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Arbitration Agreements: Decluttering the Intentions

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ABSTRACT

Contracts and agreements are the concepts and terms dominating the present era. People are now inclined towards forming a contract or agreement in the first instance, while dealing with one another, to bring in the legal sanctity into their relationship and to have a clear understanding of each other's intentions which help to avoid while, the same can be of immense help in dispute resolution, if any arises in the future.

ADR is internationally talked about and accepted dispute resolution mechanism. Herein, parties enter into an arbitration agreement with each other with the arbitration clause citing the procedure via which the dispute would be resolved peacefully, efficaciously and speedily. These arbitration agreements are nothing more than a document depicting the intentions of the parties. But at times, when these arbitration agreements are not clearly written or are ambiguous, then it is the duty of the adjudicating body to determine and carve out their real intentions and for the same Indian Supreme Court in various judicial decisions have laid down the principles and procedures to follow. This paper aims to discuss various such Supreme Court judgments. According to these decisions if the otherwise conduct and correspondences between the parties show in positive the existence of arbitration agreement and mutual consent to follow such an intention. Further, this paper also discusses, in bits, a new doctrine i.e. 'group of companies' doctrine' that caught court's attention while discussing about the existence of arbitration agreements and decluttering the intentions of the parties for the same.

I. INTRODUCTION

A contract or an agreement is a document reflecting the intention of the parties and bridging two minds for obtaining *consensus ad idem* i.e. agreeing on the same thing in the same sense. These documents govern the relationship between the parties and lay down their rights and liabilities and the way for dispute resolution, if any arises in the future. But interpreting these documents and gathering the intentions of the parties is not as simple as it may sound. It becomes even more difficult if there is no particular written agreement or contract but a

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number of exchanges via letters, emails or other correspondences. Therein the way parties act and continue with their dealings determines whether there existed any agreement or contract ad idem or not. As far as *Arbitration and Conciliation Act, 1996* [further referred to as Act, 1996] is concerned, an *arbitration agreement* has been defined under *section 2(b)* of the Act, 1996 to mean an agreement referred to in *section 7* of the Act, 1996. Therefore, to deduce if an arbitration agreement exists between the parties or not, it is of utmost importance to understand what actually *section 7* lays down and means, and for the same, we will be discussing various judgments given by different courts interpreting this provision.

Section 7 of the Act, 1996 lays down that:

Arbitration Agreement —

1. In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
3. An arbitration agreement shall be in writing.
4. An arbitration agreement is in writing if it is contained in—
    a) a document signed by the parties;
    b) an exchange of letters, telex, telegrams including communication through electronic means[2] which provide a record of the agreement; or
    c) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.
5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

From the abovementioned bare language, it can be deduced that an arbitration agreement can be a separate agreement altogether or a different document containing arbitration clause having mention in the contract or there can be a separate clause in the contract itself. *Section 7(3)* of the Act provides that the *arbitration agreement shall be in writing*, which is a mandatory requirement. *Section 7(4)* states that the arbitration agreement shall be in writing,

[2] *Inserted by The Arbitration and Conciliation (Amendment) Act of 2015*

if it is a document signed by all the parties. *But a perusal of clauses (b) and (c) of Section 7(4) would show that even if a written document*[3] *is not signed by the parties still, it can be an arbitration agreement.*

Arbitration Agreement

An Arbitration Agreement is not required to be in any particular form. In the case of ***Visa International Limited vs. Continental Resources (USA) Limited***, (2009) 2 SCC 55, the Supreme Court held as under:-

"18. That an arbitration agreement is not required to be in any particular form has been reiterated in more than one decision.[4] What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration….It needs no reiteration that *Section 7* of the Act does not prescribe any particular form and it is immaterial whether or not expression "arbitration" or "arbitrator" or "arbitrators" has been used in the agreement."

II. WHEN ARBITRATION AGREEMENT DEDUCED FROM CORRESPONDENCES

If the there is no formal agreement or contract made or signed and eventually a dispute arises between the parties while dealing with each other, it is the court who is entrusted with the task to decide onto the relationship between the parties i.e. was there any legal relationship between the parties giving rise to rights and obligations on the part of and towards each other. Therefore, existence of Arbitration agreement can be deduced by way of other documents and correspondences exchanged between the parties and by showing that the parties acted upon the agreement which contains the arbitration clause.

Therein, it was explained by the Supreme Court in the case of ***Dresser Rand S.A. vs. Binda Agro Chern,*** (2006) 1 SCC 751, that "the cardinal principle to remember is that it is the *duty of the Court to construe correspondence* with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them. The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. In case the expressions used in the *correspondence show that there was a meeting of mind and they had actually reached an agreement then it can be said that a binding contract came into existence between the parties*." "But the Court is not empowered to create a contract for the parties by going outside

[3] *Jugal Kishore Rameshwardas vs. Goolbai Hormusji AIR 1955 SC 812*
[4] *Bihar State Mineral Development Corpn. vs. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418]*

the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."[5]

Therefore, "if it can be prima facie shown that the parties are at ad idem, then the mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established and there is a record of agreement, it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. Therefore, *signature is not a formal requirement* under *Section 7(4)(b) or 7(4)(c) or under Section 7(5)* of the Act."[6]

