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

COMMERCIAL ARBITRATION APPLICATION NO.307 OF 2018

Global E-Services Private Limited	..Applicant
Vs.	
Amazon Seller Services Private Limited	..Respondent

Ms.Nikita Vardhan with Mr.Punit Damodar and Ms.Raveena Kinkhabwala
i/b. M/s.Kanga & Co. for Applicant.

Mr.Sanjeev Sawant with Mr.Murli Kale i/b. M/s.GNP Legal for
Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 8th JANUARY, 2019

P.C.:

Heard learned Counsel for the applicant and the learned Counsel
for the respondent.

2. By this application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “ACA”), the applicant seeks appointment of an arbitrator to arbitrate the disputes and differences between the parties which are said to have arisen under a leave and licence agreement dated 18 January 2016.

3. The memo of the application sets out the entire background of the disputes and differences which have arisen between the parties. The

applicant has referred to the correspondence entered between the parties as also the orders which were passed by the officer of the Collector of Stamps, Borivali, in regard to the payment of stamp duty on agreement. The contention of the applicant is that the respondent has not complied with its obligations under the said agreement. It is stated that by the letter of the applicant's Advocate dated 25 April 2017, the agreement in question came to be terminated reserving the applicant's rights to file appropriate proceedings.

4. Thereafter by the applicant's Advocate's letter dated 18 June 2018 arbitration agreement between the parties was invoked seeking reference of the disputes to an arbitral tribunal. Learned Counsel for the applicant has stated that the applicant would confine the adjudication of the disputes by the arbitral tribunal in terms of paragraph 29 as set out in the said letter dated 18 June 2018 which reads thus:-

“29. Disputes have arisen between you and our client *inter alia* in respect of (a) payments of the statutory charges for change of user and Debris Deposit to the Municipal Corporation of Greater Mumbai; (b) payments of the Security Deposit; (c) payment of the Stamp Duty and Registration Fees; (d) payment of the damages in lieu of licence fees for the period commencing from 16th October 2016 along with interest at the rate of 18% per annum; and (g) the terms and conditions agreed upon thereto by the said Agreement.”

5. There is no dispute that an arbitration agreement exists between the parties as contained in Clause 15 of the said leave and licence agreement which reads thus:-

“15. Governing Law And Arbitration:

If any dispute arising howsoever in connection with the interpretation or implementation or purported termination of this Agreement, the Parties shall attempt in the first instance to resolve such dispute by friendly consultations within 15 days of the arising of the dispute. If such dispute is not resolved through friendly consultations within 30 days after commencement of discussions or such longer period as the Parties agree to in writing, then any Party may refer the dispute for resolution by arbitration. All such disputes shall be referred to and finally resolved by arbitration by a sole arbitrator to be appointed jointly by the Parties. The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 as amended upto date. The language of the arbitration shall be English. The place of arbitration shall be Mumbai. The arbitration award shall be final and binding on the Parties and the Parties agree to be bound thereby and to act accordingly. The Arbitrator may (but shall not be required to) award to the Party that substantially prevails on merits, its costs and reasonable expenses (including legal costs). When any dispute is under arbitration, except for the matters under dispute, the Parties shall continue to exercise their remaining respective rights and fulfil their remaining respective obligations under this Agreement to the extent practicable. The Courts at Mumbai alone shall have jurisdiction to entertain and try any dispute and/or difference arising out of or in connection with the terms of this Agreement and other related document, if any.”

6. It is on the above background that the present application is filed. Mr.Sawant, learned Counsel for the respondent, has raised a preliminary objection to the maintainability of this application. His objection is to the effect that a reference of the disputes to arbitration cannot be made in view of the provisions of Section 41 of the Presidency Small Causes Courts Act, 1882 (for short, “the 1882 Act”) which according to Mr.Sawant, confers exclusive jurisdiction in regard to the disputes arising under a leave and licence agreement, to be adjudicated by the Small

