord turns to Section 5, which is at page 338, volume 4(A)
25 and then I will come straight away to the decisions on this. Any instrument comprising or
26 relating to several distinct matters shall be chargeable with aggregate amount of duties with
27 such separate instruments, each comprising or relating to one of such matters, would be
28 chargeable under this act. Now in order to fall within the expression 'distinct matters'...

29
30 **CJI D Y CHANDRACHUD:** So you have to cumulate the Stamp Duty. That's what this....

31
32 **NIKHIL SAKHARDANDE:** You would have to cumulate the Stamp Duty. But provided it
33 is a distinct matter. Now, in my respectful submission, first of all, an Arbitration Agreement
34 would not be a distinct matter because the doctrine of separability does not apply to
35 Arbitration Agreements when it comes to stamping. The legal fiction cannot be extended. The
36 second reason is that an Arbitration Agreement being ancillary to the main agreement...

37

1 **CJI D Y CHANDRACHUD:** Why do we have to get into this at all? Because the entire the
2 genesis of the dispute was whether in a 11(6A) application, you can look at... whether it has
3 examined, whether the documents have been properly stamped or otherwise. Should the
4 power of impounding be exercised by the judge in 11(6A) stage. Now for us to go into whether
5 an Arbitration Agreement is at all stamp-able. You are saying it can never be stamped. We
6 don't have facts. We don't have...for a bench of seven to decide this question would be very,
7 very....

8
9 **DARIUS KHAMBATA:** [UNCLEAR] Not this aspect, but other aspects. We are concerned
10 with 11(6A) here, which is the appointment of arbitrators by a Court ? But there's a vast body
11 of appointment that takes place by individuals outside of a court. Every matter doesn't come
12 under Section 11. Secondly, increasingly that is, institutional arbitration. Institutions have to
13 appoint. Again, they are not Courts under 11(6A). It is perhaps necessary if Your Lordships to
14 clarify that position as well. Not on the lines my learned friend is arguing. I disagree with what
15 he is arguing but it is necessary to set out the principles that all these matters have....

16
17 **CJI D Y CHANDRACHUD:** Have to be decide by the arbitrator. There we are with you Mr.
18 Khambata that we have to decide that issue, that what we say in relation to a Court for 11(6A)
19 application you say would apply when an institution is appointing an arbitrator.

20
21 **DARIUS KHAMBATA:** Or an individual.

22
23 **CJI D Y CHANDRACHUD:** That's right. For the Delhi International Arbitration Centre,
24 when they...when somebody moves the VIAC, you don't go into stamping. That will be decided
25 according to you by the arbitrator.

26
27 **DARIUS KHAMBATA:** Obviously though the three judge Bench has said that the Indian
28 Stamp Act applies, I put it in my submissions. I'm not going to labour it. Actually, the Indian
29 Stamp Act does not apply. It's the State Acts that will apply with their residuary powers. But
30 that's really them to arrive before Your Lordships but I have put it there only for clarity. Indian
31 Stamp Act won't apply at all because under entry 91 of list one the remit of what Parliament
32 can do to fix rates of Stamp Duty is very limited. In fact the residuary power is with the States.
33 So the Indian Stamp Act doesn't apply at all. I think I'll leave it at that.

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35 **NIKHIL SAKHARDANDE:** I think I'll leave it at that.

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37 **CJI D Y CHANDRACHUD:** Stamp litigation and the states in on the local Stamp Act.

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NIKHIL SAKHARDANDE: My Lord I'll also leave it at that.

DARIUS KHAMBATA: Normally on Arbitration Agreements as residuary arbitration [UNCLEAR] is 100 rupees.

NIKHIL SAKHARDANDE: Under the Indian Stamp Act it is 4 annas.

DARIUS KHAMBATA: That's a different issue. [UNCLEAR]

JAYANT MEHTA: [UNCLEAR] maybe subject to Stamp Act.

CJI D Y CHANDRACHUD: That's right.

JAYANT MEHTA: The minority My Lord [UNCLEAR].

JUSTICE SANJIV KHANNA: As an agreement, if there is a separate enactment, separate entry, it will be subject to that.

DARIUS KHAMBATA: Whatever the State Act will provide.

JUSTICE SANJIV KHANNA: Whatever the State Act will provide.

DARIUS KHAMBATA: And many have residuary clauses.

JUSTICE SANJIV KHANNA: Maybe because they are applying to the agreement.

CJI D Y CHANDRACHUD: You are right. As Mr. Khambata said, in 391 of the Union List, which is what the Indian Stamp Act is referable to says, in the book, page 472. Rates of Stamp Duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. That's the only remit of the Indian Stamp Act. Now see entry 63 of List 2, page 476. Rates of Stamp Duty in respect of documents other than those specified in the provisions of List 1.

DARIUS KHAMBATA: The residuary powers are with the states. And Your Lordships have held so in the *Rama Sharma* case. I have cited that in my submission. I have briefly placed that for Your Lordships.

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NIKHIL SAKHARDANDE: I think what we'll do is, I think I'll leave it at that. I won't labour this point anymore.

CJI D Y CHANDRACHUD: What do we do for the finding of the majority then?

NIKHIL SAKHARDANDE: That's the reason....

JAYANT MEHTA: [UNCLEAR].

CJI D Y CHANDRACHUD: Both say it is chargeable.

JAYANT MEHTA: [UNCLEAR] of the schedule.

CJI D Y CHANDRACHUD: Of the?

JAYANT MEHTA: Of the schedule to the Stamp Act.

JUSTICE SANJIV KHANNA: No. Section 5 may not apply. Section 5 when there is some other contract, because Section 5 applies if they are separate transactions in one document.

NIKHIL SAKHARDANDE: In one document.

JUSTICE SANJIV KHANNA: It doesn't apply otherwise. It doesn't apply mainly because subject matter is connected with something....

DARIUS KHAMBATA: I will address My Lords briefly on that.

JUSTICE SANJIV KHANNA: No leave it at that. We'll examine it....

NIKHIL SAKHARDANDE: I was suggesting to leave it to the facts of each case on whether...

JUSTICE SANJIV KHANNA: That will be different from...

JAYANT MEHTA: [UNCLEAR] the minority whereby the minority also says this it's 291, 292, 295 of Justice Rastogi's opinion. And 312, 412, 415.

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CJI D Y CHANDRACHUD: Minority?

JAYANT MEHTA: My Lord, minority comprises of two independent opinions of Justice Rastogi and Justice Roy. My Lord, Justice Rastogi's opinion is to be found in paragraphs 292 and 295, which would be PDF 436 of Volume 5-A and Justice Roy's opinion, Lordships may kindly note paragraphs 312, 412 and 415. 312 is at 442, 412 is at 478 and 415 is at 479.

CJI D Y CHANDRACHUD: And 312 is at page?

JAYANT MEHTA: 312 My Lord is at 442, where they say that it's actually the court in *NN Global 1* lost sight of Article 5 to the schedule of the Stamp Act.

CJI DY CHANDRACHUD: What does that say?

JAYANT MEHTA: That contains a residuary entry saying that any other agreement not provided for will be subject to the Stamp Duty.

NIKHIL SAKHARDANDE: That is the residuary article under which it is made [UNCLEAR].

JUSTICE SANJIV KHANNA: The presumption in the question as framed that it is not stamp-able is not correct.

CJI D Y CHANDRACHUD: If not otherwise provided for.

JAYANT MEHTA: That's right.

CJI D Y CHANDRACHUD: And it says 8 annas.

JAYANT MEHTA: The majority in five judge bench, goes by consideration of Article 5. Minority also takes Article 5 into consideration to say *NN Global 1* was wrongly decided on that account, but holds otherwise on the mechanism.

