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### AN UNSIGNED ARBITRATION AGREEMENT IS NOT A BAR TO ARBITRATION

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In its recent decision in the matter of *M/s Caravel Shipping Services Private Limited v M/s Premier Sea Foods Exim Private Limited* (C.A. No.-010800-010801 of 2018 in SLP (C) Nos. 31101-31102 of 2016), the Supreme Court of India (Court) has held that the only prerequisite for an arbitration agreement is that it should be in writing, and the fact that the same is not signed by parties does not make it invalid.

#### Facts

The dispute between M/s Caravel Shipping Services Private Limited (Appellant) and M/s Premier Sea Foods Exim Private Limited (Respondent) arose out of a document titled "Multimodal Transport Document/Bill of Lading" dated 25 October 2008 (BOL). The BOL specified that "*the Merchant expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the Bill of Lading whether typed, printed or otherwise*". Further, clause 25 of the BOL, which was a printed condition annexed thereto, contained the arbitration clause.

The Respondent had filed a suit before the Sub-Judge's Court in Kochi (Sub-Court, Kochi) to recover a sum of INR 26,53,593, in which suit the BOL was expressly stated to be a part of cause of action. Pursuant to filing of the suit, an interlocutory application (IA) was filed by the Appellant under Section 8 of the Arbitration and Conciliation Act, 1996 (Act) which, *inter alia*, pointed to the Sub-Court, Kochi that an arbitration clause was included in the printed terms annexed to the BOL. The IA was dismissed by the Sub-Court, Kochi.

Aggrieved by the dismissal, the Appellant filed a petition before the Kerala High Court (High Court) under Article 227 of the Constitution of India. In deciding on the appeal, the High Court stated, *inter alia*, that the arbitration clause being in a printed condition annexed to the BOL indicated no intention to arbitrate and the petition was accordingly disposed. The review filed against the said judgment was also dismissed by the High Court. Accordingly, the Appellant approached the Court.

#### Appellant's Arguments

The main arguments extended by the Appellant were as follows:

- that printed conditions of the BOL were expressly referred to in the BOL and accordingly both parties were bound by the same; and

- that in accordance with Section 7(5) of the Act read with the Court's judgment in *M.R. Engineers and Contractors Private Limited v Som Datt Builders Limited* ((2009) 7 SCC 696) (M.R. Engineers Case), there was a reference in the contract to the arbitration clause. Further, the arbitration clause was in writing and the reference was such that the arbitration clause formed part of the contract.

## Respondent's Arguments

The main arguments extended by the Respondent were as follows:

- that Section 7(4) of the Act required an arbitration agreement to be in a document that is signed by the parties; and
- that since the BOL was not signed by the Respondent, it was not bound by the arbitration clause contained in that document.

## Findings of the Court

Having heard both the parties, the Court held the following:

- that the BOL specified that the term "Merchant" expressly agreed to be bound by all the terms and conditions on both sides of the BOL whether typed, printed or otherwise;
- that perusal of clause 25 of the BOL showed that the Respondent had expressly agreed to be bound by the arbitration clause, despite the fact that it was a printed condition annexed to the BOL;
- that the Respondent had relied upon the unsigned BOL as part of the cause of action in the suit filed by it arose out of the same. In view thereof, the Respondent can no longer argue that for the purpose of arbitration, the requirement of the Act is that a valid arbitration clause should be signed;
- that in *Jugal Kishore Rameshwardas v Mrs. Goolbai Hormusji* (AIR 1955 SC 812), it was held by the Court that that an arbitration agreement needs to be in writing though it need not be signed, which principle is also contained in Section 7(3) of the Act. Section 7(4) of the Act should not be construed to mean that in all cases, an arbitration agreement needs to be signed. The only pre-requisite is that it should be in writing; and
- that Section 7(5) of the Act read with the M.R. Engineers Case implied that the reference in the BOL is such as to make the arbitration clause part of the contract between the parties.

Accordingly, the appeal was allowed and the judgments of the High Court set aside.

## Comment

The Court has clarified the meaning and purport of an arbitration agreement. The Court has rightly held that in terms of Section 7(3) of the Act, the primary pre-requisite for there to be a valid arbitration agreement is that it should be in writing. The Court further says that the conditions under Section 7(4) of the Act are not exhaustive to the extent that the same are merely circumstances to show that there is an arbitration agreement between parties. However, it would be incorrect to interpret that if the conditions under Section 7(4) are not met, there would not be a valid arbitration agreement. That is to say, what is primarily required is that the arbitration agreement be in writing.

It is pertinent also to note that courts in certain jurisdictions with a well-established arbitration regime in place, such as the Singapore High Court, have in the past held that even if a contract is not signed, the contract is still formed if there is performance of the contract by the parties' conduct. The absence of a signed arbitration agreement shall not preclude a court from finding that there is a valid and binding arbitration agreement. Thus, as a general position, to uphold that an arbitration agreement can be concluded by conduct is a pro-arbitration stand.

In light of the aforesaid, it appears that the present judgment has adopted a pro-arbitration approach and as such, may contribute positively to the existing jurisprudence on the Indian arbitration regime. The Court, by relying on the unsigned BOL, has focused on the parties' conduct and intent which indicated that there was an arbitration agreement between them. This approach of the court may set a precedent for reducing the scope for parties who try to abandon their contractual obligations. However, it may also be counter-argued that the lack of a party's signature upon a contract makes for strong evidence as to the lack of that party's consent to the agreement, and consequently to the arbitration clause therein.

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