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Tax Invoice's Clause Whether an Arbitration Clause: A Reference of Bennett Coleman & Co. Ltd. Applicant v. MAD (India Pvt. Ltd)

Deo Narayan Singh[1], Prasenjeet Kumar[2]

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Abstract

Arbitration Act, 1996 provides a process where conflicts between parties are sent to a third party who then settles them. The whole debate and discussions are related to the insertion of arbitration clause, and its validity. This article gives more focus on the discussion that whether the tax invoice's clause qualifies as an arbitration clause. The arbitration agreement becomes a crucial component of any agreement if the parties elect to submit their disputes to arbitration. The arbitration agreement or clause is the crucial component of the Arbitration Act, 1996 without whom there is no app/licability of the Arbitration Act as the arbitrator gets its authority from the arbitration agreement or clause.

In this article, this question will be solved by the analysis of the case of *Bennett Coleman & Co. Ltd. Applicant v. MAD (India) Pvt. Ltd* and various other cases and by testifying it with the help of various tests propounded by the Hon'ble courts.

It is hoped that the analysis under this study will help the readers, researchers, and practitioners in understanding the positionthat whether the tax invoice's clause qualifies as an arbitration clause. There remains no confusion in the mind of the above people regarding the conditions of the tax invoice's clause.

Keywords: Arbitration; Clause; Tax Invoice's Clause; Agreement; Parties.

INTRODUCTION

Worldwide, arbitration has expanded dramatically in recent years. It has thrived as a stand alone conflict settlement process due to the fundamental principles of party autonomy and confidentiality. The arbitration agreement establishes a legally binding process that must be adhered to by both the parties and the arbitral tribunal when making decisions. However, the complexities needed in arbitration can make it seem a little intimidating. Due to its core tenets of party autonomy and confidentiality, arbitration has emerged as a viable alternative to dispute resolution between the parties. Contrary to conventional dispute resolution procedures, the arbitral process does not start on the day a dispute arises. Regardless of the nature of the dispute, the arbitration process starts when the parties sign an arbitration agreement. At the time of the dispute,

Author Affiliation: [1]Assistant Professor (Senior Scale), Department of Law and Governance, Central University of South Bihar, Gaya 824236, Bihar, India, [2]5th year Law Student, Department of Law and Governance, Central University of South Bihar, Gaya 824236, Bihar, India.

Corresponding Author: Prasenjeet Kumar, 5th Year Law Student, Department of Law and Governance, Central University of South Bihar, Gaya 824236, Bihar, India.

Email: prasenjeetk15@gmail.com

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it establishes, mandates, and directs the arbitration processes. Therefore, if the parties decide to have their problems arbitrated, the arbitration agreement becomes a significant aspect of any deal. This requires careful consideration and planning.

As per the definition given by Q. Hogg, arbitration is the process by which any legal dispute between two or more parties that can be resolved by agreement in accordance with and satisfaction or made arbitrable by statute is subject to final, binding adjudication by a tribunal other than a court with appropriate jurisdiction.

In very simple words, the term "arbitration" refers to a process where conflicts between parties are sent to a third party who then settles them. As an alternative to courtroom proceedings, arbitration allows for the settlement of disputes outside the court. Arbitrators are the neutral third person who resolves disputes. The parties must abide by his rulings regarding the dispute. It works well for preserving time and resources. "The Arbitration and Conciliation Act, 1996" is the law that governs this form of out-of-court dispute resolution. The parties are spared from the burden of spending years in court as well as a significant amount of time and money that would have otherwise been required to be invested by this Act. A domestic tribunal is consulted when parties engage in arbitration, which is a quasi-judicial process.

In this paper the new approach of the Hon'ble Court analyses the scope of the arbitration agreement which is proposed in the case of *Bennett Coleman & Co. Ltd . Applicant v. MAD (India) Pvt. Ltd*[1] with the help of various tests propounded by various courts taking the reference of various judgments to find out the answer to the question that whether the tax invoice's clause qualifies as an arbitration clause.

Arbitration Agreement

The purpose of an arbitration procedure is to enforce an arbitration agreement. Through an arbitration agreement parties may only submit their disputes to the arbitral tribunal for decision. A tribunal for arbitration is not only created but also given form by an arbitration agreement. Determining the arbitration agreement's legal status in light of the Act is therefore critical.