To understand the application of section 7(4)(b) of the Act, 1996 it is useful to refer to an erudite judgment by the Supreme Court in ***Trimex International FZE Limited, Dubai vs. Vedanta Aluminium Limited, India,*** (2010) 3 SCC 1, wherein the Court after perusing the various emails exchanged between the parties including an email attaching a draft contract held as under :-

"44. From the materials placed, it has to be ascertained whether there exists a valid contract with the arbitration clause. It is relevant to note that on 15-10-2007 at 4.26 p.m. the petitioner submitted a commercial offer wherein Clause 6 contains the arbitration clause… At 5.34 p.m. though the respondents offered their comments, as rightly pointed out by Mr K.K. Venugopal, no comments were made in respect of the "arbitration clause". It is further seen that at 6.04 p.m., the petitioner sent a reply to the comments made by the respondent. Again, on 16-10-2007 at 11.28 a.m., though the respondents suggested certain additional information on the offer note, here again no suggestion was made with regard to the arbitration clause.

[5] *Rickmers Verwaltung Gmbh vs.Indian Oil Corporation Ltd. AIR1999SC504; MANU/SC/0726/1998*
[6] *Govind Rubber Ltd. vs. Louis Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477*

49. In the light of the details which have been extracted in the earlier paragraphs, I am unable to accept the stand of the respondent. It is clear that if the intention of the parties was to arbitrate any dispute which arose in relation to the offer of 15-10-2007 and the acceptance of 16-10-2007, the dispute is to be settled through arbitration. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialled."

Galaxy Infra and Engineering Pvt. Ltd vs. Pravin Electricals Pvt. Ltd [Judgment dated 12.05.2020]

In this case a dispute arose between the petitioner i.e. the consultancy agency and the respondent i.e. Pravin Electricals Pvt. Ltd. Wherein the petitioner provided the respondent company its necessary consultancy services to get a tender from the South Bihar Power Distribution Company Ltd. (SBPDCL). A draft agreement was sent by the respondent via email to the petitioner seeking their services and the draft contained an arbitration clause. To this, petitioner accepted the same with certain changes pertaining to the price and thereafter, thereafter the email sent to the SBPDCL was forwarded to the petitioner for the necessary action. Moreover, the carbon copy of the email intimating about the award of contract and letter of intent (LOI) was sent to the petitioner by the SBPDCL. After this as per the agreement certain invoices were raised which were duly paid. Further actions were taken, emails were exchanged and correspondences occurred between the parties. The Delhi High Court after hearing and analyzing the facts held that the Draft Agreement exchanged by email, further emails exchanged between the parties, their conduct of raising invoices on the happening of certain events, payments made in response to the raised invoices reflects the existence of an arbitration agreement between the parties and further reiterated that the signature of the party are not mandatory to decide on the issue of existence of arbitration agreement if the conduct and correspondences[7] are in positive tone reflecting that parties are acting consensus ad idem. Therefore, finding that the referred matter squarely falls within the ambit of Section 7(4)(b) of the Act.

Group of Companies Doctrine

'Group of companies doctrine' evolved from the English laws and our Indian courts have now cleared its applicability in India and has stated that determining the intention of the parties is again one of the most important feature while deciding on the applicability of

[7] *In Unissi (India) Pvt. Ltd. vs. Post Graduate Institute of Medical Education and Research, (2009) 1 SCC 107*

arbitration clauses on the non-signatory parties i.e. what is required to be deduced is whether the parties intended to bind both signatory and non-signatory companies applying the "group of companies doctrine". The following extracts of the following judgments can be read to elucidate the same.

In ***Chloro Controls India Private Limited (2013) 1 SCC 641*** concluded as follows:

"23. As the law has evolved, it has recognized that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group.

In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non--signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The "group of companies' doctrine" is essentially intended to facilitate the fulfillment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory."

The hon'ble Supreme Court in the case of Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Others, 2019 SCC Online SC 995 has held that an arbitration agreement is a commercial document inter-partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities. The intention of the parties must be inferred from the terms of the contract, conduct of the parties and correspondence exchanged to ascertain the existence of a binding contract between the parties. It would be the duty of the Court to make the arbitration agreement workable within the permissible limits of the law. The parent or the subsidiary company, entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group, to be bound by that agreement. A non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bound both the signatory as well as the non-signatory parties.

III. CONCLUSION

Thus, to lay down a crisp conclusion of the above discussion of various judgments, we can say that arbitration agreements are pre-dominantly documents which are made to give effect to the intention of the parties concerned and can't rather shouldn't be invalidated on grounds of mere technicality if the otherwise the conduct and correspondences exchanged between the parties clearly indicate the existence of the intention to bring such an arbitration agreement into effect while dealing with each other. Thus, in the light of section 7(4)(b) and (c) of the Act of 1996 we can say that an arbitration agreement even if not signed may be accepted as valid if the record of agreement can be provided by exchange of letters, telex, telegrams or other means of telecommunication including electronic means. Further, Section 7(4)(c) provides that there can be an arbitration agreement in the exchange of statements of claims and defense in which the existence of the agreement is alleged by one party and not denied by the other.

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