

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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

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

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

TRANSCRIPT OF HEARING

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

20
21 **JUSTICE SANJIV KHANNA:** Over here, its updated submissions.

22
23 **DARIUS KHAMBATA:** Updated submissions. I'm obliged.

24
25 **JUSTICE SANJIV KHANNA:** There are 38 pages in all?

26
27 **DARIUS KHAMBATA:** 38 pages. But that's because I've extracted judgments there. So it's
28 easier for me to read from their rather than troubling My Lord to go to the actual judgment.
29 I'll be going to the actual judgments in only two cases which are quite critical

30
31 **JUSTICE J.B. PARDIWALA:** Is it Harbour Assurance Company?

32
33 **DARIUS KHAMBATA:** Yes. It starts with that.

34
35 **JUSTICE J.B. PARDIWALA:** That's the Queen's Bench decision.

1
2 **DARIUS KHAMBATA:** That's right. It starts with that [UNCLEAR]

3
4 **CJI D Y CHANDRACHUD:** Yes.

5
6 **DARIUS KHAMBATA:** If My Lords just sees para 9 onwards Harbour Assurance
7 Arbitration Agreement is a self-contained agreement. In [UNCLEAR], it was held that it's a
8 self-contained agreement, which is separable from the main contract, therefore as
9 autonomous existence in our own neochrome, expressly under Section 16, Your Lordships
10 have held that Section 16 accepts the concept that, the main contract and the Arbitration
11 Agreement form two independent contract. And then in para 83, again, the Supreme Court
12 calls the Arbitration Agreement as second contract. **Redfern and Hunter** also speak of two
13 separate agreements, primary or main contract and a secondary contract. Then if we go
14 straight to para 14, **Gary Born**. The Arbitration Agreement may exist and be substantively
15 valid, notwithstanding the nonexistence, invalidity or illegality of the underlying contract, and
16 the Arbitral Tribunal may and must consider challenges to the existence, validity, or legality
17 of the underlying contract, because such challenges do not impeach the Arbitration
18 Agreement. Then **Fiona Trust**. Arbitration Agreement must be treated as a distinct
19 agreement and can be void or voidable only on grounds which delay directly to the Arbitration
20 Agreement. These are very well settled principles. So I'm not troubling... I'll just quickly go
21 through this. My Lords, next page. Again, the validity of the Arbitration Agreement is not
22 undermined as a distinct agreement. The US Supreme Court has also taken the same line in
23 **Buckeye Check Cashing**, which Your Lordships have followed, that despite the invalidity
24 of the underlying agreement as a whole, Arbitration Agreement will continue to be enforceable
25 apart from remainder of the contract. Para 17, page 11 in **Ayyaswamy**, Your Lordships have
26 held that the adjudicatory power of a Tribunal remains unaffected by any objection to the main
27 contract. And in **Vidya Drolia**, which I have not mentioned here, but which I noticed during
28 the hearing, which I'll be showing. Again, paras 173, 174, expressly say Arbitration Agreement
29 is a separate contract in itself. The Singapore position which I have set out from paras 19 to
30 22... 23, really says the idea is to insulate the Arbitration Agreement, even though it may be
31 integrated into a main contract from objections as to invalidity of the main contract. So, the
32 law of separability is very, very well entrenched in our law. And My Lords will notice that both
33 in **Ayyaswamy** and in **Vidya Drolia**, separability is spoken of as a concept which actually
34 permeates the Arbitration Act. It goes beyond just matters where there is a challenge under
35 Section 16 to a decision of an Arbitral Tribunal. So, although the legal fiction, if I may call it
36 that, in 16, is for the purpose of giving the Arbitral Tribunal jurisdiction to decide its own
37 jurisdiction, it is not restricted to that. It's a wider principle recognized under our law, and

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

10
11 **CJI D Y CHANDRACHUD:** This is a second point you are making.

12
13 **DARIUS KHAMBATA:** It's really part of this separability point. If it pertains to distinct
14 matters, the aggregate of the stamp duties on each of those distinct matters must be worked
15 out. Now, if an Arbitration Agreement is separable, then perhaps a Tribunal may be persuaded
16 to hold that there must be separate stamp duty and all. In other words, separately on the
17 Arbitration Agreement, which is what Your Lordships have held in *N.N. Global* under the
18 residuary clause, as well as substantively on the value of the main agreement. This, of course,
19 is a matter for the Tribunal. I'm not suggesting My Lords should decide this. My Lords have
20 made it clear, Your Lordships are not deciding chargeability. But I'm only placing it before My
21 Lords because this is how the issue will come to be decided, and at para 29 of my submissions,
22 I have referred to Your Lordship's Judgment in Chief Controlling Revenue Authority which
23 affirms a passage from Halsbury in relation to Section 5 of the Indian Stamp Act, that the
24 instrument containing or relating to several distinct matters, is to be separately charged, as if
25 it were a separate instrument. So even under the Stamp Act, there is some concept of
26 separability. Now it may be that a Tribunal takes the view that, no, stamp is payable only on
27 the whole. Or, it may be that it takes the view that is payable separately under 8, that's a matter
28 of chargeability. But that decision in my respectful submission, must be by the Tribunal.

29
30 **JUSTICE SANJAY KISHAN KAUL:** It's the forum, which is an issue Whether it will
31 happen, will not happen...

32
33 **DARIUS KHAMBATA:** Precisely. Precisely.

34
35 **JUSTICE SANJAY KISHAN KAUL:** The whole purpose is to shift the forum to the
36 arbitrator so that arbitration proceedings don't get delayed at the threshold. I could go there

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

3
4 **DARIUS KHAMBATA:** That's it. Now for that purpose, I want to show My Lords two
5 judgments, which My Lords have seen, but I just want to emphasize certain different aspects
6 of them. The first is, My Lord's decision in the **Ayyaswamy** case, which My Lords will find
7 in Volume 5(a) at page 1336. There are three important principles laid down here which I want
8 to just press into service... 1336 of Volume 5(a). This is **(2016) 10 SCC 386**. My Lords would
9 kindly turn to page 1359, para 33. Para 33 says, 'Section 16 empowers the Arbitral Tribunal to
10 rule upon its own jurisdiction, including ruling on any objection with respect to the existence
11 or validity of an Arbitration Agreement'. Very important because existence, even assuming
12 stamp goes to existence, it's housed with the Arbitral Tribunal under 16. 16(1)(b) stipulates
13 that a decision by the Arbitral Tribunal, that a contract is null and void shall not entail it.

14
15 **CJI D Y CHANDRACHUD:** Yes.

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

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

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

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

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

2
3 **DARIUS KHAMBATA:** Para 126. Page 182 of Volume 5. My Lords, have it?

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

6
7 **DARIUS KHAMBATA:** Para 126 covers both Separability and Competence-Competence.
8 We would now examine Principles of Separability and Competence-Competence. 'Clauses A
9 and B to Sub-section 1 of Section 16 enacts the Principle of separation of the Arbitration
10 Agreement from the underlying or container contract. Clause A by legal fiction, gives an
11 independent status to an Arbitration Clause, as if it is a standalone agreement, even when it is
12 only a clause and an integral part of the underlying or container contract. Clause B, formulates
13 a legal rule that a decision by the Arbitral Tribunal holding that the main contract is null and
14 void shall not *ipso jure* entail invalidity of the Arbitration Clause. Successful challenge to the
15 existence or invalidity or rescission of the main contract, does not necessarily embrace an
16 identical finding as to the Arbitration Agreement, provided the court is satisfied that the
17 Arbitration Clause had been agreed upon. The Arbitration Agreement can be avoided only on
18 the ground which relates directly to the Arbitration Agreement. Notwithstanding the challenge
19 to the underlying or container contract, the Arbitration Clause in the underlying or container
20 contract survives for determining the dispute. The principle prevents bootstrapping, as it is
21 primarily for the Arbitral Tribunal and not for the court to decide issues of existence, validity
22 and rescission of the underlying contract. Principle of Separation, authorizes an Arbitrary
23 Tribunal to rule and decide on the existence, validity or rescission of the underlying contract
24 without an earlier adjudication of the questions by the referable... by the referral court'. Para
25 173 and 174 are the equivalent findings on separability. In the second judgment, page 200 of
26 Volume 5(a). 'Arbitration is a creature of consensus. It is completely dependent on party
27 autonomy and the intention expressed in the agreement. A contract having multiple clauses,
28 including Arbitration Agreements, can be divided into two parts. The clauses relating to the
29 commercial relationship i.e. obligations and duties of each party can be referred to as the main
30 contract. The Arbitration Agreement, so to say, is a separate contract in itself'. And then, as
31 Lordship finds that separability of the Arbitration Agreement from the main contract,
32 historically existed even in Roman Law, and later, of course, in German and Swiss
33 jurisprudence. Now, Competence-Competence. Again para 126 I have shown. Para 129 if My
34 Lords will also kindly see, is also very instructive. At page 183, 'Principles of Competence-
35 Competence have positive and negative connotations.
36

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

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

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

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

2
3 **CJI D Y CHANDRACHUD:** On a demurrer. Justice Narasimha and Justice Pardiwala were
4 sitting with me while I was sitting with me when we found a case like that. And then the whole
5 object of sending parties to Arbitration again, defeats the purpose of Arbitration.

