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**Arbitrability of Disputes arising out of a Trust Deed/The Indian Trust Act, 1882**

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**Arbitrability of Disputes arising out of a Trust Deed/The Indian Trust Act, 1882**

The question of arbitrability of disputes is often raised by parties in arbitration proceedings and the arbitrators have always faced difficulty in settling this question. However, the landmark judgment of *Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd.* ("**Booz Allen case**") by the Supreme Court of India brought much relief as it settled the issue of arbitrability of disputes by distinguishing between the "*rights in rem*" and the "*rights in personam*" and for the first time by way of examples the non-arbitrable disputes were recognised as under:

- (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
- (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
- (iii) guardianship matters;
- (iv) insolvency and winding-up matters;
- (v) testamentary matters (grant of probate, letters of administration and succession certificate); and
- (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Recently, in the matter of *Shri Vimal Kishor Shah & Ors. Vs. Mr. Jayesh Dinesh Shah & Ors.* the Supreme Court has added one more category of cases to the list of non-arbitrable disputes set out in Booz Allen case, i.e. cases arising out of trust deed and the Indian Trust Act, 1882 ("**Trust Act**").

**Background**

The author/settlor executed a family trust deed in relation to his property, in favour of six minors ( "**beneficiaries**"). After beneficiaries attained majority, certain disputes arose between them and arbitration in terms of the trust deed was invoked. However, the parties failed to mutually appoint an arbitrator and thus an application under Section

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11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") was filed before the Bombay High Court seeking appointment of the arbitrator by one set of beneficiaries ("**Petitioners**"). The said application was contested by the other beneficiaries ("**Respondents**") on several grounds including that the beneficiaries are neither parties nor signatories to the trust deed and thus the trust deed could not be considered an "agreement" much less an "arbitration agreement". The objections of the Respondents were rejected by the Bombay High Court, primarily, for the reasons that:

- the beneficiaries being minor at the time of execution of trust deed could not be the signatories to the agreement; and
- since the beneficiaries derived benefit under the trust deed throughout their minority, on attaining majority they were to be held as party to the trust deed. Once the beneficiaries are parties to trust deed, arbitration agreement could be invoked.

Accordingly, the Bombay High Court appointed an arbitrator for deciding the disputes between the Petitioners and the Respondents. The Respondents challenged this order of the Bombay High Court before the Supreme Court and it is in this appeal where the issue of arbitrability of disputes arising out of a trust deed/the Trust Act has been decided by the Supreme Court.

The arguments of the Respondents challenging the order of the Bombay High Court before the Supreme Court were three-fold. In first place, the Respondents challenged maintainability of the Section 11 petition filed before the Bombay High Court. The second leg of argument was that the beneficiaries have not signed the trust deed and thus cannot be held parties to the trust deed. Lastly, the Respondents contended that the Trust Act is a complete code and thus the provisions of the Arbitration Act do not apply to the disputes relating to the affairs of the trust.

#### **Issues before the Supreme Court**

The important issues that arose before the Supreme Court for consideration in this case were:

- i) Whether a clause in a trust deed, which provides for resolving the disputes arising between the beneficiaries of the trust through arbitration, can constitute an "arbitration agreement"?
- ii) Whether the application filed by the Petitioners under Section 11 of the Arbitration Act can be held as maintainable?
- iii) Whether the disputes relating to affairs and management of the trust including the disputes arising *inter se* trustees, beneficiaries in relation to their appointment, powers, duties, obligations, removal, etc., are capable of being settled through arbitration by taking recourse to the provisions of the Arbitration Act, if there is a clause in the trust deed to that effect or such disputes have to be decided under the Trust Act with the aid of forum prescribed under the said Act?

#### **Supreme Court's View**

The Supreme Court concluded that the arbitration clause of the trust deed which provided for settlement of disputes/differences arising between the beneficiaries of the trust does not constitute an arbitration agreement *inter se* beneficiaries within the meaning of Section 2(b), Section 2(h) and Section 7 of the Arbitration Act. The requirements of Section 7 of the Arbitration Act includes, amongst others, the following:

1. there has to be an arbitration agreement, separate or contained in a contract;
2. it has to be in writing; and
3. parties must sign the arbitration agreement/document/contract containing the arbitration agreement.

All the above requirements have to be complied with strictly for constituting a valid and enforceable arbitration agreement. However, in the case of a trust, the settlor executes the deed in favour of the beneficiaries and it is the settlor alone who signs the document/trust deed. Since the beneficiaries are not required to sign a trust deed and thus do not actually sign it, they cannot be regarded as parties to the trust deed. As a consequence, a trust deed cannot be held as an agreement between the parties (settlor and/or beneficiaries *inter se*) and a trust deed containing an arbitration clause cannot be regarded as a valid and enforceable arbitration agreement.

With regard to the argument of the Respondents that the Trust Act is a complete code in itself and provides a comprehensive machinery to deal with all issues relating to trust, the trustees and the beneficiaries the Supreme Court discussed the law of arbitrability of disputes as settled in Booz Allen case. The Supreme Court discussed the scheme of the Trust Act and concluded that there exists an implied bar of exclusion of applicability of the Arbitration Act for deciding the disputes relating to trust, trustees and beneficiaries through private arbitration and such disputes have to be decided by the court specified under the Trust Act. While applying the principles of interpretation of law the Supreme Court held that since sufficient and adequate remedy is provided under the Trust Act for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication.

#### **Concluding Remarks**

It is a common practice to incorporate arbitration clauses in trust deeds and there is a likelihood that arbitrations with respect to the disputes arising out of the trust deeds/Trust Act would have been invoked and pending as on date. The judgment, however, does not deal with the issue of such pending/ongoing arbitrations arising out of and relating to the trust deeds/Trust Act. The fate of such arbitrations as of today seems to be in dark but would need to be addressed by courts sooner or later. It is also unclear if the judgement would hold good for public charitable trusts which are not governed by the Trust Act and are usually regulated by the public trust deeds and the relevant public charity laws, if any applicable to the state where the public trusts are registered. However, even in the case of a public trust, it can be argued that the settlor executes the deed in favour of the general public beneficiaries and it is the settlor alone who signs the document/trust deed. Since the trustees (who manage the trust) are not required to sign a trust deed and thus do not actually sign it, they cannot be regarded as parties to the trust deed and

	<p>therefore a public trust deed containing an arbitration clause cannot be regarded as a valid and enforceable arbitration agreement among the trustees for adjudication of disputes.</p>
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