
A FORUM WITHOUT A DEED: COMPULSORY REGISTRATION, SECTION 49 AND THE LIMITS OF SEPARABILITY IN IMMOVABLE PROPERTY ARBITRATION

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ABSTRACT

When the Supreme Court held in *In Re Interplay* that an unstamped instrument is inadmissible but not void, and that stamping objections belong to the arbitral tribunal rather than the referral court, it was widely read as closing a decade of litigation about defective instruments and arbitration. It closed only half of it. *SMS Tea Estates* had decided two questions, one about stamping and one about registration, and *Interplay* overruled it on the first while leaving the second standing and indeed relying on the distinction between them: Section 35 of the Indian Stamp Act bars an insufficiently stamped instrument from being used even for a collateral purpose, whereas the proviso to Section 49 of the Registration Act expressly permits collateral use. This article argues that the surviving half is a hollow victory and that the symmetry between the two defects is false. Stamping is curable at any stage by paying duty and penalty; non-registration becomes incurable once the periods in Sections 23 and 25 of the Registration Act expire. A claimant under an unstamped lease therefore ends with both a tribunal and an admissible instrument, while a claimant under an unregistered lease ends with a tribunal and an instrument the tribunal may not read, because *K B Saha* holds that where a document is inadmissible for want of registration every term in it is inadmissible and a term of the lease cannot be proved as a collateral fact. The arbitration clause is the only clause that survives, and it is the only clause of no use on the merits. The article then asks whether Section 49 binds an arbitral tribunal at all, given that Section 19(1) of the Arbitration Act frees tribunals from the Evidence Act but not from a substantive bar located elsewhere, and argues that an award resting on an unregistered compulsorily registrable deed is exposed to challenge for patent illegality. With part performance under Section 53A no longer available to an unregistered transferee after 2001, the fallbacks are largely closed. Four reforms are proposed, the principal one being a registration cure modelled on the Stamp Act.

Keywords: Registration Act 1908; Section 49; Transfer of Property Act 1882; separability; collateral transaction; arbitrability; *In Re Interplay*; *SMS Tea Estates*; patent illegality.

I. INTRODUCTION

Indian property transactions fail on formalities more often than they fail on substance. A lease for five years is reduced to writing, signed, acted upon for two years and never registered. A development agreement conferring an interest in land is executed and left in a drawer. A sale agreement is stamped at the wrong rate. When the relationship then breaks down, the parties discover that the law of immovable property is unusually unforgiving about documents, and that the instrument they have been performing for years is, for most purposes, a piece of paper the court may not look at.

Many of these instruments contain arbitration clauses. For the better part of fifteen years, Indian courts have been working out what happens to such a clause when the instrument carrying it is defective. The question has been litigated almost entirely in the vocabulary of arbitration law, through the doctrine of separability, the scope of the referral court's enquiry and the competence of the tribunal to rule on its own jurisdiction. The seven-judge decision in *In Re Interplay* is widely understood to have settled it.

It settled the stamping half. The registration half is in a stranger position, and this article is about that position. The argument is in three steps. First, the rule that rescues the arbitration clause from an unregistered deed, the collateral-transaction proviso to Section 49 of the Registration Act, rescues the clause and nothing else, so the claimant obtains a forum and no case. Second, the cure that makes the stamping problem tractable has no counterpart in the Registration Act, so the two defects are not analogous and the reasoning in *Interplay* cannot be transplanted. Third, the usual property-law fallbacks for an unregistered transferee have been closed, most importantly by the 2001 amendment to Section 53A of the Transfer of Property Act. Part II sets out the registration requirement and its sanction. Parts III and IV trace the two halves of the doctrine. Part V states the hollow-forum problem. Part VI asks whether Section 49 binds a tribunal at all. Part VII surveys the closed fallbacks, and Part VIII proposes reform.

II. THE REQUIREMENT AND ITS SANCTION

Section 17(1)(b) of the Registration Act 1908 requires registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any right, title or interest in immovable property of the value of one hundred rupees and upwards, and Section 17(1)(d) separately requires registration of leases of immovable property from year to

year, for any term exceeding one year, or reserving a yearly rent. Section 107 of the Transfer of Property Act 1882 says the same thing from the other direction: a lease of immovable property from year to year or for a term exceeding one year can be made only by a registered instrument.¹ The threshold of one hundred rupees has not been revised in over a century, with the result that the requirement now captures essentially every transaction in land.