CJI D Y CHANDRACHUD: Mechanism.

NIKHIL SAKHARDANDE: No My Lords, I was...

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JUSTICE SANJIV KHANNA: Maybe in some cases it may not be taxable. There it's not executed.

JAYANT MEHTA: Section 3 of the Stamp Act. Section 3 of the Stamp Act.

JUSTICE SANJIV KHANNA: In all cases it is not as facts.

JAYANT MEHTA: That's right.

JUSTICE SANJIV KHANNA: If it is not executable, if it is not being executed because only on execution of the instrument that the Stamp Duty is....

JAYANT K MEHTA: Even Section 3. Section 3 says certain instruments are not chargeable to Stamp Duty.

NIKHIL SAKHARDANDE: So I was suggesting My Lord, if Your Lordships could say, consider saying that so far as the stamp ability of an Arbitration Agreement is concerned, would depend upon the facts of each case. Facts of each case, and that's why My Lord it should be relegated to the Tribunal. Now My Lords the submission is at page 29 of Volume 1 where Your Lordship will find that. My Lords, the next point is... short point... is that nothing can be said to be... of course, this has been made My Lords by Mr. Datar, so I won't repeat it. But something which is rectifiable and curable, it's a temporary affliction... that's covered. That is at page 12 of me of my note. Then My Lord, the issue of Section 5 of the Arbitration Act also has My Lord been argued that it's a notwithstanding [UNCLEAR]. I've taken up also in my submission, the point of complete code, that an Arbitration Act is a complete code by itself, and therefore there is no question of the Stamp Act coming in. Just give me a minute My Lord. Part two, but part one can't be worse off than part two, because part two is on the basis of this. So My Lord, that would be my...

CJI D Y CHANDRACHUD: Thank you Mr. Sakhardande. Mr. Jayant.

JAYANT MEHTA: Your Lordships would find my written note of submissions in Volume 1 at page 30. I'll be briefer than Mr. Sakhardande My Lords. Much of the canvas has already been painted. I do not wish to repeat any of the...

CJI D Y CHANDRACHUD: Volume 1, page 30 right?

1
2 **JAYANT K MEHTA:** 30, but I have in my note referred to the paragraphs of the majority
3 and the minority... whenever My Lords need any assistance, can be taken from there. I'm not
4 reading or reiterating them. The point that I wanted to make My Lord, are the following and
5 I'll try and elaborate it. The reason why we take exception to the formulation of the mechanism
6 in which the Stamp Duty is to be collected, in the opinion of the majority of *NN Global 2* My
7 Lord are following; Not only does it not, in that classic sense, and please don't take me wrong
8 My Lord on this... in the classic sense that it really relegates us to a position where, for want of
9 a horseshoe nail the Kingdom is lost. In the sense My Lord, it compromises on all timelines of
10 the Arbitration Act contains and gives us namely My Lords, if Your Lordships will look at 11
11 sub-section 13, where it states My Lord, within 30 days of the notice served to the other side,
12 My Lord, the Section 11 petition is to be decided, Section 9 contains a timeline of 90 days and
13 so on. My Lord, all of this, is a time bound mechanism. That's one. And I will leave at that
14 because this is an obvious point and I do not wish to carry coals to Newcastle, because it is
15 going to My Lord delay. And another reason for which My Lord we said is going to delay is that
16 under the Stamp Act, we have no mechanism of ensuring that it is in a time bound manner.
17 Your Lordships realize that So in *Garware*, Your Lordships directed My Lord the stamp
18 authorities to ensure that the stamping takes place in a period of 45 days. We have no data
19 whether the stamp authorities really respected that, but now given the manner in which one
20 of the revenue authorities function, it is very likely that they did not observe that 45 day
21 window. As a result of which My Lord, making Section 11 petitions hostage to My Lord an
22 undefined timeline under the Stamp Act and over which the Section 11 court would have no
23 jurisdiction because a Section 11 Judge cannot direct the Revenue Authority to do it in a time
24 bound manner or in a certain period of time. Why? Very often you may find that Section 11
25 judge is not the same court as the court which would have territorial jurisdiction over the
26 revenue authorities.

27
28 Take, for example, seat and venue. Suppose My Lord, an arbitration... an agreement is
29 executed in Delhi, but has its seat of arbitration in Bombay, the Bombay High Court can't grant
30 can't issue directions to the revenue authorities in the state of Delhi and likewise. So you could
31 have a situation where you have an uncontrolled timeline consuming an entire process. In
32 other words for want of a horseshoe nail, you have the Kingdom getting lost. That's the point
33 number one. The second point that we have for us is consideration is that this formulation also
34 runs afoul of the larger public policy principle. The larger public policy principle that Your
35 Lordships have seen in various legislations is that My Lord, entertainability of a petition is not
36 made subject to a fiscal precondition. I hope I'm able to communicate myself. Entertainability
37 of a petition is not made subject to a fiscal precondition, except in situations where the

1 Legislature wants that to happen. And more often than not those situations are in the instances
2 of appeals. I have in my written submissions, given examples. And if I may very, very quickly
3 without taking Lordships through those provisions, if I may invite your attention, My Lords to
4 paragraph 2.4.1. Just kindly of see that at page 33 of my written submissions.

5

6 **JUSTICE SANJIV KHANNA:** Mr. Mehta, the broad proposition may be very difficult to
7 accept.

8

9 **JAYANT MEHTA:** No, I'm just taking a leaf out of that. I am not saying....

10

11 **JUSTICE SANJIV KHANNA:** Yes, you can treat it as an argument to support.

12

13 **JAYANT K MEHTA:** That's right. That's the highest that I can put it.

14

15 **JUSTICE SANJIV KHANNA:** Not as a....

16

17 **JAYANT MEHTA:** No, of course not. I cannot say that as a blanket rule, but My Lord I am
18 giving instances wherever the Legislature found that there has to be a fiscal mandatory
19 precondition. And for this, I assume that an Arbitration Agreement may be subject to Stamp
20 Duty. But even then, Section 11 contains no such formulation. And wherever the Legislature
21 wanted that fiscal preconditions to be imposed, Lordships would find that in those instances
22 in 2.4.1 My Lord, we have collated all of these in Volume 4-C. Volume 4-C.

23

24 **JUSTICE SANJIV KHANNA:** You are referring to central Excise Act, SARFAESI.

25

26 **JAYANT K MEHTA:** That's right and Your Lordships would invariably find that those
27 legislations use the word shall not be entertained, shall not be admitted. So wherever the
28 legislature failed that there has to be a fiscal mandatory inviolable inexcuseable precondition,
29 the formulation is to be found in words like shall not be entertained, shall not be admitted,
30 and so on, none of which are found in Section 11. Not even found in 9. Not even found in 8,
31 and not found in 45.