When two parties sign a contract, they can specify in writing that any disputes between them will be resolved through arbitration then as a result of that contract must be settled out of court with the help of an impartial arbitrator who is a third person chosen by both of the parties who will act as a judge and whose decision will be binding on the parties. Once made, an arbitration agreement cannot be changed when a disagreement occurs. The Supreme Court ruled in *Ravi Prakash Goel v. Chandra Prakash Goel*[2] that parties who have an arbitration agreement in place and that is applicable cannot file a lawsuit in civil court without first engaging in arbitration. According to Section 8 of the 1996 Act, the courts must order the parties to arbitration when there is an applicable arbitration agreement.

ARBITRATION CLAUSE

It is provided in section 7 Subsection 2 that a separate agreement or an arbitration clause can both be used to establish an arbitration agreement. It is a substantive, independent, distinct clause from the main contract because the main contract deals with the subject matter. An arbitration clause is a jurisdictional clause that gives jurisdictional power to the arbitral tribunal and it also provides the basis for the origin of the arbitral tribunal. It may decide the panel of the arbitrator and the modus operandi of that panel. It is a kind of customized rule and regulation given by parties to themselves. They may decide who will be the arbitrator and the place of arbitration. So it is a kind of mandate for the arbitral tribunal and once the arbitral tribunal gave the award in violation of the arbitration clause then it will be void. As soon as the dispute is resolved then the arbitral tribunal will be dissolved.

In *M/s Elite Engineering and Construction (HYD) Private Ltd. v. M/s Techtrans Construction India Private Ltd. (2018)*[3], the court provided specific recommendations for the arbitration clause's inclusion.

1. The arbitration clause agreement must be explicitly referred to.
2. The reference to the arbitration provision must make it clear that it will be incorporated.
3. All issues that may or have occurred concerning the contract must be covered by the arbitration provision.
4. The agreement that refers to another agreement that has an arbitration clause will not be acceptable.
5. A contract that refers to another agreement with terms and conditions is invalid unless it specifically refers to the arbitration provision of the other agreement.
6. The arbitration clause must be mentioned in

the institution's terms and conditions of the contract.

The Hon'ble Supreme Court ruled in the seminal case of *K.K. Modi v. K.N. Modi and Ors.*[4] that an arbitration agreement must have the following characteristics:

1. The agreement must specify that the parties shall be bound by the tribunal's ruling.
2. That a court order obtained by the court directing that the action be conducted through arbitration should be used to determine the tribunal's jurisdiction over the parties' rights.
3. The tribunal has the authority to decide the parties' rights in a fair and just manner.
4. The agreement to refer disputes to the tribunal must be legally binding.
5. The agreement shall provide that the tribunal must prepare any decisions it makes on the issue before the reference is made.

The Concept of Incorporation by Reference

As per section 7, there cannot be arbitration without an arbitration agreement. But section 89 of CPC provides that if the court finds that there is some element of settlement then the court may refer it for arbitration. Even in section 89, there cannot be a reference to arbitration without an arbitration agreement. After the reference of court under section 89, the party has to mutually agree to arbitration, if they are not willing to go to arbitration then the case reverts to court. The validity of section 89 was upheld in *Salem Advocate Bar Association, Tamil Nadu v. Union of India*[5], it was held in this case that law concerning arbitration agreements under Arbitration and Conciliation Act, 1996 is settled law and what section 89 provides it is only another gate to enter into arbitration.

What constitutes an "Arbitration Agreement"

The Supreme Court established the following guidelines for what constitutes an arbitration agreement in *Jagdish Chander v. Ramesh Chander*.[6]

a. The intent of parties. It is necessary to determine from the provisions of the agreement whether the parties intended to engage in an arbitration agreement. It is an arbitration agreement if the conditions explicitly say that the parties plan to submit their disputes to a private tribunal for resolution and agree to be bound by the decision of that tribunal. Although an arbitration agreement has a predetermined format, the language used should indicate a choice and a duty to submit to arbitration rather than just discussing the options. Where there is simply a potential for the parties to agree to arbitrate in the future rather than a requirement that they do so, there is no legally binding arbitration agreement.

b. The clause relating to the settlement of disputes - In a clause relating to the settlement of disputes, if the clause possesses the qualities or components of an arbitration agreement, it does not matter if the phrases "arbitration" and "Arbitral Tribunal" (or an arbitrator) are not used to refer to the procedure of settlement or to a private tribunal which must decide the disputes. They are:

   i. The agreement should be in writing;
   ii. The parties ought to have stipulated that any disagreements between them (past or present) would be decided by a private tribunal;
   iii. The parties should have an adequate opportunity to submit their case before the private tribunal, which should have the power to decide disputes impartially; and
   iv. The private tribunal's ruling on any disputes should have been accepted by the parties as binding.