The sanction is in Section 49. An unregistered document required to be registered shall not affect any immovable property comprised in it, and shall not be received as evidence of any transaction affecting such property.² The two limbs do different work. The first is substantive: the instrument does not operate on the property at all. The second is evidentiary: the instrument cannot be proved. A statute that said only the second thing would be a rule about proof; a statute that says both is making a statement about title.

The proviso then opens two windows. An unregistered instrument may be received as evidence of a contract in a suit for specific performance, and as evidence of any collateral transaction not required to be effected by a registered instrument.³ The second window is the one that matters here, and its boundaries were fixed in *K B Saha and Sons Pvt Ltd v Development Consultant Ltd*, where the Supreme Court held that a collateral transaction must be independent of, or divisible from, the transaction requiring registration, must not itself be a transaction requiring registration, and, critically, that where a document is inadmissible for want of registration all its terms are inadmissible, so that a term of the lease cannot be proved as a collateral fact.⁴ The window is narrow by design. It admits things that sit beside the transaction, not things that constitute it.

III. SEPARABILITY AND THE ARBITRATION CLAUSE

Section 16(1) of the Arbitration and Conciliation Act 1996 provides that an arbitration clause forming part of a contract shall be treated as an agreement independent of the other terms, and that a decision by the tribunal that the contract is null and void shall not entail ipso jure the invalidity of the clause.⁵ Separability is a doctrine about survival. It allows the dispute-resolution mechanism to outlive the bargain it was attached to, which is sensible, because the

¹Registration Act 1908, s 17(1)(b) and s 17(1)(d); Transfer of Property Act 1882, s 107.

²Registration Act 1908, s 49(a) and (c).

³Registration Act 1908, proviso to s 49.

⁴*K B Saha and Sons Pvt Ltd v Development Consultant Ltd* (2008) 8 SCC 564.

⁵Arbitration and Conciliation Act 1996, s 16(1)(a) and (b).

mechanism exists precisely to decide whether that bargain failed.

In *SMS Tea Estates Pvt Ltd v Chandmari Tea Co Pvt Ltd* the Supreme Court brought separability and the Section 49 proviso together.⁶ The instrument was a thirty-year lease of two tea estates, unstamped and unregistered, and the Gauhati High Court had held that no term of it, including the arbitration clause, could be relied upon for any purpose.⁷ The Supreme Court disagreed on registration. An arbitration clause, it reasoned, is a collateral term about the resolution of disputes rather than about the performance of the contract; it is not itself an instrument requiring registration; and it therefore falls within the collateral-transaction window. Reading the proviso with Section 16(1)(a), an arbitration agreement in an unregistered but compulsorily registrable document could be acted upon for the purpose of dispute resolution.

That holding is doctrinally clean and it has not been disturbed. It is also, as the next two Parts argue, worth considerably less than it appears.

IV. THE STAMPING DETOUR AND WHY IT DOES NOT TRAVEL

The same judgment reached the opposite conclusion on stamping, for a textual reason. Section 35 of the Indian Stamp Act 1899 provides that an insufficiently stamped instrument shall not be admitted in evidence for any purpose, and the Stamp Act contains no collateral-transaction proviso. *SMS Tea Estates* accordingly held that the clause could not be acted upon until duty and penalty were paid, and that a court under Section 11 was obliged to impound the instrument.

What followed is familiar. *Garware Wall Ropes* extended the reasoning and *Dharmaratnakara* applied it;⁸ a three-judge bench in *NN Global* took the contrary view; a five-judge bench restored the stricter position;⁹ and in December 2023 a seven-judge bench in *In Re Interplay* held that non-stamping renders an instrument inadmissible rather than void, that the defect is curable, and that objections on stamping are for the arbitral tribunal rather than the referral

⁶*SMS Tea Estates Pvt Ltd v Chandmari Tea Co Pvt Ltd* (2011) 14 SCC 66.

⁷*SMS Tea Estates Pvt Ltd v Chandmari Tea Co Pvt Ltd* (2011) 14 SCC 66; the instrument was a lease of two tea estates for a term of thirty years, which the Gauhati High Court had held could not be relied upon for any purpose.

⁸*Garware Wall Ropes Ltd v Coastal Marine Constructions and Engineering Ltd* (2019) 9 SCC 209; *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v Bhaskar Raju and Brothers* (2020) 4 SCC 612.