32

33 **CJI D Y CHANDRACHUD:** So the formula, say in the Customs Act, the Central Excise Act,
34 and SARFAESI as well....[UNCLEAR]

35

36 **JAYANT K MEHTA:** And all of these formulations apply to an appellate stage when there
37 has already been an adjudication at the first instance. There is a finding of certain payments

1 due and collectible, and then the preconditions imposed. None of them provide at the first
2 instance. And therefore it is not to say because Your Lordships are counterbalancing the two
3 acts. It's really a question as to whether the Stamp Act should take precedence over the
4 mechanism under Section 11, or would Your Lordships leave the collection and adjudication
5 of stamping and the duty to the Arbitral Tribunal. It's a choice lot between two competing
6 legislations and both of which are exhaustive courts. Stamp Act is an exhaustive court, and so
7 is an arbitration. Both are consolidating acts My Lord. So therefore, in our respectful
8 submission the formulation by the majority falls foul of this principle, that where the
9 Legislature and this is also furthered in some sense, by Section 36 of the Stamp Act. Your
10 Lordships saw that Mr. Datar in his own usual illustrious way placed before Your Lordships
11 Section 36 of the Stamp Act, which says once it is admitted into evidence, it will not be gone
12 into. So legislature, while we are making a fiscal statute itself was cognizant that you can have
13 some instruments flipping through the sieve of evidence. And then there's no question of
14 putting the clock back, going back on the admissibility of that instrument. That's why neither
15 Section 33 nor Section 35 invalidates an instrument. They only say it will not be received in
16 evidence. But and Section 36 says once it has been received in evidence, there's no question of
17 unscrambling the scrambled egg. The third aspect in our respectful submission as to why My
18 Lord, the majority's view needs to be recalibrated, is not that, the majority leaves Ms. Trivedi
19 pointed out My Lord, Section 9, the majority does not go into para 169 of the judgment.
20 Majority says we are not going into Section 9. Now, My Lord, in our respectful submission that
21 is neither here nor there for the simple reason an argument that is, I'm sure what would be
22 made before Your Lordship, that Section 9 should have a different taste. There is nothing in
23 Section 9 which gives any guidance to that argument or which supports that argument. You
24 cannot have a situation where for the purpose of Section 11, you have a formulation of Stamp
25 Duty first, entertainability later for purposes of Section 9, a different regime. So what? This is
26 going to snowball? No. Without a doubt not into a Section 9 situation. This aspect of My Lord,
27 first collect the Stamp Duty, get the certificate under 42 and then My Lord entertain the
28 petition with time My Lord, I'm sure will snowball into petitions of Section 9. Section 9 as Your
29 Lordships have defined in numerous cases is our measure that are, by definition urgent.

30

31 **JUSTICE SANJIV KHANNA:** If something is void, then Section 9 will also come in...

32

33 **JAYANT K MEHTA:** I'm so deeply obliged for the question. It is an agreement can be void
34 only within the four corners of the of the Contract Act. The Stamp Act does not invalidate a
35 contract. It only says it shall not be acted upon or would not be admissible in evidence. It does
36 not invalidate, and therefore even for the purpose of Section 9 My Lords, the test of 11, with
37 greatest of respect whether it is 8 which says *prima facie*, 45 which is now brought at par with

1 8, says *prima facie* The same test would have to be applied. And Your Lordships have in
2 **Vidya Drolia** held that the test for the purposes of 8 and 11, are synonymous. It's the same
3 test that applied to 8 and 11. Your Lordships may kindly note the paragraphs which are in
4 **Vidya Drolia**. Those are 144, 145 147.5 in **Vidya Drolia** My Lord. 144, 145, 147.5. I will
5 give the page numbers also My Lord. Kindly bear with me for a moment. Your Lordships would
6 find My Lords, 144 at PDF 189, 145 at PDF 190. 147.5 at 191 of Volume 5-A. Now My Lord, that
7 brings me to another point within this the second argument that I have that the larger public
8 policy is to not treat the fiscal requirement as secondary, but surely not something that
9 precludes any party or any person approaching the court. Now, please have with me,
10 unfortunately that is in another volume. Please have with me Section 149 of CPC. 149 of CPC.
11 Your Lordships, would find that in Volume 4-A at page 727.

12

13 **CJI D Y CHANDRACHUD:** Volume 4A page?

14

15 **JAYANT MEHTA:** 727 My Lords, PDF 727. Volume 4A, page 727. If a person is not a party
16 to an Arbitration Agreement, a suit would be the normal, usual remedy in a commercial
17 matter, answering the description of a commercial relationship in terms of the Arbitration Act.
18 If there is no Arbitration Agreement, a suit could be the remedy. For a suit, My Lord the court
19 fees would have to be paid. Please see how CPC deals with payment of court fees My Lord, 149.
20 And kindly see the language. Where the whole or any part of any fee, prescribed for any
21 document by the law, for the time being enforced relating to court fees has not been paid, the
22 court may, in its discretion at any stage, allow the person by whom such fees is payable to pay
23 the whole or part, as the case may be of such court fee, and upon such payment, the document
24 in respect to which fee is payable shall have the same force and effect as if such fee had been
25 paid in the first instance. My Lord, a plaintiff moving the court under 149 seeks leave of the
26 court to say, well, for reasons A, B and C, please direct... please allow me some time to pay the
27 court fees. That does not preclude My Lord, entertaining the suit, that does not preclude My
28 Lord, the suit court from granting an interim relief. So can we have an interpretation of the
29 Arbitration Agreement My Lord, which puts a plaintiff in a civil suit in a better position than
30 a petitioner under the Arbitration Act? Yet again, what Your Lordships find, is a Legislature
31 saying there is a pre-condition, but it is not an inviolable pre-condition. We have ways and
32 means of ensuring that My Lord, In a given situation, ends of justice are met, while the fees
33 can be collected later. We also have in the CPC, Order 20, and by the 1976 Amendment to the
34 CPC, 6(A) was brought into the CPC. Order 20, Rule 6A. Kindly have that My Lord, Your
35 Lordships would find that at 793 in the same volume. Volume 4(A). I seek Your Lordships
36 attention to sub-rule 2 of Rule 6(A). 'An appeal may be preferred against the decree... I'm sorry
37 My Lordships have it? 'An appeal may be preferred against the decree without filing a copy of

1 the decree. And in such a case, the copy made available to the party by the court shall, for the
2 purposes of Rule 1 of Order 41 be treated as a decree. But as soon as the decree is drawn, the
3 judgment shall cease to have effect of a decree for the purpose of execution or for any for other
4 purpose.' Once again My Lord, a decree would have to be stamped, would have to be drawn.
5 But the Legislature said, you don't have to wait for expedition. For ends of justice, you can
6 always have the decree being drawn in parallel, but the execution proceeds. We're not
7 waiting... the Legislature is telling us, please don't wait for a decree to be drawn, which would
8 require stamping and proceed for execution. But yet again, another instance of the fiscal
9 precondition My Lord for drawing of a decree...

10

11 **JUSTICE SANJAY KISHAN KAUL:** Many Mr. Mehta, many such examples are there. We
12 are concerned with a very narrow compass. Why are you getting into other issues?

13

14 **JAYANT K MEHTA:** Yes My Lord, I'm just giving you examples where My Lord the
15 Legislature has itself told us that a fiscal pre-condition is not such...

16

17 **CJI D Y CHANDRACHUD:** We are really confined now to interpreting this statute...

18

19 **JAYANT K MEHTA:** I'm not interpreting. My only purpose was to support my argument
20 with Order 22, Rule 6A.

21

22 **CJI D Y CHANDRACHUD:** Mr. Mehta, we've looked at your other submissions. Thank you.

23

24 **JAYANT K MEHTA:** I'm most grateful My Lord, for a very patient hearing.

25

26 **CJI D Y CHANDRACHUD:** Thank you.

27

28 **JAYANT MEHTA:** Deeply obliged.

29

30 **CJI D Y CHANDRACHUD:** Yes, Mr. Banerji. And Mr. Khambata, we just wanted to know,
31 I mean, it's entirely your choice. Would Mr. Khambata like to argue first because as the *Amicus*
32 you can wrap up what... Unless you have all decided in advance who's going to...

33

34 **GOURAB BANERJI:** Give me half an hour My Lord, most of it is covered in the written
35 submission, so I'm not going to...

36

37 **CJI D Y CHANDRACHUD:** Alright, Mr. Banerji, you complete so that...