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

11
12 **JUSTICE SANJAY KISHAN KAUL:** That's the whole thing. This Stamp Act, anything to
13 do with stamp, if it is a possibility of being curable, let us say, even recognize the possibility of
14 being curable, then how do you throw it out of a threshold?

15
16 **DARIUS KHAMBATA:** I bow down. My Lord is absolutely correct

17
18 **JUSTICE SANJAY KISHAN KAUL:** In any scenario possibly, Stamp Act requirement in
19 any formulation of it, any variation of it, I am very doubtful if at all it can be looked into?

20
21 **DARIUS KHAMBATA:** My Lord is right. I want to place a judgment before of Your
22 Lordships on that immediately after I complete this, showing that it doesn't... irregularity in
23 stamp or even non-stamping doesn't render a document invalid. Your Lordships have held
24 that. I'll place that. Very quickly, I'll just give the paras on this. I won't trouble My Lords. The
25 equivalent para is para 232, Justice Ramana's decision, where he expressly refers to Section 8.
26 That is at page 234. And he says in paragraph 233, at page 235, that the Defendant has to
27 establish *prima facie* case of non-existence. It's the other way around the Defendant will show
28 that *ex facie* there is no Arbitration Agreement. The fourth proposition again, in the interest
29 of time, I'll just give the paras. Paras 236 to 238, at pages 235, 236, relying on Your Lordship's
30 **Mayawati** decision. Ultimately says it's only contractual validity of the Arbitration
31 Agreement that has to be seen under 11. In other words, Section 7, is it complied with on the
32 face of an *ex facie*? If there's again... even on that, if there's a dispute to be gone into, it will go
33 to the Tribunal. But an *ex facie*, Your Lordships find there's just no agreement. Of course. And
34 para 244.5 and para 146, they all go on the basis of this kind of validity. And My Lord, I adopt
35 Mr. Datar's submission. I'm not going to repeat them, under the Contract Act. What is not a
36 valid contract, or what is a void contract is only one which is voided under Section 23 or under

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

3
4 **JUSTICE B.R. GAVAI:** You have elaborated on that...

5
6 **DARIUS KHAMBATA:** So I'm not touching that. I adopt that, My Lord. And the fifth will
7 not set up paras in this judgment. I'll just give the para numbers. Paras 151 to 152, page 195
8 and para 220 at page 230 is again the principles of a broad pro-arbitration interpretation and
9 a one stop forum for adjudication.

10
11 **CJI D Y CHANDRACHUD:** What is the latter para?

12
13 **DARIUS KHAMBATA:** Para 151, 152...

14
15 **CJI D Y CHANDRACHUD:** 195.

16
17 **DARIUS KHAMBATA:** ...at page 195 and para 220 at page 230. They speak of a one stop
18 adjudication presumption. You start from the presumption that everything goes to the
19 Tribunal. Now applying this to 11(6A), it's not that because the word existence is used,
20 everything coming under that umbrella of existence has to be gone into. The Legislature set
21 confined to the existence and given the principles under Section 5, and these very salutary
22 principles of law a court would restrict by way of an implied negative competence-competence.
23 Even under 11(6A) to an *ex facie* examination. This is more so because of the next point which
24 has been argued. I'll just point out what I think is relevant and which has not been shown to
25 Your Lordships under the Stamp Act. 1) non-stamping or under stamping does not result in
26 an invalidity or voidness. And 2), it is a curable defect. Now, if My Lords kindly turned to my
27 written submissions, Volume 1-B at Page 15. I won't...

28
29 **JUSTICE SANJIV KHANNA:** It's also waivable, it can waive it because ...

30
31 **DARIUS KHAMBATA:** And one can wave it. My Lord is right. In fact, there are three, four
32 sections which I want to just point out. Again, I won't read them. They've been read, barring
33 one. They've been read to My Lord.

34
35 **JUSTICE SANJIV KHANNA:** Waiver is also by conduct far more liberal. It doesn't have...

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

JUSTICE SANJIV KHANNA: Page number?

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

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

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

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

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

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

16
17 **JUSTICE SANJAY KISHAN KAUL:** All those cases will go before the Arbitrator.

18
19 **DARIUS KHAMBATA:** Correct. So I have also said...

20
21 **JUSTICE SANJAY KISHAN KAUL:** Just tell me in 11(6), why take a different view? Then
22 what would happen in that.

23
24 **DARIUS KHAMBATA:** That's right. I'm obliged. The point I'm making here is Your
25 Lordship's view on 11(6A) must try to harmonize even appointments by institution.

26
27 **JUSTICE SANJAY KISHAN KAUL:** How arbitration in other areas, other methodologies
28 takes place?

29
30 **DARIUS KHAMBATA:** So for example, all arbitration institutions have these rules. SIAC
31 for whom I appear has rules 28.1 and 28.2, which essentially an objection as to jurisdiction, as
32 to the existence of an Agreement can be initially raised before the full Court. The Court has the
33 jurisdiction at that stage to knock out a claim, if it is *prima facie* satisfied, again, the *prima*
34 *facie* test. Otherwise, it sends it to the Tribunal for a fuller decision. And I may only ask My
35 Lords to mark 5 or 6 paragraphs of Justice Roy's decision in ***NN Global***, that is paras 368 to
36 376, where he surveys the rules of several arbitral, leading arbitral institutions all of them have
37 a *prima facie* test in the first instance. Paragraph 368, at page 462, of Volume 5-A, up to para

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

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

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

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

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

8
9 **CJI D Y CHANDRACHUD:** Who are you appearing for now?

10
11 **PRASHANTO CHANDRA SEN:** My Lords I had been grateful when I was appearing in the
12 Constitution Bench for inviting submissions. So five to seven minutes My Lord.

13
14 **CJI D Y CHANDRACHUD:** Can we suggest just one thing. We have to wrap up the
15 proceedings today. It may not be in the interest of anybody that we keep it....

16
17 **PRASHANTO CHANDRA SEN:** Understood.

18
19 **CJI D Y CHANDRACHUD:** So what we will do is, we will look at the submissions of all the
20 interveners. We'd have much like to hear you all you put in a lot of industry. Please rest
21 assured, we will read all the submissions of the interveners. If we have something at the end
22 in response to what Mr. Divan has argued. And since we have heard, Mr. Datar, Mr. Gaurav
23 Banerji and Mr. Darius Khambata on this side. In rejoinder if we have some queries, we will
24 put them to the intervenor. That may be better.

25
26 **PRASHANTO CHANDRA SEN:** Two minutes for one aspect.

27
28 **CJI D Y CHANDRACHUD:** We can't give two minutes to everybody. Thank you. Yes, Mr.
29 Divan. Do this, give us your submissions. Yes Mr. Divan?

30
31 **JUSTICE SANJAY KISHAN KAUL:** We've narrowed down the controversy, therefore,
32 there's really nothing to be added.

33
34 **PETITIONER'S COUNSEL:** Nothing to repeat. Only then, as it just have pointed out
35 relevant pages of my written submissions.

36
37 **JUSTICE SANJAY KISHAN KAUL:** That we will read it. Don't worry.

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

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

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

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

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

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

CJI D Y CHANDRACHUD: But justice...

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

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

SHYAM DIVAN: You may certainly.

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

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

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

28
29 **JUSTICE B.R. GAVAI:** Divan.

30
31 **SHYAM DIVAN:** I'm sorry.

32
33 **JUSTICE B.R. GAVAI:** We are a 5 Judges Constitution Bench, has found the view taken by
34 earlier 5 Judges Bench.

35
36 **SHYAM DIVAN:** Yes, yes

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

2
3 **SHYAM DIVAN:** Yes, yes.

4
5 **JUSTICE B.R. GAVAI:** Is the reference to 7 Judges not called for?

6
7 **SHYAM DIVAN:** Yes, so let me answer that straight away. If in an appropriate jurisdiction,
8 I answer that straight away, if in an appropriate jurisdiction, Your Lordships exercising a
9 jurisdiction, Your Lordships finds that a 5 Judge Bench is not appropriate *prima facie* or
10 otherwise by all means you have the power to do so. So I concede and I accept that, but not in
11 the curative jurisdiction. Now I'll come.. let me answer that question straightaway first.

12
13 **JUSTICE SANJAY KISHAN KAUL:** That doesn't survive.

14
15 **SHYAM DIVAN:** I'm so sorry. There are fundamental issues. I'm sorry.

16
17 **CJI D Y CHANDRACHUD:** That doesn't really survive, subject to what you say.

18
19 **JUSTICE SANJAY KISHAN KAUL:** Because even when you were arguing earlier, we said
20 this is not a case for curatives.

21
22 **SHYAM DIVAN:** Sorry?

23
24 **JUSTICE SANJAY KISHAN KAUL:** This is not a case for curative.

25
26 **SHYAM DIVAN:** That's my submission, I mean it's ultimately for the Court to prove.

27
28 **JUSTICE SANJAY KISHAN KAUL:** This is not a case for curative. You may be right, you
29 may not be. We can't say that.

30
31 **SHYAM DIVAN:** Correct, correct.

32
33 **JUSTICE SANJAY KISHAN KAUL:** But you said look don't make curative interpretations,
34 appreciate these submissions.