⁹*NN Global Mercantile Pvt Ltd v Indo Unique Flame Ltd* (2023) 7 SCC 1 (five-judge bench).

court.¹⁰ SMS Tea Estates and Garware were overruled on this point.

The reasoning in *Interplay* rests on the distinction between the two statutes, and the Court drew it expressly: Section 49 of the Registration Act permits an unregistered instrument to be used for a collateral purpose, whereas Section 35 of the Stamp Act bars such use.¹¹ The registration holding in SMS Tea Estates therefore survives not by oversight but because the Court treated it as resting on a different and sounder footing.

This is where the symmetry breaks. The Stamp Act is a fiscal statute, and its bar is a collection device. Sections 33, 35, 38 and 42 together create a mechanism by which an impounded instrument, once the deficit duty and penalty are paid, is certified and thereafter admissible for all purposes as if it had been duly stamped from the outset.¹² The defect is curable at any time, by anyone, for money. That is precisely what allowed the Court in *Interplay* to characterise the defect as one going to admissibility rather than to validity.

Registration has no equivalent. Section 23 of the Registration Act requires a document to be presented for registration within four months of execution, and Section 25 permits the Registrar to admit it within a further four months on payment of a fine where the delay is due to urgent necessity or unavoidable accident.¹³ After that, the door closes. There is no provision by which a party may, two years into a dispute, pay a penalty and have an executed lease registered with retrospective effect. The non-registration of an instrument is, in the ordinary case, permanent.

The consequence is that the two defects, which the litigation has treated as variations on a theme, are structurally different. The claimant under an unstamped lease emerges from *Interplay* with a tribunal and, after paying duty, with an instrument that can be put in evidence and sued upon. The claimant under an unregistered lease emerges from SMS Tea Estates with a tribunal and with an instrument that will never be admissible for the thing it was written to do.

¹⁰In *Re Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* (2024) 6 SCC 1 (seven-judge bench, 13 December 2023).

¹¹In *Re Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* (2024) 6 SCC 1, distinguishing s 49 of the Registration Act 1908, which permits an unregistered instrument to be used for a collateral purpose, from s 35 of the Indian Stamp Act 1899, which bars such use.

¹²Indian Stamp Act 1899, ss 33, 35, 38 and 42.

¹³Registration Act 1908, ss 23 and 25.

V. THE HOLLOW FORUM

Put the two rules side by side. The arbitration clause gets through the collateral-transaction window because it is divisible from the transaction and does not itself require registration. Every other clause in the instrument fails that test for the same reason the clause passes it: the term as to rent, the term as to the duration of the lease, the covenant for renewal, the clause conferring a development right, the description of the demised premises, are all terms of the very transaction for which registration was required. K.B. Saha states the point without qualification: where a document is inadmissible for want of registration all its terms are inadmissible, and a term of the lease cannot be proved as a collateral fact.¹⁴

A claimant who invokes the clause therefore arrives before a tribunal to prove a case constituted entirely of material the tribunal may not receive. He wishes to establish that he held a lease for thirty years; the deed cannot be received as evidence of the lease. He wishes to establish the rent, the renewal option, the covenant against eviction; those are terms of the inadmissible instrument. He is left with the fact of possession, the fact of payments made and received, and whatever can be built out of conduct.

That residue is not nothing. It will usually establish a month-to-month tenancy arising by implication from possession and the payment of rent, and it may support a restitutionary claim. But it is a fraction of the bargain, and it is a fraction that could have been established without any instrument at all. The arbitration clause, in other words, delivers the claimant to a forum competent to decide a claim he can no longer prove. The separability doctrine has worked exactly as designed and has produced a result of no practical value.

There is a further oddity. Because the clause survives, the claimant is also deprived of the argument that there is no arbitration agreement at all, which would at least send him to a civil court where the same evidentiary bar would apply but where the law of the Registration Act is, as a matter of institutional habit, more reliably applied. Separability here operates to the claimant's detriment.

¹⁴K B Saha and Sons Pvt Ltd v Development Consultant Ltd (2008) 8 SCC 564, holding that where a document is inadmissible for want of registration all its terms are inadmissible, and that a term of the lease itself cannot be proved as a collateral fact.

VI. DOES SECTION 49 BIND AN ARBITRAL TRIBUNAL?

The preceding Part assumed that an arbitral tribunal must apply Section 49. The assumption deserves examination, because Section 19(1) of the Arbitration Act provides that an arbitral tribunal shall not be bound by the Code of Civil Procedure 1908 or the Indian Evidence Act 1872.¹⁵ If the Section 49 bar is evidentiary, the argument runs, a tribunal is free of it, and the hollow-forum problem dissolves.