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GOURAB BANERJI: My Lord, there is obviously a sense of *Deja Vu* here My Lords, having argued this at some length before five judges.

CJI D Y CHANDRACHUD: And you are not springing any surprises on us I hope.

GOURAB BANERJI: I am My Lord, I'm coming to the surprise in a minute. This is the second time that there has been a Seven Judge bench in an arbitration matter and the earlier one was in this very Court in 2005 in **SBP**. The reason I'm mentioning this is, that both matters concern an apparently innocuous provision of the law, which is appointment of an arbitrator, which is usually only to be brought in when the parties fail to appoint somebody or the institution fails, or there is some stop gap required where the court has to step in, really just to make an appointment. Yet such a matter has come before this court on two occasions before seven judges. My Lord why is a question that perhaps My Lord will require a long debate but I will show Your Lordships a little bit of the history of Article 11, which is relevant only to the question before My Lord, which is, it's a very narrow reference before My Lords. Section 11, should the Section 11 court go into stamping? That's the only question, which Your Lordships have to see, or should it be left to the arbitrator? Obviously the canvas is wide. The problem is that while answering such an issue, every sentence that Your Lordships utter in these seven judges will have an impact on Section 11. That's the reality of the matter. We have lived with **SBP** for 18 or 20 years. And even after the 2015 amendment **SBP**, the ghost continues. It was relied on in **Garware**, which is squarely before My Lord. And there is a very important passage in Justice Roy's judgment, where he deals with **SBP**. That's one aspect of the matter. So far as the narrow question is concerned on 11(6A), elaborate arguments have been made. I will...I have in my index, set out a structure as to how Your Lordships can look at Section 11 and the consequences of stamping that it is...Obviously the agreement is valid and not void. This is a matter only of admissibility. All that has been argued. I will show a few pages of items which may have been missed, that's all. But before I do that, I'll just take two minutes more of indulgence because it's a mindset issue. Judges normally, as I understand, I don't have any personal experience. Whenever a matter comes before a Judge, there is an inclination to decide. If there is injustice and injustice presents itself, and somehow there is an issue, the judge will decide. The entire purpose of 11 is somehow to impose self-restraint in not deciding. There is a *Lakshman Rekha*. If Your Lordship sees the language of 11(6A), the word used is confined to the examination. There is a *Lakshman Rekha*. There is a very limited scope in which the Court...My Lord a Section 11 court is really... And I said this before. It's really not a court. In fact, Your Lordship earlier would decide Section 11 with a single judge. That was the practice in this court. That was the practice in the High Court. It would all be

1 decided by a learned single judge. And in fact, there was a judgment of Justice Bharucha, as
2 Your Lordships will remember of five judges in **Konkan**. Chief Justice Bharucha as he then
3 was, which said that really all you need to see is whether the procedure has been followed and
4 appoint and that of course will not find favour in **SBP**. So the practicality of deciding
5 something in a court in some way defeats Section 11, the way the two acts are placed. We have
6 grown up with the 1940 Act. The 1940 Act has a provision in Section 20 where you appoint an
7 arbitrator with intervention of the court, Your Lordships may remember long time ago this
8 section was there. There the thinking was at the very first instance, the court will intervene
9 and the court will decide what is the scope of the reference and all points would be decided at
10 the Section 20 stage and go on. The '96 Act is a complete about turn. Nobody is saying... this
11 is something which haunts judges; nobody is saying that the court will not have the final say.
12 The court has to have the final say. The last word, supervisory jurisdiction has to be with the
13 court. Arbitrators cannot be allowed to run riot. But Lord, we are not at the last stage. We are
14 at the first stage, at the appointment stage. So who has the first look, and who has the second
15 look? What has happened here is, instead of the first look being with the arbitrator at
16 the Section 16 or Article 16 stage, slowly and slowly 11 Jurisdiction is being slowly and slowly
17 My Lord increased. And the burden is immediately coming on the Court. And the whole
18 purpose was that the burden should not come on the Court. Any matter Your Lordships take
19 of 11, whether stamping or otherwise, Your Lordships will issue notice. Somebody will file a
20 reply. They will say limitation. They will say this that... lot of court time My Lord is taken and
21 the entire purpose of taking it out of the system on day one, which the institutions do. They
22 appoint. It goes out. 16, you have your first shot. 34, you have your second shot, and ultimately,
23 the Court decides. So please keep this larger picture in mind, because every sentence Your
24 Lordship will see on Section 11(6A) will have some impact My Lord, broadly. Every sentence,
25 not only in restamping... this I wanted to make this submission at the first instance. Now, in
26 this slide, I will just show the index to my written submissions and only show a few aspects
27 that Your Lordships may consider. Please come to the written submissions. The written
28 submissions start at page 45 of the first volume. Have My Lords got the index? I've just put it
29 in a structure, and most of these arguments My Lord, have already been made. Four or five
30 aspects I just want to highlight. First is the introduction. How did the reference come about.
31 What were the findings in **NN Global**? What is the relevant issue framed? Then, what are the
32 summary of the submissions? I'll place them at the end, then the Stamp Act, the relevant
33 provisions, which Mr. Datar had mentioned, the relevant authorities. Now My Lord, here
34 **Hindustan Steel** was mentioned. There are some very interesting judgments My Lord, Privy
35 Council, High Court and the Supreme Court. I will come back to that. Then My Lord Section
36 C is Stamp Act versus the Indian Contract Act. That also has been addressed in some detail,
37 2(g), 2(h), 2(j), what I would submit are the errors. Then My Lord, (iv), international

1 perspective. I want to develop this. I want to show My Lord, what is the basis of this article
2 and how it directly impacts this stamping case? Then My Lord, Arbitration and Conciliation
3 Act at page 46. What is the history? What are the relevant paragraphs of the 246 Law Report?
4 What did the High Level Committee say? And then some judgments, and then (vi), I have
5 focused on **Garware** and **United India Hyundai** because that has been specifically
6 affirmed by the Constitution Bench in paragraph 29 and **Vidya Drolia** actually, now it has
7 been clarified. And I have mentioned it in my written submission in Career Institute, that
8 really the question was not there. Your Lordship will see that one page before I go back on my
9 note. Lordship just sees the Career Institute reference. Please come to page 108 of the written
10 submissions.

11

12 **JUSTICE SANJIV KHANNA:** How long are your written submissions?

13

14 **GOURAB BANERJI:** My Lord, I thought that it is better to put everything down so that since
15 we are pressed for time I have put everything down in writing so that it is there rather than
16 only giving pointers. Please come to 107. I mentioned Careers Institute Educational Society.
17 This judgment My Lord, this order came one day before **Vidya Drolia**. Had this come
18 perhaps My Lord, there would not have been any need to debate **Vidya Drolia** to great length
19 sorry in **NN Global**. This order had not come. Then the judgment was delivered one day later
20 and it has the scope of **Vidya Drolia** has been explained in Career Institute. I am therefore
21 not going to really touch upon **Vidya Drolia** today. I want to just show My Lord's **Garware**,
22 because nobody has yet Your Lordships have not seen **Garware**, which is the sheet anchor
23 decision on the basis of which the five Judge My Lord proceeds. So if Your Lordships are
24 pleased to just see **Garware**. My Lord, **Garware** is at page 33, volume 5-A.

25

26 **JUSTICE SANJAY KISHAN KAUL:** 5-A?

27

28 **GOURAB BANERJI:** My Lord, **Garware** is absolutely on the point where this court holds,
29 that at the Section 11 stage stamping is required. That is My Lord, the two Judge bench. My
30 Lord, the reasoning in **Garware**, Your Lordships will just note the paragraphs, paragraphs
31 18 to 22 and 29 in **Garware**. 8 to 14 is the history...