35
36 **SHYAM DIVAN:** I'm sorry.

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

SHYAM DIVAN: Yes.

JUSTICE SANJAY KISHAN KAUL: That was your submission.

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

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

SHYAM DIVAN: Yes, answer is yes.

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

SHYAM DIVAN: So the answer is yes .

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

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

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

26
27 **JUSTICE SANJAY KISHAN KAUL:** Cause, there can be a legal cause and there can be a
28 factual cause.

29
30 **SHYAM DIVAN:** So...

31
32 **JUSTICE SANJAY KISHAN KAUL:** Just...

33
34 **SHYAM DIVAN:** Yes. Let me answer that...

35
36 **JUSTICE SANJAY KISHAN KAUL:** ... Factual Cause has been segregated as a Chief
37 Justice put to you.

1
2 **SHYAM DIVAN:** Yes.

3
4 **JUSTICE SANJAY KISHAN KAUL:** To keep the curative aspect in a sense, out of it.

5
6 **SHYAM DIVAN:** Yes.

7
8 **JUSTICE SANJAY KISHAN KAUL:** But we do believe, seven of us do believe, that there
9 is unsettled legal position towards the fact, which has its own ramifications, and as the Chief
10 Justice put it. It becomes the court's duty in its endeavour...

11
12 **SHYAM DIVAN:** So I quickly end that, I quickly answer that. My answer is yes. It is the duty
13 of the court. But if you are right on means and ends, then it's the duty of the court when and
14 where. So I'll come to that straightaway. It is the duty of the court when *NN Global* in an
15 appropriate proceeding, is doubted The five judgment. It goes by way of review. And then it is
16 before curative. That is a separate ladder. And it's important to maintain these ladders. It is
17 not permissible. According to us, it's not permissible. It is not desirable. And according to our
18 understanding of the law laid down in the judgment so far, Your Lordships have restricted,
19 curative, continuous. I mean, restricted in a sense, when the justice of the case demands...

20
21 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR]

22
23 **SHYAM DIVAN:** I'm sorry..

24
25 **JUSTICE SANJAY KISHAN KAUL:** There's no difference of perception on this issue. The
26 issue is that some way your submission bound to be affected or coloured by the fact why my
27 curative petition.

28
29 **SHYAM DIVAN:** Sorry.

30
31 **JUSTICE SANJAY KISHAN KAUL:** Why my curative petition? Why are you doing this in
32 my curative petition? That's the bottom line of what you are saying.

33
34 **SHYAM DIVAN:** No, that's wrong. There are two elements here. The first element. Your
35 Lordship is right. That it is in my... I'm briefed in this case, so I have to say that please don't
36 upset my apple cart. My agreement, by the way, I mean, this is quite amusing. My Arbitration

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

3
4 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] curative I mean...

5
6 **SHYAM DIVAN:** 26 years down the line, we are thinking of appointing an Arbitrator. I mean
7 what a joke. Not for a fact that it's a serious question of law, which Your Lordships are
8 considering.

9
10 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR]

11
12 **SHYAM DIVAN:** Sorry.

13
14 **JUSTICE SANJAY KISHAN KAUL:** I told my Chief Justice on a lighter side, in Chennai,
15 I've had to refer an arbitration in the year 2015 an application filed in 1999. There was a life
16 dispute. It was accepted as a life dispute and I had to refer. The unfortunate part was that the
17 only unfortunate part of the application was not taken up. So therefore, we are not getting into
18 the facts of it. Therefore, somehow I feel you're more troubled by the fact that why are your
19 clients being troubled in a curative jurisdiction. Therefore at the threshold itself looking to
20 your submission on the earlier day...

21
22 **SHYAM DIVAN:** Yes, yes.

23
24 **JUSTICE SANJAY KISHAN KAUL:** ...we thought we had taken care of this issue by not
25 looking into the curative issue at all.

26
27 **SHYAM DIVAN:** Yes.

28
29 **JUSTICE SANJAY KISHAN KAUL:** And that's something Mr. Datar [UNCLEAR] the
30 curative will be...

31
32 **SHYAM DIVAN:** The question I've asked in... Of course the Chief Justice can constitute a
33 panel of seven. What's the jurisdiction this court is exercising today?

34
35 **JUSTICE SANJAY KISHAN KAUL:** It is determining the legality of the view taken by an
36 opinion...

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

3
4 **JUSTICE SANJIV KHANNA:** Mr. Divan the basic objection seems to be that while
5 examining curative petition, the legal ratio raised decided in judgment should not be re-looked
6 at by a larger bench.

7
8 **SHYAM DIVAN:** I'm sorry My Lord, the last...

9
10 **JUSTICE SANJIV KHANNA:** While examining a curative petition, or while deciding a
11 curative petition the legal ratio laid down by Five judges Bench or any smaller bench should
12 not be looked into. That's a larger perspective. But in a given case, where we find that the
13 business ramification or other issues have arisen which have raised some doubts and issues.
14 why not examine it? We are not saying that curative petition is going to be examined on facts
15 itself separately. If there is some doubt or debate on the legal principles laid down, legal ratios
16 laid down which have wide ramifications impact, why can't we go into that? Why should we...?

17
18 **SHYAM DIVAN:** I'll tell Your Lordships...

19
20 **JUSTICE SANJIV KHANNA:** If really speaking where the means are right. Because if there
21 is some issue which has arisen, which has led to a lot of disturbance, then it's the right means
22 to also check it. It's not something that we are usurping a jurisdiction which doesn't list with
23 us. We are all adjudicators. We have to adjudicate. We keep on re-examining ourselves,
24 correcting ourselves. That's how it is.

25
26 **SHYAM DIVAN:** So let me just be very brief on this point. And let me give you the page
27 numbers and the date. May I just indicate it? Please, don't misunderstand me. I'm not saying
28 that the Seven Judge Bench can't overrule a Five judge Bench. That's not my case. My
29 submission is, of course you can. But if we are a means and ends institution, then it ought to
30 be in an approach in an appropriate packaged case and proceeding. And this may not be an
31 appropriate proceeding for two reasons. Now let me just for several reasons let me just indicate
32 those... and since Your Lordships, I'll state the points. If Your Lordship wants me to go to it, I
33 will go to it. But we have the pages here. So the first point is that the ground given. Please just
34 note this. The first point is that the ground given in so far as the curative petition as contained
35 in the certificate is that there is a reference which has made, been made to a larger bench in
36 **NN Global**. So this is the primary ground. This in my respectful submission cannot be a
37 ground for the purposes of issuing a certificate. Your Lordships have deprecated certificates of

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

6
7 **JUSTICE SANJAY KISHAN KAUL:** [NO AUDIO] When Five Judges maybe sitting in
8 curative jurisdiction. He is not denuded of the power to constitute a larger bench to examine
9 the petition of the law [UNCLEAR].

10
11 **SHYAM DIVAN:** I agree that. I agree with you.

12
13 **JUSTICE SANJAY KISHAN KAUL:** That's all we are doing.

14
15 **SHYAM DIVAN:** May I just say this?

16
17 **JUSTICE SANJAY KISHAN KAUL:** Even there, Mr. ...We did not let them argue in
18 further... is something which needs to be looked into or delegated to arbitrator. There also,
19 we've have not permitted them to expand the contour. Some of them have argued...

20
21 **SHYAM DIVAN:** Anyway, Your Lordships have followed my point now. So I'll just give you
22 the points. So, the first point is

23
24 **JUSTICE SANJAY KISHAN KAUL:** We are giving it to you to fight another day on the
25 curative petition. We are not dealing with that aspect. We are today, not... please take...

26
27 **SHYAM DIVAN:** Frankly I'm just making a suggestion. If you don't find, if you find or rather
28 if you do find in my favour that the essential elements for a curative jurisdiction are not made
29 out, then my respectful submission would be the appropriate cause is to decline to exercise
30 this jurisdiction because you are exercising no jurisdiction other than curative today, when
31 you pass the order suggesting that you are clarifying it. Sorry, that's my understanding of the
32 law. But if Your Lordships finds that there is some other jurisdiction which is also being
33 exercised over here. I don't find any. Sorry.

34
35 **JUSTICE SANJAY KISHAN KAUL:** We have said repeatedly that so far as the curator
36 matter is concerned, it will be heard by a Five judges bench, whether they agree, disagree,
37 dismiss the petition in the facts of the case is a separate matter, but on a general principle of

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

3
4 **SHYAM DIVAN:** Let me just proceed now. I followed the point. So let me just state my
5 points, and then Your Lordships will consider them appropriately. So my first submission is
6 that by relabelling it, as In Re, etc., it doesn't alter the nature of the jurisdiction or exercise.
7 that's my understanding of the law. The nature of the jurisdiction remains that's 1. Point
8 number two, if you are choosing to exercise curative jurisdiction, which, of course you may,
9 there are well settled parameters. And I'm just indicating those parameters. I'm just
10 mentioning them because they are in our submission. I'll list them. Sorry.

11
12 **JUSTICE SANJAY KISHAN KAUL:** Mr. Divan, problem is Mr. Divan that we are not
13 looking into it. So you're arguing something which we are not looking.

14
15 **SHYAM DIVAN:** But if it's curative? And then Your Lordship says that...

