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ARBITRATION CLAUSE CONTAINED IN AN INVOICE - INTERPRETATION IN TERMS OF SECTION 7(4) OF THE A&C ACT



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Introduction

1. The guiding principle of arbitration in India is party autonomy. Party autonomy must however not be exercised unilaterally and there must be consensus between the parties as to the method of dispute resolution.
 2. The consensus in this sense truly begins from the stage of entering into an agreement when the parties choose arbitration as the forum for dispute resolution.
 3. Section 7 of the Arbitration and Conciliation Act, 1996 (A&C Act) defines an arbitration agreement as an agreement by which the parties submit their dispute to arbitration.
 4. Under Section 7(2), an arbitration agreement may be in the form of a clause in the contract or a separate agreement between the parties.
 5. Section 7(3) states that an arbitration agreement must be in writing. One of the parties cannot claim to have orally entered into an arbitration agreement by way of a verbal understanding.
 6. Further, Section 7(4) provides circumstances under which the arbitration agreement would be considered to be in writing, which are:
 - a. It is a document signed by the parties;
 - b. Record of the agreement is provided in an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means;
 - c. Exchange of statement of claims and defence where existence of an agreement is alleged by one party and not denied by the other party.
 7. Section 7(5) contemplates existence of an arbitration agreement by reference of the same in another agreement.
 8. Thus, in terms of Section 7, the arbitration agreement must be in writing, qualifying the consent of both the parties to have the dispute, inter se, resolved through arbitration.
- Mr. Mohammad Eshrar Ahmed vs. M/s. Tyshaz Buildmart India Private Limited [O.M.P.(T)(Comm.) 105/2023, I.A. 22122/2023], Delhi High Court**
1. In this case, the Court made observations on validity of an arbitration agreement contained in an invoice when the party in receipt of such invoice has not consented to the same.
 2. It was observed that there must be an agreement in writing to submit the dispute to arbitration within the meaning of Section 7 of the A&C Act. The present case does not attract any of the circumstances delineated under Section 7(4) of the A&C Act.
 3. The invoice, claimed by the party invoking arbitration (Respondent), to consist the arbitration clause does not bear the signature or expressed consent of the other party (Petitioner) to resolve the dispute by arbitration. The letter sent by the Respondent was as per the arbitration clause contained in the invoice issued by it. The dispute was non- payment of invoice. The Court accepted the contention of the Petitioner that there was no agreement as to the arbitration clause qua the parties. In fact, the invoice was issued on 15th May, 2023 and the notice invoking arbitration on 31st May, 2023.
 4. Thus, it was held that invocation of arbitration was not in sync with the arbitration agreement and there

was in fact, no arbitration agreement at all as the invoices did not contain the signature of the other party or anything to show that the petitioner had consented to the recitals contained in the invoices.

5. Further held that even if the invoice contains the arbitration clause, it has not been accepted by the other party expressly or impliedly and hence cannot be said to be an agreement in the strict/real sense of the word. No other documents executed between the parties have been relied upon to invoke the arbitration clause.
6. The Court applied the proposition followed in *NSK India Sales Company Pvt. Ltd. vs. Universal Trading Company Pvt. Ltd.* (2015 SCC OnLine Mad 14146) wherein it was held that the subject document neither contained the declaration in the prescribed form nor any endorsement to consider the acceptance thereof by both the parties thus rejecting the contention that the invoice issued by one party was a valid arbitration agreement.
7. The Court further clarified that even assuming there is an agreement, even the arbitrator has not been appointed by mutual consent. If the other party fails to give its consent to appointment of an arbitrator, the party invoking arbitration has the right to approach the Court under Section 11(5) or (6) of the A&C Act but it cannot unilaterally appoint the arbitrator.
8. An arbitrator appointed unilaterally is de jure incapable of functioning as such and the arbitral proceedings consequent on unilateral appointment stands vitiated. This has been confirmed by the Supreme Court in many judgments including *Bharat Broadband Network Ltd. vs. United Telecoms Ltd.*, (2019) 5 SCC 755 and *Perkins Eastman Architects DPC vs. HSCC (India) Ltd.*, (2020) 20 SCC 760.
9. The Court also clarified that a prayer for appointment of substitute arbitrator under Section 14(1)(a) of the A&C Act could not be granted since first, there is no agreement between the parties to warrant reference of dispute to arbitration and second, there is no legal mandate to follow up every termination of mandate with appointment of a substitute arbitrator.

Other judicial interpretations

1. Similar view was taken by the Calcutta High Court in *R.P. Infosystems Private Limited vs. Redington (India) Limited* (AP 626 of 2018). It was observed that although no standard form has been prescribed, the intent of the parties to refer the dispute to arbitration must be absolute and clear from the terms of the agreement. The Court however, held the invoice between the parties to be valid because the other party acted upon it and only brought the issue of its non-existence at the challenge stage under Section 34 of the A&C Act after the award was passed.

2. This can be clearly distinguished from the decision of the Delhi High Court in *Taipack Ltd. vs. Ram Kishore Nigar Mal* (2007) SCC On Line Del 804) where it was held that since there was no acceptance of the conditions contained in the invoice, it cannot be said to be a binding agreement.
3. Courts have also clarified that it is not always necessary for the parties to endorse their signatures upon the arbitration agreement. If the parties have acted upon such agreement and their mutual intent to refer the dispute to arbitration can be confirmed, then it would be a valid arbitration agreement within the purview of Section 7(4) of the A&C Act.
4. Thus, the basic principle that emanates from the decisions discussed hereinabove is that the intent and mutual decision of the parties has to be understood in the facts of each case for the Court to determine the existence of a valid arbitration agreement. Party autonomy must be upheld while disregarding unilateral actions. Under a valid arbitration agreement, parties must “agree” to refer the dispute to arbitration.
5. The conditions to be satisfied for a valid arbitration agreement, as provided in *Solaris Chem Tech Industries Ltd. vs. Assistant Executive* (2023 SCC OnLine SC 1335) may however be used as a reference:
 - “(i) The agreement must be in writing, as stipulated by sub-section (3) of Section 7;
 - (ii) Parties should have agreed to refer any disputes, present or future, between them to an arbitral tribunal;
 - (iii) The arbitral tribunal should be empowered to adjudicate upon the disputes in an impartial manner giving due opportunity to the parties; and
 - (iv) The parties should have agreed that the decision of the tribunal would be binding between them.”

Conclusion

Section 7 of the A&C Act provides for validity of an arbitration agreement by implication, but such implication also has to be on consent or mutual understanding between both parties. A mere mention without any subsequent event or documentation to evidence acceptance, either expressly or impliedly, cannot by itself be said to be a valid arbitration agreement.