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WHETHER A MATTER CAN BE REFERRED FOR ARBITRATION IN THE ABSENCE OF AN ARBITRATION CLAUSE OR AGREEMENT?

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ABSTRACT

In a country like India where "Our legal system has a reputation for being expensive and for being prone to delays"[5] and our courts are overburdened inadequate infrastructure, thus constantly suggesting arbitration, in fact "Indian courts are known for their pro-arbitration stance". But Indian citizens, corporates, companies are still reluctant to include Arbitration clause in their principal or standalone agreement due lack of clarity or middle ground. .So, as said many of the legal contracts in India lacks arbitration clause due to various reasons thus the question in hand is whether a Matter Can be Referred for Arbitration in the Absence of an Arbitration Clause or Agreement? And to find the answer for the same the researcher will look in various provisions, legal theories as well as judgements (both national and international) along with precedents developed over time.

Keywords: *Arbitration, Absence of an Arbitration Clause, Indian legal space, pro-arbitration stance, Novation*

[5] *India's legal system 'expensive', 'prone to delays': President Kovind* (2018) *The Indian Express*. Available at: https://indianexpress.com/article/india/indias-legal-system-expensive-prone-to-delays-president-ram-nath-kovind-5101493/.

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I. INTRODUCTION

Many people are unaware that even when an original contract does not contain an arbitration clause, arbitration procedures are nevertheless fully feasible. Although the framework of arbitration and litigation is similar, the main distinction between the two is that the former is only possible because of an arbitration provision or arbitration agreement. The formal agreement between the parties to arbitrate any disputes or disagreements they may have now or in the future is known as an arbitration agreement. Held in the case of **Canara Bank vs. Mahanagar Telephone Nigam Ltd**.[6]

Since arbitration is an entirely mutual dispute resolution procedure, the parties' agreement is the only factor that determines whether arbitration procedures may be initiated. The necessary will (or consent to arbitrate) is frequently, but not always, included in the agreement reached between the parties in the form of an arbitration provision.

The process of alternate dispute procedures can occasionally become time-consuming due to inartistic writing, which negates its fundamental purpose. When there is no arbitration clause or provision in place, the problem gets worse since a valid arbitration agreement is the cornerstone upon which the whole structure of the arbitral procedure is built and because the nature of the dispute lends itself more favorably to arbitration.

In this paper, the author would like to answer the research question as to "**If there is not a clause or agreement requiring arbitration, can a matter nevertheless be referred to arbitration?"**

II. THE PARTIES' INTENTIONS

In **Sonact Group Limited v. Premuda SPA**[7], the English High Court endorsed the "*pro-arbitration approach*"[8] to the implementation of formal settlements through arbitration. The Court came to the judgement that the parties might be presumed to have meant that the arbitral tribunal under the principal agreement would also have jurisdiction over disputes arising out of the settlement agreement between the same parties, even though the settlement agreement did not explicitly contain an arbitration clause. The Court's judgement was supported by the parties' apparent desire to arbitrate their differences and that's what it matters.

The Supreme Court and High Courts of India have also taken a similarly pragmatist and pro-arbitration approach. The Arbitration and Conciliation Act, 1996 governs arbitration law in India, furthermore, Section 7[9] of the aforementioned law defines an arbitration agreement as "*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*"

As per section 7(3) of The Arbitration and Conciliation Act, 199610, "an arbitration agreement shall be in writing" and can take the shape of a standalone contra ct or an arbitration clause in the existing contra ct. A written arbitration clause is admissible under clause 411 of the aforementioned section if it is contained in a document that the parties have signed, an exchange of letters or correspondence that serves as a record of the agreement, or 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. When a written contract refers to another document that contains an arbitration clause in a way that makes it a part of the contract, such reference becomes an arbitration agreement.

The courts have frequently reaffirmed that an arbitration agreement need not be in a certain

[6] Civil Appeal Nos. 6202-6205 OF 2019 (Arising out of SLP (Civil) No. 13573-13576 of 2014)

[7] Males J: [2018] EWHC 3820 (Comm): 12 December 2018

[8] Berger, P.D.K.P. (2016) *Principle XIII.1.2 - interpretation of arbitration agreements*, *translex*. Available at: https://www.trans-lex.org/968902/_/interpretation-of-arbitration-agreements/#:~:text=This%20pro%2Darbitration%20approach%20or,before%20an%20international%20arbitral%20tribunal.

