

SHEPHALI

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION PETITION (L) NO. 362 OF 2016**

Dynatron Services Pvt Ltd	...Petitioner
<i>Versus</i>	
MTU India Pvt Ltd & Anr	...Respondents

Ms F Moosa, i/b Prakash Mahadik, for the Petitioners.
Mr Varad Deore, for the Respondents.

CORAM: G.S. PATEL, J
DATED: 12th January 2017

PC:-

1. The Petitioner seeks reliefs under Section 9 of the Arbitration and Conciliation Act, 1996. It is the Petitioner's case that without just cause and without citing without any contemporaneous material of "under performance" on the part of the Petitioner, the 1st Respondent purported to refuse to renew or extend an agreement of 1st January 2015. Ms. Moosa for the Petitioner states that this is the first time in a relationship that has spanned 31 years that any such thing has come to pass. In a letter dated 30th December 2016, in response to the Petitioner's previous letters (which are noted at the head of the letter), the 1st Respondent said in paragraph 1 that this was not a case of termination but of non-renewal.

2. The reliefs sought pending arbitration are to restrain the 1st Respondent and the 2nd Respondent (presumably the company that is taken over the 1st Respondent) from entering into a service agreement with any third party and to stay any an earlier letter of 29th September 2016 which the Petitioner describes as a termination letter.

3. Apart from the difficulty in making an order compelling the Respondents to continue any service arrangement or agreement with the Petitioner against their wishes, and I am not at all certain that this can be done by a judicial mandate especially under Section 9 of the Arbitration and Conciliation Act, the real difficulty in Ms. Moosa's way is that there does not appears to be an Arbitration Agreement at all. Clause 7.7 of the Service Agreement, which is at Exhibit "A" to the Petition, reads thus:

"7.7 Applicable Law, Arbitration

This Agreement is governed by the laws in force at DISTRIBUTOR's place of business. However, if performance under this Agreement is illegal under a valid law of any jurisdiction where such performance is to take place, the performance will be mdified to the minimum extent necessary to compny with such law if it was effective on the date of execution of this Agreement.

It is understood that neither party shall by reason of this partnership be held to perform any acts which may in any way constitute a violation of any

enforceable imperative laws or any equivalent binding provisions in their own jurisdiction.”

(Emphasis added)

4. It is true that the caption mentions the word “Arbitration”, but that is all. Nothing in the next two paragraphs speaks of arbitration. I cannot possibly accept Ms. Moosa’s submission that this clause should be read “in context”. It is difficult to understand what precisely would be the implication of any such approach, for we should then be left to speculate entirely as to the very many things that are required to be incorporated in an arbitration agreement, including the Arbitral Tribunal composition or selection procedure, the venue or seat of arbitration, the applicable law etc. These are not matters on which a Court can speculate. All of these elements must be clearly stated. Either there is an arbitration agreement or there is not.

5. Ms. Moosa’s submission is that in its response in the 30th December 2016 letter, the 1st Respondent has said that there being no dispute, there is nothing to take to arbitration and, therefore, the 1st Respondent has accepted that there is indeed an arbitration agreement. I do not think this is correct. That letter was in response to the Petitioner’s demands for a resolution of its perceived disputes by arbitration. This is all that the 1st Respondent replied to. An arbitration agreement cannot be conjured up in this fashion on the basis of surmise and conjecture. An arbitration agreement, like every agreement or contract, requires above all that there be a demonstrated *consensus ad idem*, i.e., a reflection that the two parties

to a contract are of one mind on the contractual relations that will govern them. An arbitration agreement is no different. The parties must agree on their dispute resolution mechanism by arbitration. Where there is no agreement shown at all, and the other side denies that there was any such agreement, it is impossible to read into the contract a provision that does not exist. This is also not a cursory or slapdash agreement. It appears to be detailed and comprehensive and it seems to be inconceivable that the parties would have not included an arbitration clause had they agreed on one.

6. It is not possible to grant any relief in the present Petition. It is dismissed. There will be no order as to costs.

(G. S. PATEL, J.)