The argument should fail, for three reasons. First, Section 19(1) names two statutes and Section 49 is in neither. It is located in the Registration Act, and the freedom conferred by Section 19(1) is a freedom from two identified codes of procedure and proof, not a general licence to disregard statutory rules that happen to operate on evidence. The point has acquired an incidental sharpness since the Indian Evidence Act 1872 was replaced by the Bharatiya Sakshya Adhiniyam 2023, while Section 19(1) continues to refer to the repealed Act.¹⁶

Second, the bar is not merely evidentiary. Section 49(a) provides that the unregistered instrument shall not affect the immovable property comprised in it.¹⁷ That is a rule of substantive property law, and it is unaffected by anything in the Arbitration Act. A tribunal that is free to receive a document is not thereby free to give it an operative effect the legislature has withheld. The evidentiary limb in Section 49(c) is the procedural expression of a substantive disability, and a tribunal cannot take the second without the first.

Third, the consequences at the enforcement stage make the point practically. An award that gives effect to an unregistered compulsorily registrable instrument contravenes a substantive provision of Indian law. Under the patent illegality standard, as explained in *Associate Builders* and confined in *Ssangyong*, an award that contravenes the substantive law of India is liable to be set aside;¹⁸ Section 34(2A) now states the ground expressly for domestic awards.¹⁹ A tribunal that treated Section 19(1) as a licence would therefore be constructing an award built to be annulled. The better view is that Section 19(1) relieves a tribunal of the technicalities of

¹⁵ Arbitration and Conciliation Act 1996, s 19(1).

¹⁶ Indian Evidence Act 1872, repealed and replaced by the Bharatiya Sakshya Adhiniyam 2023 with effect from 1 July 2024; s 19(1) of the Arbitration and Conciliation Act 1996 continues to refer to the Act of 1872.

¹⁷ Registration Act 1908, s 49(a).

¹⁸ *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49; *Ssangyong Engineering and Construction Co Ltd v National Highways Authority of India* (2019) 15 SCC 131.

¹⁹ Arbitration and Conciliation Act 1996, s 34(2A), inserted by the Arbitration and Conciliation (Amendment) Act 2015.

proof, not of the rules that determine whether a transaction in land has legal effect.

VII. THE FALLBACKS, AND WHY THEY ARE LARGELY CLOSED

Property law once offered the unregistered transferee a substantial consolation in Section 53A of the Transfer of Property Act, the doctrine of part performance, under which a transferee in possession under a written contract who had performed or was willing to perform could resist dispossession by the transferor. As originally enacted the section applied although the contract, though required to be registered, had not been registered. The Registration and Other Related Laws (Amendment) Act 2001 deleted those words.²⁰ Part performance now requires a registered contract, which is to say that the doctrine no longer does the work it was invented for. The transferee in possession under an unregistered agreement to sell has, since 2001, no shield.

The first limb of the proviso to Section 49 offers more. An unregistered instrument may be received as evidence of a contract in a suit for specific performance.²¹ A claimant seeking specific performance of an agreement to sell may therefore put the agreement in evidence, notwithstanding non-registration, and the Specific Relief Act as amended in 2018 has made specific performance the general rule rather than a discretionary remedy.²² The difficulty in the present context is the word 'suit'. An arbitral reference is not a suit, and whether the limb extends to arbitral proceedings has not been authoritatively decided. A claimant who would have had the benefit of the proviso in a civil court may find that the arbitration clause he relied upon to reach the tribunal has deprived him of it. This is the hollow-forum problem in its sharpest form, and it is an argument for reading 'suit' purposively rather than for construing it narrowly.

What remains is restitution. Sections 65 and 70 of the Indian Contract Act permit recovery where an agreement is discovered to be void or where a person lawfully does something for another non-gratuitously.²³ These provisions will return deposits and advances and may compensate improvements, and claims of that kind are plainly arbitrable, being claims in

²⁰Transfer of Property Act 1882, s 53A, as amended by the Registration and Other Related Laws (Amendment) Act 2001, which deleted the words permitting reliance on an unregistered contract.

²¹Registration Act 1908, proviso to s 49, first limb.