[9] The Arbitration and Conciliation Act, 1996, s. 7

[10] The Arbitration and Conciliation Act, 1996, s. 7(3)

[11] The Arbitration and Conciliation Act, 1996, s. 4

form, keeping in mind Section 7(4)[12]. It is implied from the many papers that the parties have signed and exchanged during the course of their agreement, making it conceivable to use arbitration even in the absence of an express agreement.

The Apex Court clarified that the arbitration provision is not necessary to be in any specific form in **Smt. Rukmanibai Gupta v. The Collector, Jabalpur &Ors**[13]. What is crucial is that it should be possible to deduce from the wording of the agreement that the parties intended to submit the disagreement to arbitration. Therefore, whether or not the term "arbitrator" or the word "arbitration" have been used in the agreement is irrelevant. Furthermore, it is not crucial that the arbitration clause be in the same document as the other provisions of the parties' agreement. Additionally, the Supreme Court focused on the fact that conflicts were brought to arbitration and that the arbitrator's ruling was rendered final as markers of the type of the agreement, which the Court concluded to be an arbitration agreement.

"Law is well settled that arbitration clause may be incorporated by reference to a specific document which is in existence and whose terms are easily ascertainable."[14]

In **Visa International Ltd vs. Continental Resources USA Ltd**[15]**,** the court stated,

"*No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.*",

Which is somewhat similar to the points considered above and also stated

"*Any dispute arising out of this agreement, and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act 1996.*"

The Supreme Court held in **Mahanagar Telephone Nigam Ltd vs Canara Bank**[16] that if it can be inferred from the documentation on record that the parties were "*ad idem*" and reached an agreement on all important conditions, such contract would be declared binding. The meaning of a contract should thus be read using common sense, and such comprehension should not be hampered by a pedantic and legalistic interpretation.

"A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An 'arbitration agreement' is a commercial document inter parties and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities." [17]

In addition, when determining the terms of the agreement in **Khardah Company Ltd. v. Raymon and Co. (India) Pvt. Ltd**[18], the supreme court stated: *"If on a reading of the document as a whole, it can fairly be deduced from the words actually used herein, that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis, a question of construction of the contract."*

III. PARTY AUTONOMY

"Party autonomy has been held to be the brooding and guiding spirit of arbitration."[19]

The flexibility of the parties to create their contractual connection however they see fit is

[12] The Arbitration and Conciliation Act, 1996, s. 7(4)
[13] Smt. Rukmanibai Gupta vs Collector Jabalpur And Ors (1980) 4 SCC 556
[14] Ibid
[15] ARBITRATION PETITION NO. 16 OF 2007
[16] Mahanagar Telephone Nigam Ltd vs Canara Bank, CIVIL APPEAL NOS. 6202-6205 OF 2019 (Arising out of SLP (Civil) No. 13573-13576 of 2014)
[17] CIVIL APPEAL NOS. 6202-6205 OF 2019, (Arising out of SLP (Civil) No. 13573-13576 of 2014)
[18] Khardah Company Ltd. v. Raymon and Co. (India) Pvt. Ltd 1962 AIR 1810, 1963 SCR (3) 183
[19] PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited; MANU/SC/0295/2021

known as "*party autonomy*." One of the main benefits of arbitration is that the parties may agree on everything, from the hearing dates to the process to be followed. The party autonomy concept is a fundamental tenet of international trade and dispute resolution.

The Supreme Court of India clarified the significance of party autonomy in Arbitration Mechanism in the landmark case of **Pasl Wind Solutions Private... vs. Ge Power Conversion India Private**[20] by drawing on several precedents and foreign references.

As a result, the Apex Court determined in **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc**[21] that:

"*Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law.*"

The Apex Court in the judgment has also shed light on the findings of authors in "*Comparative International Commercial Arbitration which says - "*[22]

"*All modern arbitration laws recognize party autonomy, that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavorable or inappropriate law to an international dispute. This choice is and should be binding on the Arbitration Tribunal. This is also confirmed in most arbitration rules.*"[23]

Henceforth, in determining the existence, legality, or interpretation of the arbitration agreement or the presence of an arbitration provision in the agreement, the contents of the said contract must be understood in the way that the parties wish and want them to be understood.