16
17 **JUSTICE SANJAY KISHAN KAUL:** It's a catch 22 situation.

18
19 **SHYAM DIVAN:** It's a catch 22.

20
21 **JUSTICE SANJAY KISHAN KAUL:** You can't do it in a curative because of the restricted
22 parameters.

23
24 **SHYAM DIVAN:** Okay. Let's keep that aside, let's keep that argument aside.

25
26 **JUSTICE SANJAY KISHAN KAUL:** We are only looking to one proposition of law *dehors*
27 the curative, whether in case of a 11(6) jurisdiction, stamping is something to be looked about.

28
29 **SHYAM DIVAN:** Okay, so now let's drop this. Now next three sentences. I'll try and not use
30 the word curative. Suppose even a theoretical situation a very, very wrong judgment comes
31 out by this court and it is brought to the attention of the Chief Justice of India, or senior judges,
32 et cetera. That look, this looks extremely wrong and very perilous. The question I ask myself
33 is that can the Court thereafter constitute a bench of a larger panel, put a label In Re and then
34 decide the issue to overrule that. I don't believe that is acceptable. That's my understanding of
35 the law. I believe that can certainly be done in an appropriate case. An appropriate case comes
36 up. That's what means and ends is about. But that's our understanding.

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

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

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

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

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

29
30 **SHYAM DIVAN:** Yes.

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

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

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

JUSTICE BR GAVAI: Means the same thing.

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

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

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

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

SHYAM DIVAN: Yes.

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

SHYAM DIVAN: Yes.

JUSTICE SANJAY KISHAN KAUL: You are in different jurisdiction.

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

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

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

3
4 **JUSTICE SANJIV KHANNA:** Mr. Divan, even if one looks at the provision as it applies to
5 the, in fact, none of the High Courts of the Supreme Court has done it. But if we'd passed, the
6 High Court or the Supreme Court had passed resolution and designated authority or an
7 institution, all eleven applications would go to that institution. Under the law existing as of
8 now, once the High Court or the Supreme Court authorizes the institution, then that
9 institution will appoint an Arbitrator under 11(4). All of it.

10
11 **SHYAM DIVAN:** May I just respond to...?

12
13 **JUSTICE SANJIV KHANNA:** That's a different matter.

14
15 **SHYAM DIVAN:** No. But may I just My Lord... That is a possible, that's a possible view for
16 Your Lordships to take. So then the situation is that you have a situation where moving forward
17 post 2019 Act, there'll be no question of such a problem at all. And Secondly, if the *prima facie*
18 view, which was expressed by Your Lordship just now, a moment ago, is that if there is a
19 designation by a High Court, then that's another way in which the entire problem may go. But
20 I thought I should just mention to you that the **Sri Krishna Committee** when it made its
21 recommendations, read this very provision differently, leaning on the earlier Law Commission
22 report, which also took the view that even as that post 2015 Amendment Act, there is still an
23 aspect which is left for the Court. But that's really controlling.... Your Lordships left to decide
24 that aspect.

25
26 **JUSTICE SANJAY KISHAN KAUL:** Law stands today...

27
28 **SHYAM DIVAN:** So look at it only as it stands.

29
30 **JUSTICE SANJAY KISHAN KAUL:** What may happen tomorrow one doesn't know...

31
32 **SHYAM DIVAN:** Yes, But I Just thought...

33
34 **JUSTICE SANJAY KISHAN KAUL:** It happens to be [UNCLEAR] ...seem to have been
35 having another loop. What form It comes today. Conjecture...

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

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

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

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

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

CJI D Y CHANDRACHUD: Correct.

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

CJI D Y CHANDRACHUD: [UNCLEAR]

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

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

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

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

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

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

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

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

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

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

3
4 **SHYAM DIVAN:** Right.

5
6 **JUSTICE SANJIV KHANNA:** You need not, therefore, rely upon the parent clause.

7
8 **SHYAM DIVAN:** That won't be Section 11(6).

9
10 **JUSTICE SANJIV KHANNA:** The fact that the parent agreement is under stamped or non-
11 stamped is immaterial. In that case for going into the question of existence of an arbitration.

12
13 **SHYAM DIVAN:** You are right, you are right. There's a deeming fiction here. Now I'll read
14 the whole of 4. I'm grateful. This 4 is very important. So please have a look at it. I'm on Section
15 7, Sub-Section 4. An Arbitration Agreement is in writing, if it is contained in (A) a document
16 signed by the parties. B) So, this I believe would answer the description of an instrument
17 straight away.

18
19 **JUSTICE SANJIV KHANNA:** Correct, correct. You are right.

20
21 **SHYAM DIVAN:** B) An exchange of letters, telex, telegrams, or other means of
22 telecommunication, including communication through electronic means which provide a
23 record of the agreement or C) an exchange of statement of claim and defence in which the
24 existence of the agreement is alleged by one party and not denied by the other. So My Lords,
25 just coming straight away to Clause 3....

26
27 **JUSTICE B.R. GAVAI:** Exchange of email may also constitute an Arbitration Agreement.

28
29 **SHYAM DIVAN:** It may. It may. It may. Okay. So now I'm just getting a little ahead of the
30 script, but just let me tell you where the suggestion which we are going to make. There is...
31 because I think Your Lordship is also looking at it from a practical point of view. I mean, what
32 happens in a situation. So let me just depart from this section and just provide, supply what
33 we consider is an appropriate cause. Before a... our understanding of the Scheme under the
34 Stamp Act is, on execution or before execution stamp duty is payable. That's first point.
35 However apart from that situation, supposing the contract is being worked there are no
36 disputes, there are no disputes at all between the parties. The contract is being worked. A party
37 can all ... and the parties did not, whatever, pay the Stamp Duty at the time of execution or

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

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

5
6 **JUSTICE SANJAY KISHAN KAUL:** Mr. Divan, somebody feels the Agreement is properly
7 stamped. Let us say, another person says the agreement is deficiently stamped.

8
9 **SHYAM DIVAN:** Yeah.

10
11 **JUSTICE SANJAY KISHAN KAUL:** The moment this is done , you are wanting them to
12 move to the Collector's stamp to get this adjudicated first, whether it's deficiently stamped or
13 not.

14
15 **SHYAM DIVAN:** Yeah.

16
17 **JUSTICE SANJAY KISHAN KAUL:** The move 11(6A) the concerned Arbitrator will decide
18 whether it is deficiently stamped, it is properly stamped.

19
20 **SHYAM DIVAN:** I'll come to that, if it's permissible in Law. Of course, that's one, the...

21
22 **JUSTICE SANJAY KISHAN KAUL:** Why shouldn't? Whole issue is in 11(6)... What can be
23 done by the Arbitrator, it in the Court 11(6)? This is the only issue which is there.

24
25 **SHYAM DIVAN:** I agree with you, but there is, Your Lordships have seen there is a long line
26 of judgments and there is good. I will, of course, try and develop. And I'll answer, I'm alive to
27 that issue, which is troubling. In terms of Your Lordship, wants our assistance on what is the
28 appropriate statutory design today not what is desirable? There may be some situations which
29 are desirable. Why not go here? And why not go there, but does it lend itself to a possible
30 interpretation of the type which Your Lordship is suggesting? That's really the question, or do
31 we go by the rigor of what we believe is the correct position? So Your Lordships have now seen
32 7. Now My Lords since Your Lordship is just on that very page. Just have a look at Section 5
33 now. Please just see this and I will just state the point quickly. Extent of judicial intervention:
34 Notwithstanding anything contained in any other law for the time being in force, in matters
35 governed by this part, no judicial authority shall intervene except where so provided in this
36 part. Now My Lord, I would respectfully submit, that the purpose and object of this section
37 has consistently understood [UNCLEAR] that you don't allow suits to be filed to block

1 arbitrations, applications, which are not contemplated under the Arbitration Act. Some other
 2 type of action which would delay or prevent or stop the process of arbitration from moving
 3 forward. That is the purpose of Section 5. The purpose of Section 5 as we understand it is not
 4 to override a statute such as and a mandate of a statute if we are correct under, say the Stamp
 5 Act. Let me read it again. 'Notwithstanding anything contained in any other law for the time
 6 being enforced and matters govern no judicial authority intervene'. What is the meaning of
 7 judicial authority intervene? You are invited through some sort of an interlocutory application,
 8 through some sort of a suite, through some sort of other action, to block an arbitration
 9 proceeding. That is the intention of this particular statute. Now I just raise a second issue.

10 Your Lordships correctly flagged the question regarding and Mr. Khambata was also correct
 11 with regard to the.... Your Lordships will just give me a moment. With regard to the legislative
 12 competence of those various entries. So Your Lordship recalls that there is 63, 91... Item 91 of
 13 7th Schedule First List, 63 of Second Schedule. Seventh Schedule, I'm sorry. List 2. An
 14 arbitration comes in the concurrent list. Now the question which I'm posing because I believe,
 15 I believe that the interpretation which is being suggested by them that please use Section 5 to
 16 trump, so to speak, all these Stamp Acts is constitutionally infirmed. And I'll just state my
 17 point why. Stamp Duty, as we have just indicated, falls within the respective legislative realms
 18 for the purposes of taxation or finance, or raising revenue. We don't believe that in exercise of
 19 powers to frame an Arbitration Law, parliament can trench upon an act or a power which is
 20 left with the State Legislatures to impose or an exaction in the form of stamp duty. So Section
 21 5, it would be very dangerous. I mean, there's a submission. It would be incorrect. Let me not
 22 say...