c. A clear and specific intention to resolve the matter through arbitration. It is an arbitration agreement when the clause specifies that any disagreements between the parties must be resolved through arbitration. It suffices for there to be a clear and unambiguous statement of the intention to resolve disputes through arbitration without listing the specific terms of an arbitration agreement. However, a dispute resolution clause will not be considered an arbitration agreement if it contains language that expressly excludes any of the characteristics of an arbitration agreement or otherwise takes away from it. For example, a contract cannot be described as an arbitration agreement if it calls for the arbitrator to decide a claim or dispute without holding a hearing, if it directs the arbitrator to act solely in the best interests of one party, if it states that the arbitrator's decision will not be final and binding on the parties, or if it states that if either party is unhappy with the arbitrator's decision, he may file a civil lawsuit to seek relief.

d. The word "arbitration" alone is insufficient.

However, if a clause requires or contemplates further, new permssion of the parties for referral to arbitration, then it is not an arbitration agreement simply because the word "arbitration" or "arbitrator" is included in the clause. If a clause relating to the resolution of disputes uses language like "parties can, at their discretion, refer their disputes to arbitration" or "if any dispute arises between the parties, they should consider settlement by arbitration," it is clear that the clause is not meant to serve as an arbitration agreement. Therefore, the aforementioned factors must essentially be included in the wording of the relevant arbitration clause in the contract in question to constitute a valid arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996.

e. The arbitration agreement's "Contents." An agreement is deemed to be in writing if it appears in:

i. A document that the parties have signed.

ii. A correspondence between the parties that serves as a record of the agreement, such as letters, telegrams, or other types of communication.

iii. An exchange of statements of claim and defence in which one party alleges the existence of the agreement and the other party disputes it.

iv. A contract between the parties that alludes to another document that contains an arbitration clause.

Two requirements must be met for a provision for arbitration to become an arbitration agreement: (i) It must be between the parties to the dispute, and (ii) It must be pertinent to or related to the dispute. The Supreme Court ruled in *Indowind Energy Ltd. v. Wescare (1) Ltd. & others*[7] that because the appellant/ petitioner Indowind is not a party to the arbitration agreement, no claim or dispute involving it may be the subject of a referral to arbitration.

An Arbitration Agreement is Necessary

A contract's reference to a document containing an arbitration clause is considered an arbitration agreement, according to the Madras High Court, which claims that Section 7 of the Act makes it clear that an arbitration agreement must be in written and signed by both parties. In the case of, *Sagar Infra Ltd. v. Financial Tools and Hardware*[8], the respondent signed the invoices, not the revision petitioner, through which the supply was made following the purchase order. The revision petitioner, not the respondent, has signed the reference to the purchase order. Because neither party signed the arbitration clause, even if it is in the purchase order, it will not be considered an agreement to arbitrate disputes. As a result, the arbitration language in the purchase order does not satisfy the requirements of the arbitration agreement as described in Section 7 of the Act, 1996, and since there is no such arbitration agreement, the Act, 1996's provision cannot be applied.

Analysis of case Bennett Coleman & Co. Ltd. Applicant Versus MAD (India) Pvt. Ltd[9]

The facts o facts of the case state that The respondent, an advertising agency, interacted with the applicant, a news media company engaged in a variety of activities including news publishing, T.V., internet, radio, and outdoor domain, to be approached by various advertisers to place advertisements in the applicant's newspapers, channels, radio, and other outdoor publications via release orders. The applicant would publish the required advertisement in various media platforms, both physical and virtual, based on the release orders obtained from the respondent, and would then provide an invoice to the respondent for payment towards the issuing of such advertisement. Upon receipt of the invoices, the respondent was required to fulfill his commitment to pay the applicant within 120 days. Any further payments will be charged interest at a rate of 18% per year.

An important requirement of the agreement requires the respondent to pay for advertisements placed in Member publications, whether or whether he has already received payment from those publications' end customers. The respondent issued several release orders to the applicant between July 2017 and April 2019. According to the applicant, advertisements were placed in print and non-print media as a result, and timely bills were raised against the respondent for the services performed under the release orders. Nevertheless, the respondent failed to make the payments on time, and the applicant claims that this failure persisted from July 2017 to April 2019 despite the invoices being raised and the applicant's attempts to collect the past-due payment failing each time. The parties' correspondence is entered into the record, and according to the applicant's plea, a sum totaling Rs. 11,49,23,640 was owed and payable

until April 30, 2022. On 11/7/2022, the applicant requested the appointment of the sole arbitrator as provided for in the Dispute Resolution Clause, a clause that is a component of the tax invoice.

