

**If there is no arbitration agreement between the parties, the court cannot refer the parties to arbitration without a joint memo or written application by the parties**

On 9th March, 2018, Supreme Court of India, in the matter *Kerala State Electricity Board and Anr. Vs. Kurien E. Kathilal and Anr.* (MANU/SC/0231/2018) held that the High Court should not have referred the parties to arbitration without a joint memo or a joint application of the parties, when there was no arbitration agreement between the parties. Thus, in the absence of an arbitration agreement between the parties, a written consent of parties by way of joint memo or joint application is necessary for the court to refer the parties to arbitration. Oral consent given by the counsel of the parties is not sufficient for the reference of the parties to arbitration.

**Issue**

Whether the High Court was right in referring the parties to arbitration on the oral consent given by the counsel without written instructions from the party?

**Supreme Court decision**

Supreme Court observed that jurisdictional pre-condition for reference of a dispute to arbitration under section 7<sup>[1]</sup> of the Arbitration and Conciliation Act is a reference or submission that should be sought, by parties, to arbitration. Reference of a dispute to arbitration under Section 89<sup>[2]</sup> of CPC can be done only when the parties agree for settlement of their dispute through arbitration in contradiction to other methods of alternative dispute resolution mechanism mentioned in Section 89 CPC.

The Court further referred to the fact that when it comes to referring parties to arbitration, oral consent given by counsel without a written memo of instructions would not fulfill the requirement under Section 89 of CPC. The court relied on its earlier judgments in *Afcons Infrastructure Ltd and Anr v Cherian Varkey Construction Co (P) Ltd and Shailesh Dhairyawan v Mohan Balkrishna Lulla*, wherein it was held that resort to arbitration in a pending suit by the orders of the court would be only through agreement between parties for settlement of their dispute through arbitration and such agreement can only be by means of a joint memo or joint application or a joint affidavit before the court in the order sheet signed by the parties.

The court concluded that once award is passed by the arbitral tribunal, the award shall be set aside only under limited grounds, thus referring the parties to arbitration, which has serious civil consequences, both procedurally and substantively. When there was no arbitration agreement between the parties, without a joint memo or a joint application of the parties, the High court should not have referred the parties to arbitration.

**Conclusion**

When there is no express arbitration agreement between the parties as regards to reference of disputes for arbitration, the court cannot refer the parties to arbitration unless there's a written consent by parties by way of joint application or a joint memo or a joint affidavit.

Thus, a written memo of instructions by parties is necessary for the reference of dispute to arbitration and an oral consent given by the counsel of the parties would not fulfill the requirement under section 89 of CPC.

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[1] Section 7-Arbitration agreement---

(1) In this Part, "arbitration agreement" means 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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(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) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract

[2] Section 89 - Settlement of disputes outside the Court