23
 24 **CJI D Y CHANDRACHUD:** Entry for arbitration... that is...

25
 26 **SHYAM DIVAN:** Arbitration is, I think 13, three...Roman...Sorry, 7th Schedule List 3.

27
 28 **CJI D Y CHANDRACHUD:** And Arbitration.

29
 30 **SHYAM DIVAN:** Your Lordships have that? Civil Procedure, including the manner included
 31 in the Code of Procedure, the commencement of the Constitution, Limitation and arbitration...
 32 so, this...

33
 34 **CJI D Y CHANDRACHUD:** The purpose of the Arbitration Act, is not to prevent the
 35 collection of revenue. The question is what is the state at which it has to be exercised.

36
 37 **SHYAM DIVAN:** I agree with that...

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

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

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

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

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

SHYAM DIVAN: Yes.

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

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

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

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

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

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

2
3 **JUSTICE SANJIV KHANNA:** Sorry interrupting, because you also accepting it. The
4 separation between the severability of the Arbitration Agreement. let's assume the contract is
5 found to be void. Let's assume the contract. Section 65.

6
7 **SHYAM DIVAN:** A general contract.

8
9 **JUSTICE SANJIV KHANNA:** For some reason. Section 65 of the Contract Act applies.
10 Then also, you have to compensate. If the Arbitration Agreement is valid, the arbitrator will
11 then apply Section 65...

12
13 **SHYAM DIVAN:** Right.

14
15 **JUSTICE SANJIV KHANNA:** Of the Contract Act.

16
17 **SHYAM DIVAN:** Yes, yes of course. But provided that...

18
19 **JUSTICE SANJIV KHANNA:** Let's assume so. Suppose for non-stamping...

20
21 **SHYAM DIVAN:** I accept that Your Lordship is right. I agree. It can be done.

22
23 **JUSTICE SANJIV KHANNA:** That answers the question why should we stall the
24 arbitration?

25
26 **SHYAM DIVAN:** Should I just should I just. First of all, I accept the position. I don't think
27 anybody is contesting it that as far as the Arbitral Tribunal is concerned, the Arbitral Tribunal
28 has jurisdiction. The issue is when we are going through a Section 11 route, and the expression
29 which is used by Counsel on the other side is that Arbitration Agreement, according to us, has
30 to be seen, before you appoint under Section 11, has to be seen. Now that examination of the
31 Arbitration Agreement, what is the mandate under the Stamp Act? Does it get in any manner
32 diluted by when a court looks at it? Does it in any manner get diluted by the provisions of the
33 Arbitration Act. And is it a situation where only one forum is to look at it? Or is it a situation
34 where potentially at least you can have or is required. The requirement of law is that the Court,
35 if it comes up before the court for the first instance, the court ought to look at it. That's the
36 issue I understand .

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

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

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

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

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

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

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

3
4 **JUSTICE SANJAY KISHAN KAUL:** Very limited scope.

5
6 **SHYAM DIVAN:** Very limited.

7
8 **CJI D Y CHANDRACHUD:** We will come back.

9
10 **P C SEN:** My Lord, one thing which will cut short judicial time, Section 33 (2)(b). Stamp Act
11 itself provides for delegation of those duties to an officer, an Arbitrator would include that My
12 Lords. That provision may cut short a lot of conflict between the two Acts.

13
14 **COUNSEL:** Section 35 will have to be...

15
16 **CJI D Y CHANDRACHUD:** Roughly how long would you take? Because there's another
17 matter. That's why... not otherwise to stop you in the ranks or anything. So that we'll, adjust
18 that other matter. Reference to a three judge bench.

19
20 **SHYAM DIVAN:** I'll try and wrap in another half an hour... I'll take half. But Mr. Nayyar
21 will take half....

22
23 **MR. NAYYAR:** I'll take half an hour. 15- 20 minutes. half an hour... whatever I can get.

24
25 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] I thought you have restricted yourself.
26 You are for an intervener.

27
28 **NAKUL DEWAN:** No. That's correct. But like, Mr. Khambata. [UNCLEAR] Hyderabad
29 centre. [UNCLEAR] because my proposition is actually going to be based on separability.
30 Which My Lords in fact I have a different position to take from what Mr. Khambata has taken,
31 because in my respectful submission, you cannot expand separability beyond section. But at
32 the end of the day, I still come back.

33
34 **CJI D Y CHANDRACHUD:** There's a three judge bench between me, Justice Pardiwala and
35 Justice Manoj Misra. It's a difference of two Judges on that medical termination of pregnancy.
36 We'll take that up at sharp 02:00, and we'll come back in a combination of seven the moment
37 that gets over.

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

CJI D Y CHANDRACHUD: Yes, yes, absolutely.

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

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

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

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

SHYAM DIVAN: Sorry?

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

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

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

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

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

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

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

3
4 **CJI D Y CHANDRACHUD:** An appeal would arise, if we were to reverse the view, insofar
5 as your Client is concerned. We have...the purpose of this....[UNCLEAR]...

6
7 **SHYAM DIVAN:** No even on law, even on law, you see, I was just, anyway I will now go on
8 the Stamp Act, but I want Your Lordships to very seriously consider, because if you had in the
9 future, if you have in the future, some judgment comes which XYZ doesn't like. Can the Chief
10 The question I ask myself, is, can the Chief Justice of India, constitute a larger Bench, then
11 just put it before that Bench without having a Live List or decide whether there's a Live List
12 and then do it? I don't believe it can be done. But anyway, that's for Your Lordships to reflect
13 on. Sorry. I'm sorry?

14
15 **COUNSEL:** All I want there is...

16
17 **CLAIMANT'S COUNSEL:** There is a second matter, which is listed before My Lords...

18
19 **CJI D Y CHANDRACHUD:** The Section 11?

20
21 **CLAIMANT'S COUNSEL:** The Section 11 is listed before My Lord. And that was placed
22 before Five. Certainly, My Lord, the Chief Justice of India, in Dawoodi Bohra, can constitute a
23 Bench of the relevant strength. Right? Seka Dobrik is listed before My Lord. All this My Lord
24 may be there in the first matter, there is a second live matter which Your Lordships have
25 listed...

26
27 **SHYAM DIVAN:** There is no live matter, at least that I am aware of. There is some live
28 matter, then that's the appropriate case. Then I completely agree with the amicus. In that case,
29 an appropriate order can be passed.

30
31 **JUSTICE B.R. GAVAI:** I'm sorry it's becoming a little excessive on this issue.

32
33 **SHYAM DIVAN:** It's a very serious issue My Lord, It's a very serious issue.

34
35 **JUSTICE SANJAY KISHAN KAUL:** You are entitled to your view, I'm not saying this. It
36 has been repeated...

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

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

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

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

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

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

15 **DEBESH PANDA:** Absolutely.

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

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

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

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

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

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

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

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

1
2 **CJI D Y CHANDRACHUD:** Please this will not be permitted, I assure you, that if you argue
3 for another five minutes...

4
5 **CJI D Y CHANDRACHUD:** That you argue for another five minutes. We'll be washing out...

6
7 **CLAIMANT'S COUNSEL:** No sir. Within half a minute I can complete.

8
9 **CJI D Y CHANDRACHUD:** Listen to me sir, you did that in the previous matter also, in
10 **Sita Soren** the other day. If you argue for another 5 minutes you will be washing out the
11 impact of the argument of the lawyers who have argued before you. So in your interest, please
12 allow the other side to argue.

13
14 **CLAIMANT'S COUNSEL:** I have a small request, since I appeared before the Constitution
15 for **NN Global** has also given three judges, led by Mr. Raman, would Your Lordships care to
16 hear me for five minutes?

17
18 **CJI D Y CHANDRACHUD:** We will see how much time you have at the end. Because we
19 have to conclude by 4 o' clock today.

20
21 **CLAIMANT'S COUNSEL:** Nothing more than that.

22
23 **NAKUL DEWAN:** Mr. Khambata appeared for SIAC and I am appearing for the Hyderabad
24 Centre. There are certain institutional points that we want to make.

25
26 **JUSTICE SANJAY KISHAN KAUL:** In institutional points I just wanted to clarify what
27 you will address. Are you saying that the 11(6) must address the issue of limitation first. Is that
28 the institution's view?

29
30 **NAKUL DEWAN:** No. And the point I want to make...

31
32 **JUSTICE SANJAY KISHAN KAUL:** That's the only issue we are deciding.

33
34 **NAKUL DEWAN:** That's right.

35
36 **JUSTICE SANJAY KISHAN KAUL:** What my institution will say, what another institution
37 will say is not relevant.

1
2 **NAKUL DEWAN:** The only point I want to make. In fact Khambata sort of hinted on it. And
3 my respectful submission is that Your Lordship should, in fact, looking at effective parity, take
4 the view that under Section 11, Your Lordships can't take evidence. If Your Lordships takes
5 that view, then the entire Section 33 of the Stamp Act becomes inapplicable. And that's really
6 what I want to make good. That's one point.