Issue: whether a clause contemplating reference of disputes and differences arising out of or concerning a contract or order of advertisement, bill, or otherwise breach thereof, to be referred to Sole Arbitrator, printed at the back of the tax invoice would amount to an arbitration clause.

CONTENTION OF PETITIONER

The tax invoices that are on file refer to the nature of the transaction between the parties and include all the necessary information about how the publication is to occur and the appropriate rate for printing the material in print ads and magazine ads. Additionally, the business terms and conditions are discovered to be ingrained overleaf the tax invoice and include clause (F) which read thus:

"All disputes and differences arising out of or about a contract or order or advertisements, a bill in connection therewith or otherwise, or the breach thereof shall be referred to the sole arbitration following the Arbitration and Conciliation Act, 1996 for any modifications thereof, Bennett, Coleman & Co. Ltd, shall have the right to nominate a such arbitrator. The award made in pursuance thereof shall be final and binding on both parties"

The other relevant clauses upon which Mr. Kamath lay his hands are clause nos. (g) and (h) which record thus:

(G) Contents of the bill will be considered as correct if no error is reported within 21 days from the date of the bill.

(H) By accepting this invoice, the agency confirms it has, directly or indirectly, charged only the gross amount as offered by Bennett, Coleman & Co. Ltd to its client(s) and will not charge any amount over and above the gross amount as specified by Bennett, Coleman & Co. Ltd. In case of breach of this clause, the agency shall indemnify Bennett, Coleman & Co. Ltd and its Directors for any third party claim.

The work was completed at the level of the applicant company, so invoices were raised, and the amount under the invoices remained due and payable. Mr. Kamath's submission is following the purchase orders. According to his argument, the respondent has not denied his or her liability, so the court must exercise its jurisdiction. Furthermore, the existence of the arbitration clause in the tax invoice that has been acted upon is not disputed, so the clause must be interpreted as a mutually agreed upon provision that binds both parties, regardless of the wording used therein.

Contention of Respondent

The respondent's knowledgeable attorney would contest the existence of the arbitration agreement and cite the learned Single Judge's ruling in *Concrete Additives and Chemicals v. S.N. Engineering Services Pvt. Ltd.*[10] (Arbitration Application (L) No. 23207/2021) decision as support for his position. The argument put forth on behalf of the respondent by relying on the ratio to be inferred from the judgment is that there was no conscious agreement between the parties to refer the disputes for adjudication and that just because a tax invoice was issued concerning a purchase order that provided for arbitration did not result in an arbitration agreement.

Applicability of Law of Facts

According to the Arbitration Act's framework, the Arbitration provision can be read independently of the other clauses and is a legal contract in and of itself.

Although there is no fixed formula for what constitutes an arbitration agreement, the basic elements are already well established, and it must meet the following criteria to qualify as an arbitration agreement:

I. There must be a present or future difference in connection with some contemplated affairs.

II. There must be an intention of the parties to settle such differences by private Tribunal.

III. The parties must agree in writing to be bound by the decision of the Tribunal.

IV. The parties must be at ad idem.

Though no specific format is required to create an arbitration agreement, it is unmistakably true that the words "must unquestionably" signify the parties' consent to be referred to arbitration, regardless of the wording they choose to use. The most important thing to determine is whether or if the parties intended to refer a dispute to arbitration. This information can be obtained from one document or several papers in the form of correspondence, including letters, facts, messages, etc. The parties must expressly consider that the agreed upon Tribunal will decide on the dispute

that is formed at the time the referral is made, and that tribunal will determine the parties' substantive rights. The parties must have agreed that they shall be bound by the Tribunal's ruling.

Ration decidendi

The question to be discussed here is whether the present clause contained in a tax invoice would be construed as an 'arbitration clause'.

The Apex Court in the case of *MTNL vs. Canara Bank*[11], Civil Appeal 6202-6205 of 2019, where the existence of a valid arbitration agreement has held that no particular format is required for the arbitration agreement. It must be determined whether or not the parties intend to resolve their differences through arbitration. The agreement between the parties to submit their disputes or differences to arbitration, whether expressly or implicitly stated in a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties, constitutes the essential components or attributes of an arbitration agreement.