32

33 **CJI CHANDRACHUD:** 18 to 22 and?

34

35 **GOURAB BANERJI:** ... and 29 My Lords. These are very important if Your Lordship, starts
36 with paragraph 8 to 14. I just... that starts at page 46. 8 to 14 summarize the previous history.
37 **Konkan, Rani, SBP** and then quote the Law Commission etc. and the bill. And it

1 summarizes everything in one place My learned senior Mr. Datar referred to paragraph 13,
2 which has the statement and objects and reasons, but in one place My Lord, everything has
3 been summarized. 8 to 14. The reasoning starts at paragraph 18, which is at page 54. 18 to 22
4 is the heart of the reasoning. It will be noticed from the aforesaid judgment that where an
5 Arbitration Clause is contained in an agreement or a conveyance, different consequences
6 ensue, depending on whether the agreement or conveyance is unregistered or unstamped.
7 Then the next sentence. 'It is settled... again My Lord, SBP comes back in the picture... 'It is
8 settled by SBP and Co. that Section 16 of the '96 Act has full play only after the Arbitral
9 Tribunal is constituted without intervention of Court under 11. My Lord, this is harking back
10 to the previous regime of intervention in Court, intervention of the Court, intervention without
11 the Court. My Lord, this finding at paragraph 18 proceeds on the basis that SBP is good law.
12 That moment something is decided in 11, the 16 jurisdiction, which is really the wider
13 jurisdiction of existence, validity, jurisdiction is curtailed because a Court, and no court My
14 Lord, the Chief Justice or it's designate, because that was **SBP**, has decided something in a
15 mini trial finally. So, how dare an arbitrator go behind a Section 11 order in a Section 16
16 situation. That is the impact of the quote of paragraph 12 which is quoted in some detail here
17 and My Lord that quotation of **SBP**, which is relied on by the two judges at page 54, if Your
18 Lordships come to 55 somewhere in the middle My Lord, '*Prima facie*...', Your Lordships have
19 this? '*Prima*...', this is relevant because of My Lord, 'the Model Law commentary'... '*Prima*
20 *facie*, it would be difficult to say, that in spite of the finality conferred under Sub-Section 7 of
21 Section 11, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that
22 decision and rule on its own jurisdiction or on the existence of an Arbitration Clause. So My
23 Lord, what **SBP** says is, because 11(7) says the decision of Chief Justice is final, 16 jurisdiction
24 is curtailed, 11 binds the 16. Now My Lord, that is the basis on which if Your Lordships sees, at
25 the next paragraph 22. The finding on this aspect. Sorry, please come to page 56. In view of
26 the law laid down by the Seven Judge Bench, it is difficult to accede to the argument made by
27 the Learned Counsel on behalf of the Respondent, that Section 16 makes it clear that an
28 Arbitration Agreement has an independent existence of its own, must be applied while
29 deciding an application under Section 11. So the 16 argument that all issues should go to the
30 arbitrator is rejected in view of SBP, this is first find. Second finding, 19 the finding is the Law
31 Commission has not specifically referred to My Lord SMS, but it has overruled. It has
32 legislatively overruled **SBP**. Then 20, then 22 is the second error, which is the para which has
33 been confirmed by the Division bench...Constitution Bench. Please come to para 57... page 57.
34 When an Arbitration Agreement is contained in a contract, it is significant that the agreement
35 only becomes a contract if it is enforceable by law. No difficulty. We have seen how under the
36 Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law
37 unless it is duly stamped. Now this is the error which has been compounded by the

1 Constitution Bench. Therefore, on a plain reading of So and So and Section 2(h) of the act,
2 2(h) is set out above, which is 2(g) and 2(h) have been set out. Would make it clear arbitration
3 would not exist where it is not enforceable by law. This is the second error and the third error
4 is at 29, where **Hyundai** comes in. That's the third aspect Your Lordships may consider which
5 is at page 62. Running page 62. Here, the Division Bench relies on **Hyundai** to say this was
6 a Scott and Avery Clause case. I'll just read it. The judgment in **Hyundai** is important. What
7 was specifically under consideration was an Arbitration Clause, which would get activated only
8 if an insurer admits or accepts liability. Since on facts it is found insurer repudiated the same,
9 though an Arbitration Agreement it exists, so to speak in the policy, it would not exist in law,
10 as was held in that judgment. When one important fact is introduced, namely, insurer has not
11 admitted or accepted liability. So My Lord, this is the understanding of **Hyundai**. There's a
12 problem with **Hyundai** because **Hyundai** is... there are difficulties which I've highlighted
13 in my note. The clause is intact. It is just that the scope is limited to quantum and not liability.
14 We can't say that the...

15

16 **JUSTICE SANJIV KHANNA:** **Hyundai** is accepted.

17

18 **GOURAB BANERJI:** It says an accepted matter to the... So there's a problem with
19 **Hyundai** also. Likewise in the facts of the...

20

21 **JUSTICE SANJIV KHANNA:** Just one minute.

22

23 **GOURAB BANERJI:** So My Lords in fact what happened in **Hyundai**, I put it in my note
24 is, the learned single judge of the Madras High Court, she appointed an arbitrator saying that
25 this should go to arbitration. This Honourable Court My Lord following a pre-11(6A) judgment
26 held that no, there was no dispute as to... there was a dispute as to liability. Hence the matter
27 should rest here. And the 11 was dismissed. So again, the problem there is that, so I have dealt
28 with that in my written submission. On the basis of **Hyundai**, which is now affirmed by the
29 five judges, and Justice Roy takes the opposite view. On the basis of **Hyundai**, this is the third
30 part of the ratio of this judgment. Likewise, in the facts of the present case, it is clear that the
31 Arbitration Clause that is contained in the subcontract would not exist as a matter of law. To
32 summarize on **Garware**, My Lord, 3 points on **Garware**, one My Lord, it resurrects **SBP** to
33 curtail the Section 16 jurisdiction. It resurrects **SBP** My Lord. Section 16 jurisdiction is
34 curtailed basis **SBP** and relying on Section 11(7). This is one. Two, My Lord, it.... And that is
35 a point which has been developed in great detail by Mr. Datar. Two. It holds a non-stamped
36 agreement to be non-existent in law. And three My Lord, it relies on **Hyundai**, which itself has
37 its own problems because it was an accepted matter case. It was a three judge bench and there

1 were there are issues with that judgement, and I have spelt it out. Just to decide *Hyundai*,
 2 Your Lordships, there had to be numerous hearings first in the Madras High Court, then it
 3 came here. Then that was heard. So, My Lord, this is exactly what is what is the entire idea is
 4 to take it out of the court at the first instance and push it to the arbitrator. And of course, My
 5 Lord ultimately supervise at the 16 /30. So My Lord, this is so far as *Garware* is concerned.
 6 *Hyundai* I have said whatever I have to say. I will now go to just two pages on this issue of
 7 existence in law and stamping. And then the foreign jurisprudence, which has not been shown.
 8 And then I'll sum up. Two pages in the written submissions Your Lordships, will see and
 9 something quite interesting. Please come to page 61.... 59. This is following on from what Mr.
 10 Datar has already argued in respect of the Contract Act what is the intersection of the Contract
 11 Act and the Stamp Act. Your Lordships at page 59, *Hindustan Steel* My Lord, that has
 12 already been mentioned. Then at the bottom of 59, there is a mention of the Privy Council
 13 which affirms the Patna High Court. Page 59 of the written submission. Have Your Lordships
 14 got 59? Volume 1, titled Relevant Authorities My Lords. First, there is *Hindustan Steel*,
 15 which was mentioned in the morning, then My Lord, at the bottom of page 59, is the Privy
 16 Council in the Patna High Court Judgment which My Lord I have quoted, 'Object of the Stamp
 17 Act is not to alter the terms of the bargain between the parties, protect the revenue by
 18 excluding proof of the bargain.' This is so far as this is concerned. Then, at page 60, My Lord,
 19 there are a series of Judgments which consider the Stamp Act in some detail in the context of
 20 validity and out of these Judgments, the second one *Gulzarilal Marwari*. All these
 21 judgments were considered by Justice Roy in his dissent, noted in the majority but not
 22 considered. *Gulzarilal Marwari* is important because what the judge there finds is that in
 23 England there are provisions which make... where non-stamping actually makes an agreement
 24 void, unlike in India. So My Lord, he gives that example in *Gulzarilal Marwari*. Then
 25 *Poorna Chandra Chakrabarti*, Justice Bijan Mukherjea's judgment, and then My Lord,
 26 the most interesting one which is the bottom of page 60.