7
8 **CJI D Y CHANDRACHUD:** You're really on this side, Mr. Dewan.

9
10 **NAKUL DEWAN:** My Lords on the point of 11 if I may... Mr. Khambata pointed out but on
11 the...

12
13 **CJI D Y CHANDRACHUD:** Your physical situation [UNCLEAR]

14
15 **NAKUL DEWAN:** The reason why I am here is because on the doctrine of separability, my
16 respectful submission is going to be that, no, they're not separable documents for the purposes
17 of the Stamp Act. And to that extent, the five judges are correct because you can't expand the
18 doctrine of separability beyond Section 16 and that's the other point which I'll make good. I
19 don't need more than ten minutes on these. That's it because Mr. Khambata has addressed
20 Your Lordship suggesting.... what Mr. Khambata suggested is that expand the doctrine of
21 separability. My respective submission is...

22
23 **JUSTICE SANJAY KISHAN KAUL:** We are not going to that issue. It was narrowed down.

24
25 **NAKUL DEWAN:** Correct. Why are you treating....

26
27 **JUSTICE SANJAY KISHAN KAUL:** After narrowing of issues, still everybody wants to
28 address everything on this earth which is possible to be said under the Earth.

29
30 **NAKUL DEWAN:** The entire genesis of *NN Global 1* was the doctrine of separability.
31 Suggesting that because of the doctrine of separability, the document didn't have to be
32 stamped. *NN Global 2* goes and says, no, it is not separable. They are all part of the same
33 agreement. The argument made by the other side is, expand the doctrine of separability. That
34 is going to be inconsistent with our act. It's going to be inconsistent with the entire line of
35 English law decisions which we've continued to follow, which have clearly said that it is
36 separable only for the perspective of invalidity, not from the perspective of every other matter.
37 It is still a part of the bundle.

1
2 **CJI D Y CHANDRACHUD:** It's not necessary for us to see what are the outer limits of the
3 doctrine of separability here at all. We have to mainly only here decide as to whether the stage
4 of Section 11 (6A), the court is required to examine whether the instrument has been
5 insufficiently stamped.

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

11
12 **CJI D Y CHANDRACHUD:** Alright let's hear Mr. Divan.

13
14 **SHYAM DIVAN:** So very quickly, may I just take you, please, directly to page 329 of Volume
15 4(A). So now I am on the Stamp Act. So I'll just make a few comments and a few provisions.
16 So first, Your Lordships may go to page 329 of Volume 4(A) where you will find the definition
17 in 212 of executed and execution. Executed and execution used with reference to instruments
18 mean signed and signature, and includes attribution of electronic records within the meaning
19 of Section 11 of the Information Technology Act. Then just please read a little further 214.
20 Instrument includes every document by which any right or liability is or purports to be created,
21 transferred, limited, extended, extinguished, or recorded. b) A document electronic or
22 otherwise created for a transaction in a stock exchange or depository by which any right or
23 liability is or purports to be created, transferred, limited, extended, extinguished, or recorded.
24 So My Lords I want to just tie up these two definitions with the definition under Section 7 of
25 the Arbitration Act. Arbitration Act is required to be in writing. We are writing that's common
26 ground. Please link that to the definition of the word instrument. I think I believe there is no
27 escape from the fact that the Arbitration Agreement is an instrument broadly covering covered
28 by this definition. Now please move on Section 3, Your Lordship knows is the charging section.
29 So I'm not taking you to that. Please go directly to Section 17. Section 17, which you will find
30 at page 348, same Volume 348.

31
32 Now this is the point which you alluded to in the morning. Instruments executed in India. All
33 instruments chargeable with UT and executed by any person in India, shall be stamped before
34 or at the time of execution. Now this is the clear mandate of the law. So My Lords, I recall. Mr.
35 Datar was mentioning that he had his client in the old Madras City Civil Court days, who used
36 to only stamp 50% of the documents. All right, you take the run the risk. But the law mandates
37 that you must execute at the time or before, before or at the time of execution, you ought to

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

17
18 **JUSTICE SANJIV KHANNA:** Mr. Divan?

19
20 **SHYAM DIVAN:** I'm sorry?

21
22 **JUSTICE SANJIV KHANNA:** You are right. This is a provision.

23
24 **SHYAM DIVAN:** Yeah, this is a provision. And this is the correct way.

25
26 **JUSTICE SANJIV KHANNA:** One minute...

27
28 **SHYAM DIVAN:** I'm sorry..

29
30 **JUSTICE SANJIV KHANNA:** In practical terms, if we apply, it'll be chaotic, it'll be chaotic,
31 to say the least.

32
33 **SHYAM DIVAN:** No. Why would it be chaotic? That's what law requires.

34
35 **JUSTICE SANJIV KHANNA:** Because you don't know what happens, if you apply over
36 there, how much time it takes.

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

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

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

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

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

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

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

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

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

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

7
 8 'No instrument chargeable with duty shall be admitted in evidence for any purpose, by which
 9 person having by law or consent of parties authority to receive evidence or shall be acted upon,
 10 registered, or authenticated by such person or by any public officer unless an instrument is
 11 duly stamped.' So there are four. One, as Your Lordships correctly said, receiving evidence,
 12 admitting an evidence. That's one. Second, acted upon. Third, registered and fourth,
 13 authenticated. So there are four distinct situations which Section 35 envisages, admitting in
 14 evidence is one of them. Section 11, I would respectfully submit, is not an admission of
 15 evidence stage, it's a stage of 'acting upon'. I don't think there can be any... I mean... that's our
 16 submission. I don't believe there's any doubt, at least in our mind with regard to the fact that
 17 the Section 11 court is required to 'act upon'. Now, if this is the mandate of the law in terms of
 18 Section 35, I've already read the embargoes etc. with regard to the Section 10. The scheme of
 19 the statute, at least to us appears to be, that before a court under Section 11, If this issue is
 20 raised under Section 11, however narrow the jurisdiction, because undoubtedly it's a narrow
 21 jurisdiction, this would be within the duty and obligation of the Court. Now My Lords, there
 22 are six characterizations which Your Lordships have used recently, in terms of this. So I'll just
 23 mention them. We have put them in our written submission. One is Your Lordships have said
 24 Section 11 is not 'Mechanical'. That's one way. The second expression used is Your Lordships
 25 have said it is not 'Ministerial', but it is performing a 'Judicial Function'... so that's in **Vidya**
 26 **Drolia** as well. The third, Your Lordship's recent judgment is, it's restricted to the 'Eye of the
 27 Needle'. A fourth expression Your Lordships have used in **Vidya Drolia** and other judgments
 28 is to 'Cut the Deadwood'. The fifth is, it's a very narrow jurisdiction on 'Existence and Validity',
 29 which is the 'Magic Eye Judgment', and of course, when in doubt refer. So, having regard to
 30 the conspectus of these tests, which are really different ways of saying that it's a narrow
 31 jurisdiction, nevertheless, according to us, just on a reading of the Stamp Act, and I have made
 32 my submissions on Section 5 of the Arbitration Act, there doesn't appear to be to be any reason
 33 or justification to exclude the operation of the Stamp Act at the Section 11 stage. Now My
 34 Lords, we are fortified in this. And here, I'm just requesting you to please... I'll just request you
 35 to turn to, if you would, to Volume 2, page 6, please. So Volume 2 is my submissions. Volume
 36 2, page 6, please just go to page 6. It'll just save me a lot of time. Would Your Lordships have

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

3
4 **CJI D Y CHANDRACHUD:** Section 35 will apply because of the.. and shall or shall be acted
5 upon.

6
7 **SHYAM DIVAN:** Yes. Acted upon. So...

8
9 **CJI D Y CHANDRACHUD:** Acted upon is also qualified by any such person. Now any such
10 person means who having by law or consent of parties authority to receive evidence. Acted
11 upon is also qualified by any such person. Any such person means a person referred to earlier.

12
13 **SHYAM DIVAN:** Right.

14
15 **CJI D Y CHANDRACHUD:** So there is a word public officer. That I mean I don't know
16 [UNCLEAR] public officer.

17
18 **SHYAM DIVAN:** But we are a court.

19
20 **CJI D Y CHANDRACHUD:** Possibly the court is a public officer.

21
22 **SHYAM DIVAN:** No I mean this is astonishing.

23
24 **CJI D Y CHANDRACHUD:** But a Section 11 court may be a public officer for that.

25
26 **PRASHANTO CHANDRA SEN:** Here I may just draw attention to 33(2)(b). There's an act
27 of delegation with the Stamp Act itself envisages. if the High Court can delegate this function
28 of examining and impounding to an officer, which includes an arbitrator. He is authorized to
29 take evidence.

30
31 **NAKUL DEWAN:** In fact, my submissions deal with this very point, saying that all of this
32 goes to the arbitrator if you read 33, 35 because what parties have done is that by consent...My
33 Lords even in the terms of the Arbitration Act by consent, parties have agreed that as far as
34 their disputes are concerned, it is the arbitrator who takes in evidence. That happens because
35 of Section 19 of Arbitration act. So when you harmonize both the provisions...