"*In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement.*"[24]

IV. POWER OF THE COURT TO REFER THE MATTER FOR ARBITRATION

When two parties sign into a contract and there is no arbitration clause, the parties have just one option, which is for the aggrieved party to file a civil claim in court. In such circumstances, the court may realize during the hearing that the subject, being a commercial disagreement, is better addressed through alternative conflict channels because litigation is a long and complicated process.

Section 89 of the CPC[25], says – "*Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:-- (a) arbitration (b) conciliation; (c) judicial settlement including settlement through Lok Adalat: or (d) mediation.*"

Additionally, if the court believes that there is a settling aspect that would be desirable to the parties, the court will draught the terms of the agreement and, after hearing from the parties, may send the subject for arbitration,

[20] Ibid

[21] Bharat Aluminium v. Kaiser Technical Services, Civ App 3678 of 2007

[22] Lew, Julian D. M., Loukas A Mistelis, and Stefan M Kröll. *Comparative International Commercial Arbitration.* The Hague: Kluwer law international, 2003.

[23] *[Chapter 17: Determination of Applicable Law in Julian D.M. Lew, Loukas A. Mistelis, et al.,Comparative International Commercial Arbitration (Kluwer Law International 2003) pp. 411-437 , Para 17-8]*

[24] Amazon.Com Nv Investment ... vs Future Retail Limited CIVIL APPEAL NOs. 4492-4493 OF 2021

[25] The Code of Civil Procedure, 1908, s. 89

conciliation, or judicial settlement. The Courts may send any issue to arbitration in the absence of a pre-arbitration clause or agreement.

The Supreme Court clarified the requirements for referring a matter to arbitration under Section 89 of the Civil Procedure Code in **Kerala State Electricity Board and Anr. Vs. Kurien E. Kathilal and Anr**[26], as the contract did not contain an arbitration clause in this case, and thus a civil suit was filed in the Kerala High Court. The court remarked during the hearing that because the disagreement was commercial in nature, it would take a long time to settle it through a civil complaint. The Court decided that it would be best to refer the case to arbitration. The court obtained the parties' consent, the parties agreed, and the dispute was submitted to arbitration by the High Court's decision.

The Kerala Electricity Board filed an appeal with the Supreme Court, claiming that there was no arbitration agreement or written condition. The parties provided their oral approval in open court, and there was no written agreement explicitly establishing the parties' purpose and assent to send the subject to arbitration, which is required by section 7 of the AC Act[27]. The High Court should not have sent the parties to arbitration without a "joint memo or a joint application" from the parties, held the Supreme Court of India, and that there was no arbitration agreement between the parties. Therefore, the parties must agree in writing by joint letter or joint application for the court to send the parties to arbitration if there is no arbitration agreement between the parties. Only the oral consent of the counsel for the parties may be used to send the parties to arbitration.

Section 7 consequently requires courts to get the parties' written assent before submitting a matter to arbitration, even if they are following Section 89 of the CPC

The Supreme Court defined this requirement in the Kerala Electricity Board case as follows:

"35. *Insofar reference of the parties to arbitration, oral consent given by the counsel without a written memo of instructions does not fulfill the requirement under Section 89 CPC. Since referring the parties to arbitration has serious consequences of taking them away from the stream of civil courts and subject them to the rigor of arbitration proceedings, in the absence of arbitration agreement, the court can refer them to arbitration only with written consent of parties either by way of joint memo or joint application; more so, when government or statutory body like the appellant-Board is involved."*

Even if no prior arbitration agreement existed, the parties to the complaint may agree to arbitrate if the court provides them with a choice of ADR procedures under Section 89 of the Code. Such an agreement can be made before the court in the form of a "*joint memo, joint application, or joint affidavit*," or it can be recorded in the "order sheet" signed by the parties. Once the parties have signed such a written agreement, the matter then can be sent to arbitration under Section 89 of the Code, and the requirements of the Act will apply to the arbitration.[28]

In the absence of an arbitration clause, Section 89 of the Civil Procedure Code allows courts to send a dispute to arbitration; however, such a referral can only be made if all contract parties unanimously agree to resort to arbitration. As previously noted, such authorization must be in writing. As a result, only the Court has the ability to rule on the presence or legality of an arbitration agreement.