27

28 **CJI CHANDRACHUD:** The Pakistan...

29

30 **GOURAB BANERJI:** Pakistan... Now My Lord, it is very elaborate, but I will not read the
 31 judgment. He goes into the Legislative history of Section 33 and 35 from the 1890s and sets it
 32 out. But My Lord, I am not on the judgment so much as the judge. The person who delivered
 33 this Judgment was a Parsi Judge called Dorab Patel. He was destined to be the... he was their
 34 H. R. Khanna. He was destined to be Chief Justice of Pakistan. When Zia-ul-Haq came to
 35 power, he was asked to take an oath of office. He refused and he resigned. So he could not
 36 become Chief Justice of Pakistan. In the Bhutto reference three dissents. One of his main
 37 dissent was authored by Dorab Patel. So very learned man.... Barrister. He analyses in great

1 detail the interplay. This case what had happened was, there was an insurance contract. In
2 that insurance contract, which was unstamped, the matter went to an award. The award was
3 sought to be enforced. The argument was made that look, the initial document is unstamped.
4 It is void. He said that cannot be the law. That is a valid document. And there are some very
5 interesting passages, some purple prose if I can put it, where he uses very My Lord colourful
6 language, and he analyses this and Your Lordships would certainly read this judgment if only
7 for that, and for the background. So My Lord, the consistent position in all High Courts in the
8 Privy Council, everywhere else is, the fact that mere payment of Stamp Duty My Lord does not
9 invalidate the bargain. In fact, the way he puts it is, 'the object of the Legislature was to protect
10 public revenue and not to interfere with commercial life by invalidating instruments vital to
11 the smooth flow of trade and commerce. And then he said it would be against all canons of
12 construction to enlarge the meaning of the words in 35 so as to render invalid, instruments
13 which fall within the mischief. So My Lords if the majority view in **NN Global** is to be
14 sustained by this court today, forget arbitration, anybody can turn around and say at any point
15 that this agreement is void, this agreement is invalid. I won't do anything, whatever benefit
16 I've got. In fact My Lord, we had also cited before the five judges, a Privy Council Judgment,
17 which explains that if you take this sort of extreme view, then there will be all sorts of practical
18 difficulties and Mr. Datar mentioned the quotation My Lord from Mulla. We had also cited My
19 Lord, the 13th Law Commission, where this problem was addressed. I'll just show My Lord
20 that passage from the 13th Law Commission, which is mentioned in the note itself presided
21 over by Mr. Setalvad, where he deals with this particular issue specifically. Your Lordships will
22 just see page 64 of the written submissions. 64 refers to **Mahan Singh**, which is the Privy
23 Council, and then, please see page 65. This very question was raised about unenforceability.
24 This very question of stamping and unenforceability was raised and shot down and the law
25 was summarized. My Lord at page 65. All these documents followed are on record. We've given
26 the volume and the page where it is there. The above judgment was relied upon by the Law
27 Commission in its 13th Report, chaired by M. C. Setalvad specific context of an unstamped
28 agreement while dealing with a recommendation as regards Section 2(g) as follows. Director
29 of Legal Studies has also made the suggestion it should be provided in Section 2(g) that
30 agreements of imperfect obligations are not void, but only unenforceable. He has mentioned
31 an unstamped agreement as an instance of such a case. Such an instrument, which is a record
32 of an agreement, is neither receivable in evidence nor can be acted upon see Section 35 of
33 Stamp Act. Since the decision of the Privy Council in **Mahan Singh versus Yubabi**, which
34 I quoted there, the law is well established that the expression unenforceable by law, which is
35 what is in 2(g), does not mean unenforceable by reason of some procedural regulation law of
36 limitation, but unenforceable by reason of substantive law. In view of this, it is unnecessary to
37 introduce the suggested change. So 2(g) is restricted to unenforceable by law which as is

1 explained is void. So My Lord if agreement is void, null and void, that stands on a completely
2 separate footing. We are not going into existence or validity here. We are on admissibility. So
3 this is so far as this aspect is concerned. In this background, I would like Your Lordships now,
4 just before I come to the summary of my submissions, to just see the Model Law and the
5 commentary because that has some impact on this. So the Model law, Article 11 of the Model
6 Law was basically incorporated by us in Section 11 and Your Lordships will recollect, I
7 mentioned it a little earlier that **SBP** seems to suggest in the majority and is disagreed by
8 Justice Thakkar in the minority, that because 11(7) says a decision by the Chief Justice is final
9 that means nobody else can look at it in 16. The intention, actually in the Model Law was
10 exactly the opposite. This expression final and no appeal has been explained. My Lord there
11 are two commentaries on the Model Law, which are of relevance. One is a book by Peter
12 Binder. We have put the extract. Peter Binder very conveniently, collects all the foreign law on
13 each of the articles. And there is a second book by Holtzmann and Neuhaus, which we have
14 put also extremely convenient, because the entire discussion as to the *Travaux* is set out in
15 Holtzmann and Neuhaus. I know my learned friend, Mr. George Pothan has individually set
16 out the entirety, but these two books actually summarize the entirety, and I will just show four
17 pages of that.

18

19 **CJI D Y CHANDRACHUD:** Where is that? Where have you referred to these two?

20

21 **GOURAB BANERJI:** The first one if Your Lordships see Peter Binder, Peter Binder is in
22 Volume 4-B at page 4393. I hope I got that right. Serial number 7, Volume 4-B. 4393.
23 Interestingly My Lord, today I'm citing the fourth edition. The second edition was cited in SBP,
24 but not noted. 4393. Has Your Lordships got 4393? International Commercial Arbitration and
25 mediation in UNCITRAL Modern Law jurisdiction. In fact Your Lordships will find there is
26 not much case law because nobody other than us has a problem in appointing arbitrators and
27 there's a reason. Have Your Lordships got 4393? 4394 is where the Model Law is set out. Please
28 see Article 11(5) because this will become relevant later. A decision on a matter entrusted by
29 paragraph 3 or 4 of this article to the Court or other authority specified in Article 6 shall be
30 subject to no appeal. This is where we get our finality provision from. The Court or other
31 authority in appointing that shall have due regard to qualification. So, this is the source of our
32 11(7) of finality. Now, why did this come is made clear if Your Lordships go down a few pages
33 to 4398, it starts at 4397. Default Procedure. 4398. Paragraph 6. Two very interesting
34 sentences at the bottom of 4398. The finality of a courts or other authorities decision in this
35 case is essential to the rapid constitution of the Arbitral Tribunal as was pointed out by the
36 analytical commentary, I'll show the analytical commentary. The next sentence is even more
37 interesting. It is suggested that this provision does not infringe on the procedural rights of the

1 parties because the possibility of applying for setting aside of the award, according to Article
2 34(2)(a)(iv) of the Model Law remains open. So finality, the purpose of finality is really to
3 make sure that the procedure starts, because the arbitration should start. But then, of course,
4 the court has the right.