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

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

7
 8 **SHYAM DIVAN:** That's one. Equally we have no doubt that if it is the High Court or the
 9 Supreme Court, then it would be covered and under Section 35, and it would be covered not
 10 in the sense of taking evidence, because Your Lordship may not be at that time admitting it to
 11 evidence, but certainly it is to be acted upon. That's why we sought to link acted upon with
 12 your other judicial responsibility, judicial application of mind to satisfy yourself on existence.
 13 However, confine that jurisdiction may be. That's the short hand submission. So we believe 35
 14 does apply to a Section 11 court, and it does apply to whatever to the High Court or the Supreme
 15 Court, as the case may be. That's where we are and the language is wide enough. Otherwise it
 16 might be rendering this otiose. So that's it. So I was now on if Your Lordship recalls Volume 2
 17 page 6, please. Page 6. May I state the point?

18
 19 **CJI D Y CHANDRACHUD:** Yes.

20
 21 **SHYAM DIVAN:** So we are on para 1.4. I'm drawing attention to 1.4 because of the constraint
 22 of time. What I want to just mention is that look, we've had not just one stray judgment, in
 23 fact, to one judgment, Justice Gavai and Justice Surya Kant are a party. That's the present
 24 judgment. We've had a series of judgments which we have encapsulated in paragraph 14.
 25 There's a total of about twelve of our judges who've looked at this over the years from 2011
 26 onwards, and the narrowest **SMS**, which is the 2011. That Justice, I think Raveendran and
 27 Justice Patnaik, they looked at it from the Stamp Act point of view and they said that look, this
 28 is clear to us and therefore having regard to that and they placed it on that. Then after just
 29 have a look. Now I'll read 1.4. It is submitted that this Honourable court in **SMS Tea** so that's
 30 the first one. Then we've got **Naina Thakkar versus Annapurna Builders**, because
 31 that's also two learned judges. **Black Pearl Hotels versus Planet M Retail Limited**.
 32 That is, three learned judges. Your Lordship has that? My Lords I am on para 1.4, page 6. So
 33 I'm just to save time just reading this. So we have **SMS Tea**. That's the leading judgment. I
 34 mean in first in point of time, then we have **Naina Thakkar versus Annapurna**, which
 35 Your Lordship may note, is two learned Judges. Then we have **Black Pearl Hotels versus**
 36 **Planet M Retail Limited** that I believe is three learned Judges. Then the judgment referred
 37 to **Garware Wall**, Justice Nariman and Justice Vineet Saran's Judgment. **Garware Wall**

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

28
 29 **JUSTICE SANJAY KISHAN KAUL:** Which provision are you referring to Mr. Divan?

30
 31 **SHYAM DIVAN:** No, much was made of those definition clauses, etc. Now, I just want to
 32 point out what is the contract at saying, and the whole thing is void, etc. That's not the case at
 33 all, since we are straying, I'm meeting this because much time was spent on these particular
 34 definitions and how the Constitution Bench has done it, and how Justice Nariman in
 35 **Garware** dealt with it. So I want to just explain it. The standard the original template, which
 36 was used by our court was founded on **SMS Tea**, which Your Lordship see Stamp Act.
 37 Thereafter, the Bench felt in **Garware** that there may be another perspective. Now, what is

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

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

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

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

JUSTICE SANJAY KISHAN KAUL: Before the other Bench.

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

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

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

10
11 **JUSTICE SANJAY KISHAN KAUL:** Talking of Volume 5-A.

12
13 **NIKHIL NAYYAR:** Yes, Volume 5-A. It is the second tab at page 16 para 22.1. Starting at 22.
14 May I read?

15
16 **JUSTICE SANJAY KISHAN KAUL:** Yes.

17
18 **NIKHIL NAYYAR:** We may therefore sum up the procedure to be adopted, where the
19 Arbitration Clause is contained in an agreement which is not registered but compulsory
20 registerable, and which is not duly stamped. The Court could before admitting any document
21 into evidence or acting upon such documents, examine, please note the word My Lord.
22 Examine such... examine whether the instrument document is duly stamped, and whether it
23 is an instrument which is compulsorily registerable. Now, the word examine, Your Lordship
24 will find in 33(2) of the Stamp Act. That is the extent of the duty My Lord. 33 Sub-clause 2.
25 The word used there is examine. After the impounding...

26
27 **JUSTICE SANJAY KISHAN KAUL:** I also says the Court should before admitting in a
28 document in evidence.

29
30 **NIKHIL NAYYAR:** Or acting upon.

31
32 **JUSTICE SANJAY KISHAN KAUL:** Yes together.

33
34 **NIKHIL NAYYAR:** Correct My Lord.

35
36 **JUSTICE SANJIV KHANNA:** Say there's difficulty. One difficulty. We accept this
37 proposition.

1
2 **NIKHIL NAYYAR:** Yes.

3
4 **JUSTICE SANJIV KHANNA:** If we accept that the Arbitration Agreement is severable.
5 Even if the parent contract or the underlying contract is held to be bad, is to be impounded.
6 Section 65 and 70, what restitution as quantum merit will apply. Cannot then it be argued that
7 this issue can be gone into by the arbitrator as well as civil court?

8
9 **NIKHIL NAYYAR:** The question. Severability? Mr. Divan has a more elaborate argument
10 on that but...

11
12 **JUSTICE SANJIV KHANNA:** Quantum merits are decided by the...

13
14 **NIKHIL NAYYAR:** They can certainly decide but the question.... My Lord, the question is
15 this... the question is this. The argument of severability does it extend beyond the purpose In
16 16(1)(B). Yes. Because our submission is the purpose of the argument of severability is limited
17 to that. It does not preclude My Lord. Yes.

18
19 Why not? Of course, they can My Lord. But the question is, is the court precluded under 11.
20 No My Lords, 35. Kindly see, what is the language of 35. 35, first is mandatory. It says, shall.
21 There is no option there really speaking, it shall and shall not act upon both, now, what at that
22 stage My Lord, I don't... I am sorry My Lords. No. But since Your Lordship mentioned about
23 no, the point I was trying to make is, I'm sorry... now 33. The point I was trying to make My
24 Lord is... My Lord the word used in **SMS** was examine. They were conscious while making the
25 amendment the words used in para 22.1 is examine. The language in the Stamp Act is examine.
26 The language in 6A is examine. It is not My Lords, that there is any greater degree of inquiry
27 that is required. So examine My Lords, will encompass. An examination is to whether a
28 document or an agreement is properly stamped or not. [NO AUDIO]. Sorry?

29
30 **JUSTICE SANJAY KISHAN KAUL:** Anything else?

31
32 **NIKHIL NAYYAR:** Sorry. Not... just 2-3 short points, My Lords. The second aspect on
33 Section 5 My Lord. Section 5 My Lords, is not a bar, because Section 5 only says My Lords,
34 notwithstanding, and under as per this part...

35
36 **CJI D Y CHANDRACHUD:** That Mr. Divan has made a point. The object of 5 was to prevent
37 suits being filed... to delay Arbitration...

1
2 **NIKHIL NAYYAR:** Correct, but once there is a jurisdiction, once there is a jurisdiction under
3 11 or 9 or My Lords 34 or 37, the width of that jurisdiction is not controlled by 5. Just one
4 judgment My Lord, that Your Lordships may note it, I don't have the time to read it. That's
5 [UNCLEAR], My Lord, it's in Volume 5(B) My Lord... at page 547. Sorry 522 at My Lords,
6 paras 38 and 39, at 547. That 5 My Lords, will not control the actual width of the jurisdiction.
7

8 **CJI D Y CHANDRACHUD:** I'm sure a lot of other States have this. Under the Revenue Law,
9 in Maharashtra, if a certain point arose before a Civil Court, you had to refer it to the Revenue
10 Authorities for determination. What used to happen then is, the moment you got the Revenue
11 Authorities, everything then went into a series of procedural remedies, revision, a statement
12 of case, an appeal. So what the experience was that the entire process before the Civil Courts
13 was stalled, because until a finding was reached by Revenue Authority and exactly that's what's
14 going to happen here. The moment we read the Stamp Act provisions to the 11(6A) stage, or
15 the 11(6) stage, the net consequence is going to be, that the entire gamut of remedies under
16 the Stamp Act will have to be exhaustive, and that never comes to an end. It goes on for years.
17

18 **NIKHIL NAYYAR:** No My Lord. There I have two submissions, My Lord. One is My Lord,
19 there is assumption implicit in this that the Arbitral Tribunal will handle it better. And that
20 the Arbitral Tribunal will be able to control the stamp proceedings equally well. That's an
21 assumption I would say, with respect My Lord, because if the Court is not able to control it My
22 Lords, as Your Lordships are observing My Lord...
23

24 **JUSTICE SANJAY KISHAN KAUL:** Why will the courts control it? It is not.....
25

26 **NIKHIL NAYYAR:** No, it's not controlling. That I'll deal with separately...
27

28 **JUSTICE SANJAY KISHAN KAUL:** ...No the intent of an Arbitration Act, very basic
29 summary nature of preceding 11(6). Why is it detailed under threshold... whether they control
30 it better or not control it better. The arbitrator...
31

32 **NIKHIL NAYYAR:** ...if the concern is...
33

34 **CJI D Y CHANDRACHUD:** 2019 Amendment though not enforced...
35

36 **NIKHIL NAYYAR:** Yes.
37

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

2
3 **NIKHIL NAYYAR:** Correct...