In **Sukanya Holdings Pvt. Ltd vs Jayesh H. Pandya & Anr**[29] court opined that "*section 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration.*"

[26] Kerala State Electricity Board vs Kurien E. Kalathil , CIVIL APPEAL NOS.3164-3165 OF 2017
[27] The Arbitration and Conciliation Act, 1996, s. 7
[28] Ibid; See 21
[29] Sukanya Holdings Pvt. Ltd vs Jayesh H. Pandya & Anr, Appeal (civil) 1174 of 2002

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This Court reaffirmed the position in **Jagdish Chander v. Ramesh Chander**[30] by declaring the following:

"Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code."

It is important to keep in mind that while it is possible to send a dispute to arbitration without a clause by assuming the parties' intentions, the Apex court has also rejected such a referral in situations where the parties' intentions could not be assumed from the exchange of papers.

The Supreme Court rejected a reference to the existence of an arbitration agreement between the *"first respondent and the appellant"* in **S.N. Prasad, M/S Hitek vs. M/S Monnet Finance Ltd. & Ors**[31] and explained that, in order for a statement of claim to qualify as an arbitration agreement under section 7(4)(c) of the Act, the applicant must make a *"specific allegation about the existence of an arbitration agreement and the other party must non-denial*"

"An `allegation' is an assertion or declaration about a fact and also refers to the narration of a transaction. If there is no allegation as to the existence of any arbitration agreement between the parties, the question of 'non-denial' does not arise and the matter will not be referred for arbitration because no reference in any manner by the party is inferred."[32]

V. CONCLUSION

The patterns have shifted recently. According to recent judgements, India is leaning toward arbitration and adopting a pro-arbitration attitude. The judiciary in India has repeatedly taken a pragmatic approach to arbitration, highlighting the value of party autonomy as "the grund norm" in **Pasl Wind Solutions Private... vs. Ge Power Conversion India Private**[33], placing a high priority on determining the parties' intentions in **Visa International Ltd vs. Continental Resources USA Ltd**, and upholding the applicability of mutual consent in **Jagdish Chander v. Ramesh Chander**[34].

The Legislature has also taken significant steps towards this direction by reducing the scope of interference in arbitration proceedings as is evident from what was opined in **N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.**[35] as, *"The legislative policy of minimal interference is enshrined in Section 5, which by a non-obstante clause prohibits judicial intervention except as specified in Part I of the Arbitration Act."*

Both the legislature and the judiciary are making excellent progress, but in these situations where there is no arbitration clause, parties must exercise extreme caution. It is usually better to have a good arbitration provision prepared if the parties' desire to submit the matter to arbitration is evident. In Kerala State Electricity Board and Anr. vs. Kurien E. Kathilal and Anr., it is noted that mutual consent of the parties to submit the subject to arbitration ought to be in writing and should not be overlooked throughout the process of drafting are crucial. A legally enforceable arbitration agreement is the foundation of an arbitration, according to the Supreme Court's ruling in Mahanagar Telephone Nigam Ltd. v. Canara Bank.

In reality, it can be difficult to persuade a business partner to accept arbitration once a disagreement has occurred since the party in violation may want the case's settlement to be pushed off indefinitely. However, for parties facing the prospect of litigation before a clogged court system, it is frequently in both

[30] Jagdish Chander v. Ramesh Chander , Appeal (civil) 4467 of 2002

[31] S.N. Prasad, M/S Hitek vs. M/S Monnet Finance Ltd. & Ors ,CIVIL APPEAL NO. 9224 OF 2010 [Arising out of SLP [C] No.17114/2008]

[32] Ibid see 26

[33] Pasl Wind Solutions Private... vs. Ge Power Conversion India Private, CIVIL APPEAL NO. 1647 OF 2021 [ARISING OUT OF SLP (CIVIL) NO.3936 OF 2021]

[34] Jagdish Chander v. Ramesh Chander, CASE NO.: Appeal (civil) 4467 of 2002

[35] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd CIVIL APPEAL NOS. 3802 - 3803 / 2020

parties' interests to agree to arbitration after a disagreement has developed in order to prevent protracted court processes that are in the best interests of neither side.

In addition, several companies in India have been successful in getting partners and clients to agree to arbitrate a dispute after one has developed by making the offer more appetizing, such as by recommending mediation first, with arbitration to follow only if mediation is failed. In conclusion, if the parties reach a submitting agreement after a disagreement has occurred, arbitration without an arbitration provision is a completely viable dispute resolution option. Because the parties consent to arbitration fully aware of the scope of an ongoing conflict, arbitration by submission agreements really represents the pinnacle of consensualism.