5

6 Paragraph which I was reading My Lord, please see the Act. Your Lordships are very familiar
7 with the Act. My Lord, in 8 there is an appeal. Section 8, there is an appeal. In 9, there's an
8 appeal. In 17 there's an appeal. Even in 16, there's a part-appeal. In 34 there's an appeal. In 45
9 there is an appeal. Only in Section 11, is it that there is a specific no-appeal and the reason is
10 for this reason. Every other... because in every other situation the court is a [UNCLEAR] Court.
11 In an 8 Your Lordships will have to apply mind as to whether it is a suit which has to be stayed.
12 What are the *prima facie* grounds, et cetera. 9 is interim relief. There has to be some *prima*
13 *facie* case. 16, Jurisdiction. If it is allowed, there is an appeal. 34-Application of mind. 45-
14 There are some grounds. But 11 the statute says, 11(7) of our statute says no appeal and the
15 reason is this. Finality is in the context that you get the cart rolling. So that 16, there is a lacuna
16 in our statute that in the Model Law there was an appeal from 16. The reason why there is no
17 other jurisprudence of any consequence abroad. And My Lord, I'll show that is because all
18 these issues stamping, this, that everything goes to 16. There's a straight appeal to 16 before
19 the 34. So you don't have to suffer the whole arbitration. But that's My Lord a legislative lacuna
20 which may perhaps be addressed. So this is the passage here. Finality is essential to the rapid
21 Constitution and then there's a footnote. The footnote refers to the analytical commentary
22 which I will show. And the suggestion by Peter Binder is the reason that this does not fall foul
23 of party's rights is because you have a later challenge. Justice Thakkar, in his dissent, uses the
24 phrase chronological priority. My Lord uses the 1st look and 2nd look. First look with the
25 Tribunal, final second definitive look with the court. Nobody's running away for that. So this
26 is one passage I want to show. The second one is the...My Lord in this if Your Lord goes, on
27 e more page at 4399. Cases clout... so all the cases under the clout system, Article 11. And there
28 is not much law, because this is really not debated. This is not a problem. This is a problem
29 peculiar to our act and our jurisprudence. Those cases are there. Please leave that. Please come
30 now to the relevant portion of the *Travaux preparatoires* the Model Law. Please come first to
31 page 4363. Same bundle. 4362 is the title. Everything is in one place. A guide to the UNCITRAL
32 Model Law on international commercial arbitration, legislative history and commentary.
33 Howard Holtzmann and Joseph Neuhaus. This in the next page gives the article. I don't want
34 to read the entire thing, but it is essentially a default clause. It's a stop gap. Please come to
35 4386. Seventh Secretariat Note Analytical Commentary on draft X A/CN.9/264, 25th March
36 '85. This has been separately annexed also, but it is here, and in this would Your Lordships
37 come to para 7, which is at page 4387. This is what is quoted. Rules and guidelines are decision

1 of court. Paragraph five. According to paragraph 5, the decision of the court shall be final
2 whether it relates to a matter entrusted to it by the court by the suppletive rules of paragraph
3 3, or by the mandatory provision of paragraph 4. In cases where an agreed appointment
4 procedure fails to secure the appointment. Finality seems appropriate... these are the words
5 which again take us back... in view of the administrative nature of the function and essential
6 in view of the need to constitute the Arbitral Tribunal as soon as possible.

7

8 **CJI D Y CHANDRACHUD:** As you said to get the cart going.

9

10 **GOURAB BANERJI:** This is to get so... The entire purpose of Article 11 was only
11 appointment of arbitrator and leave everything else by and large to the 16 jurisdiction. So this
12 is the international. This is the basis on which we have our 11(7), which uses final and no
13 appeal. Same My Lord, the same portion is used in 11(7). So this is something that Your
14 Lordships may keep in mind because in *Garware*, the two judge bench specifically refers to
15 that portion of SBP, and on that basis curtail 60 and says that 11 has a wider play. So My Lord,
16 it squarely applies. And this aspect has been dealt with by Justice Roy in his dissent in four
17 paragraphs, which I will show My Lord, and then I will just summarize my submissions in My
18 Lord, two pages. Your Lordship just may just see the dissent of Justice Roy on this aspect. Your
19 Lords may come to page 492 of Volume 5-A. Your Lordships will just give me a minute. Yes.
20 My Lordship, may come to page 458.

21

22 **JUSTICE SANJIV KHANNA:** 458 or part of....

23

24 **GOURAB BANERJI:** 458 of Justice Roy's...

25

26 **JUSTICE SANJIV KHANNA:** Paragraph or page number?

27

28 **GOURAB BANERJI:** Page number. Volume 5-A. My Lord.

29

30 **CJI D Y CHANDRACHUD:** 5A?

31

32 **GOURAB BANERJI:** 5A. 457 he is discussing SBP and 458 My Lord. He starts discussing
33 the dissent at para 353 and he gives My Lord, he summarizes Justice Thakkar's dissent at 354.
34 Firstly, the function of the Court is to interpret the provisions as it is and not to amend, alter
35 or substitute the interpretive process. Secondly, it's for the Legislature to make a law
36 applicable to certain situations contemplated by judiciary is no power entering into legislative
37 wisdom. Thirdly, as held by me, the decision of the Chief Justice is merely a *prima facie*

1 decision and subsection 1 of Section 16 confers express power on the Tribunal to rule on its
2 own jurisdiction. Fourthly, it provides a remedy to deal with situations, create created by the
3 order passed by the Arbitral Tribunal. Emphasis in original. Then what sheet anchor of his
4 decision is in the guise of interpreting statute, judicial legislation, not permissible. And then
5 355. He then considers Section 16 in some detail, and then 356 is the conclusion in the dissent.
6 The above line of reasoning in Thakkar J's dissent resonates with the internationally
7 recognized principle of competence, competence, and the doctrine of separability majority
8 opinion SPB suggests Section 11 could conduct a mini trial at the prereferral stage, which is
9 where My Lord we are heading again. Jurisprudential correctness for SBP has been doubted
10 and was considered as excessive judicial intervention. It has been legislatively overruled by
11 subsequent amendment. So My Lord, he finds **SBP** is gone and there are number of
12 observations thereafter. The majority still and the concurring jurisdiction of Justice Ravi
13 Kumar still relies on **SBP. Garware**, still relies on **SBP**. That ghost is still there because My
14 Lord we feel or judges feel that where there is some injustice, even at the 11 stage there is an
15 inherent desire to correct the wrong. But in correcting that wrong what the balance is that
16 that wrong could equally perhaps be corrected by somebody else without taking up. Today,
17 seven judges are sitting on an arbitration matter which really should be somewhere else, before
18 somebody else, deciding a 16 on stamping. So My Lord, that was the that was what the dissent
19 specifically affirms. So My Lords, these aspects Your Lordships may keep in mind while laying
20 down the parameters of 11 in its totality, and in particular, 11(6A), which is the language is
21 absolutely clear. Nothing [UNCLEAR]. In the majority judgment in the five judges, there is no
22 place where 11(6A) is quoted. Confined to the examination of the existence of the Agreement,
23 each word has been paraphrased analysed in great detail by Justice Roy. That expression, that
24 provision, is not quoted in the majority at all. So My Lord, whether on the text or the context,
25 admissibility issues at least should not be touched at the 11 stage. Now, My Lord, in that light,
26 I just want to conclude by reading or placing two pages of the written submissions, which
27 summarize whatever My Lord there is. It is summarized at various places. Your Lordships will
28 come to page 54 of the Volume 1, written submissions. It's just two pages My Lords, I'll just
29 place it. 54 in Volume 1. The majority view in **NN Global**, the unstamped Agreement is void,
30 does not exist in law, does not lay down the correct law, such a view is conflict of provision of
31 Stamp Act, set of jurisprudence... In so concluding majority judgment failed to deal with the
32 several authorities cited before it, including all these authorities, which I mentioned, stating
33 that an unstamped Agreement does not render it invalid or void. Then My Lord, two is, it is a
34 fiscal enactment. It is not a weapon of technicality. Three My Lord, I have taken from the
35 judgment of the Supreme Court of Pakistan. Object is to protect public revenue, not to interfere
36 with commercial life by invalidating instruments vital to the smooth flow of trade and
37 commerce. Four My Lord, it's a curable defect, merely prescribed document from being

