

Dispute

October 25, 2013

WRITTEN ARBITRATION AGREEMENT MUST BE PRODUCED - ORAL EVIDENCE, NO SUBSTITUTE

- An application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**") for appointment of arbitrator cannot be made in case where an arbitration agreement is not in writing and is not produced at the first instance.
- Section 7(4) is exhaustive. It does not contemplate that an oral account of a document signed by the parties would also be an arbitration agreement.

The Bombay High Court ("**Bombay HC**") in its recent judgment of *Yashvant Chunilal Mody v. Yusuf Karmali Kewala & Ors.*¹ ("**Respondents**") dealt with the issue of admissibility of oral evidence to establish the existence and validity of an arbitration agreement not produced before the court. This issue arose in the context of Yashwant Mody's ("**Applicant**") inability to produce the written arbitration agreement / clause relied upon for the purposes of appointment of an arbitrator under Section 11(6) of the Act.

FACTS

In the present case, the Applicant had made an application for appointment of a sole arbitrator under Section 11 of the Act. The application was made after the Respondents failed to appoint a sole arbitrator under the arbitration clause in a purported written partnership deed ("**Partnership Deed**") which the Applicant claimed had been entered into by the parties in 1975. This fact was disputed by the Respondents. Interestingly, the Applicant was unable to produce the written Partnership Deed or a copy of the same.

ISSUE

The primary issue before the Bombay HC, was "*whether the party invoking arbitration must, therefore, produce that mandatory written agreement or whether such party can only allege that an agreement is in writing and seek to prove it by oral evidence.*"

JUDGMENT

The Court considered the following two aspects before ruling on the issue:

1. The mandate under Sections 7(3) and 7(4)² of the Act, which require that an arbitration agreement must compulsorily be in writing and in the form prescribed therein.
2. The Applicant's contention that though the Partnership Deed and the arbitration clause, thereunder, could not be produced before the Court, the existence of the same could be established by oral evidence of the Applicant and his cross examination, as envisaged under Section 63(5) of the Indian Evidence Act, 1872.³

The Court held that a mere oral evidence of a document signed between the parties does not fall within the ambit of written arbitration agreement as defined under Section 7(4) of the Act. Hence, such oral account could not be considered as a valid arbitration agreement. The Bombay HC held that Section 7(4) was an exhaustive section and any agreement which did not fulfill the criteria prescribed thereunder could not be considered to be a valid written arbitration agreement for the purposes of the Act.

In light of the above reasoning, the Bombay HC further held that allowing a party to prove a written arbitration agreement by oral evidence of its contents, in accordance with Section 63(5) of the Indian Evidence Act, 1872, would be dissonant with the legislative intent towards enactment of Section 7(4) of the Act.

The Bombay HC relying on the jurisprudence stated that Section 7 had been enacted with the intent of weeding out oral arbitration agreements and if the parties are allowed to establish the existence of an arbitration agreement by such oral evidence then it would open floodgates of litigation and defeat the very legislative intent.

Further, the Bombay HC also considered the Supreme Court judgment in *M/s. SBP & Co. v. M/s. Patel Engineering Ltd. and Anr.*,⁴ ("**Patel Engineering Case**") to determine the issue at hand. The Supreme Court in this case had held that when a court is approached under Section 11 of the Act then the Chief Justice must decide whether there exists an arbitration agreement as defined in the Act. Moreover, in arriving at such decision, the Chief Justice "*can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary.*"⁵ However, the Bombay HC, while dealing with the *Patel Engineering Case*, held that the Supreme Court's ruling was with regard to interpretation of whether or not a particular written document would qualify as an arbitration agreement and was not applicable to a circumstance where a party seeks to prove the existence of a written agreement which was not produced before the Court.

Thus, the Bombay HC held that, in view of the exhaustive ambit of Section 7(4), a party was required to produce, at the first instance, a written arbitration agreement when making an application under Section 11 of the Act. In light of

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the above, relying on the provisions of the Act and judicial precedents, the Bombay HC rejected the application due to the Applicant's failure to produce the purported written Partnership Deed and the arbitration clause therein.

CONCLUSION / CRITICAL ANALYSIS

The judgment is appreciable considering that the Bombay HC dwelled deep into the legislative intent of Sections 7(3) and 7(4) of the Act. The Bombay HC rejected the application considering that if courts admit oral evidence as secondary evidence for determining the existence of a written arbitration agreement which is not produced before the court, the same could lead to numerous frivolous litigations initiated under Section 11 of the Act with parties seeking to further their own *mala fide* intentions. However, this restrictive approach in admission of oral evidence for the purposes of determining the existence of an arbitration agreement suffers from its own unique flaws.

Firstly, such an approach may not be in the best interests of the parties who are unable to produce the written arbitration agreement owing to genuine and *bona fide* reasons such as the arbitration agreement being lost or destroyed. A party's inability to produce an arbitration agreement does not negate the fact that such an agreement may have been entered into between the litigating parties with the intention of submitting the disputes to arbitration.

Secondly, the judgment seems wanting in so far as it states that oral evidence regarding the contents of a written arbitration agreement is not a valid arbitration agreement under Section 7(4) of the Act. While the same is undeniably true, distinction can be drawn between oral evidence sought to be tendered in order to establish the existence of the contended arbitration clause and for establishing an oral arbitration agreement. Though the credibility of the oral evidence provided by the Applicant may have been questioned on other grounds, the oral evidence could not have been rejected on the grounds of non-conformity with Section 7(4) as the same was not an arbitration agreement.

To conclude, Bombay HC's ruling in the present case may be successful in containing frivolous litigations under Section 11 of the Act. However, it does not completely put to rest the issue posed in the case and opens it to further interpretation and analysis.

Further, the judgment does not completely clear the ambiguity surrounding the issues of law which were raised in the present case. On the contrary, it leaves the door open for further interpretation and analysis.

– Varuna Bhanrale, Payel Chatterjee & Vyapak Desai
You can direct your queries or comments to the authors

¹ Arbitration Application (L.) NO.859 OF 2013
² Section 7 of the Act: Arbitration agreement.-
(1) ***
(2) ***
(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 or other means of telecommunication which provide a record of the agreement; or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) ***
³ Section 63: Secondary evidence means and includes:....
(5) oral accounts of the contents of a document given by some person who has himself seen it.
⁴ AIR 2006 Supreme Court 450(1)
⁵ AIR 2006 Supreme Court 450(1), at paragraph 38

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