Causes Court. To support his contention, Mr.Sawant has placed reliance on the decision of the learned Single Judge in **ING Vysya Bank Limited Versus Modern India Limited & Anr.**¹. In the said case, a learned Single Judge of this Court was considering an application under Section 9 of the ACA in a dispute between petitioner licensee and the respondent licensor. The prayer of the licensee was for an injunction restraining the licensor from terminating the agreement of licence entered between the parties, and a relief that the licensor shall be restrained from acting upon a communication calling upon the licensee to hand over vacant possession and restraining the licensor from initiating proceedings for the recovery of possession of the licensed premises. Also an injunction was prayed restraining the licensor from disturbing the use and occupation of the licensee and from entering into any third party rights in respect of the licensed premises. The respondent licensor objected to the maintainability of the Section 9 petition on the ground that Section 41 of the 1882 Act would confer exclusive jurisdiction on the Small Causes Court to seek such reliefs. It is in this context the Court considered the issue whether the provisions of Section 41 of the 1882 Act would bar the jurisdiction of the arbitral tribunal to entertain a claim for specific performance of an agreement of renewal contained in an agreement of licence executed between the parties. Referring to the law laid down by the Supreme Court in **Natraj Studios (P) Ltd. Vs. Navrang Studios**², the

1 2008(2) Mh.L.J. 653

2 1981(1) S.C.C. 523

Court reached to a conclusion that an exclusive jurisdiction is conferred on the Small Causes Court to try and entertain all suits and proceedings between licensor and licensee or landlord and tenant relating to possession of immovable property situated in Greater Mumbai or recovery of charges or means. The Court observed thus:-

“18.

There is in other words, a pre-existing relationship of licensor and licensee between the parties; the occupation of the petitioner is relatable to the existence of that relationship and the petitioner seeks an extension of the relationship upon the exercise of the option of renewal under an existing agreement. The expression that is used in section 41(1) is a suit relating to the recovery of possession. As the Supreme Court noted in Ogales case, a suit relating to the recovery of possession is a concept which is much wider in its ambit than a suit for possession. What the petitioner claims in essence is the continuation of the relationship of a licensor and licensee on the strength of the exercise of the option of renewal.

19. The relief that has been sought in the arbitration petition under section 9 is indicative in some measure of the nature and character of the dispute between the parties. The Respondents dispute that the Petitioner exercised the option of renewal as provided in the agreement. The relief which the Petitioner claims in the application under section 9 is an injunction restraining the respondents from terminating the agreement; from acting in pursuance of a letter demanding possession and from adopting proceedings for securing the eviction of the petitioner or the recovery of the possession of the licensed premises. The petitioner seeks an injunction restraining the respondents from obstructing its uninterrupted, unbroken, quiet and peaceful use, occupation and enjoyment of the licensed premises; from selling, transferring or alienating the licensed premises; obstructing or preventing the delivery of service envisaged in the agreement; obstructing supply of utilities such as electricity and water and other consequential reliefs. There can be absolutely no manner of doubt that the relief sought relates to the recovery of possession.

23. For all these reasons, I am of the view that the objection to the jurisdiction of this Court to entertain the Petition is well founded. The recourse to arbitration under the terms of the arbitration clause contained in the agreement of leave and licence would be barred by virtue of

the exclusive jurisdiction conferred upon the Court of Small Causes by section 41(1) of the Presidency Small Cause Courts Act, 1882. The Petition shall stand dismissed.”

7. The objection and contention of Mr.Sawant is contested by learned Counsel appearing for the applicant who submits that the applicant is not seeking recovery of possession of the premises or for recovery of any rent. It is submitted that the applicant's claim is in the nature of damages and as specified in the paragraph 29 of the letter dated 18 June 2018. It is thus her submission that Section 41 of the Act would have no application qua the claim as being made by the applicant. In supporting the said contention, learned Counsel for the applicant has placed reliance on the decision of the learned Single Judge of this Court in **RMC Readymix (I) P. Ltd. Vs. Kanayo Khubchand Motwani**³ and another decision of the learned Single Judge of this Court in **BNP Paribas Securities India Pvt. Ltd., Mumbai vs. Cable Corporation of India Ltd., Mumbai**⁴. A perusal of these decisions clearly indicate that the issue which fell for consideration of the Court in both the said cases was in regard to a claim for refund of security deposit under the leave and licence agreement. Considering the factual matrix, the Court was of the opinion that the proceedings as initiated by the parties being for recovery of the security deposit it was not necessary for the recovering parties to espouse the jurisdiction of the Small Causes Court under Section 41 of the 1882 Act.