1 admitted into evidence. Five My Lord, again, does not affect the validity of the transaction,
2 merely renders the document inadmissible. Six My Lord is important. Parties which have
3 acted upon contracts substantially perform their obligations under such contracts
4 insufficiently stamped to be visited with severe, drastic and unduly harsh consequences. If an
5 unstamped agreement is deemed to be not existing in law and ought to be void. Particularly
6 true in cases original agreement is not traceable. Then My Lord, seven is widening of the scope
7 of Arbitration Agreements. Then page 55, 11(6A) language, confined to the examination of the
8 existence, investigations aspect stamping, contrary to the plain language. Contrary also to the
9 statement of objects and reasons which says, 'Please don't go into other issues.' Then word
10 'confined' has a specific meaning My Lord. This was quoted by Justice Roy in his judgment
11 that it's a *Lakshman Rekha*. You have a limit. Then My Lord, what I have submitted is
12 'existence' has a specific meaning. Should be restricted to existence and validity at the highest
13 of the Arbitration Clause. Validity would mean Arbitration Agreement, not null and void. It
14 should be restricted to formal validity at stage of contract formation. Inquiry should only be
15 to satisfy agreement in writing for contractual ingredients fulfilled and in any eventuality, by
16 no means should it be extended to whether document is inadmissible as being unstamped.
17 'Inadmissibility' and 'Invalidity' My Lord, whichever way we look at it, are different legal
18 concepts. Lack of stamping is admissibility. And then My Lord I've mentioned 2015
19 Amendment and it is not turning a blind eye because My Lord the Arbitrator can look at it.
20 And 16, even if Your Lordships under 11 appoint an Arbitrator, the section is clear, 33 and 35,
21 make it clear. Arbitrator is an authority under 33. He can look at it. He is looking at it My Lord,
22 in all Institutional Arbitrations, in all other ad-hoc Arbitrations, where there is consent. As an
23 Arbitrator, I have also been confronted on the first day with an unstamped agreement. One
24 has to sort it out in whichever way possible. And My Lords, ultimately, there are a lot of two
25 or three judge benches. Sometimes it is difficult to reconcile them, but Your Lordships have
26 the luxury of sitting in seven. And if there are some portions that can be ironed out, I would
27 request My Lord, this is an opportunity, after 18 years My Lord. It is not often that one gets a
28 chance to raise an Arbitration issue before a forum and every sentence of My Lords in the
29 context of appointment of Arbitrator will have some impact. It may be that 2019 amendment
30 may be notified. It has not been notified as yet. There is some rethinking on some aspects.
31 Ultimately, whatever Your Lordships say will have an impact not only... and I'm making... and
32 I think I can make bold to say, not only on the stamping aspect, it may have some impact on
33 other Section 11s. And I conclude by My Lord, mentioning a judgment of My Lords, which
34 shows that there are 11s pending from 2006, 2010, 2012, and the reality is it is really like a
35 mini trial. You file the application, other side comes. He files a reply, you file a rejoinder. Then
36 there is a full-fledged hearing in the High Court. Then there is an SLP. Then Your Lordships
37 sometimes... and the reality is that. And we made this calculation, maybe in eight or ten

1 matters, My Lords have closed the 11. In the vast majority of matter their appointment has
2 been made and the matter has gone on. So it is also a question of balancing judicial time and
3 the legislative intent and keeping it out of the system at the first instance. Nobody is saying it
4 will not come back. Everything somehow at the 34 stage or somewhere may come back, but
5 that's the larger issue. My Lords, I am deeply obliged.

6

7 **CJI D Y CHANDRACHUD:** Thank You Mr. Banerji. Yes Mr. Khambata.

8

9 **DARIUS KHAMBATA:** I thought my learned friend would leave me 45 minutes, but he
10 seems to have left me 5 minutes.

11

12 **CJI D Y CHANDRACHUD:** But Mr. Khambata, we can give you a little time tomorrow.

13

14 **DARIUS KHAMBATA:** Lordships are kind enough for that. I will, of course not repeat
15 anything. And I want to also place before Your Lordships a perspective not only under Section
16 11, but also private appointments of arbitrators and institutional appointments because I
17 think, as my learned friends have said, seven judges do not sit often to hear an arbitration
18 matter. It's best that these matters are also ironed out by Your Lordships because otherwise
19 other matters will float up the stream to Your Lordship subsequently, there's no point in that.
20 Your Lordships are fully seized of all the issues. It's best that Your Lordships lay down the law
21 emphatically now. I think Justice Khanna actually encapsulated the issue before My Lords
22 when all is said and done. And I believe Justice Khanna said whether non-stamping or under
23 stamping of the main contract can render the Arbitration Agreement void or invalid. That's
24 really the heart of this debate and I would request My Lords to hear my arguments with one
25 or two overarching thoughts. The first thought is that ultimately, the Stamp Act is a means to
26 secure revenue for the State arising from the stream of trade and commerce. The Arbitration
27 Act assists the stream of trade and commerce. And any roadblocks at the initial stages will only
28 dry up that stream. So to use Stamp as a gateway dispute to arbitration really defeats the
29 purposes of both acts. Today we are talking about making India a global hub for arbitration.
30 And we have before us Section 5 of the Act, which has already been shown to My Lords, as well
31 as the fact that the Arbitration Act is a complete code. And I think taking all these together,
32 My Lord I want to first make give Your Lordships, three reasons why the issue of stamp must
33 be left to the Tribunal in the first instance. There is always a 34 court. There is always a second
34 look. And as my learned friend said the first look should it be just a *prima facie* look? Should
35 it be a look at all or should it actually decide the matter at the outset. Now, there are three
36 broad reasons why I comment, that Your Lordships purposively interpret the provisions of
37 this Act to hold that the matter must be left to the Tribunal. The first, and I'll go through it

1 very briefly because my Lords have expressed some view on that already, is the doctrine of
2 separability. I'm conscious of the fact that under Section 16 that doctrine is incorporated for
3 the purpose of the Tribunal deciding its own jurisdiction. But it's not only under Section 16,
4 that we find the doctrine of separability under our act. We have it in black and white in Section
5 7. If My Lords, just see section 7 for a moment. 7 Sub-Section 2 which draws the distinction
6 between an Arbitration Agreement, which may be in an Arbitration Clause and the main
7 contract. My Lord may I continue tomorrow?

8

9 **CJI D Y CHANDRACHUD:** Half an hour to 45 minutes tomorrow?

10

11 **DARIUS KHAMBATA:** I can complete.

12

13 **CJI D Y CHANDRACHUD:** We'll be here at 10:30.

14

15 **DARIUS KHAMBATA:** We're grateful Your Lordships.

16

17

18

END OF THIS PROCEEDING