4
5 **CJI D Y CHANDRACHUD:** ...which is to continuously constrict or constrict or confine the
6 intervention of the Court at the first look stage. By taking it away completely, if the
7 Amendment were to be enforced.

8
9 **NIKHIL NAYYAR:** Yes My Lords, therefore My Lords, what we had suggested was, kindly
10 just have the order of the Judgment of the Delhi High Court in *Splendor*, because My Lords,
11 it sets out a whole scheme as to how to control...

12
13 **CJI D Y CHANDRACHUD:** That you have made a point... Delhi and Bombay..

14
15 **JUSTICE SANJAY KISHAN KAUL:** [UNCLEAR] Constitution Bench judgement whether
16 everything should be left in a limbo, or they devised the method...

17
18 **NIKHIL NAYYAR:** Actually My Lord, it's not a case of limbo... because they've actually
19 devised the method to expedite it and control time frames. In fact, in the Bombay case, they
20 found that the difference was Rs.44/-.

21
22 **CJI D Y CHANDRACHUD:** They were implementing the Constitution Bench.

23
24 **NIKHIL NAYYAR:** It's a workable solution is what I'm saying. What I'm suggesting was it's
25 a workable solution. It's not a solution that can't work, My Lord.

26
27 **CJI D Y CHANDRACHUD:** Thank you, Mr. Nayyar. Thank you very much.

28
29 **NIKHIL NAYYAR:** only one sorry answer. One last point My Lords was on this on the
30 question of 35. It says 'for any purpose'. In *Avinash Kumar Chauhan*, Your Lordships have
31 said My Lords, if it is not stamped, unlike 49 of the Registration Act, it cannot be reused, even
32 for a collateral purpose... that is *Avinash Kumar Chauhan* My Lords, is in Volume 5-B
33 page 104 at para 22 to 25, page 110. I'm grateful.

34
35 **NAKUL DEWAN:** I am supposed to take not more than 10 minutes. So that my learned
36 friends also...

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

3
4 **NAKUL DEWAN:** I have always, I am appearing for an institution. My difficulty with as far
5 as the Challenge to the *NN Global* judgment is this. We affirm *NN Global* the five Judges
6 on the basis that the doctrine of separability is limited and that the Arbitration Clause save
7 and except for matters under Section 16, is part and parcel of the main contract. So to that
8 extent, we affirm *NN Global 2*. The little leg which stands on that side, which is in fact the
9 practical leg that under Section 11 an arbitration need not be stalled, if an Arbitration
10 Agreement is inadequately or not stamped at all, or the main contract is not stamped. Now,
11 why is the doctrine of separability relevant?

12
13 **JUSTICE SANJAY KISHAN KAUL:** That is the only point we are deciding.

14
15 **NAKUL DEWAN:** That's correct. In fact, you're not just heard Mr. Khambata at length on
16 the doctrine of separability where he suggested...

17
18 **JUSTICE SANJAY KISHAN KAUL:** I've been saying repeatedly, and I think on behalf of...
19 people have gone here there in many places.

20
21 **NAKUL DEWAN:** That's right.

22
23 **JUSTICE SANJAY KISHAN KAUL:** We have repeatedly, I think at cost of repetition, the
24 Chief Justice, all of us have been repeating what we are deciding. If we are repeating what we
25 are deciding what's the point of saying. He said, this. so I'm saying this. So and so said this so
26 I'm saying this.

27
28 **NAKUL DEWAN:** I appreciate. Why is the doctrine of separability relevant? I won't take
29 more than a minute to explain to My Lords. If Your Lordships holds that today the parent
30 agreement and the Arbitration Agreement are fused for all purposes save and exception for
31 Section 16, then the challenge, as far as inadequacy of stamping really goes to the challenge as
32 far as the main agreement is concerned and where there could be... where the level of
33 stamping, the quantum of stamping becomes a matter of dispute. It's a matter of...

34
35 **JUSTICE SANJAY KISHAN KAUL:** We are not dealing... submitting before us. Even if...
36 The point is if you are debating it, I agree. You have a right to say, but we are not dealing with
37 it. We have said so 20 times. We are not. We are saying the only issue we're dealing with is

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

3
4 **NAKUL DEWAN:** My Lords I have no difficulty. My written submissions are there. In case
5 Your Lordships go into the doctrine of separability. My submissions are there that it must be
6 restricted. That's all. Now I come to the second point. And the only point that I will then
7 address my points on, which is in relation to Section 11. And whether should an arbitration be
8 stalled? If Your Lordships has Section 33 of the Stamp Act.

9
10 **JUSTICE SANJAY KISHAN KAUL:** I thought you were on the side of the....

11
12 **NAKUL DEWAN:** On their side.

13
14 **JUSTICE SANJAY KISHAN KAUL:** Then there is nothing to add.

15
16 **NAKUL DEWAN:** No. The only difference My Lords is this. Mr. Datar seemed to suggest
17 that a Section 11 court could perhaps take evidence. He said. I'm not arguing that they can't
18 take evidence. Mr. Khambata said, perhaps they cannot take evidence. My position...

19
20 **CJI D Y CHANDRACHUD:** Why do we have to go into these?

21
22 **NAKUL DEWAN:** Because the Section 33 of the Stamp Act. And I will tell Your Lordships
23 why. If Your Lordship has Section 33 of the Stamp Act, what does 33 set out. What 33 sets out
24 is that every person by having by law or consent of parties authority to receive evidence. My
25 Lords that's the starting point. Now, by my respectful submission is this. Once parties have
26 chosen arbitration as a mechanism for resolving disputes, they have by consent under the
27 Arbitration Act authorize the Arbitral Tribunal to be the body which receives evidence. And
28 that becomes evident from Section 19.

29
30 **JUSTICE SANJAY KISHAN KAUL:** Thank you. That's exactly what I said before. You have
31 a chosen judge, you have an arbitrator, the arbitrator will take a call.

32
33 **NAKUL DEWAN:** And the consent. So therefore, as far as the second part of Section 33 is
34 concerned, it doesn't arise because by consent you've said the Tribunal receives evidence. Now
35 My Lords what about the first part? Every person having by law authority to receive evidence.
36 Now, that is where Your Lordships has to consider the Arbitration Act and Section 11. There
37 my respectful submission is this. Under Section 11 Your Lordships is only appointing an

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

17
18 **CJI D Y CHANDRACHUD:** You are therefore supporting that submission.

19
20 **NAKUL DEWAN:** To that extent, I support that position because that's the long and short
21 of all that I have. That all of this has been set out in my written submissions.

22
23 **CJI D Y CHANDRACHUD:** Thank you Mr. Dewan.

24
25 **RESPONDENT'S COUNSEL:** I am at 707.1....

26
27 **CJI D Y CHANDRACHUD:** No one second, Mr. Khambata? How do you read that one part
28 of Section 35? Just a couple of questions really which... 1) What is the object of Section 5? I'll
29 come to that in a moment. Section 35... 35 says in Stamp Act, no instruments chargeable if
30 duty shall be admitted in evidence for any purpose, by any person having by law or consent of
31 Party's authority to receive evidence, right?

32
33 **DARIUS KHAMBATA:** Yes My Lord.

34
35 **CJI D Y CHANDRACHUD:** The court under 11 is not that part. That's fair enough. Now, or
36 shall be acted upon, registered or authenticated by any such person. Now any such person
37 means the person referred to earlier..

DARIUS KHAMBATA: The first part...

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

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

CJI D Y CHANDRACHUD: Of public office.

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

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

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

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

CJI D Y CHANDRACHUD: Absolutely.

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

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

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

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

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

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

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

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

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

CJI D Y CHANDRACHUD: To 73?

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

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

3
4 **CJI DY CHANDRACHUD:** Thank you very much.

5
6 **SHYAM DIVAN:** Just one point. At least our position, we believe that the High Court and
7 the Supreme Court is covered by the opening part, every person having by law, a consent of
8 Party's authority to receive evidence.

9
10 **DEBESH PANDA:** My Lords just one request.

11
12 **SHYAM DIVAN:** We are covered by that, we don't need to really go in...

13
14 **DEBESH PANDA:** Just one request My Lord. Mr. Datar is not here. Just in a note we had
15 made. We wanted to just hand it over. This covers our points in rejoinder on 5. Just I'm
16 handing over the note. Your Lordship may see it.

17
18 **MALVIKA TRIVEDI:** On the interpretation of *Hindustan Steel* which is in Para 65 and
19 70 of the Constitution Bench Judgment because what happened there was after stamp paper
20 [UNCLEAR] Then it was being stated that it should not be [UNCLEAR]. So, My Lord, that is
21 also analysed. Therefore, to say that the *Hindustan Steel* Judgment will actually have an
22 impact, My Lord, is not correct. Because what actually can be acted upon can only be
23 enforceable.

24
25 **CHIEF JUSTICE CHANDRACHUD:** Alright. Thank you.

26
27 **DARIUS KHAMBATA:** May I put in a short note on Public Officer. Just a short one.

28
29
30 ***END OF THIS PROCEEDING***