3 2006(4) Mh.L.J. 299

4 2012(4) Mh.L.J. 782

8. Be that as it may. Having heard learned Counsel for the parties and having perused the pleadings, I may observe that considering the provisions of Section 11(6A) of the ACA, the scope of enquiry to be undertaken in adjudication of this application would be limited, only to consider the existence of an arbitration agreement. There is no dispute that the licence agreement in question contains an arbitration clause. It can also be clearly seen that the applicant by its Advocate's letter dated 18 June 2018 has invoked the arbitration agreement. As the respondent failed to agree for reference of the disputes to an arbitral tribunal, the present application was filed. The objection as raised on behalf of the respondent that this application under Section 11 of the ACA should not be entertained in view of the provisions of Section 41 of the Act as the dispute of the nature as sought to be asserted by the petitioner are required to be adjudicated by the Small Causes Court, in my opinion, cannot be entertained at this stage of the proceedings and by not making a reference of the disputes to arbitration.

9. This is for two fold reasons. Firstly that the objection of the respondent is of a bar to arbitrability/maintainability of the claim in view of a statutory provisions of Section 41 of the 1882 Act and to contend that the arbitral tribunal would have no jurisdiction to entertain the claim of the applicant. Prima-facie considering the plea as being urged on behalf of the applicant in regard to the claims as contained in paragraph 29 of

the invocation letter (supra) at this stage I am not persuaded to accept an argument of the respondents of an express bar to such claims applying section 41 of the 1882 Act which are in fact yet to be made by the applicant before the arbitral tribunal. Further the respondent is not precluded and more particularly considering the provisions of Section 16 of the ACA to agitate such objections/challenge as claims before the arbitral tribunal. The respondent's objection also cannot be accepted as an objection at the threshold to deprive the applicant of a reference to arbitration. Secondly, it cannot be blanketly said and more particularly considering the nature of pleas as made in paragraph 29 of the invocation notice (supra) that the objection of Mr.Sawant can be applied to all the claims. It would in fact be too pre-mature for the respondents to say this. It would be very well open to the respondent to raise such objection only on considering the claims which would be ultimately made by the applicant in the statement of claim which would be filed before the arbitral tribunal.

10. Further considering the position in law as can be seen from the decisions of **RMC Readymix (I) P. Ltd.** (supra) and **BNP Paribas Securities India Pvt. Ltd., Mumbai** (supra), it cannot be said that every issue arising under the leave and licence agreement would file within the jurisdiction of the Small Causes Court as the Court in the facts arising in those cases has held that a claim for security deposit was definitely not an

issue which fall within the purview of Section 41 of the Act. There can be similarly some other issues which would not strictly fall under Section 41 of the Act and therefore, it would be appropriate that any such objection be raised by the respondent before the arbitral tribunal after the statement of the claim is filed by the applicant, before the arbitral tribunal.

11. With the above observations, the petition is required to be allowed in terms of the following order:-

ORDER

(i) Mr. Justice J.H. Bhatia (Retd.) is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the Leave and Licence Agreement dated 18 January 2016;

(ii) The learned sole arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

(iii) It is made clear that all the objections of the respondent to the maintainability of the claims as may be made by the applicant are expressly kept open, as also the applicant's contentions in that regard are

also expressly kept open;

(iv) Needless to observe that the arbitral tribunal shall adjudicate the disputes and differences between the parties without being influenced by any observations as made in this order which are in the context of deciding this section 11 application only;

(v) At the first instance, the parties shall appear before the arbitrator on 18 January 2019 at the mutually convenient time;

(vi) Office to forward a copy of this order to the learned Arbitrator;

(vii) The application is disposed of in the above terms. No costs.

[G.S. KULKARNI, J.]