According to Section 7(4)(b) of the 1996 Act, a letter, telegraph, telex, or another form of communication, including electronic means, can result in an arbitration agreement.

Section 7(4)(b) of the 2015 Amendment Act now reads, "including communication through electronic means". Even if the other party might not have executed a formal contract, it cannot exclude him from liability under the agreement if it can be demonstrated that the parties are ad idem.

Arbitration agreements must be interpreted following the general rules for interpreting laws, statutory instruments, and other contracts. To determine if there is a legally binding contract between the parties, the contents of the agreement, the parties' actions, and any correspondence must all be taken into consideration. It would be deemed to be a binding contract if the records indicate that the parties were ad idem and had truly achieved an understanding regarding all pertinent elements. A common sense approach must be used to determine a contract's meaning; a legalistic and pedantic interpretation cannot be permitted.

The decision of the Delhi High Court in *Scholar Publishing House Pvt. Ltd vs. M/s. Khanna Traders*[12], and the Supreme Court in *Inox Wind Ltd. Vs. Thermocables Ltd*[13], held that dealing with such a clause, which comprised the terms of supply and a procedure for referring a disagreement to arbitration, where the problem arose as a result of unpaid invoices that the responder had received, acknowledged, and acted upon. When a purchase order specifies that delivery will be made following the terms stated therein, contained in standard terms and conditions, which contain an arbitration clause, and which were not in dispute, will suffice for the adoption of an arbitration clause.

JUDGMENT

Hon'ble Bombay High Court held that it can be seen that the parties have acted upon the invoices and there was no denial of the invoices raised by the applicant thus, because it is obvious that the parties have responded to the invoices and that the applicant's invoices were not denied, the language in the invoices, which expressly refers to arbitration, deserves to be interpreted as an arbitration clause. This Court's decision in Concrete Additives is based on the unusual circumstances of the case and the fact that the law has been established. It states that any written document exchanged between the parties that serve as a record of the agreement and for which there is no denial on the part of the other party would fall squarely within the purview of Section 7 of the Arbitration and Conciliation Act, 1996 and it would resemble a clause requiring arbitration. Consequently, the respondent's objection is rejected, acknowledging that the tax invoice's language amounts to an arbitration clause.

CONCLUSION

After analyzing the above mentioned law and referred case I am of opinion that the arbitration provision is legitimate and enforceable against the parties provided it complies with the requirements of an arbitration agreement. The Court's ruling in the Bennett Coleman Case is consistent with the design of the Act, which states expressly that an arbitration agreement will be deemed valid if its existence is not disputed. The broad rules for interpreting laws, statutory instruments, and other contracts apply to the interpretation of arbitration agreements. To determine if there is a legally binding contract between the parties, the contents of the agreement, the parties' actions, and any correspondence must all be taken into consideration. It would be deemed to be a binding contract if the records indicate that the parties were ad idem and had truly achieved an understanding regarding all pertinent elements.

The essential elements or characteristics of an

arbitration agreement are the agreement between the parties to submit their disputes or disagreements to arbitration, whether such agreement is expressed explicitly or implicitly in a clause in an agreement, a separate agreement, or correspondence/documents exchanged between the parties. If the intention is clear and unambiguous that the disputes will be settled through arbitration, there need not be a list of specific terms defining what constitutes an arbitration agreement. It is sufficient to adopt an arbitration provision when a purchase order states that delivery will take place in accordance with the terms mentioned therein, as long as those terms are included in standard terms and conditions, contain an arbitration clause, and were not in dispute.

It is true that the words "must unquestionably" signify the parties' permission to be referred to arbitration, regardless of the wording they choose, even if there is no set format required to make an arbitration agreement. Finding out whether or not the parties intended to submit a dispute to arbitration is crucial. One document or a collection of papers in the form of correspondence, such as letters, facts, messages, etc., may include this information. When making the referral, the parties must explicitly take into account that the agreed-upon Tribunal will adjudicate the dispute and will determine the parties' actual legal rights. Any written communication between the parties that acts as a record of the agreement and for which there is no denial on the part of the other party would come squarely within the ambit of Section 7 of the Arbitration and Conciliation Act, 1996, and would resemble a clause demanding arbitration. Hence the existence of the arbitration clause in the tax invoice that has been acted upon is not disputed, so the clausein the tax invoice's language amounts to an arbitration clause and hasbinding nature.

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