²²Specific Relief Act 1963, ss 10 and 20, as substituted by the Specific Relief (Amendment) Act 2018.

²³Indian Contract Act 1872, ss 65 and 70.

personam between the parties.²⁴ They will not deliver possession, a term of years, or a development right.

It is worth noting that arbitrability itself is no longer the obstacle it was. Vidya Drolia overruled the line of authority holding tenancy disputes governed by the Transfer of Property Act to be non-arbitrable, and Suresh Shah confirmed that such disputes may be referred, the exclusion being confined to disputes under rent control and similar special statutes.²⁵ Indian law has therefore opened arbitration to immovable property disputes at the very moment at which the evidentiary foundation of many such disputes is most precarious.

VIII. REFORM

Four changes would address the problem, in descending order of importance.

First, and principally, a registration cure. The Registration Act should be amended to permit an instrument that is the subject of pending judicial or arbitral proceedings to be presented for registration beyond the periods in Sections 23 and 25, on payment of a prescribed fine, with effect from the date of execution. This is not a novel mechanism; it is the Stamp Act mechanism in Sections 35 and 42, which the Supreme Court in *Interplay* treated as the reason stamping defects are curable. There is no principled reason why the State's interest in a complete land record should be vindicated by permanently disabling an instrument rather than by collecting a penalty and registering it. The fiscal statute is the more pragmatic of the two, which is an odd state of affairs.

Second, clarification of the proviso. The first limb of the proviso to Section 49 should be amended to read 'in a suit or arbitral proceeding for specific performance', or Section 49 should carry an explanation to that effect. The limb was drafted in 1908 for a world in which specific performance was sought in a civil court, and its restriction to suits is an accident of drafting date rather than a policy choice. The amendment would cost nothing and would remove the perverse result that an arbitration clause worsens a claimant's evidentiary position.

Third, a preliminary-issue practice. Where an instrument conferring an interest in immovable property is compulsorily registrable and unregistered, a tribunal should ordinarily decide the

²⁴*Booz Allen and Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.

²⁵*Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1; *Suresh Shah v Hipad Technology India Pvt Ltd* (2021) 1 SCC 529.

admissibility question as a preliminary issue under Section 16 rather than at the award stage.²⁶ The referral court's enquiry under Section 11(6A) is confined to the existence of the arbitration agreement, and after Interplay the court will not examine instrument defects;²⁷ the filter therefore has to operate within the arbitration if it is to operate at all, and it should operate early, before the parties have spent two years proving a case that cannot be received.

Fourth, drafting practice. Parties to leases, development agreements and agreements to sell should execute the arbitration agreement as a separate document rather than as a clause in the instrument. A standalone arbitration agreement is not an instrument creating an interest in immovable property, requires no registration, and raises none of the questions this article has discussed. The 2024 consultation draft on arbitration reform does not address the registration question,²⁸ and until it or something like it does, the cheapest protection available is a second signature page.

None of these proposals touches arbitrability, and none disturbs Interplay. They address the mismatch between a formalities regime designed around a permanent sanction and a dispute-resolution regime that has been opened up to the transactions that regime governs.

IX. CONCLUSION

The doctrine as it stands produces an elegant result and a useless one. The arbitration clause in an unregistered lease survives, because it is collateral; every term that matters perishes, because it is not. Interplay has made the parallel defect of non-stamping curable and has thereby widened the gap, since the claimant who failed to stamp is now substantially better placed than the claimant who failed to register, although the second failure is at least as common and is often the same party's doing in the same transaction.

The deeper point is about where arbitration law can and cannot help. Separability is a powerful doctrine, but it operates on jurisdiction, not on title. It can deliver a claimant to a tribunal; it cannot make a deed effective that the Registration Act says does not affect the property. Reforms directed at the Arbitration Act will not fix this, which is why the principal proposal

²⁶ Arbitration and Conciliation Act 1996, s 11(6A), inserted by the Arbitration and Conciliation (Amendment) Act 2015.

²⁷ Arbitration and Conciliation Act 1996, s 16.

²⁸ Department of Legal Affairs, Ministry of Law and Justice, 'Draft Arbitration and Conciliation (Amendment) Bill 2024' (18 October 2024) accessed 1 October 2026.

here is an amendment to the Registration Act. Until the formalities regime acquires a cure resembling the one the Stamp Act has had since 1899, the most useful advice to a party transacting in Indian land remains unglamorous: register the instrument, and in the meantime sign the arbitration agreement separately.