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

**ARBITRATION APPLICATION NO.388 OF 2018**

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| Amit Subhash Ghogare    | ..Applicant  |
| Vs.                     |              |
| Shivaji Shamu Waghalkar | ..Respondent |

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Mr.J.N. Jain for Applicant.  
Mr.S.R. Chopade-Patil i/b. Mr.Amit Munde for Respondent.

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**CORAM : G.S. KULKARNI, J.**

**DATE : 13<sup>th</sup> MARCH, 2019**

**P.C.:**

Advocate Mr.Chopade-Patil submits that he has instructions to appear in the matter on behalf of the respondent. He states that he would file vakalatnama. Accordingly, taken up for hearing.

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

3. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the ACA") whereby the applicant seeks appointment of an arbitrator to adjudicate the disputes and differences between the parties, which are stated to have arisen under the Leave and Licence Agreement dated 1 July 2017 as executed between the parties. The arbitration agreement is contained in Clause

11 of the said agreement which reads thus:-

“11. In case any dispute arises between the parties hereto in respect the Licensed premises/business arising out of these presents or any other matter in dispute relating to or arising out of or touching this Leave and Licence Agreement and/or in respect of the transaction and/or rights of obligations of any parties, the same shall be referred to the sole Arbitrator of an Arbitrator mutually agreed to by both parties, based at Mumbai, whose decision shall be final and binding on both the parties.”

4. The claim of the applicant is for refund of security deposit of Rs.30 Lakhs along with interest from 9 October 2017. By a letter of the applicant's Advocate dated 23 October 2018, the applicant invoked the arbitration agreement and sought appointment of an arbitrator to adjudicate the disputes on refund of the security deposit. The applicant's Advocate's letter was responded by a letter of the respondent's Advocate dated 2 November 2018 (Exhibit-E, page 41 of the paper-book) in which in paragraph 6, on behalf of the respondent it was recorded as under:-

“6. It is matter of record that there is no pending liability from my client. My client is not ready to accept the name of arbitrator suggested by you and there is no question of going to the arbitration as there are no such dues from my clients Side on the contrary you are liable to pay Rs.28,88,550/-. Still you want to proceed for arbitration in my clients opinion the arbitration should be before retired Judge and therefore I suggest name of Retired Judge Mr.T.K. Jagdale as an arbitrator.”

5. Learned Counsel for the applicant submits that even if the agreement in question is a leave and licence agreement, the bar under

Section 41(1) of the Presidency Small Causes Court Act, 1882 would not be applicable and the Court can still appoint an arbitrator to adjudicate the disputes between the parties, this for the reason that the claim of the applicant is in regard to the refund of the security deposit. To support this contention, learned Counsel for the applicant placed reliance on the decision of the learned Single Judge of this Court in **BNP Paribas Securities India Pvt. Ltd. Vs. Cable Corporation of India Ltd.** in **Arbitration Petition No.212 of 2012**, decided on 20 October 2012 in which considering the decisions in **RMC Readymix (I) Pvt. Ltd. vs. Kanayo Khubchand Motwani**<sup>1</sup> and the decision of the Division Bench in the case of **Sanjog Sadanand Parab vs. B.P. Gharda & Co.** dated 25 April 2011 in Summons for Judgment No.445 of 2007 in Summary Suit No.29 of 2004 as also the decision of the Division Bench in the case of **Oberai Construction Pvt. Ltd. vs. Worli Shivshahi Co-op. Housing Society Ltd.**<sup>2</sup>, the Court came to a conclusion, that it was permissible for the Court to appoint an arbitrator to adjudicate the disputes, in regard to the refund of the security deposit under a leave and licence agreement. The Court held that the claim for refund of security deposit was not a relief which was covered by Sub-section (1) of Section 41 of the Presidency Small Causes Court Act, 1882. A relief which was sought was not covered by Section 41(1) of the Presidency Small Causes Court

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1 2006(4) Bom.C.R. 437

2 2008(5) Bom.C.R. 855

Act, 1882 as claim for security deposit was not a claim for recovery of licence fees or charges or rent or for recovery of possession, and a case of an injunction against dispossession from the licensed premises. In this context, learned Single Judge made the following observations:-

“ In taking this view, the Learned Single Judge relied upon another judgment of a Learned Single Judge of this Court in **RMC Readymix (I) Pvt. Ltd. vs. Kanayo Khubchand Motwani** and on a decision of the Division Bench on a reference in the case of **Sanjog Sadanand Parab vs. B.P.Gharda & Co.**, dated 25 April 2011.<sup>2</sup> Consequently, it was held that the Petition under Section 9 was not barred by the provisions of Section 41 of the Presidency Small Causes Court Act, 1882. ....

.....

As noted earlier, in proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, inter partes a Learned Single Judge of this Court has taken the view that the claim for refund of security deposit is not a relief which is covered by Sub-section (1) of Section 41 of the Presidency Small Causes Court Act, 1882. The fact that the Respondent has instituted a suit against the Petitioner seeking recovery of possession and other monetary claims arising under the Leave and Licence Agreement and the Amenities Agreement was duly noted in the order of the Learned Single Judge. In taking this view, the Learned Single Judge followed the earlier judgment of another Learned Single Judge in **RMC Readymix** (supra) and the view of the Division Bench on a reference in **Sanjog Parab's** case. That being the position, the exercise of the power under Section 11(6) by the designate of the Chief Justice must be in conformity with the view as to jurisdiction that has been taken by the Learned Single Judge on the petition under Section 9. This is a matter of first principle, but in any event, is governed by the view expressed by a Division Bench of this Court in **Oberai Construction Pvt. Ltd. vs. Worli Shivshahi Co-op. Housing Society Ltd.** The Division Bench observed as follows:

“Under section 11 as noted earlier the issue will be open for consideration if the issue has not been decided by a Competent Court or Judicial forum. Though section 9 of the Act confers a power to grant only interim relief, the grant of relief is subject to the Judicial forum or Court having jurisdiction to grant

interim relief. As noted in Patel Engineering (supra) the Court while deciding an application under Section 9 can decide the issue as to the existence of an arbitral clause or the subject matter being covered by the arbitral clause. Such a decision a finding as to jurisdiction cannot be prima facie, if the obiter dicta in Patel Engineering (supra) is to be accepted. The issue would stand finally concluded. If the issue is sought to be raised before another Court or Judicial forum, considering the principles of issue of estoppel, that Court or Judicial forum would be estopped from deciding that issue.”

In that view of the matter, the application under Section 11(6) would have to be allowed. ....”

6. Now coming to the facts of the present case, it is clear that there is arbitration agreement between the parties as also there is appropriate invocation to the arbitration agreement by the letter dated 23 October 2018 of the applicant's Advocate as replied by the respondent's Advocate. The respondent is also not averse for the disputes to be referred for arbitration of a sole arbitrator.

7. In the above circumstances, the application is required to be allowed. Hence the following order:-

### **ORDER**

(i) Mr.Rakesh Reddy, Advocate of this Court, is appointed as a prospective sole Arbitrator to arbitrate the disputes and differences between the parties under the Leave and Licence Agreement dated 1 July 2017;

- (ii) The learned prospective 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) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;
- (v) All contentions of the parties on merits of the matter are expressly kept open;
- (vi) The application is disposed of in the above terms. No costs.
- (vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

Address: Office No.141, A-Wing, Mittal Tower,  
14<sup>th</sup> Floor, Nariman Point, Mumbai.

**[G.S. KULKARNI, J.]**