

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMM. ARBITRATION APPLICATION NO.75 OF 2017

Reliance Communications Ltd.)....Applicant
V/s.

Maharashtra State Road Development)
Corporation Ltd.)....Respondent

Mr.Amit Khairwar I/by D.H.Law Associates for the applicant.
Mr.Vishesh Kalra I/by Vidhi Partners for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 6.9.2018

P.C.:-

1. This application is filed under Section 11 of the Arbitration and Conciliation Act 1996 (the said Act) to refer the disputes between the parties to arbitration.

2. Petitioner and respondent had entered into an agreement as evidenced by the letter of intent dated 4.4.2008. Clause 20 of the Letter of Intent reads as under :-

“20. Any dispute between the parties hereto shall be resolved by mutual discussion. The unresolved disputes, if any, shall be referred to the Vice Chairman and Managing Director of the MSRDC for a decision and his decision shall be final and binding on the parties hereto.”

3. Differences arose between the parties and the applicant addressed communication to respondent demanding payment. None

of those communications are annexed to the application. Counsel for applicant tenders photo copy of the letter dated 31.8.2015. This letter also does not refer to referring any dispute to arbitration even if one accepts the applicant's case that clause 20 is an arbitration agreement. Clause 11(4) of the Arbitration & Conciliation Act 1996 reads as under:-

“11. Appointment of arbitrators-

(1).....

(2).....

(3).....

(4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party ; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].”

4 This court shall make an appointment upon request of a party if a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party. There is no such request from the applicant.

Therefore, this application itself is pre mature and not maintainable.

5 Secondly, clause 20, in my opinion, is not an arbitration clause.

6 Counsel for the applicant relied upon a judgment of the Apex court in ¹*Jagdish Chander Vs. Ramesh Chander & Ors.* to submit that a clause can constitute an arbitration agreement even if the words 'arbitration' and 'Arbitral Tribunal' are not used with reference to the process of settlement or with reference to the private Tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes so long as it has the attributes or element of an arbitration agreement. Mr.Khairwar submitted that what is required is whether the private Tribunal is empowered to adjudicate upon the disputes in impartial manner, giving due opportunities to the parties to put forth their case. This court is in respectful agreement with the proposition suggested by counsel.

7 Advocate for respondent is also in agreement with the proposition. What we need to see is whether clause 20 has the attributes or elements of an arbitration agreement.

8 Mr.Khairwar relied upon a judgment of a single Judge of

1 (2007) 5 Supreme Court Cases 719

this court (S.J.Kathawala,J) in ²*Tatva Global Environment (Deonar) Ltd. Vs. Municipal Corporation of Gr. Mumbai*, to submit that clause 20 has to be construed as an Arbitration agreement. Mr. Khairwar submitted that even in the case of *Tatva Global* (supra) arbitration clause which was clause 21 therein referred only to an internal procedure for any dispute, difference or claim arising out of the agreement and it did not contemplate referral of such difference or claim to any 3rd party for adjudication but still court came to a conclusion that clause 21 was an arbitration agreement.

9 Mr.Kalra for respondent relied upon the unreported order of another single Judge of this court in ³*Kalyan Toll Infrastructure Ltd. Vs. Maharashtra State Road Development Corporation* where the court came to a conclusion that the clause therein which was similar to the clause in the present matter was not accepted as an arbitration clause.

10 I have heard the counsel and also considered the application and affidavit in reply. There can be no dispute that even if the words arbitration, arbitral Tribunal or arbitrator is not used, so long as the clause had the elements or attributes of an arbitration

2 2015 (4) LJSOFT 20

3 Arbitration Petition No.13 of 2013 decided on 26.2.2014

agreement, it would constitute an arbitration agreement. Clause 20 in the agreement which is the subject matter of this application, only states that any dispute between the parties hereto shall be resolved by mutual discussion and unresolved dispute shall be referred to the Vice Chairman and Managing Director of MSRDC for decision and this decision shall be final and binding on the parties. In ***Tatva Global*** (supra) the clause was referring to internal procedure but the reason why the court came to a conclusion that there was an intention to refer the dispute to arbitration is because in ***Tatva Global*** (supra) there was another clause viz. clause 23 in which clause-21 in that agreement was referred to and that clause spoke of arbitration between the parties. Clause-23 in ***Tatva Global*** (supra) reads as under :-

“23. JURISDICTION

Subject to clause 21, only the courts in Mumbai shall have jurisdiction to try all disputes and matters arising out of or under this agreement, after reference to Arbitration.”

(emphasis supplied)

11 In the present case there is no clause similar to clause 23. Therefore, the facts in the present case are different from the facts in ***Tatva Global*** (supra) and I cannot accept that clause 20 has the attributes or elements of an arbitration agreement. It only refers to an internal procedure for resolution of any dispute, difference or claim

arising out of an agreement. Just because clause the clause states
“decision shall be final and binding on the parties hereto “won't
convert that into an arbitration agreement”.

12 In the circumstances, application dismissed.

Jahagirdar
Kiran
Ganesh

Digitally
signed by
Jahagirdar
Kiran Ganesh
Date:
2018.09.10
14:31:07
+0530

(K.R.SHRIRAM,J)